



A NEW SUPPORT SCHEME FOR VETERANS

A REPORT ON THE REVIEW OF THE
WAR PENSIONS ACT 1954





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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

25 May 2010

Dear Minister

NZLC R115 – A New Support Scheme for Veterans: A Report on the Review of the War Pensions Act 1954

I am pleased to submit to you Law Commission Report 115, *A new support scheme for veterans: A report on the review of the War Pensions Act 1954*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in cursive script, reading "Geoffrey Palmer". The signature is written in dark ink and is positioned above a horizontal dashed line.

Geoffrey Palmer
President

FOREWORD

This review arose out of the recognition that the current War Pensions Act is outdated, unwieldy and no longer fits the needs of the veterans it is intended to serve. The War Pensions Act 1954 has not been adapted to the changed social, military and legal context. Additionally, it does not take account of modern disability management principles. The cumbersome administrative and decision-making processes cause delays and frustration for veterans seeking assistance. Many aspects of the administration of the war pensions system are simply not working.

The history of the War Pensions Act has been central to this review. Pensions for injury as a result of war service have been with us since the Military Pensions Act 1866. The assistance provided to veterans has taken several forms, but in reality very little has changed since the War Pensions Act 1915. More than 90 years of legislative inertia has not left New Zealand's system of assistance to veterans in a good state. It is vastly in need of modernisation.

Our recommendations are based on continuing the unbroken tradition of care and responsibility for veterans and their family members who suffer harm as a result of veterans' service. The principles that have long been central to this system will remain so. However, with the benefit of modern research on disability, service and compensation, it is clear that a different approach is needed, especially for our younger veterans.

Since releasing *Towards a New Veterans' Entitlements Scheme: A Discussion Paper on a Review of the War Pensions Act 1954*, we have engaged with many people and organisations on the numerous issues that this review has raised. We learned much through our consultation meetings at 12 RSAs throughout New Zealand, and at the New Zealand Defence Force (NZDF) focus groups of serving personnel at camps and bases we attended. These were an excellent opportunity to hear views on what is most important to those who are most affected by our proposals.

We received 139 submissions on the questions and issues discussed in our issues paper. These were from 100 individuals and 32 organisations or agencies, including the NZDF, the Royal New Zealand Returned and Services' Association (RNZRSA) and numerous local RSAs. We sincerely appreciate the efforts that these individuals and groups went to in order to provide us with feedback.

We have been engaged in continuing discussions with the RNZRSA, the NZDF and Veterans' Affairs New Zealand (VANZ).

We have found the experiences of countries similar to New Zealand in revising systems of assistance for veterans to be extremely helpful. We have learned much from the legislative reforms in Australia, Canada and the United Kingdom, and their approaches have helped us to refine our ideas. We are particularly indebted to the Australian Department of Veterans' Affairs for their unstinting help.

The purpose of this review has been to produce veterans' legislation that is fair and reasonable. We have sought to develop recommendations for a better system; one that acknowledges the harm that can be caused by service and that provides assistance that best addresses needs. This report provides our conclusions about the direction that we believe New Zealand's veterans system should take. We have given careful consideration to all issues. There have been many considerations to balance. Our thinking on many issues has progressed and our ideas have developed as a result of further research and consultation. Overall, we believe that the system we recommend is the fairest and most effective of all the options we have considered.

The Commissioner in charge of this project was Geoffrey Palmer. The legal and policy advisers were Lecretia Seales and Marion Clifford.



Geoffrey Palmer
President

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Veterans' Affairs New Zealand

We would like to give special acknowledgement to the committee established by the Royal New Zealand Returned and Services' Association to liaise with the Law Commission on this review, the membership of which has included Air Vice Marshal (Rtd) Robin Klitscher, John Campbell, Rob Munro, Chris Mullane, Barry Clark, Margaret Snow and Keith Mitchell.

A new support scheme for veterans

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Summary

- 1 We propose new veterans' entitlements legislation to replace the War Pensions Act 1954 with a fair and modern scheme that addresses the needs of a diverse veteran population. The proposed legislation is designed to sit comfortably within the context of other Government assistance. It would ensure that veterans are entitled to the same assistance as ordinary New Zealanders in a similar position receive. It would also provide a margin of additional support for veterans and their family members who have been adversely affected by service in order to acknowledge the impacts of being placed in harm's way in service of the state.

SCHEME STRUCTURE

- 2 We concluded that the best approach to updating and improving New Zealand's veterans' entitlements legislation was to develop two schemes. We recommend that the first scheme, which we will refer to as **Scheme One**, retains a large measure of consistency with the current legislation. Scheme One would cover veterans and service personnel who have disabilities relating to service more than 35 years ago, including service in wars and emergencies up to and including Vietnam. The cut-off for this scheme would be service prior to 1 April 1974. **Scheme Two**, the scheme designed around modern principles of disability management to suit the needs of younger veterans, would apply to all veterans who served on or after 1 April 1974. Scheme structure is discussed in chapter 2.
- 3 We recognise that if it adopts these recommended schemes the New Zealand Government would in many respects be charting new territory. We understand that with the innovative and the unfamiliar there may be some uncertainty about whether the needs of all those concerned will be met. To address this, we propose in chapter 1 that the new veterans' legislation be officially acknowledged as "living statutes" and include a provision requiring the periodic review of their operation.

ELEMENTS COMMON TO BOTH SCHEMES

Service eligibility

- 4 Under our recommendations Scheme One would cover those with "routine service" and "qualifying operational service" (currently described as war or emergency service) prior to 1 April 1974. This service equates exactly to the service prior to 1 April 1974 currently covered by the War Pensions Act and war and emergency service post 1 April 1974. All wars and emergencies declared under the War Pensions Act would become qualifying operational service under the new legislation. Those who served in routine service in the New Zealand armed forces prior to 1 April 1974 outside of these wars and emergencies would continue to be covered, as would those with other service covered by the War Pensions Act.

- 5 Scheme Two would allow the Minister of Veterans' Affairs, following consultation with the Chief of Defence Force, to declare other overseas deployments to be qualifying operational service. This decision would be based on factors relating to the operational and environmental risk. Where possible, the decision as to whether a new deployment is qualifying operational service would be made prior to the service personnel leaving for the operation. Service eligibility is discussed in chapter 3.

Service-related impairment

Connection between service and impairment

- 6 In chapter 4 we recommend that the new legislation provide entitlements in respect of injury, illness or death that is attributable to or has been aggravated by qualifying service. The legislation should define “attributable to” and “aggravated by” for the purpose of greater precision and guidance for decision-makers. Attributability should continue to be defined broadly to include indirect attributability, in accordance with *Nixon v War Pensions Appeal Board*.¹
- 7 We propose that Scheme One would only exclude from coverage the type of behaviour currently excluded under the War Pensions Act – injury, illness and death arising from desertion, being absent without leave and not being paid, and wilful misconduct.²
- 8 Our proposed Scheme Two differs from Scheme One by providing exclusions from coverage for particular types of activity that result in injury, illness or death. This reflects the greater acceptance of modern service personnel and the public that there are certain types of activities on operational deployments that should not warrant the special state responsibility to provide entitlements. This is because some activities are a person's own responsibility.

Evidential standards and instruments

- 9 Under this proposal, the new legislation would contain relaxed evidential rules at the same level of benevolence as those currently contained in the War Pensions Act. This includes the rebuttable presumption of attributability or aggravation on the basis of some reasonable evidence that the condition was in fact possibly or probably attributable to or aggravated by qualifying operational service. These rules should be rewritten in a more understandable and easily applicable manner. A less beneficial evidential standard would apply to those with routine service, as is the case under the current scheme.

1 *Nixon v War Pensions Appeal Board* HC Wellington CP360/91, 5 March 1993.

2 War Pensions Act 1954, s 19.

- 10 We have become aware that a system of beneficial evidential rules has inherent weaknesses that lead to difficult, inconsistent, inefficient decision-making. Consequently, we have come to the view that we need to have instruments to assist with decision-making. We recommend that the legislation incorporates ‘statements of principles’ (SOPs) and ‘presumptive lists’ to direct how the relaxed evidential standard operates in the case of a particular condition. We propose that New Zealand borrow extensively from the Australian SOPs developed by the Repatriation Medical Authority. These issues are discussed in chapter 5.

Measuring impairment

- 11 Under our proposal in chapter 6, the new legislation would address one of the major failings of the war pension scheme by rationalising the system for measuring a veteran’s degree of impairment. Rather than allowing the accumulation of disablement percentages well in excess of 100 %, the new legislation would adopt the American Medical Association *Guides to the evaluation of permanent impairment* (AMA Guides) method of calculating whole person impairment, which does not allow for impairment of more than 100 %.
- 12 We recommend that the *AMA Guides*, along with a purpose-written supplement based on ACC’s *Handbook to the AMA Guides*, be incorporated in legislation as the tool for determining the percentage level of impairment created by an injury or illness. The veterans’ supplement should be developed in consultation with the expert medical panel prior to the commencement of the legislation.

Decision-making structure

Statutory decision-maker

- 13 We recommend that the responsibility for the administration and decision-making under the new legislation should rest with the General Manager of Veterans’ Affairs New Zealand (VANZ). The General Manager would give delegates within VANZ the responsibility for awarding and administering the entitlements that rest purely on administrative criteria.

First-level decisions on impairment compensation claims

- 14 We propose that the initial decision-making on Disablement Pension claims be made by delegates of the General Manager of VANZ within the department. We do not see that it is necessary or advantageous to have claims panels involved at this level of decision-making. A decision-making structure that has VANZ making the initial decisions on claims fits comfortably with a system where the majority of claims will require the application of decision-making instruments, such as SOPs and presumptive lists.

Reviews of decisions on impairment compensation claims

- 15 There are two aspects to a decision regarding impairment compensation. The first relates to the decision of whether to accept a medical condition as service-related for the purposes of awarding impairment compensation. We recommend that, where these decisions are not based on decision-making instruments, the reviews

should be undertaken by review panels made up of one VANZ reviewer and one RNZRSA nominated reviewer. In other cases, an internal VANZ reviewer should review the decisions.

- 16 The second type of decision in impairment compensation cases relates to the level of impairment at which impairment compensation is awarded once it has been decided that the medical condition is service-related. We consider that reviews of decisions relating to the percentage of impairment caused by a medical condition should be the subject of a review by a medical assessor who is trained in the use of the *AMA Guides*.

Appeals

- 17 We recommend that the legislation establish the Veterans' Appeal Tribunal to hear appeals on all decisions that can be reviewed by VANZ. In *Tribunal Reform* we proposed a framework on tribunals.³ The Veterans' Appeal Tribunal should, as far as possible, conform to this framework. This would mean that the tribunal will be independent of VANZ. The legislation should allow an appeal on questions of law to the High Court.

Decisions on the Veteran's Pension

- 18 The provisions of the Veteran's Pension in the proposed new legislation would continue to reflect the provisions of the New Zealand Superannuation and Retirement Income Act 2001. We consider that the decision on eligibility for Veteran's Pension should be the responsibility of the Ministry of Social Development. VANZ should be responsible for the decision on whether a veteran has eligible service. If a veteran disagrees with a decision about the Veteran's Pension relating to their service eligibility, the decision should be reviewed by VANZ reviewers, with an appeal to the Veterans' Appeal Tribunal. For all other aspects of the Veteran's Pension, the decision-making structure applying under the Social Security Act 1964 should apply.
- 19 Decision-making structures are discussed in chapter 7.

Administration

Expert medical panel

- 20 The new legislation should establish an expert medical panel as a statutory body, based on the current Ministerial advisory body on veterans' health. The panel would be made up of medical experts in fields relevant to veterans' health. We recommend that the panel's role include developing presumptive decision-making instruments, providing guidance on the development of a supplement to the *AMA Guides* and deciding on the use of the Veterans' Medical Research Trust Fund.

³ Law Commission *Tribunal Reform* (NZLC SP20, 2008).

Advisory body

- 21 The new legislation should provide for the establishment of a veterans' advisory body. The body should have representation from a variety of veterans' organisations. The advisory body would advise the Minister of Veterans' Affairs from a veterans' perspective. This would include matters relating to the operation of the legislation. However, it could also advise on wider issues relating to veterans.
- 22 Features of the administration of the new schemes are discussed in chapter 8.

OUTLINE OF
ASSISTANCE
RECOMMENDED
UNDER SCHEMES
ONE AND TWO

TABLE 1: ASSISTANCE PROVIDED UNDER SCHEME ONE	
Type of entitlement	Scheme One provides:
Impairment compensation	<p><i>Disablement Pension</i> – a periodic payment proportional to the veteran's percentage of service-related whole person impairment.</p> <p><i>Terminal Illness Lump Sum</i> – terminally ill veterans may choose to have 1 year's worth of Disablement Pension paid as a lump sum rather than a periodic payment.</p> <p>No new conditions or reviews from the age of 80 in light of comprehensive medical benefits for over 80s.</p>
Income support	<p><i>Veterans' Weekly Income Compensation</i> – a weekly payment equivalent to 80% of the average wage for veterans under 65 who are unable to work because of service-related impairment.</p> <p><i>Veteran's Pension</i> – veterans over 65 with qualifying operational service receive Veteran's Pension instead of NZ Superannuation regardless of whether they receive a Disablement Pension.</p>
Health care	<p><i>Treatment of accepted disabilities</i> – reimbursement of all treatment costs for accepted disabilities.</p> <p><i>Medical treatment for over 80s</i> – Disablement Pension recipients over 80 receive a number of extra medical benefits for any injuries or illnesses regardless of whether they are related to service.</p>
Independence assistance	<p><i>Veterans' Independence Programme (VIP)</i> – Disablement Pension recipients assessed as needing independence assistance, such as home help, house keeping and meal preparation, because of an accepted disability may receive this through VIP.</p>
Rehabilitation	<p><i>Rehabilitation</i> – rehabilitation services for accepted disabilities where they are assessed as being able to rehabilitate.</p>
Families	<p><i>Surviving Spouse Pension</i> – surviving spouses of deceased veterans who received a Disablement Pension receive a periodic payment at the rate of 50% of that pension.</p> <p><i>Children's Pension</i> – periodic payment paid in respect of dependent children of deceased veterans on the same basis as the current Children's Pension.</p> <p><i>Education Bursaries</i> – education bursaries as in the current legislation.</p> <p><i>Funeral Grant</i> – spouse or estate of any deceased veteran, regardless of whether he/she received a Disablement Pension, receives a funeral grant covering the actual and reasonable funeral expenses up to a prescribed maximum.</p> <p><i>VIP</i> – spouses and children of deceased veterans can receive psycho-social rehabilitation assistance, such as counselling and home help, for up to 1 year after the veteran's death.</p>

TABLE 2: ASSISTANCE PROVIDED UNDER SCHEME TWO

Type of entitlement	Scheme Two provides:
Rehabilitation	<i>Rehabilitation</i> – rehabilitation services to restore veterans to their pre-injury capabilities to the maximum extent possible.
Income replacement	<i>Veterans' Weekly Income Compensation</i> – veterans under 65 who are unable to work and have a rehabilitation plan in place receive a weekly payment equivalent to 100% of their earnings while they are rehabilitating or for 1 year (if this is shorter). After this, veterans receive 85% of earnings for as long as they are continuing to rehabilitate and/or have incapacity for work. <i>Retirement Lump Sum</i> – Veterans' Weekly Income Compensation recipients for 10 years or more, who meet an asset test, receive a lump sum when they reach 65.
Impairment compensation	<i>Lump Sum Payment for Permanent Impairment</i> – lump sum proportional to level of permanent service-related impairment.
Health care	<i>Treatment of accepted impairments</i> – reimbursement of all treatment costs for accepted disabilities. <i>Medical treatment for over 80s</i> – impairment compensation recipients over 80 receive free a number of extra medical benefits for any injuries or illnesses regardless of whether they are related to service.
Independence assistance	<i>Veterans' Independence Programme (VIP)</i> – VIP services for impairment compensation recipients and veterans over 80 who are assessed as needing it.
Transition assistance	<i>Resettlement training</i> – workshops and information for veterans leaving NZDF. <i>Job Placement Programme</i> – any veteran discharging from the NZDF may receive job skills training, career counselling and job finding assistance. <i>Education about VANZ assistance.</i>
Recognition of service and service-related impairment in older age	<i>Veteran's Pension</i> – veterans over 65 with qualifying operational service receive Veteran's Pension instead of NZ Superannuation regardless of whether they received impairment compensation.
Families	<i>Surviving Spouse Lump Sum</i> – surviving spouses of deceased veterans with a service-related death receive \$20,000. <i>Surviving Spouse Weekly Income Compensation</i> – surviving spouses of deceased veterans, who qualify for the Surviving Spouse Lump Sum, receive income compensation at the rate of 60% of the veteran's earnings for 5 years or for as long as the spouse is caring for a child of the veteran under 18 years. <i>Children's Lump Sum</i> – every child of a deceased veteran with a service-related death receives \$5,000. <i>Children's Weekly Income Compensation</i> – children who receive the Children's Lump Sum receive an equal share of 20% of the veteran's earnings until age 18. <i>Funeral Grant</i> – the spouse or estate of any deceased veteran, regardless of whether he/she received impairment compensation, receives a funeral grant covering the actual and reasonable funeral expenses up to a prescribed maximum. <i>Independence assistance</i> – spouses and children of deceased veterans can receive VIP assistance, such as counselling and home help, for up to 1 year.

Note: ACC lump sum payments and weekly compensation for service-related injuries, illnesses or deaths are not paid in addition to entitlements under Scheme Two. ACC/the NZDF would pay some of the Scheme Two entitlement if the veteran, spouse or child qualifies for ACC also.

SCHEME ONE 23 Scheme One, which is discussed in Part 2 of the report, builds upon the existing war pensions scheme, but in a way that modernises, clarifies and strengthens the assistance provided and the systems for providing it. It is intended to deliver entitlements that generally correlate with existing War Pensions Act entitlements, but with increased emphasis on providing assistance for the major needs of senior veterans, namely health care and practical support to remain independent.

Impairment compensation

24 The proposed Scheme One retains the Disablement Pension as the primary entitlement for attributable injury or illness. Existing recipients of the War Disablement Pension would have their current rates grandparented and would receive their current rate plus any across-the-board increase determined by the Government.

25 New recipients of the Disablement Pension would be assessed using the whole of body assessment system. The maximum rate of pension would apply to those with impairment of 80 % or higher. We propose that proportionally higher levels of pension be given to veterans with the highest levels of service-related impairment.

26 Like the War Disablement Pension, the Disablement Pension would be a payment to recognise the non-economic impacts of an injury or illness on a veteran's life. The non-economic impacts of an injury or illness include pain and suffering caused by the medical condition and the resultant loss of enjoyment of life. We propose some general increase in the rates of Disablement Pension because of the advanced age and reducing numbers in this group.

27 We recommend that Scheme One introduce an innovative arrangement for addressing the high number of claims for injuries or illnesses that are likely to have a significant age component in their causation and for which causation is difficult to prove. Scheme One would provide that a recipient's percentage of Disablement Pension would be fixed after they reach the age of 80. Reassessment of Disablement Pensions would not be available for those 80 years or older, and no new applications for Disablement Pensions from veterans over the age of 80 would be allowed. As a replacement, all veterans with any level of Disablement Pension would be provided with a significant medical treatment and independence assistance entitlement from the time that they reach 80 years.

28 We also recommend that, except in special circumstances, veterans are required to wait two years after their Disablement Pension has been assessed before they can apply for a reassessment.

29 We propose that Scheme One provide veterans who have a service-related terminal illness with the choice of one year's worth of the maximum Disablement Pension as a lump sum instead of continuing to receive the fortnightly pension. Other veterans should also have the option to receive their pension fortnightly or annually. Impairment compensation for Scheme One is discussed in chapter 9.

Income support

Veterans' Weekly Income Compensation

- 30 We consider that those under 65 year olds who receive the Veteran's Pension are disadvantaged when compared to the position they could have been in if they had been able to continue working. Veteran's Pension for under 65s is currently paid at the same rate as New Zealand Superannuation. This differs from the income support standard that applies in the Accident Compensation (ACC) context, which is paid at 80 % of the claimant's pre-injury income. We consider that the income support for veterans who are prevented from working should be brought into line with the ACC standard of income support rather than the social security standard. We propose that Scheme One would provide a Veteran's Weekly Income Compensation (VWIC) payment payable at 80 % of the average wage instead of the Veteran's Pension for under 65 year olds.
- 31 The eligibility criteria for VWIC would include the inability, because of service-related injury or illness, to engage in the employment in which one was previously employed. Veterans in receipt of VWIC would have their rehabilitation needs assessed. To continue receiving VWIC the veteran would have to have a continued inability to work. We propose that Scheme One would allow veterans in receipt of this entitlement to resume some work and receive some income before their income level makes them ineligible. Current under 65 year old recipients of the Veteran's Pension should be able to choose to apply to see if they are eligible for the new payment, or else continue to receive the Veteran's Pension.

Veteran's Pension

- 32 Our recommendation is that Scheme One retain the Veteran's Pension as the income support entitlement for those who are above the retirement age. This entitlement should be used to provide greater recognition to all veterans. The Veteran's Pension should continue to be paid instead of and at the same rate as New Zealand Superannuation, but the eligibility should be widened to include all veterans who are 65 years or over and have service in a qualifying operational deployment. The Veteran's Pension should retain the additional benefits of the automatic Community Services Card, payment not ceasing if the recipient is in the public hospital for more than 13 weeks and the lump sum payment on death.
- 33 Compensation for loss of income in Scheme One is discussed in chapter 10.

Health care

Treatment for accepted disabilities

- 34 In chapter 11, we recommend that Scheme One shall provide funding for all of the veteran's treatment costs for accepted disabilities. This is consistent with the treatment entitlement provided under current legislation. At the time that a Disablement Pension is awarded for a disability, VANZ would approve certain treatment for that disability, in accordance with medical advice.

Health care assistance for over 80s

- 35 We propose in chapter 11 that a new form of medical assistance be introduced to the veterans' scheme. This would work in conjunction with the restriction on further reviews of Disablement Pensions after recipients turn 80. The new programme would provide all veterans with qualifying operational service and a Disablement Pension with a significant medical benefit to reduce their general medical costs. All veterans currently on a War Disablement Pension, who are over 80 years and have qualifying operational service, should be able to access health care assistance through this programme. This entitlement would provide recognition and real assistance to any elderly veteran who has received any service-related impairment.

Independence assistance

- 36 A key need for senior veterans and severely impaired veterans is assistance to maintain their independence, particularly so that they can remain in their own homes. We propose in chapter 12 a type of assistance specifically directed at helping veterans with significant health limitations to maintain their independence. This assistance should replace the allowances and VANZ discretionary funding. We have called it the Veterans' Independence Programme (VIP). VIP would augment existing assistance available through the Ministry of Health and Ministry of Social Development. It covers health and support services in the home, personal care, housekeeping services, access to meals, maintenance of grounds, transportation for independence and home adaptations. We propose that the following veterans qualify for the programme:
- (a) any recipient of a Disablement Pension [for independence needs that are associated with an accepted disability]; and
 - (b) veterans with qualifying operational service who are:
 - 80 years or over;
 - in receipt of a Disablement Pension; and
 - assessed as needing independence assistance for any medical condition.

Rehabilitation

- 37 Personal rehabilitation of a veteran’s own physical and mental capabilities has never been directly provided for in the war pensions legislation. Some war pension entitlements have been used to provide rehabilitation-type services. We consider that the new legislation should allow for rehabilitation directly for those who suffer a service-related injury or illness from which they can be rehabilitated. We recommend that Scheme One enable VANZ to provide rehabilitation services for those with an accepted injury or illness who are assessed as being able to rehabilitate. Like ACC legislation, Scheme One should define rehabilitation as including “treatment”, “social rehabilitation” (which we have renamed “psycho-social rehabilitation”) and “vocational rehabilitation”. Rehabilitation for Scheme One is discussed in chapter 13.

Families

Surviving Spouse Pension

- 38 The Surviving Spouse Pension is regarded as an important aspect of the veterans’ entitlements system. It appears to fulfil a number of purposes, including providing recognition of the care provided by a veteran’s spouse, compensation for loss of a veteran, and economic assistance. We propose that Scheme One retain the Surviving Spouse Pension, with some changes to the eligibility criteria.
- 39 The pension would cease when the recipient remarries or enters a new de facto relationship or civil union. A lump sum of two years’ worth of the pension should continue to be paid to give a final economic boost to the spouse before the pension ceases.
- 40 We propose that the surviving spouse or partner of any deceased veteran who was in receipt of a Disablement Pension when he or she dies would be eligible for the Surviving Spouse Pension. The pension would be paid at 50 % of whatever Disablement Pension the veteran received. These criteria would markedly expand the number of spouses and partners that would be eligible for some pension. The wider eligibility criteria would mean that the purpose of the pension is more about recognising the surviving spouse’s role than being compensation for hardship arising from having a seriously disabled spouse or for losing a spouse.
- 41 All of those currently in receipt of a Surviving Spouse Pension would transfer to a new Surviving Spouse Pension of at least the same rate as they received previously. The spouses or partners of living veterans who have met the eligibility criteria for the Surviving Spouse Pension by reaching a War Disablement Pension of at least 70 % prior to the introduction of new legislation, would receive the Surviving Spouse Pension of at least the former level of the pension even if the veteran dies after the introduction of the new legislation.

Children's Pension

- 42 We propose that Scheme One continue the assistance available in the case where a deceased veteran leaves dependent children. This would be available in the same circumstances as it is currently. For efficiency and simplicity, Scheme One would combine the Children's Pension and Parent's Allowance into a single periodic payment.

Education Bursaries

- 43 Scheme One would continue the education bursaries currently provided under the War Pensions Act, to contribute to the education costs of deceased veterans' children.

Funeral grant

- 44 The funeral grant is another entitlement that can be improved. The eligibility criteria for the proposed funeral grant under Scheme One would be expanded so that the spouse or estate of *any* deceased veteran with qualifying operational service, rather than just those with a certain degree of Disablement Pension, can receive the grant. Service-related disablement would no longer be a requirement for the grant to be paid. The grant would provide recognition to all veterans. The grant would increase the payment to the actual and reasonable funeral costs up to a maximum that is equivalent to the maximum funeral grant paid by ACC. This is significantly higher than the current war funeral grant.

Independence assistance

- 45 We recommend that independence assistance through the VIP should be available to spouses, partners and children of deceased veterans for up to one year after the veteran's death where this is necessary. The programme should include counselling and home help.
- 46 Assistance to families under Scheme One is discussed in chapter 14.

SCHEME TWO

- 47 Scheme Two provides the opportunity for a new approach to addressing disability in veterans. In recent decades there have been developments in New Zealand and internationally in the structure of schemes of entitlements for injuries and a shift in focus from compensation to rehabilitation. There has been a move towards modernising military disability and compensation schemes internationally. Recently introduced veterans schemes in other countries emphasise, to varying degrees, wellness and rehabilitation, rather than focussing on disablement and compensation.⁴

4 WestWood Spice *Disability in the 21st Century: Constructive Approaches to Disability – A review carried out for the Australian Department of Veterans' Affairs* (WestWood Spice, East Balmain, 2008) at 35.

- 48 It has been recognised that in many cases, compensation does not assist a person’s recovery from injury or illness. Restoring them to full participation and inclusion in society can better be achieved through systems that provide for whole-person rehabilitation, include a person’s family, and promote returning to work as the optimum outcome. At this stage in the history and evolution of our veterans’ entitlements law, New Zealand has the opportunity to introduce a truly progressive, forward-thinking and holistically-focused scheme.
- 49 We propose that Scheme Two be an assistance scheme for veterans who have served on or after 1 April 1974. Scheme Two would aim to assist and support veterans from the time immediately following a service-related injury so that they can recover from their incapacity to the maximum extent possible. It provides a suite of different types of assistance to provide for the holistic needs of veterans at different stages of their lives. Scheme Two allows for early intervention, which promotes recovery, provides incentives towards wellness rather than reinforcing a veteran’s “sick” role, and uses rehabilitation rather than compensation as the gateway to other entitlements.
- 50 In implementing Scheme Two, the Government would be investing significantly in wellness programmes and assistance in the short term. While this is an added short-term expense, we are convinced that this is worthwhile. Aiding recovery and facilitating a return to participation in work and all aspects of life would reduce the long-term dependency of seriously injured veterans. A shift away from lifelong periodic compensation payments would mean that rehabilitation assistance could be funded to a higher level than now with the expectation of reduced expenditure in the future.
- 51 We believe that many of the principles that have existed in the War Pensions Act from the outset are correct. Consequently, the fundamental basis of Scheme Two is consistent with Scheme One, and with previous legislation. Scheme Two is designed to dovetail with New Zealand’s other social support schemes, such as ACC and social security, where appropriate. It is, therefore, a rational and principled system that accords veterans a degree of special treatment as recognition of their service and as assistance for those who have been injured as a result of being put in harm’s way by the state. Compensation and entitlements in Scheme Two would incorporate any entitlements that may be payable under the ACC Scheme.

Rehabilitation

- 52 Rehabilitation, which is central to the proposed Scheme Two, is discussed in chapter 16. One of the main purposes of the scheme is to restore veterans who are injured as a result of qualifying service to their pre-injury capabilities to the maximum extent possible. Every veteran who has a service-related injury or illness and is assessed as being able to rehabilitate would be entitled to rehabilitation services.
- 53 The scheme has a multifaceted approach to rehabilitation. Scheme Two should cover treatment, psycho-social and vocational rehabilitation.⁵ The rehabilitation entitlements provided to a veteran under Scheme Two should coordinate with any rehabilitation entitlements that the veteran has under ACC.

5 Accident Compensation Act 2001, s 6 (definition of “rehabilitation”).

- 54 Under our proposals, Scheme Two requires that veterans are assessed for being able to rehabilitate as soon as is practically possible after an injury or illness is accepted as being covered. The decision on cover would be made within a short time frame. VANZ would have an obligation to make sure that a rehabilitation plan is put in place for each veteran who qualifies for rehabilitation services. The plan would be shaped to the individual veteran's needs, capabilities and preferences. Both the veteran and VANZ would have to agree to carry out their role under the plan. Every veteran would be provided with a case manager as a single point of contact to manage the rehabilitation process.
- 55 While the rehabilitation plan would address only the veteran's service-related medical condition or conditions, we suggest that VANZ takes a holistic approach to the type of rehabilitation that is made available to veterans. A person is more likely to achieve recovery to the maximum extent possible if the assistance received addresses not only the need to return to employability but the needs of the whole person.
- 56 A feature of most of the more progressive injury entitlement systems is an emphasis on psycho-social rehabilitation services. This includes individual counselling, relationship counselling, mental health treatment, drug and alcohol programmes, peer support and life skills coaching.⁶
- 57 We propose that Scheme Two provide psycho-social rehabilitation for veterans' family members also. We recommend that Scheme Two provide vocational rehabilitation to a veteran's spouse or partner if the veteran is assessed as being unable to make use of rehabilitation because of serious, permanent incapacity that causes the veteran to be unable to work. The purpose of this entitlement would be to reduce the financial impact of the veteran's incapacity on the veteran's family.

Income replacement

Veterans' Weekly Income Compensation

- 58 We propose in chapter 17 that Scheme Two introduce a VWIC payment that is similar to Scheme One's income replacement payment for under 65 year olds. The payment would compensate a person who is injured as a result of qualifying operational service and who is consequently unable to work for loss of the income he or she would otherwise have received. Because ACC provides a weekly compensation entitlement, which most injured veterans will qualify for, VWIC would be designed to enhance ACC payments for those who have dual entitlement to ACC and veterans' assistance. The payment would also ensure that veterans who do not qualify for ACC in respect of their injury or illness are not worse off than veterans who do receive ACC entitlements.
- 59 This assistance would follow from eligibility for rehabilitation services. Veterans who have incapacity for work and have a rehabilitation plan in place would be eligible for VWIC paid at a rate of 100 % of pre-incapacity earnings. This rate would be for either one year or, if it is shorter, for the period during which the rehabilitation plan is in place.

6 WestWood Spice, above n 4, at 51.

60 After this period, veterans who have incapacity for work and:

- continue to have a rehabilitation plan in place; or
- are unable to rehabilitate further,

would continue to be eligible for VWIC, at the rate of 85 % of pre-incapacity earnings.

61 The income support payment would continue for as long as the veteran has incapacity for work due to the service-related injury or illness and would cease once the recipient reaches the retirement age. As with ACC, the payment can cease at age 65, or, if the veteran chooses, at age 66. VWIC would also cease if the veteran is assessed as no longer having incapacity for work. Veterans would be able to resume working part time and continue to receive some of their VWIC.

Retirement lump sum

62 We recommend that a new type of entitlement be introduced to provide assistance to those who are unable or have a reduced ability to save for their retirement due to their inability to work. Veterans who have received VWIC for at least 10 years and who meet an asset test should be eligible for a lump sum payment when they reach the age of 65. We suggest that something in the order of \$25,000 might be appropriate.

Impairment compensation

63 We propose that Scheme Two provide a payment to acknowledge a permanent physical or mental impairment. The purpose of this payment would be to recognise loss of quality of life and capacity to enjoy life, and to enable veterans to maximise their future quality of life. Veterans with a service-related injury or illness that is causing permanent impairment would receive a lump sum payment. The amount would be dependent on the percentage of whole person service-related impairment that has been assessed. It would be paid after the injury or illness has reached a stable, permanent condition. Eligibility for the lump sum would be assessed after eligibility for rehabilitation has been determined.

64 Once a veteran's total service-related whole person impairment has been assessed, it would be possible under Scheme Two for the level of whole person impairment to be reassessed if he or she develops other service-related injuries or illnesses or if accepted conditions worsen. If total service-related whole person impairment becomes higher, an additional lump sum payment could be made. Ordinarily, veterans would need to wait two years after having received lump sum compensation before they could apply for reassessment of their level of impairment, but an exception may apply for significant increases in impairment.

65 Scheme Two would also set an age cut off for the reassessment of lump sum compensation after veterans reach the age of 80 years. From this age onwards, veterans with service-related impairment would be granted extensive medical benefits to replace the need for continued investigations into the attributability of medical conditions. Scheme Two's compensation for permanent impairment is discussed in chapter 18.

Health care

Treatment for accepted impairments

- 66 Like Scheme One, we recommend Scheme Two provide funding for the costs of medical treatment for accepted impairments to ensure that a veteran does not have to bear the ongoing costs of medical attention to maintain his or her health.

Health care assistance for over 80s

- 67 We propose that Scheme Two also provide a medical entitlement from the age of 80 years for all veterans with qualifying operational service who have an accepted impairment. These veterans would qualify for a number of health care benefits regardless of whether their medical conditions are service-related.
- 68 Health care under Scheme Two is discussed in chapter 19.

Independence assistance

- 69 We recommend in chapter 20 that VIP, as discussed in Scheme One, also apply to veterans covered by Scheme Two.

Transition assistance

- 70 We recognise that the point at which a veteran is transitioning from military to civilian life is a time of potential vulnerability and greater need. We propose in chapter 21 that assistance is provided to veterans at this time in the form of resettlement training, job placement assistance and education about VANZ.

Recognition of service and service-related impairment in older age

- 71 The Veteran's Pension is also a feature of the proposed Scheme Two. This is discussed in chapter 22. As with the Scheme One entitlement, it is an income support alternative to New Zealand Superannuation for those who have qualifying operational service. The Veteran's Pension would be available to all veterans who are 65 years and over as recognition for their service. Veteran's Pension would provide a Community Services Card to recipients. Payment of the Veteran's Pension would not cease if the recipient is in public hospital for longer than 13 weeks. A lump sum payment would be paid to the veteran's spouse or estate on his or her death.

Families of deceased veterans

Surviving spouse

- 72 We propose that Scheme Two target entitlements to those spouses and partners of deceased veterans who are most deserving of assistance. Scheme Two would provide generous entitlements to spouses and partners of veterans who die in direct temporal proximity to their service. Rather than an entitlement that provides all surviving spouses with a degree of recognition for simply being the

spouse of a veteran, the entitlements should be granted to persons who lose a veteran spouse as a direct result of service and where the veteran's life span is significantly shorter than the average.

- 73 We recommend that the surviving spouse or partner of a veteran who has a "service-related death" should qualify for assistance. A "service-related death" should be defined as:
- (a) death during qualifying operational service that is caused by service;
 - (b) death within 10 years of qualifying operational service from an injury or illness that was attributable to or aggravated by that qualifying operational service; or
 - (c) death more than 10 years after qualifying operational service from an accepted "late onset condition" that was attributable to or aggravated by that qualifying operational service.
- 74 We propose that a list of known late onset conditions be developed by the expert medical panel to define those conditions for which there may be a strong service relationship and which are known to develop more than 10 years after qualifying operational service as a result of that service activity or exposure.
- 75 There are several entitlements that should be provided to the spouse or partner of a veteran who has a service-related death. As it is possible that entitlements would also be provided by ACC in respect of a veteran's death, the proposed entitlements take into account possible ACC entitlements.

Lump sum compensation

- 76 Scheme Two should provide surviving spouses and partners with a lump sum following a veteran's death. We suggest a payment of \$20,000 may be appropriate. It would be designed to provide immediate benefit to the veteran's family shortly after the loss of the veteran.

Weekly income compensation

- 77 Spouses and partners of deceased veterans would also be provided with weekly income compensation at a rate of 60 % of the veteran's earnings. This entitlement would last for five years or for as long as the spouse is caring for a child of the veteran who is under 18 years. This would be financial assistance and compensation for loss of income during a period that could be financially difficult without the deceased's income.

Children's entitlements

- 78 Where a veteran dies of a service-related death, entitlements should be provided to the children of the veteran who would otherwise be dependent on the veteran. ACC's definition of a child (under 18 years) would be used for consistency.

Lump sum compensation

- 79 We propose that every child of a deceased veteran who qualifies for entitlements receives a lump sum payment of \$5,000. This would provide a reasonable amount per child to be used for investment in the child's education or any other purpose.

Weekly income compensation

- 80 Under Scheme Two weekly compensation of a share of 20% of the veteran's earnings prior to death would be divided equally between the children of the deceased veteran as weekly income compensation. This would be paid to each child until he or she turns 18 years or 21 years if he or she continues in education.

Funeral grant

- 81 A funeral grant for any veteran with qualifying operational service would be paid under Scheme Two as it would be under Scheme One.

Independence assistance

- 82 As with Scheme One, we propose that VIP should be available to spouses, partners and children of deceased veterans for up to one year after the veteran's death where this is necessary.

- 83 Assistance to families under Scheme Two is discussed in chapter 23.

IMPLEMENTATION OF THE NEW LEGISLATION

- 84 We are proposing significant changes for the veterans' scheme and there are a number of aspects of our proposed scheme that will take some time to implement. The Department of Veterans' Affairs in Australia and Veterans Affairs Canada, which have both implemented new veterans' legislation in recent years, have emphasised to us the importance of allowing sufficient time and resources to implement new legislation. Consequently, it would not be possible to implement this proposed scheme quickly.

- 85 Before new legislation can be brought into force, the following would have to be carried out:

- (a) the development of a veteran-specific supplement to the *AMA Guides*;
- (b) the development of disability pension rates for whole person impairment percentages;
- (c) research and development of decision-making instruments, such as 'statements of principles' and 'presumptive lists';
- (d) the development of regulations to cover rehabilitation services, independence assistance, health benefits and other matters that require subordinate legislation;
- (e) the development of structures and systems in VANZ for decision-making on different types of entitlements;
- (f) the development of computer systems through which the scheme can be administered;
- (g) the establishment of a Veterans' Appeal Tribunal;
- (h) the establishment of a statutory expert medical panel;
- (i) the establishment of a veterans' advisory board;
- (j) the development of a code of claimant's rights; and
- (k) the education and training of VANZ staff, NZDF and ACC staff, veterans' organisations, medical practitioners, health service providers and other stakeholders involved in the new legislation.

- 86 It has been difficult to obtain detailed costings of the proposals in this report. We asked VANZ to assist with this and most of the costing estimates that are included in the report are based on their approximations of the costs of our proposals where it was possible for these to be made. The lack of available base data on the number of veterans in the population has proven to be a significant limitation in determining likely costs.
- 87 It is likely that our recommendations would result in some increase to the costs of the veterans' system. This may depend on the number of eligible claimants. We recommend that the Government obtain rigorous costings before making decisions on the implementation of the recommendations in this report.

Recommendations

PART 1: ELEMENTS COMMON TO BOTH SCHEMES

Part 1 of the report relates to aspects of the proposed legislation that would apply to both proposed new schemes.

Chapter One – Principles

- R1 The purpose of the new legislation should include:
- to acknowledge community responsibility for injury, illness or death to veterans as a result of being placed in harm's way in service of New Zealand;
 - to provide veterans with fair entitlements;
 - to promote equal treatment of equal claims;
 - to promote a benevolent approach to claims; and
 - to ensure that the scheme is administered efficiently.
- R2 The new legislation should require periodic review at least every five years.

Chapter Two – Scheme structure

- R3 The new system should create two separate schemes for different veterans depending on date of service either through the introduction of two separate Acts or as a single Act with distinct parts applying to Scheme One and Scheme Two. Scheme One would apply to serving personnel with service prior to 1 April 1974. Scheme Two would apply to those with qualifying operational service from 1 April 1974.
- R4 If two Acts are introduced, the Scheme One legislation should be entitled the “Military Entitlements Act” and the Scheme Two legislation the “Armed Forces Rehabilitation and Compensation Act”.

Chapter Three – Service eligibility

- R5 The new legislation should cover the same types of service currently covered by the War Pensions Act 1954, that is, any service in the New Zealand armed forces prior to 1 April 1974 and qualifying operational service on or after 1 April 1974.
- R6 Scheme One should also cover:
- civilians employed by the Government to serve overseas in connection with qualifying operational service, who were New Zealand residents when they commenced service;

- former members of the forces of any Commonwealth country who served in qualifying operational service and were New Zealand residents when they commenced service and resided in New Zealand subsequently;
 - former members of the New Zealand mercantile marine during World War Two; and
 - former members of the mercantile marine of any country of the Commonwealth during World War Two, who were New Zealand residents when they commenced service and resided in New Zealand subsequently.
- R7 Scheme Two should also cover civilian members of the New Zealand Defence Force who serve in qualifying operational service.
- R8 All wars and emergencies currently covered by the War Pensions Act 1954 should be declared qualifying operational service.
- R9 The Minister of Veterans' Affairs, following consultation with the Chief of Defence Force, would have the authority to declare that a particular deployment constitutes a qualifying operational service.
- R10 The declaration should be required to specify the period of time and the locations on land or sea that constitute qualifying operational service.
- R11 The new legislation should set out a list of factors to be taken into consideration when deciding if a deployment should be declared qualifying operational service. This list should be:
- (a) the operational threat posed to the well-being of personnel by:
 - the activity of stakeholders, factions and security forces, including military and political activity;
 - the local conditions and hazards, including violence as a result of crime, civil disturbance, rioting and protest action;
 - introduced operational danger such as mines, unexploded ordnance, booby traps and any nuclear, biological and chemical threat; and
 - acts of terrorism, whether specifically directed at NZDF personnel or not; and
 - (b) the environmental threat to the health and well-being of personnel due to:
 - water, food and sanitation;
 - endemic, epidemic and other diseases of operational importance;
 - insect, animal and plant hazards; and
 - roads and associated traffic hazards.
- R12 If possible, declarations of qualifying operational service should be made prior to personnel leaving New Zealand for the deployment.
- R13 The legislation should allow the Minister of Veterans' Affairs to declare that a deployment is qualifying operational service at any time before, during or after the deployment.

- R14 Declarations of qualifying operational service should be published in the *Gazette* and made publically available on the VANZ website.

Chapter Four – Connection between service and impairment

- R15 The veterans' legislation should cover injuries, illnesses and deaths that are attributable to or have been aggravated by service.
- R16 For an injury or illness to be attributable to service it must have:
- resulted from an occurrence that happened while the veteran was rendering qualifying operational service; and
 - been caused or contributed to by qualifying operational service.
- R17 For an injury or illness to be aggravated by service, it must have:
- been made worse by service; and
 - either:
 - been sustained before the veteran entered qualifying operational service and was recorded in a service medical examination prior to the qualifying operational service; or
 - been sustained before the veteran entered qualifying operational service but without the veteran's knowledge and it was not found in a service medical examination prior to the qualifying operational service; or
 - arisen during qualifying operational service but was not caused by qualifying operational service.
- R18 Scheme One should continue to exclude from coverage injuries, illnesses or deaths that occurred while a veteran was a deserter, absent without leave and not in receipt of continuous pay, or that resulted from wilful misconduct.
- R19 Scheme Two should exclude from coverage, at the discretion of the General Manager of VANZ, injuries, illnesses or deaths that are:
- the result of illegal activity;
 - self-inflicted (unless suicide or caused by a service-related psychological impairment);
 - the result of alcohol or drug consumption (unless caused by a service-related psychological impairment);
 - smoking-related; or
 - due to sexually transmitted infections.

Chapter Five – Evidential standards and instruments

- R20 The new legislation should include beneficial evidential provisions that adopt the same level of benevolence towards veterans' claims as those in the War Pensions Act 1954. A more beneficial standard of proof should apply to veterans with service in qualifying operational service compared with the standard that applies to service personnel with routine service.
- R21 The legislation should allow for the creation of statements of principles (SOPs) and presumptive lists, to guide decision-making on certain relationships between medical conditions and service.

- R22 SOPs should be a list of the service factors that link a particular condition with service. Only the factors contained in a SOP should be able to link the condition covered by the SOP with service. Different SOPs reflecting the appropriate standard of proof should apply to veterans with qualifying operational service and service personnel with routine service.
- R23 The expert medical panel should have the power to adopt or amend presumptive decision-making instruments.
- R24 The new legislation should require that any presumptive decision-making instruments are based on “sound medical and scientific research”, which should be defined.
- R25 The United States’ Committee on Evaluation of the Presumptive Disability Decision-Making Process for Veterans should be closely examined and relevant recommendations incorporated into the process for establishing presumptive decision-making instruments in New Zealand.
- R26 A presumptive list should be a list of medical conditions for which there is a rebuttable presumption that a condition is related to service based solely on diagnosis of a condition and service in a particular theatre. The legislation should set out the degree of relationship between a service factor and a medical condition that is sufficient for a presumptive list to apply. The expert medical panel should examine the United States presumptive rules and the research of the Institute of Medicine, as well as other evidence, in determining whether to establish a presumptive list for the New Zealand system.
- R27 The legislation should allow individual veterans, veterans’ groups and VANZ to refer medical conditions to the expert medical panel for consideration of whether presumptive decision-making rules need to be adopted or reviewed.
- R28 The expert medical panel should be able to review and recommend amendment to any existing decision-making instruments on the basis of new medical and scientific evidence.
- R29 The new legislation should allow requests for review of decision-making instruments from individual veterans, veterans’ organisations or VANZ to be considered by a review committee within three months of the decision to adopt or amend a decision-making instrument. The grounds on which a review could be requested should be that the instrument is not based on sound medical and scientific research or that the sound medical and scientific research is insufficient to justify the making of the instrument.
- R30 The new legislation should require the appointment of a permanent chair of the review committee who is a medical or scientific expert. The Minister of Veterans’ Affairs should be required to appoint up to two additional reviewers, being medical or scientific experts in fields relevant to the medical condition being examined, when a review request is made. The review committee should be required to make a declaration in writing to give reasons for its decision and be able to make recommendations to the expert medical panel regarding that condition.

Chapter 6 – Measuring impairment

- R31 The new legislation should provide that the following tools are used to determine the level of whole-person impairment caused by service-related injury or illness:
- American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA Guides)*; and
 - a supplement specific to this scheme.
- R32 The supplement to the *AMA Guides* should be developed by VANZ in conjunction with the expert medical panel.
- R33 Assessments of service-related impairments should be carried out by VANZ approved assessors.

Chapter 7 – Decision-making

- R34 The authority for the administration of the legislation and overall decision-making should be vested in the General Manager of VANZ.
- R35 The new legislation should include a section setting out the functions of the General Manager. These should include:
- to grant compensation and other entitlements and assistance to veterans and certain other persons under and in accordance with the legislation;
 - to arrange provision of treatment, rehabilitation and other services for veterans and other persons under and in accordance with the legislation; and
 - to provide the Minister with information concerning, and to advise the Minister on, matters relating to the operation of the legislation.
- R36 The General Manager should be provided with the power to correct administrative errors.
- R37 The General Manager should be responsible for determining all claims for all assistance and entitlements, including impairment compensation. The new Act should provide the General Manager with the authority to delegate this decision-making power to any employee of the department, and potentially to other departments.
- R38 The new legislation should set out the following details relating to claims for any entitlement:
- (a) a claimant must make application for an entitlement;
 - (b) applications for entitlements are to be made in writing on a form specified by the department and must contain all of the necessary information;
 - (c) the date of lodgement is the date the application form is received by the department;
 - (d) the General Manager has the responsibility to make decisions in a timely manner; and
 - (e) when being advised of a decision, a claimant must be advised of any review rights.

- R39 We recommend that the following types of decisions are covered by the right of review:
- (a) the eligibility of a veteran for any entitlement or assistance under the legislation;
 - (b) the relationship of any medical condition to a claimant's service;
 - (c) the claimant's service eligibility; and
 - (d) the degree of impairment caused by a medical condition.
- R40 A person whose claim for impairment compensation is declined on the basis that the impairment is not related to service and presumptive decision-making instruments did not apply to the decision should be able to request to have their claim reviewed by a review panel.
- R41 Review panels should be made up of one VANZ reviewer and one reviewer nominated by the RNZRSA. Both reviewers should be suitably qualified, with either legal or medical expertise. If the reviewers disagree, the General Manager of VANZ should be responsible for the overall decision.
- R42 If a person disagrees with the level at which impairment compensation has been awarded, this review of the level of impairment is to be carried out by a medical assessor trained in using the *AMA Guides*. A VANZ medical reviewer should then provide a decision based on both the original medical assessment and the review assessment.
- R43 The review of any other type of decision, including impairment compensation decisions based on presumptive decision-making instruments, should be made by VANZ.
- R44 The legislation should provide that requests for the review of any decision regarding an entitlement should be made in writing within six months of the original decision.
- R45 Reviewers should be required to provide notification in writing of their decision and the reasons for it. Claimants should also be advised of any right of appeal to the appeal tribunal.
- R46 The War Pensions Appeal Board should be replaced with a new independent tribunal, named the Veterans' Appeal Tribunal.
- R47 In order for an appeal of a decision to be heard, the claimant should first have the decision reviewed. Both the claimant and VANZ should have the right to appeal a decision of a review panel to the Veterans' Appeal Tribunal within six months of the review decision. The Veterans' Appeal Tribunal would have the power to uphold or overturn the original decision.
- R48 The Ministry of Justice, through the Tribunals Unit, should provide administrative support to the Veterans' Appeal Tribunal.
- R49 Appointments to the Veterans' Appeal Tribunal should be independent and merit-based. The appointment process should be open and give the opportunity for the appointing authority to assess candidates' abilities.

- R50 The Minister of Justice should recommend appointments after consultation with the Minister of Veterans' Affairs. The responsibility for appointing members should be with the Governor-General on recommendation of the Minister of Justice.
- R51 Members of the Veterans' Appeal Tribunal should be appointed for a fixed term of three years and the chair should have a fixed term of five years. The legislation should set out limited grounds for termination of appointment allowing removal on the basis of "just cause".
- R52 The Veterans' Appeal Tribunal should have two or three members sitting at each hearing. It should be necessary for the chair to have legal expertise. The current requirement that some of the members should be medically qualified should be retained. The nomination of a medical member by the RNZRSA should be retained.
- R53 The Veterans' Appeal Tribunal should be required to conduct hearings with as little formality as is consistent with a fair and efficient process.
- R54 The Veterans' Appeal Tribunal should not be bound by legal forms or rules of evidence. If a provision that the tribunal is to make decisions based on the substantial merits and justice of a case is included, the legislation should clearly state the circumstances when the application of strict legal technicalities can be relaxed and to what extent.
- R55 The Veterans' Appeal Tribunal should have the power to call and examine witnesses, and to require the production of papers, documents, records and things for inspection by the tribunal. These powers should be set out in the legislation.
- R56 The tribunal should be required to provide reasons for decisions in writing.
- R57 The tribunal should have the following powers:
- (a) to summon witnesses, administer an oath or affirmation and take sworn evidence;
 - (b) to require parties and witnesses to produce information and documents;
 - (c) to require the disclosure of information between the parties to proceedings; and
 - (d) to exclude people when they are abusive or disruptive and generally maintain order during proceedings.
- R58 There should be a presumption that hearings of the Veterans' Appeal Tribunal are closed.
- R59 Decisions of the Veterans' Appeal Tribunal that have value as precedents should be published on the VANZ website.
- R60 The Veterans' Appeal Tribunal should be given limited powers to award costs.
- R61 The legislation should allow appeals from decisions of the Veterans' Appeals Tribunal to the High Court on matters of law only.

- R62 The General Manager of VANZ should have the power to allow reconsideration of previously declined impairment compensation claims in the following situations:
- (a) where an administrative error has materially affected the original decision (“administrative error” should be defined to exclude contended errors relating to the substance of the decision, and should include only errors relating to missing or incorrect information relating to service or diagnosis of a condition);
 - (b) where a presumptive decision-making rule (such as a presumptive list or SOP) has been introduced or amended, and the original claim would have been materially affected by the rule; and
 - (c) where a new declaration of qualifying operational service has been made, and the original claim would have been materially affected by the rule.
- R63 In the case where a previously declined claim is reconsidered and accepted, the commencement date of the pension should be the date of the original application for that medical condition.
- R64 Initial decisions on entitlement to a Veteran’s Pension should be made by the Ministry of Social Development, with VANZ advising on whether the service eligibility is met. If a veteran disagrees with a decision relating to their service eligibility, the decision should be reviewed by VANZ reviewers. An appeal on the service eligibility decision should be to the Veterans’ Appeal Tribunal. For all other aspects of the Veteran’s Pension, claimants should under the Social Security Act 1964 be able to request reviews of the decisions from a benefits review committee and appeal to the Social Security Appeal Authority.

Chapter 8 – Administration

- R65 The new legislation should require that a veteran who is receiving assistance under veterans’ legislation be given a case manager.
- R66 The War Pensions Medical Research Trust Fund should be renamed the Veterans’ Medical Research Trust Fund. Administration, including investment, of the fund should be carried out by VANZ.
- R67 The new legislation should establish an expert medical panel, with the following roles:
- reviewing international medical and scientific research relating to the impacts of service on veterans’ health;
 - formulating presumptive decision-making instruments;
 - establishing guidelines for conditions where any deterioration after a veteran has left service should not be considered service-related;
 - commissioning research;
 - making decisions on expenditure of the Veterans’ Medical Research Trust Fund on veteran-related medical research;
 - providing the Minister of Veterans’ Affairs and the Chief of Defence Force with guidance regarding the monitoring of veterans;
 - providing information to medical practitioners about the treatment of veterans; and

- providing advice to the Minister of Veterans' Affairs and Chief of Defence Force on issues relating to the medical impacts of military service, both past and present.
- R68 The expert medical panel should have a similar membership to the current Expert Panel on Veterans' Health, including medical experts in different fields, the NZDF Director-General of Medical Services and a lay member with relevant expertise. The Minister of Veterans' Affairs should appoint the panel members. Nominations should come from both the RNZRSA and the General Manager of VANZ. The panel should be resourced so that it has administration and research support available to it.
- R69 The new legislation should establish an independent veterans' advisory board with the function of advising the Minister of Veterans' Affairs on issues concerning the legislation and its administration, as well as on other veteran-related issues. It should have up to six members who are nominated by the RNZRSA or other veterans' organisations and appointed by the Minister. The board should meet approximately five times per year. Administrative support should be provided by VANZ.
- R70 The new legislation should require VANZ to develop a code of claimants' rights.
- R71 The NZDF should keep a register of all veterans known to have been exposed to certain factors during qualifying operational deployments.

PART 2:
SCHEME ONE

The recommendations in Part 2 address our proposals for Scheme One, which would replace the War Pensions Act 1954 for veterans and former members of the forces with services prior to 1 April 1974. Each element of the assistance provided under Scheme One is set out in Table 1 of the summary.

Chapter 9 – Impairment compensation

- R72 Scheme One should include a Disablement Pension to replace the War Disablement Pension. This should be a tax-free, periodic payment for service-related impairment.
- R73 The Disablement Pension should commence from the date of receipt of the written application, unless there was an administrative error.
- R74 The Disablement Pension should cease four weeks after the recipient's death.
- R75 Current recipients of the Disablement Pension should have their rate of pension grandparented and receive their current rate plus any increase pursuant to recommendation 85. If current recipients apply for a new condition under the new legislation, they should be assessed under the whole of body assessment method.
- R76 New recipients of the Disablement Pension after the introduction of the new legislation should be assessed using whole person impairment percentages rather than cumulatively adding the individual impairment percentages of each accepted injury or illness. The maximum rate of pension for new recipients would be given to those with impairment of 80 % or higher.
- R77 The rates of Disablement Pension for those with the most severe levels of impairment should be proportionally higher.

- R78 The legislation should require that Disablement Pensions are either temporary or permanent. A permanent pension should only be awarded after an injury or illness has reached a stable, permanent state. When a temporary pension is awarded, a decision must be made regarding the appropriate period after which the level of impairment should be reassessed. The decision-makers should be able to extend the temporary pension where there is a likelihood that the level of impairment will continue to change. After a medical assessment showing that the injury or illness has reached a stable, permanent state, the decision-maker should determine whether there is ongoing impairment and award a permanent pension if there is. Those awarded a temporary pension should be given a treatment or rehabilitation plan by VANZ staff and have their level of impairment reassessed once this has been completed.
- R79 Scheme One should only allow reassessment of a Disablement Pension after at least two years have elapsed since that veteran has had his or her whole person impairment assessed or reassessed. However, it should be possible for Disablement Pension recipients to request reassessment of their level of service-related impairment within two years of their last assessment if there is evidence that their impairment has significantly increased and that this is due to service-related conditions. “Significantly” should be defined as an increase of 10 or more percent in whole body impairment.
- R80 VANZ should have the ability to initiate a reassessment of the level of impairment if it considers that the level of service-related impairment has changed.
- R81 The expert medical panel should create guidelines on medical conditions for which it should be presumed that any deterioration after a veteran has left service is not service-related.
- R82 Scheme One should not allow Disablement Pension applications for new medical conditions or reviews of existing accepted conditions after veterans have reached the age of 80 years.
- R83 The legislation should allow a veteran’s full New Zealand Disablement Pension entitlement to be paid at the same time as an overseas equivalent pension as long as the pensions relate to different medical conditions.
- R84 Those diagnosed with a terminal service-related injury or illness should have the option of electing to receive one year’s worth of the maximum rate of the Disablement Pension paid as a lump sum to cover the period of one year following the terminal diagnosis.
- R85 The Government should consider some meaningful increase to the rates of the Disablement Pension.
- R86 The legislation should provide that the Disablement Pension is increased annually in line with any change in the consumer price index.

Chapter 10 – Compensation for loss of income

- R87 Scheme One should provide a Veterans' Weekly Income Compensation (VWIC) payment for veterans of qualifying operational service who are under 65 years and are unable to work because of their service-related impairment.
- R88 Every recipient of VWIC should be required to have a rehabilitation plan in place.
- R89 Current under 65 year old recipients of the Veteran's Pension should be able to transfer to VWIC if they meet the eligibility criteria. Current under 65 year old recipients of the Veteran's Pension that choose not to apply for VWIC would remain on Veteran's Pension, with the current rules for that payment continuing to apply.
- R90 The rate of VWIC should be based on 80 % of the average wage.
- R91 VWIC should be paid to eligible veterans up until they turn 65 years old.
- R92 If a recipient of VWIC is able to resume some work, the VWIC payment should be reduced so as to ensure that the total of the veteran's VWIC and earnings does not exceed the average wage.
- R93 The legislation should allow a veteran residing overseas to receive VWIC. However, if there are any costs associated with the assessment of the veteran's eligibility for the entitlement, VANZ should not be required to meet the costs of assessing the veteran overseas or of the return of the veteran to New Zealand.
- R94 The Veteran's Pension for veterans 65 years and over should be retained.
- R95 All veterans with qualifying operational service should be eligible for the Veteran's Pension, regardless of whether they have received impairment compensation.

Chapter 11 – Health care

- R96 Scheme One should retain the provision of funding for a veteran's medical costs relating to all accepted injuries and illnesses.
- R97 At the time that an injury or illness is accepted, VANZ should decide on the medical treatment that is approved for that condition.
- R98 Veterans with accepted injuries or illnesses should be provided with a treatment card that allows health care providers to access information on exactly what medical treatment VANZ has approved.
- R99 VANZ should be able to consider paying for treatment costs additional to those that are approved at the time of the acceptance of the condition but only after special application by the veteran or his or her GP.

- R100 The new legislation should set out the criteria against which all treatment should be considered. The following criteria should be considered:
- the treatment is necessary and appropriate, and of the quality required, for this purpose;
 - the treatment will be performed only on the number of occasions necessary for this purpose;
 - the treatment will be given at a time and place appropriate for this purpose;
 - the treatment is of a type normally provided by a treatment provider;
 - the treatment is provided by a treatment provider of a type who is qualified to provide that treatment and who normally provides that treatment; and
 - the treatment is provided after VANZ has agreed to it (unless special conditions apply regarding urgent treatment).
- R101 In making a decision on treatment VANZ should take into account:
- the nature and severity of the injury;
 - the generally accepted means of treatment for such an injury in New Zealand;
 - the other options available in New Zealand for the treatment of such an injury; and
 - the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.
- R102 The legislation should allow for veterans to be paid the necessary travel costs to receive medical treatment. ACC regulations should be used as a model for the rules relating to when and to what extent travel costs are paid.
- R103 VANZ should establish regulations and policy that set out what health care assistance is covered. These regulations should define “treatment” and the exact bounds and cost limits of what is covered by each type of assistance.
- R104 Any veteran who is in receipt of a Disablement Pension and is 80 years or over should be entitled to receive in relation to any medical condition (regardless of whether the condition is related to service):
- funding of GP visits;
 - funding of pharmaceuticals that are subsidised through Pharmac;
 - funding of specialist consultations with a registered medical practitioner; and
 - in respect of certain specified types of surgery:
 - funding for the first specialist’s assessment to be undertaken at a private hospital; and
 - the surgery to be undertaken at a private hospital if it cannot be carried out through the public health system within a reasonable time.
- R105 The Government should consider funding the full cost of surgeries covered by this entitlement through Vote Veterans’ Affairs rather than Vote Health.
- R106 Over 80 year old veterans that qualify for this entitlement should receive a veteran’s card that identifies this.

Chapter 12 – Independence assistance

- R107 The following persons would qualify for the Veterans' Independence Programme (VIP):
- Any recipient of a Disablement Pension. This group would qualify for independence assistance that is associated with the accepted disability or disabilities.
 - Veterans with qualifying operational service who are over 80 years old and in receipt of a Disablement Pension. This group would receive assistance based on needs arising from any medical condition.
- R108 The services provided under VIP should include:
- section maintenance – the activities regularly required to maintain the section immediately surrounding the veteran's primary residence;
 - home help – routine domestic tasks required to support the veteran in remaining at their primary residence;
 - personal care – assistance with the tasks of daily living;
 - modifications to the home – adaptations to the veteran's primary residence to assist the veteran to live as independently as possible; and
 - transport for independence – assisted transport for social purposes for those for whom social isolation is harmful to the health.
- R109 A special category of independence assistance should be provided for veterans who are not in receipt of a Disablement Pension, but who have qualifying operational service. These veterans should be eligible to have a case manager and to receive some VIP services on a discretionary basis.
- R110 The new legislation should adopt the travel concession amendments announced by the Government in December 2009.
- R111 A decoration allowance should be incorporated into other legislation.

Chapter 13 – Rehabilitation

- R112 Veterans that are assessed as being able to rehabilitate from their service-related injury or illness should be provided with rehabilitation services.

Chapter 14 – Families

- R113 The new legislation should provide that the surviving spouse, civil union partner or de facto partner of any person who was in receipt of a Disablement Pension when he or she died is eligible for a Surviving Spouse Pension.
- R114 Every eligible spouse or partner should receive an amount of pension that is proportional to the level of Disablement Pension that the veteran was receiving prior to death, for instance, 50 %.

- R115 The Surviving Spouse Pension should cease if the surviving spouse or partner remarries or enters a new civil union or de facto relationship. The legislation should continue to provide a lump sum payment of two years' worth of Surviving Spouse Pension when the surviving spouse or partner enters the new relationship. Once the Surviving Spouse Pension has ceased because of a new relationship, it should not be reinstated if the new relationship ends.
- R116 A Children's Pension (combining the current Parent's Allowance and Children's Pension) should be paid to children of veterans with a service-related death or who received a Disablement Pension for impairment equivalent to the current 70 % level. The definition of "child" should include adopted children and step-children and apply until the child turns 18.
- R117 The new legislation should retain the war bursaries and the Government should consider increasing the amounts paid.
- R118 A funeral grant should be paid on the death of any veteran who had qualifying operational service, regardless of whether he or she received impairment compensation. A funeral grant should also be paid in respect of persons with routine service whose death is attributable to their service or who qualify under current legislation.
- R119 The funeral grant should be for the actual costs of the funeral up to a specified maximum that is no less than ACC's funeral grant.
- R120 VIP services should be available for surviving spouses or partners of deceased veterans for up to one year if they are assessed as needing it.

PART 3: SCHEME TWO

The recommendations in Part 3 relate to our proposed Scheme Two. This would provide assistance to veterans who have served on or after 1 April 1974. The elements of the assistance proposed under Scheme Two are set out in Table 2 of the summary.

Chapter 16 – Rehabilitation

- R121 The new legislation should create an obligation on the Government to rehabilitate any veteran who becomes impaired as a result of qualifying operational service and who is assessed as being capable of rehabilitating in order that the veteran can recover to the maximum extent practicable.
- R122 The services provided should cover medical, psycho-social and vocational rehabilitation.
- R123 The General Manager of VANZ should have the discretion to provide rehabilitation services to any veteran in relation to a physical or mental impairment if he or she is satisfied that it is likely to have been caused by qualifying operational service, such that a claim for impairment compensation would be tenable if the impairment proved permanent.
- R124 VANZ should have an obligation to make sure that a rehabilitation plan and case manager are put in place for each veteran who qualifies for rehabilitation services.

- R125 Any veteran receiving rehabilitation services should have an obligation to cooperate with VANZ in determining the rehabilitation services that can be supplied and to participate in the rehabilitation.
- R126 Scheme Two should provide vocational rehabilitation to a veteran's spouse or partner if the veteran is assessed as being unable to make use of rehabilitation because of serious, permanent incapacity that causes the veteran to be unable to work.

Chapter 17 – Compensation for loss of income

- R127 The new legislation should provide that Veterans' Weekly Income Compensation (VWIC) will be paid to a veteran with qualifying operational service who is unable to work because of a service-related injury or illness and is participating in a rehabilitation plan.
- R128 The new legislation should provide for veterans to receive income compensation (whether through VWIC or a combination of VWIC and ACC income compensation) at a rate of 100 % of their earnings prior to the service-related injury or illness that has made them unable to work. VWIC would be paid at this rate for either:
- one year; or
 - the period during which the veteran is receiving rehabilitation services,
- whichever is the shorter. After this period, veterans who:
- continue to have a rehabilitation plan in place and have incapacity for work; or
 - are unable to rehabilitate further and have incapacity for work,
- would continue to be eligible for VWIC, but at 85 % of pre-incapacity earnings.
- R129 VWIC should cease after the veteran is assessed as no longer having incapacity for work or after the veteran turns 65 or (if the veteran elects to continue receiving VWIC rather than Veteran's Pension) 66.
- R130 If a recipient of VWIC is able to resume some work, the VWIC payment should be reduced so as to ensure that the total of the veteran's VWIC's and earnings does not exceed their pre-injury earnings.
- R131 The legislation should allow a veteran residing overseas to receive VWIC. However, if there are any costs associated with the assessment of the veteran's eligibility for the entitlement, VANZ should not be required to meet the costs of assessing the veteran overseas or of the return of the veteran to New Zealand.
- R132 The new legislation should provide a retirement lump sum payment, for instance \$25,000, for veterans who have received VWIC for 10 years or more, and who meet an asset test.

Chapter 18 – Compensation for permanent impairment

- R133 Scheme Two should provide for tax free lump sum impairment compensation to be paid at a rate dependent upon the level of whole person service-related impairment.
- R134 Levels of impairment should be assessed in 1 % increments.

- R135 Impairment compensation should only be paid for impairment of 10 % or higher.
- R136 The lump sum payment should only be paid once the condition has settled into a stable level of impairment.
- R137 The lump sum compensation for impairment under the new veterans' entitlements scheme should be set at a level that is equivalent to the ACC lump sum impairment compensation amounts with an additional percentage, such as 20 %, on top of this. However, consideration should be given to setting the impairment compensation for the highest levels of impairment at amounts that are proportionally higher.
- R138 The legislation should provide that, where ACC lump sum impairment compensation is paid for the same injury, the full impairment compensation amount that the veteran is entitled to under the veterans' scheme will be made up of the ACC lump sum and a veterans' impairment compensation lump sum.
- R139 Scheme Two should only allow reassessment of the percentage that a veteran is impaired due to service after at least two years have elapsed since that veteran has had his or her whole person impairment assessed or reassessed. However, it should be possible for impairment compensation recipients to request reassessment of their level of service-related impairment within two years of their last assessment if there is evidence that their impairment has significantly increased and that this is due to service-related conditions. "Significantly" should be defined as an increase of ten or more percent in whole body impairment.
- R140 Scheme Two should not allow Disablement Pension applications for new medical conditions or reviews of existing accepted conditions after veterans have reached the age of 80 years.
- R141 The new legislation should provide for recipients of lump sum payments to receive funding of up to a set maximum for professional financial advice if they choose to obtain this.

Chapter 19 – Health care benefits

- R142 Scheme Two should retain the provision of funding for a veteran's medical costs relating to all accepted injuries and illnesses.
- R143 At the time that an injury or illness is accepted, VANZ should decide on the medical treatment that is approved for that condition.
- R144 Veterans with accepted injuries or illnesses should be provided with a treatment card that allows health care providers to access information on exactly what medical treatment VANZ has approved.
- R145 VANZ should be able to consider paying for treatment costs additional to those that are approved at the time of the acceptance of the condition but only after special application by the veteran or his or her GP.

- R146 The new legislation should set out the criteria against which all treatment should be considered. The following criteria should be considered:
- the treatment is necessary and appropriate, and of the quality required, for this purpose;
 - the treatment will be performed only on the number of occasions necessary for this purpose;
 - the treatment will be given at a time and place appropriate for this purpose;
 - the treatment is of a type normally provided by a treatment provider;
 - the treatment is provided by a treatment provider of a type who is qualified to provide that treatment and who normally provides that treatment; and
 - the treatment is provided after VANZ has agreed to it (unless special conditions apply regarding urgent treatment).
- R147 In making a decision on treatment VANZ should take into account:
- the nature and severity of the injury;
 - the generally accepted means of treatment for such an injury in New Zealand;
 - the other options available in New Zealand for the treatment of such an injury; and
 - the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.
- R148 The legislation should allow for veterans to be paid the necessary travel costs to receive medical treatment. ACC regulations should be used as a model for the rules relating to when and to what extent travel costs are paid.
- R149 VANZ should establish regulations and policy that set out what health care assistance is covered. These regulations should define “treatment” and the exact bounds and cost limits of what is covered by each type of assistance.
- R150 Any veteran who is in receipt of a Disablement Pension and is 80 years or over should be entitled to receive in relation to any medical condition (regardless of whether the condition is related to service):
- funding of GP visits;
 - funding of pharmaceuticals that are subsidised through Pharmac;
 - funding of specialist consultations with a registered medical practitioner; and
 - in respect of certain specified types of surgery:
 - funding for the first specialist’s assessment to be undertaken at a private hospital; and
 - the surgery to be undertaken at a private hospital if it cannot be carried out through the public health system within a reasonable time.
- R151 The Government should consider funding the full cost of surgeries covered by this entitlement through Vote Veterans’ Affairs rather than Vote Health.
- R152 Over 80 year old veterans that qualify for this entitlement should receive a veteran’s card that identifies this.

Chapter 20 – Independence assistance

- R153 The following persons should qualify for the Veterans' Independence Programme (VIP) under Scheme Two:
- Any recipient of a Disablement Pension. This group would qualify for independence assistance that is associated with the accepted disability or disabilities.
 - Veterans with qualifying operational service who are over 80 years old and in receipt of a Disablement Pension. This group would receive assistance based on needs arising from any medical condition.
- R154 The services provided under VIP should include:
- section maintenance – the activities regularly required to maintain the section immediately surrounding the veteran's primary residence;
 - home help – routine domestic tasks required to support the veteran in remaining at their primary residence;
 - personal care – assistance with the tasks of daily living;
 - modifications to the home – adaptations to the veteran's primary residence to assist the veteran to live as independently as possible; and
 - transport for independence – assisted transport for social purposes for those for whom social isolation is harmful to the health.
- R155 A special category of independence assistance should be provided for veterans who have not received impairment compensation, but who have qualifying operational service. These veterans should be eligible to have a case manager and to receive some VIP services on a discretionary basis.

Chapter 21 – Transition assistance


- R156 The NZDF should be required to provide all members of the armed forces, including Reserve Forces, with transition assistance when they leave the armed forces.
- R157 Job placement assistance, including job search training, career counselling and job finding assistance, should be available to all members of the forces when they are leaving the armed forces.
- R158 VANZ should educate currently serving veterans with qualifying operational service about what is provided for veterans under the legislative scheme.

Chapter 22 – Recognition of service for senior veterans

- R159 Scheme Two should retain the Veteran's Pension for veterans 65 years and over.
- R160 All veterans with qualifying operational service should be eligible for the Veteran's Pension, regardless of whether they have received impairment compensation.

Chapter 23 – Families

- R161 Spouses or partners of veterans with a service-related death should be eligible for assistance. We recommend that Scheme Two define a service-related death as:
- death during qualifying service;
 - death within 10 years of qualifying service from a condition that was attributable to or aggravated by qualifying service; or
 - death more than 10 years of qualifying service from an accepted late onset condition.
- R162 The new legislation should provide a lump sum compensation payment of approximately \$20,000 for surviving spouses.
- R163 When a spouse qualifies for ACC in respect of the veteran's death, ACC should pay the survivor's grant under ACC legislation and VANZ should pay the amount required to top the total payment up to the amount the spouse is entitled to under veterans' legislation.
- R164 Spouses and partners of deceased veterans should be provided with weekly income compensation at a rate of 60 % of the veteran's earnings. This entitlement would last for five years or for as long as the spouse is caring for a child of the veteran who is under 18 years.
- R165 Surviving spouses who qualify for entitlements should be entitled to VIP services for up to one year following the veteran's death.
- R166 Scheme Two should allow for the surviving spouse to receive vocational rehabilitation services.
- R167 Every child (under 18 years) of a deceased veteran with a service-related death should receive a lump sum payment. This could be set at \$5,000.
- R168 Weekly compensation of a share of 20 % of the veteran's earnings prior to death should be divided equally between the children of the deceased veteran as weekly income compensation and paid to each child until he or she reaches 18 years or 21 years if he or she continues in full time study.
- R169 A funeral grant should be paid on the death of any veteran who had qualifying operational service, regardless of whether he or she received impairment compensation.
- R170 The funeral grant should be for the actual costs of the funeral up to a specified maximum that is no less than ACC's funeral grant.



Part 1
ELEMENTS
COMMON
TO BOTH
SCHEMES

Part 1: Elements common to both schemes

An introduction

Part 1 discusses our recommendations for the aspects of the proposed legislation that would be common to both Scheme One, the scheme to replace the War Pensions Act 1954 for those with service prior to 1 April 1974, and Scheme Two, the scheme for veterans with service on or after 1 April 1974.

Part 1 covers the following:

- The principles that would underpin the new legislation (chapter 1);
- The structure and transitional arrangements for the proposed legislative schemes (chapter 2);
- The types of service that would be covered by the new legislation and how decisions regarding service deployments would be made (chapter 3);
- The type of connection between service and impairments that would be covered by the new legislation and certain types of activity that may be excluded from coverage (chapter 4);
- The evidential standards and decision-making instruments for proving claims for impairment compensation under the proposed legislation (chapter 5);
- The tool for measuring the degree of impairment caused by a service-related injury or illness (chapter 6);
- The decision-making structures proposed for the new legislation (chapter 7); and
- The proposed features of the administration of the new legislation (chapter 8).

Chapter 1

Principles

- 1.1 The obligation to care for our injured veterans is long-standing. We believe this obligation should endure. The new legislation that we recommend would pick up a baton of responsibility for those who have been injured as a result of being placed in harm's way in service of New Zealand that goes back to the 1860s. As such, we believe the principles embedded in past legislation should continue. We should reinforce these with principles of sound governance and administration in order to make our veterans system as robust and as fair as possible.
- 1.2 In *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (the Issues Paper), we set out the general principles we consider should govern a modern scheme of veterans' entitlements.⁷ We agree with the broad principle that persons who have been subjected to the risk of death or injury in the interests of the nation through military service should in return be entitled to all benefits, allowances and services to which every other New Zealander is entitled, plus additional assistance administered through Veterans' Affairs New Zealand (VANZ).
- 1.3 This translates to the following principles, which should underpin the development of a new scheme:
 - **Community responsibility** – Veterans put themselves in harm's way during service on behalf of the nation. The community therefore has a reciprocal responsibility to look after veterans and their families if they are injured or killed. This is an enduring obligation.
 - **Fair entitlements** – A fair entitlement scheme should provide for greater entitlements than are available to other New Zealanders, and include:
 - Compensatory payments for the effects on a veteran's quality of life caused by injury or disease attributable to service;
 - Income support or replacement where a veteran's injury or disease affects his or her ability to earn money by working;
 - Rehabilitation services, including medical support and services and support based on a veteran's needs; and
 - Compensation and income support payments to eligible family members upon the death or serious impairment of a veteran.

⁷ Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at chapter 7.

- **Equality** – There should be equal treatment of equal claims. Decision-making criteria should be clear.
- **Benevolent approach to claims** – In considering veterans’ claims for entitlements, beneficial evidential provisions should be applied to veterans.
- **Administrative efficiency** – The scheme should be as simple as possible and should aim to minimise delays. It should not replicate existing structures.
- **Affordability** – The scheme should be affordable in terms of the community’s expectations and priorities. This concept should encompass sustainability and resource efficiency.

SUBMISSIONS ON THE GENERAL PRINCIPLES

- 1.4 Eighty percent of submitters agreed with the principles identified in the Issues Paper. Those who suggested alternative principles generally suggested narrower aims that singled out one particular aspect of a veterans’ entitlements scheme, such as the importance of rehabilitation, entitlements for surviving spouses or acknowledging the service of those who did not serve overseas.
- 1.5 The Royal New Zealand Returned and Services’ Association’s (RNZRSA’s) submission agreed with the principles, and highlighted additional factors, including that no account should be taken of income or property in determining the amount of impairment compensation, that income compensation should be tax-free and not considered income for income testing for any social security entitlement, and that the new legislation does not disadvantage any veteran or other entitled person. The RNZRSA was concerned to ensure that the Government balance considerations of affordability with the community responsibility.
- 1.6 The New Zealand Defence Force (NZDF) supported the principles suggested and noted that they were compatible with the current strategic themes of the NZDF. It suggested that the principle of affordability could be expanded to include sustainability and resource efficiency so that non-fiscal as well as fiscal factors can be considered.

ROLE OF GENERAL PRINCIPLES IN VETERANS’ ENTITLEMENTS SCHEME

Purpose section

- 1.7 Modern New Zealand statutes include a purpose section. This section, which is usually one of an Act’s first sections, briefly sets out the Act’s purpose. The section provides clarity as to the legislature’s intention. It can be used as an aid to the interpretation of substantive provisions of an Act.
- 1.8 The general principles outlined above should form the basis of the purpose section of new legislation. Phrased as purposes, the general principles would be at the core of the new veterans’ entitlements scheme. The first five of the above general principles should be rewritten as purposes for the new legislation’s purpose clause. The sixth general principle, “affordability”, will not translate into one of the purposes of the legislation. The principle of affordability will already have been considered prior to the scheme’s implementation in the Government’s decisions on the nature of the scheme to be legislated.
- 1.9 The majority of submitters agreed with these suggested purposes.

Principles section

1.10 Some legislation also contains a set of principles to which all persons exercising or performing a function, duty or power under the Act must have regard.⁸ A purpose section and a principles section were added to the Social Security Act 1964 in 2007.⁹ We have considered this for the new veterans' legislation. However, the legal status of a principles section is uncertain and could overly complicate the decision-making process. We consider that it is better to express the principles as a detailed object or purpose clause. If the general principles clearly underpin the design of the scheme, it is unnecessary to have a principles section further influencing decision-making. Having a broad principles section which applies to all decision-making under the Act increases the risk of judicial review.

LIVING DOCUMENT

1.11 In delving into the history and current state of New Zealand's veterans' legislation, we have recognised that this has been neglected law for a number of years. Many of the problems that have necessitated this review could have been avoided if regular and thorough attention had been given to the effectiveness and rationality of the War Pensions Act throughout its history. Good legislation requires not only focused and careful consideration at its genesis, but ongoing review. We hope that veterans' legislation never again falls into a legal abyss. Those who have been harmed in service of our country deserve better than that.

1.12 When Canada introduced its new legislation applying to its post-war veterans, the New Veterans Charter, in 2005, the Government of Canada obviously had a similar intention of safeguarding their new scheme from becoming bad law. Moreover, Canada's New Veterans Charter was attempting to achieve something never before done in their country or the rest of the world. Consequently, there was a risk of the untested for the veteran stakeholders and the Government. In consideration of this, the Canadian Government introduced the legislation as a "living charter". In doing so, the Government undertook to leave the entire scheme open to regular review and reconsideration. This commitment has proved to be very successful for Canada. It paved the way for unanimous support for the legislation from veterans' groups. It also keeps alive expectation within the Government that the New Veterans Charter may be adjusted or amended if it is found that its measures are not quite right for achieving the best outcome for Canada and its veterans. Canada established review bodies comprised of veterans and medical and scientific experts in relevant fields which report on how the New Veterans Charter is working.

8 See, for example, Children, Young Persons, and their Families Act 1989, s 5.

9 Social Security Act 1964, ss 1A and 1B; Social Security Amendment Act 2007, s 23.

- 1.13 We recommend that New Zealand take a similar approach to our new veterans' legislation. The new Acts should be formally considered "living statutes". Legally, this should be achieved by including a provision requiring the periodic review of the operation of the legislation, such as that included in the Evidence Act 2006.¹⁰ We recommend that the period of review should be no longer than five years. The Minister of Veterans' Affairs could establish a specific panel to review the legislation when it is to be reviewed. We recommend that veterans, as well as relevant experts, provide input into the review process.

10 Evidence Act 2006, s 202.

Chapter 2

Scheme structure

- 2.1 Early on in our consideration of the shape of a new veterans' entitlements scheme, it became apparent that one solution was not going to fit all of those who are or potentially will be affected by veterans' entitlements legislation. We came to the view that, while all of those affected by a veterans' entitlements scheme should be transferred to new legislation, one new Act was not going to be suitable for all. Consequently, we recommend a new system in two separate Acts, creating separate schemes for different veterans depending on date of service. This is a combination of options 2, 3 and 5 presented in the Issues Paper.
- 2.2 The reason for this approach is that service personnel who served prior to 1 April 1974 are in a different legal position to those who served after 1 April 1974 and those who will serve in the future. Those who served prior to 1 April 1974 do not have access to the Accident Compensation scheme (ACC) for personal injuries arising out of service in that period, but those serving after 1 April 1974 may.
- 2.3 Although the Accident Compensation Act 1972 introduced a scheme for the compensation of injuries that in many respects paralleled the scheme for service personnel, only minor amendments were made to the War Pensions Act 1954 at this time. The War Pensions Act was amended from 1 April 1974 such that serving personnel who did not serve in a war or emergency no longer qualified for entitlements. In amending the legislation, the Government considered that ACC legislation introduced from this point now adequately covered serving personnel without service in a war or emergency. For service from 1974 onwards, the Government's approach to veterans' entitlements has been targeted at those that it places in harm's way through operational service overseas.
- 2.4 The amendments to the War Pensions Act to take into account the introduction of ACC failed to acknowledge that some people may qualify for entitlements under both schemes, creating the potential for 'double-dipping'. Although both the War Pensions Act and ACC provide entitlements for injuries sustained by accidents, there is no legislative direction about how the respective entitlements are to interact. The entitlements provided through the War Pensions Act and ACC are very different and do not correspond directly. In devising a new veterans' entitlements scheme, it has, therefore, been necessary to consider how the scheme can best work in an ACC environment, at least for those whose war

pension entitlements relate to service after 1 April 1974. Those who have entitlements arising from service prior to 1 April 1974 have to be viewed in a different context.

- 2.5 Additionally, the approach of having two separate schemes for those with service before and after 1 April 1974 is a judicious one in the context of New Zealand's military history. The list of wars and declared emergencies shows that 1974 is a rational division point between historic and modern service. Up until 1974, New Zealand forces were involved regularly in a number of conflicts and operational situations. By 1974, the vast majority of New Zealand serving personnel had been withdrawn from Vietnam and the Mururoa nuclear tests emergency was over. The Gulf Conflict, which began in December 1990, is the next emergency covered by the War Pensions Act.
- 2.6 This period of relative inactivity for the New Zealand armed forces makes a two-scheme approach practical and efficacious from an administrative point of view. It is clear which serving personnel should be covered by the first scheme and by the second scheme. There is a clear temporal division between these two groups. Those serving prior to 1974 are generally much older than those who have qualifying service after this date. The service experiences of those serving in emergencies after 1990 are of a different nature to those prior to 1974.
- 2.7 A further reason for introducing separate schemes for those serving before and after the introduction of ACC is that in New Zealand and throughout the world there have been developments in the form taken by compensation schemes like this one. Modern schemes have focused on rehabilitation and provide lump sum compensation payments and income-based weekly payments where a recipient is unable to work. ACC is a scheme of this nature, as are the new veterans' schemes in Australia, Canada and the United Kingdom.¹¹ The modern approach has advantages for veterans and the Government. However, for those already receiving entitlements under the very different type of scheme that is the War Pensions Act, the conversion to a new type of scheme would be too great a leap. It would be too difficult to translate existing entitlements into a form that accords with the requirements of a modern scheme. It would also be likely to cause uncertainty and disruption among current recipients, many of whom are elderly and have been in receipt of their current entitlements for decades. The option of retaining a scheme that is similar to the War Pensions Act, but with improvements to overcome current difficulties with the system, was preferable.
- 2.8 The large majority of claimants of the War Disablement Pension under the War Pensions Act 1954 have service prior to 1 April 1974. Of a total of 13,935 recipients of the War Disablement Pension, 13,876 have the pension for disabilities connected with service prior to 1 April 1974.¹² Setting the cut off date between the two schemes at 1 April 1974 ensures that the vast majority of current recipients would fall into the first scheme.

11 Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at chapter 6.

12 As at 31 March 2010. Figures obtained from Veterans' Affairs New Zealand.

- 2.9 Ideally, the same law would apply to all veterans. Multiple schemes cause complication. However, given the reasons outlined, a single scheme is simply not feasible at present. By closing the first scheme to veterans who serve after a certain date, we are doing our best to ensure that both schemes will not be necessary indefinitely.
- 2.10 The Royal New Zealand Returned and Services' Association (RNZRSA) is supportive of having two separate schemes for the two different groups.

OPTIONS CONSIDERED

- 2.11 We considered several other approaches to the structure of the new legislation and the transition from one scheme to another. Some approaches were based on date of claim, where all of those who make new claims after the date of the enactment of the new legislation would fall under the new Act. Other approaches relied on date of service by setting the cut off point on the basis of when a veteran's service took place. We also looked at whether individuals should be able to opt in to a new scheme.
- 2.12 In our analysis of the options, the following considerations were highly significant:
- that the administrative, structural and substantive problems of the current legislation are addressed;
 - that all of those who have service in the same deployment or operation are covered by the same legislation as a matter of fairness and equity;
 - that the time before the scheme for older veterans, is phased out would be minimised in order to reduce the administrative complexity of running two schemes at once;
 - that as large a group of veterans as possible are covered by a new, modernised veterans scheme immediately;
 - that the division point between two schemes is rational and simple to administer;
 - that there are not two separate administration and decision-making structures in place at one time; and
 - that the approach chosen is the fairest and best way to address the needs of all groups of veterans.
- 2.13 The option that best addresses these considerations is a date of service approach as other options have significant shortcomings. Our version of the date of service approach would mean that a new veterans' entitlements scheme would apply to those who have served after 1 April 1974. This would be combined with an overhaul of the existing scheme to improve administration and decision-making, and rationalise entitlements. The approach would result in two schemes. The first, Scheme One, would apply to serving personnel with service prior to 1 April 1974. Scheme Two would apply to those with qualifying service from 1 April 1974. The War Pensions Act 1954 would be repealed from the date of enactment of the new legislation. The schemes could be set out either in a single new Act or two separate new Acts. This approach assists legislative clarity, certainty and simplicity by providing modern legislation for both groups of veterans.

2.14 The 44 submission responses on this issue were widely split among the different options. Several submitters qualified their responses with the preference that those with current entitlements under the War Pensions Act would not be disadvantaged by the transfer to a new scheme.¹³ The New Zealand Defence Force (NZDF) recognised the need to balance the desire to produce the greatest possible legislative clarity, certainty and simplicity against the need to maintain the confidence of those currently receiving entitlements who are comfortable with what they receive and may not wish to see a change.¹⁴

NAME OF NEW
LEGISLATION

2.15 Our Issues Paper suggested that the new legislation should be entitled “Veterans’ Rehabilitation and Entitlements Act” or something similar. With the recommendation that two separate schemes are required, it may be necessary to consider two new names.

2.16 We received 46 submissions on the question of the new Act’s name. There were 26 different suggestions. The most popular were “Veterans’ Rehabilitation and Entitlements Act”, “Veterans’ Entitlements and Rehabilitation Act”, “Veterans’ Act” and “Veterans’ Entitlements Act”. It was clear that most submitters did not think that the terms “war” and “pensions” should be included in the title of the new legislation.

2.17 The RNZRSA suggested the “Military Rehabilitation and Entitlements Act”. The NZDF considered that the term “entitlement” should be used rather than “benefit”, given the nature of the support provided by the Government. Both the RNZRSA and the NZDF favoured not using the word “veteran” in the title. The NZDF found that currently serving personnel considered that the term “veteran” evoked a specific image of someone who has served in a conflict such as World War Two or Vietnam rather than currently serving members. The NZDF suggested using a name similar to that used in Australia, such as “Military Rehabilitation and Compensation Act” or “Military Rehabilitation and Entitlements Act”.

2.18 The term “entitlement” can itself have associations with which we may want to avoid. Since producing the Issues Paper, we have been informed about the research and philosophies behind modern disability schemes. There has been a shift in focus away from seeing the purpose of these schemes as the granting of “entitlements”. Instead they provide assistance to restore whole-person health and re-establish injured persons as fully functioning members of society. We understand that the language used is a vital part of characterising the scheme. Language which is positive, emphasises the individual and is focused on “wellness” will help the scheme to achieve its purpose.¹⁵

13 Seven submitters made this comment.

14 Submission of the New Zealand Defence Force (submission received 12 March 2009) at 14.

15 WestWood Spice *Disability in the 21st Century: Constructive Approaches to Disability – A review carried out for the Australian Department of Veterans’ Affairs* (WestWood Spice, NSW, 2008) at 71.

- 2.19 Much of the consideration is dependent upon who the legislation will cover and so depends upon the decisions made regarding service eligibility. Scheme One will be a replacement for the War Pensions Act for those who served prior to 1 April 1974. Like the War Pensions Act, this scheme would cover routine service personnel who served in the New Zealand armed forces prior to the introduction of ACC as well as veterans of wars and emergencies.
- 2.20 Clearly there is concern that the use of the term “veteran” in the title of an Act indicates that legislation does not apply to those who do not have war service, or service in a war-like operation or deployment. As Scheme One would cover some non-veterans, it may not be appropriate to include the term “veteran” in reference to Scheme One. On the other hand, Scheme Two is likely to apply only to service personnel who have served in a qualifying operational deployment. If service in “harm’s way” is the criteria for being a “veteran”, then Scheme Two can be said to apply only to veterans. However, the feedback from currently serving personnel through the NZDF indicates that “veteran” is not a term that currently serving personnel who have qualifying operational service associate themselves with.
- 2.21 We recommend that, should our proposals be enacted in two separate Acts, the Scheme One legislation is entitled the “Military Entitlements Act” and the Scheme Two legislation the “Armed Forces Rehabilitation and Compensation Act”.

TRANSITION

- 2.22 As stated, the division point between the schemes would be 1 April 1974. The general rule would be that claims for injuries, illnesses and deaths related to service prior to 1 April 1974 would be covered by Scheme One and claims related to service on or after 1 April 1974 would be covered by Scheme Two.
- 2.23 The more complex cases are those veterans who served after 1 April 1974 and are already receiving a War Disablement Pension under the War Pensions Act. This group is relatively small. There are currently 59 veterans in this position. There are also two recipients of the Surviving Spouse Pension whose veteran partners have died as a result of emergency service post 1 April 1974.¹⁶ Because there are such small numbers in these groups and it is desirable to have as many people as possible covered by Scheme Two so that Scheme One’s lifespan is not extended for many years to cover very few people, we favour transferring these people to Scheme Two. As the current entitlements of this group would be significantly altered by a transfer to Scheme Two, it would probably be necessary to provide lump sum payments as a replacement for the periodic payments under the War Pensions Act. Veterans’ Affairs New Zealand (VANZ) estimates that the cost of lump sum payments in order to transfer these recipients to Scheme Two would be approximately \$4.81 million for the veterans and \$0.31 million for the spouses.

¹⁶ As at 31 March 2010. Figures obtained from Veterans’ Affairs New Zealand.

- 2.24 Another group of complex cases are those who have qualifying operational service both pre- and post-1 April 1974. For these veterans, if the injury or illness for which they are claiming is clearly related only to service on or after 1 April 1974, the claim would be dealt with under Scheme Two. If the injury or illness relates to service prior to 1 April 1974 or it is unclear exactly which term of service has caused the injury or illness, Scheme One will cover the claim.
- 2.25 For new claims we recommend that the following rules apply:
- (a) New claims for injuries, illnesses and deaths relating to service prior to 1 April 1974 should be covered by Scheme One;
 - (b) New claims for injuries, illnesses and deaths relating to service on or after 1 April 1974 from veterans who have never received a War Disablement Pension under the War Pensions Act should be covered by Scheme Two; and
 - (c) New claims for injuries, illnesses and deaths relating to service on or after 1 April 1974 from veterans who have received a War Disablement Pension under the War Pensions Act should be covered by:
 - Scheme One if the new claim relates to service prior to the enactment of the new legislation; and
 - Scheme Two if the new claim relates to service after the enactment of the new legislation.
- 2.26 Reviews of accepted disabilities should always be dealt with under the scheme that aligns closest to that under which the disability was originally accepted. Reviews of disabilities accepted under the War Pensions Act should be considered under Scheme One. The same should also apply to new disabilities which are consequential upon existing accepted disabilities.
- 2.27 The day before the date that the new legislation enters into force would be the cut off date for all claims under the War Pensions Act. New administrative and decision-making structures would apply from this date. This means that the claims submitted but not determined prior to the cut off date would be decided upon by decision-makers under the new structure. The purpose of this is to make the transition as simple as possible for VANZ. It will mean that VANZ does not have to have two separate administration and decision-making structures in place at the same time.

Chapter 3

Service eligibility

- INTRODUCTION
- 3.1 The service eligibility provisions chosen for the new veterans’ entitlements scheme will answer the important questions of who is a “veteran” and who is covered by the legislation. As a part of this review, we have considered the scope of coverage of the veterans’ entitlements scheme. We have heard considerable argument regarding whether or not a broader group of New Zealand’s service personnel should be able to receive entitlements under new legislation, than is the case currently. We have reached the conclusion that going forward the scheme should apply to those service personnel who are specifically sent by the Government into areas and situations of objectively greater actual risk of harm.
- 3.2 One of the major problems with the War Pensions Act 1954 is the lack of clarity regarding the type of service that is covered and how this decision is to be made. Currently, the Act provides coverage for service in wars or emergencies. Emergencies are determined by the Minister of Veterans’ Affairs. There are no set criteria to inform this decision or processes to follow. The Issues Paper set out four options for determining which New Zealand Defence Force (NZDF) deployments are covered by the new veterans’ scheme. We favour option 1, which would leave the decision regarding qualifying service to the Minister, but would provide parameters around how and when this decision is to be made.
- 3.3 It should be noted that all of the wars, emergencies and other service covered under the War Pensions Act would continue to be covered. The process included in the new legislation would only add to the list of service deployments that constitute eligible service under the system of assistance for veterans.
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- SCOPE OF COVERAGE
- 3.4 Throughout our work on this project, the proposals about who should be given coverage under veterans’ legislation in the future have generally fallen into one of three categories. The first suggests maintaining a similar approach to the current one. Serving personnel are covered for service that occurred in certain places and times where there was greater actual risk. These situations are termed wars or emergencies under the War Pensions Act. For the sake of simplicity we will refer to them as “operations” here, although they may or may not be all of the deployments that the NZDF classifies as operations.

- 3.5 The second approach is to cover any person who serves in the New Zealand armed forces. A third suggestion is a tiered approach that provides superior coverage to those who have service in a risky operation and lesser coverage to others who have served in the armed forces. The delineation between the tiers could be through the evidential standard that is required in order for a claim to be accepted.
- 3.6 Who benefits from veterans' legislation is at the heart of the issues being considered in this review. The whole premise of a system for veterans is that there is a distinct group of New Zealanders who deserve special assistance if they are injured or ill. The Government's obligation to this group arises because of what veterans are required to do in service of the country. To answer this question we need to identify exactly what it is about what veterans have done that gives rise to the Government's obligation and the distinction from other New Zealanders.
- 3.7 All military service involves some physical risk and strain that is not typical of most employment. However, it is not just the fact of military service that gives rise to the Government's special obligation. It is when service personnel are exposed to extraordinary risk in service of the country that we would argue the higher duty of care exists. It would normally entail potentially life threatening action against a hostile enemy, or perhaps in extreme environmental conditions. It is when service personnel are in situations far outside that which they would expect or choose to experience in standard employment and living circumstances in New Zealand that there is a moral obligation on the Government if something goes wrong. We suggest that limiting future coverage to only those who can clearly be said to have been placed in harm's way in service of the country seems to be the approach that best accords with this intention.
- 3.8 The Accident Compensation scheme (ACC) makes the need for a distinction even more clear. ACC is a universal system of entitlements for injury by accident. Ordinary workplace injuries, and indeed those occurring to members of the NZDF, are covered by ACC. The Government's policy approach for many decades has been that ACC provides adequate support and compensation for workplace injuries. As a veterans' scheme is providing extra coverage and entitlements on top of ACC to a group of New Zealanders, the service justifying this must be of a sufficiently special nature. The risk and type of activities involved in routine service in the defence force can be likened to that in other employments, such as in the police or fire service. It is only when a service person is placed outside of their usual circumstances and faces actual risk of harm from a conflict situation or extreme environment that there are grounds for a special entitlements regime to apply.
- 3.9 We consider that the New Zealand public and the Government are more likely to accept the greater expense of coverage for serving personnel if it is limited to those who are truly placed in harm's way in the service of the country. Indeed, veterans themselves have shown that they recognise that the distinction should be maintained. In submissions, the most popular option for the type of service that should qualify a person for veterans' entitlements was operational service classified as medium to very high risk. The Royal New Zealand Returned and

Services' Association (RNZRSA) accepts the distinction given to those with operational type service, describing them as “the representative group in whose memory New Zealanders turn out in their thousands each ANZAC Day”.¹⁷

- 3.10 This approach does create some difficulties. It appears to be harder for modern service personnel to delineate the difference between service that has a special degree of risk and routine service. Comment in focus groups of the NZDF indicated that many currently serving members consider that non-operational service could pose as much risk as operational service.¹⁸ Serving personnel are concerned about injuries caused over a long period of service in the NZDF, regardless of whether the person served in operations, as it may be difficult to obtain ACC coverage for these injuries.
- 3.11 The second option, providing coverage under veterans' legislation for injuries and illnesses caused by any service in the New Zealand armed forces, would clearly define who has coverage. The scope of coverage would be generous and would ensure that all types of injuries and illnesses associated with any aspect of military service are covered. However, there is a much weaker argument for a special, generous system of assistance if this approach is taken. There is no extraordinary risk inherent in all military service that justifies a separate system of assistance. Injuries and illnesses that are common to many employments would be given coverage and access to entitlements greater than what ordinary New Zealanders receive. There would, therefore, likely be less public support for this approach. The wider scope of coverage would in all likelihood result in reduced entitlements because the funding available would have to be spread over a broader group.
- 3.12 The tiered approach was possibly a useful compromise. It would allow coverage for injuries and illnesses that ACC would not cover. It would also maintain a distinction between service where a person is specifically placed in harm's way and routine service. This approach was supported by the RNZRSA and participants in NZDF focus groups, many of whom argued that all service warranted eligibility for entitlements as recognition of service.¹⁹ However, this approach is difficult to justify given ACC. ACC provides a comprehensive “tier” of coverage for serving personnel. While Australia, United Kingdom and Canada have taken a tiered approach to coverage in their new veterans' entitlements schemes, all three are operating within systems where there is no comprehensive injury coverage akin to ACC. Given ACC's comprehensive nature and the complexity of its funding system, it is extremely unlikely that the Government would ever consider exempting serving personnel from ACC and providing coverage under a different scheme while they are working. This approach would also mean that different evidential standards would need to be applied depending on where an injury or illness occurred. This would create an unacceptable level of complexity in the system.

17 Submission of the Royal New Zealand Returned and Services' Association (submission received 19 December 2008) at 5.

18 Submission of the New Zealand Defence Force (submission received 12 March 2009) at 16.

19 Submission of the Royal New Zealand Returned and Services' Association, above n 17, at 5; Submission of the New Zealand Defence Force, above n 18, at 16.

- 3.13 We favour the approach of maintaining the distinction between those who have been specifically placed in harm's way and other serving persons.

Routine service covered by the War Pensions Act

- 3.14 Currently service personnel who had service in the New Zealand forces prior to 1 April 1974 can receive entitlements under the War Pensions Act. These personnel are distinguished from those with war or emergency service by the evidential standard applicable. We recommend that the new legislation continues to cover this group. We do not consider that existing assistance should be removed. We propose retaining the distinction between this group and those with qualifying operational service through different evidential standards in Scheme One. This approach in Scheme One effectively extends ACC-like coverage to a group that would not otherwise have it. This accords this group special status so that they can receive extra assistance on top of that available to ordinary New Zealanders.

Other service covered by the War Pensions Act

- 3.15 The War Pensions Act covers several other groups of people. These are:
- (a) Civilians, who were bona fide residents of New Zealand at the point that they commenced service, and were employed by the New Zealand Government to serve overseas in connection with a war or emergency;²⁰
 - (b) Former members of the forces of any country of the Commonwealth, who were bona fide residents of New Zealand at the point that they commenced service, who served in a war or emergency and resided in New Zealand subsequently;²¹
 - (c) Former members of the New Zealand mercantile marine who served during World War Two;²² and
 - (d) Former members of the mercantile marine of any country of the Commonwealth, who were bona fide residents of New Zealand at the point that they commenced service, served in World War Two and resided in New Zealand subsequently.²³
- 3.16 We propose that these groups continue to be covered by Scheme One. Former members of the mercantile marine are currently subject to a more stringent evidential test of the causation of their disabilities. We recommend that, rather than having a separate evidential test for the mercantile marine, these persons' claims are dealt with under the same evidential standards as would apply to former members of the forces with routine service.
- 3.17 We propose that coverage under Scheme Two explicitly include civilian members of the NZDF who serve in qualifying operational service. Scheme Two should not cover other groups additional to members of the forces. Under Scheme Two,

²⁰ War Pensions Act 1954 s 55.

²¹ *Ibid*, s 56.

²² *Ibid*, s 62.

²³ *Ibid*, s 63.

there is no longer a need to include those who have served in another country's defence force. These persons should be covered by their own country's veterans' scheme.

- 3.18 Some members of the New Zealand Police are currently in receipt of War Disablement Pensions for police service prior to 1 April 1974. Subsection 42(1) of the now repealed Police Act 1958 provided:²⁴

Subject to the provisions of this section, where the disablement or death of any member of the Police has occurred (whether before or after the commencement of this Act) and is attributable to, or aggravated or precipitated by, his service as a member, there may be paid to him and his dependants (in the case of his disablement) and to his dependants (in the case of his death) pensions and allowances at rates not exceeding the rates that would be payable if he had been a member of the Forces within the meaning of the War Pensions Act 1954 and if his disablement or death were attributable to, or aggravated or precipitated by, his service as a member of the Forces.

- 3.19 The Police Act 1958 required that the Secretary for War Pensions consider the applications from members of the Police. The new Policing Act 2008 provides that section 42 of the Police Act 1958 “continues to apply as if it had not been repealed in respect of any person who was, immediately before the commencement of this Act, receiving a pension under that section”.²⁵
- 3.20 We do not intend that entitlement to the Disablement Pension should be removed from members of the Police who are in receipt of them. Consequently, we recommend that the new legislation should allow existing Police recipients of the Disablement Pension to receive Disablement Pensions under Scheme One.

PROCESS FOR DETERMINING COVERAGE

- 3.21 The second aspect of service eligibility is the process by which the Government decides what operations meet the qualifying operational service standard. This process is mainly applicable to Scheme Two as all new operations will fall under Scheme Two.

Analysis of options

- 3.22 We propose that the Minister makes the decision on service eligibility. The new legislation would set out criteria for what makes an operation qualifying operational service. Many of the factors would require detailed military knowledge of the risks and activities of certain deployments. Consequently, this would mean that the NZDF would have to be closely involved in the decision-making as an advisor to the Minister. These criteria would ensure that the decision-making is consistent and transparent.
- 3.23 We prefer this approach because the Minister is constitutionally the best person to make the decision. The decision is separated from the Chief of Defence Force, so that considerations of coverage under a veterans' entitlements system and the potential costs would not affect the NZDF's military decision-making, and vice versa. In practice, the decision would be made with the consent of Cabinet.

²⁴ Police Act 1958, s 42.

²⁵ Policing Act 2008, s 110.

Essentially, therefore, this is a decision of the executive branch of Government, the same branch responsible for sending our forces into risky situations. The legislation should ensure that the Minister has to be informed by all of the relevant information and advice from the NZDF. However, the decision-making is sufficiently removed from the NZDF so that there would be no conflict of interest between New Zealand's military needs and obligations and the duty owed towards veterans.

- 3.24 As this decision is not directly tied to any other decisions within the NZDF, such as those relating to risk classification or medals, there will be flexibility and independence in the decision-making.
- 3.25 We considered recommending that all serving personnel with overseas service or with operational service be covered. These approaches would have set an indisputable line between qualifying service and non-qualifying service and would not have required a potentially time-consuming process for determining whether a deployment was covered.
- 3.26 However, covering all service personnel with overseas service or operational service would have significantly widened the eligibility criteria from that which exists in the War Pensions Act. Several submitters identified that some overseas deployments do not involve a greater than normal risk of harm, with one submitter describing some overseas deployments as “government paid holidays”. Some overseas service and operational service involves very little risk, and similar working conditions to routine service in New Zealand. This may mean that the veterans' entitlements scheme would become unaffordable. It also weakens the principle on which the veterans' entitlements scheme is justified as it would allow those who are not subject to risk to qualify on the same basis as those that are. Additionally, there is the potential for perceived inequality of entitlements for those service personnel who remain in New Zealand but who are carrying out the same tasks as those who are overseas or on operations.
- 3.27 We also considered directly tying the decision to the NZDF's Military Threat Assessment. The Military Threat Assessment classification decision is made by the Chief of Defence Force in accordance with Defence Force Order 115. A Military Threat Assessment of Medium, High, or Very High indicates that a participant is being put into harm's way. Consequently, this approach is broadly equivalent to the current standard for service eligibility. The NZDF carries out a Military Threat Assessment when deploying any personnel to any location. The assessments are regularly reviewed and revised if necessary based on the most up to date military intelligence.
- 3.28 While pegging the service eligibility decision to an external decision had some attractions in that there is already a set process and set criteria in existence, this approach raised some concerns. This option meant that effectively the Chief of Defence Force was making the decision. As discussed above, our view is that it is better for the Chief of Defence Force not to have this responsibility.
- 3.29 Yet, there definitely is merit in allowing the decision on service eligibility to be informed by the NZDF Military Threat Assessment process and information.

Who will make the decision?

- 3.30 The decision regarding the eligibility of those with service in a particular deployment would be made by the Minister of Veterans' Affairs. The Minister, following approval from Cabinet, would declare that a particular deployment constitutes qualifying operational service.

Form of declaration

- 3.31 The legislation would require that the declaration specifies the period of time and the locations on land or sea that constitute service in the qualifying operational service deployment. All service personnel who served in that deployment during the time and within the location specified would then be eligible for entitlements based on impairments which result from this service. The declarations should be detailed enough that it would be reasonably clear to determine whether a person is covered by the legislation for their service in a particular place at a particular time. In the declaration, the Minister would be able to commence service eligibility in relation to a particular deployment from a date in the past or the future depending on when personnel begin serving there and when the deployment meets the criteria to be considered qualifying operational service.
- 3.32 The Minister may not be able to specify an end date for the deployment being considered qualifying operational service as the deployment may be ongoing. In these cases, the Minister would state the first date on which the deployment became qualifying operational service and that this status is ongoing with the end date to be set by a later declaration. Once a deployment is over or the level of risk has reduced such that the deployment no longer meets the criteria for service eligibility, the Minister should make a declaration ending the period of qualifying operational service.

Criteria

- 3.33 In order to make the decision-making on service eligibility robust and transparent, the new legislation should include a list of factors to be taken into consideration. Qualifying operational service should be service that poses a risk of harm to those serving there that is well above the risk associated with ordinary non-operational service activity. The risk may be operational, caused by the actions of hostile forces and the requirements on the personnel, or environmental, caused by the physical or mental hazards personnel are exposed to by being there. These matters should include those relevant to the NZDF's Military Threat Assessment as this process analyses a range of different types of risks faced by those serving in a particular location. These factors are:
- (a) the operational threat posed to the well-being of personnel by:
- the activity of stakeholders, factions and security forces, including military and political activity;
 - the local conditions and hazards, including violence as a result of crime, civil disturbance, rioting and protest action;
 - introduced operational danger such as mines, unexploded ordnance, booby traps and any nuclear, biological and chemical threat; and
 - acts of terrorism, whether specifically directed at NZDF personnel or not; and

- (b) the environmental threat to the health and well-being of personnel due to:
- water, food and sanitation;
 - endemic, epidemic and other diseases of operational importance;
 - insect, animal and plant hazards; and
 - roads and associated traffic hazards.
- 3.34 Information regarding each of these matters is collected by the NZDF at the time of deployment to each new location and is updated regularly throughout a deployment.

Advice

- 3.35 The Minister should be required to consult with the Chief of Defence Force prior to making a declaration. This would allow the intelligence information collected by the NZDF to inform the Minister's decision. The legislation should state that the veterans' advisory board (discussed in chapter 8) should be consulted prior to the decision being made, if this is possible within the limits of time and security issues.

Timing

- 3.36 The declaration of service eligibility for the veterans' scheme should be made prior to personnel leaving New Zealand for a deployment if possible. The NZDF will already be advising Cabinet regarding the decision to deploy New Zealand personnel. The same information can also be used to advise the Minister of Veterans' Affairs on the status of the deployment under the veterans' scheme.
- 3.37 In some cases it may not be apparent that a deployment warrants eligible service status under veterans' legislation until after personnel are already serving there. The legislation should allow the Minister to make a declaration that a deployment is qualifying operational service at any time before, during or after the deployment. If the risk of a deployment escalates during its course, such that it meets the level required for a declaration of qualifying operational service to be made, the Minister should be able to declare it to have qualifying operational service status at any point during the deployment based on when that risk increased.

Publication of a list of eligible deployments

- 3.38 There should be a requirement in the legislation that the declarations are published in the *Gazette* and are made publically available on the Veterans' Affairs New Zealand website. This ensures that the declarations become public information and that those potentially affected by them have access to the information. Having the list of declared deployments in either the primary legislation or in regulations, means that the process for adding to the list would be lengthy.

Chapter 4

Connection between service and impairment

CONNECTION TO SERVICE

- 4.1 The War Pensions Act 1954 uses the terms “attributable to” and “aggravated by” to describe the relationship that a member of the forces’ disability or death must have with service in order for the injury or illness to be covered. We consider that this type of connection is appropriate for the new legislation. The Government should be responsible for providing entitlements where the qualifying service has either caused an impairment or death, or has made an existing impairment worse.
- 4.2 However, the exact meanings of the terms “attributable to” and “aggravated by” are not self-explanatory. They leave room for argument as to what degree of relationship between service and impairment is acceptable, and whether there is any type of behaviour or activity the results of which will not be considered related to service.
- 4.3 The principle behind the language used to describe the connection between service and impairment should be responsibility. Assistance should be provided where the Government is responsible for all or some of the circumstances that bring about an impairment.
- 4.4 The *Nixon v War Pensions Appeal Board* judgment showed that the term “attributable” in the current legislation includes impairment that stems only in part from service and impairment that is indirectly caused by service.²⁶ The Court provided that impairment stemming not only from conduct forming a matter of actual military duty under orders was covered, but also optional activity encouraged or facilitated by the military as a perceived useful adjunct to military service. The term “attributable” was found to exclude activity while simply on leave from service. Submitters generally agreed that the liberal interpretation of “attributable to service” that was applied in *Nixon* should continue to apply.

26 *Nixon v War Pensions Appeal Board* HC Wellington CP360/91, 5 March 1993.

- 4.5 We recommend retaining similar types of relationships between an injury or illness and service as sufficient for the legislation to apply. However, we suggest that the legislation specify to a greater degree the type of connection between service and impairment that is covered. This approach would be similar to that taken by Australia in the Veterans' Entitlements Act 1986,²⁷ and Military Rehabilitation and Compensation Act 2004,²⁸ and the United Kingdom in the Armed Forces Compensation Scheme.²⁹ This would be easier for decision makers to apply. It would reduce current element of discretion that is inherent in the decision, and make it more certain and transparent.
- 4.6 We propose that for an injury or illness to be attributable to service it must have:
- (a) resulted from an occurrence that happened while the veteran was rendering qualifying operational service; and
 - (b) been caused or contributed to by qualifying operational service.
- 4.7 We propose that for an injury or illness to be aggravated by service, it must have:
- (a) been made worse by service; and
 - (b) either:
 - been sustained before the veteran entered qualifying operational service and was recorded in a service medical examination prior to the qualifying operational service; or
 - been sustained before the veteran entered qualifying operational service but without the veteran's knowledge and it was not found in a service medical examination prior to the qualifying operational service; or
 - arisen during qualifying operational service but was not caused by qualifying operational service.

EXCLUSIONS:
SCHEME ONE

- 4.8 A significant point of consideration has been whether all injuries and illness that occur while a service person is on a deployment should be covered or whether some injuries or illnesses that result from certain types of activity should be excluded from coverage. We think that it is important that Scheme One retains consistency with the War Pensions Act. Consequently, the current exclusions should be retained. These are injuries incurred while a deserter, while absent without leave and not in receipt of continuous pay, or resulting from wilful misconduct.³⁰ The effect of these seldom-applied exclusions generally is more a gesture towards safeguarding against unjust claims, than a means of denying veterans coverage. We recommend that these provisions are rewritten using modern defence force terminology.

27 Veterans' Entitlements Act 1986 (Cth), s 9.

28 Military Rehabilitation and Compensation Act 2004 (Cth), s 27.

29 Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (UK), arts 7–9.

30 War Pensions Act 1954, s 19.

- 4.9 We consider that Scheme Two can take a more modern approach to excluding some activity from coverage. While we do support a broad approach to what can be connected to service, we suggest that the legislation should be specific about whether certain behaviours are covered or not. Throughout our consultations and research, we have become aware that there are a number of activities that a significant number of people do not think should be covered by a veterans' scheme. These include illegal activity, self-inflicted injuries and substance abuse.
- 4.10 In the submissions and consultation there was considerable discussion on other types of activities, such as alcohol and drug related injuries and sexually transmitted infections, which currently may be covered, which some people think should not be. Younger service people especially were more likely to think that these should be excluded. Opinion was less clear regarding injuries from sports and injuries occurring while on leave.³¹

Repugnant to justice

- 4.11 The Royal New Zealand Returned and Services' Association (RNZRSA) and New Zealand Defence Force (NZDF) suggested that when determining whether an injury or illness is sufficiently connected to service to be covered by the Act, all injuries or illnesses which are attributable to or aggravated by service should be covered unless it is "repugnant to justice" to cover the injury or illness. "Repugnant to justice" is the phrase used in Accident Compensation (ACC) legislation.³²
- 4.12 ACC legislation has used the term "repugnant to justice" in relation to whether persons imprisoned for committing a crime through which they suffered an injury should be awarded compensation in respect of that injury. Currently, the Accident Compensation Corporation can apply to the District Court for a determination that it does not have to provide or can delay providing entitlements to a person who suffered a personal injury in the course of committing an offence and is imprisoned for the offence. The section lists a number of factors that the Court must have regard to in deciding this, such as the harm caused, the gravity of the offence, and the claimant's culpability and personal circumstances.³³
- 4.13 In *Accident Compensation Corporation v Curtis* the Court of Appeal held that the emphatic wording of the term "repugnant to justice" sets a high threshold.³⁴ The Court determined that, in the context of someone injured while committing a crime for which he or she is imprisoned, "justice" amounts to the demands of retribution, denunciation, deterrence and reparation. Only where these demands

31 There were 41 submissions that dealt with whether or not injuries caused by some activities during a deployment should be excluded from service. Twenty-six submitters considered all activity should be covered, while 16 considered that some activities should be excluded.

32 Accident Compensation Act 2001, s 122.

33 Ibid.

34 *Accident Compensation Corporation v Curtis* [1994] 2 NZLR 519 at 529 [Curtis].

outweigh the primary statutory objective of universal rehabilitation and compensation for personal injury by accident should the entitlements be withheld.³⁵

- 4.14 The “repugnant to justice” test will be replaced from 1 July 2010 with a new provision that disentitles from compensation any claimant injured in the course of committing any offence with a two year or more maximum term of imprisonment who receives imprisonment or home detention for the offence. A further new section allows the Minister to exempt a claimant who would be otherwise disentitled if there are exceptional circumstances relating to the case.³⁶ These changes will mean a move away from such a high threshold for disqualification to ACC and an increased number of cases where ACC compensation does not apply.
- 4.15 We think that the repugnancy to justice test is not appropriate as a means of distinguishing those who should not be covered by the veterans’ system. The test sets a high threshold in ACC law, which may be appropriate because ACC is a no fault scheme. However, even this is being changed as the legislature clearly considers that repugnancy to justice is too high a test for disqualification to ACC.
- 4.16 The veterans’ scheme is not a no fault scheme, but a “State fault” scheme. The Government is responsible for the harm it causes, even if only caused indirectly by it. The principle behind veterans’ entitlements, that the Government should look after those that are injured because it has put them in harm’s way, indicates that it is only intended that the Government will provide entitlements where the Government is responsible. The exclusions in the War Pensions Act for disablements that occur while deserting or being absent without leave or because of wilful misconduct illustrate that this is not a no fault scheme and that a lower threshold than “repugnant to justice” is applied. Where a veteran is solely morally and criminally responsible for the incident causing injury, we do not think that the Government should be responsible for providing assistance over and above ACC entitlements.
- 4.17 The suggestion of using a repugnance to justice test does highlight an important point. This is that we should be considering what is *just*. This requires considering what fits within the purpose of the veterans’ scheme and what the Government should be responsible for. It will be important to bear in mind that ACC will cover injuries caused by accidents that are not covered by the veterans’ scheme, unless they result from serious criminal offences. The choice will not be between entitlements under the veterans’ scheme and no coverage, but between the veterans’ scheme and ACC.

35 It was found not to be repugnant to justice to provide entitlements to a person who had impairment from a previous car accident and a drug and alcohol problem when she had driven at high speeds killing three passengers (*Curtis*). It was found not to be repugnant to justice to provide entitlements to a person who drove a motorcycle into a van at high speed killing one and was seriously injured and lost his marriage and his job as a result (*Curtis*). It was found to be repugnant to justice to provide entitlements to a person who drove with blood alcohol of three times the legal limit and killed four occupants of an oncoming car (*Accident Compensation Corporation v Rodgers* [1997] 2 NZLR 52).

36 Accident Compensation Amendment Act 2010, s 13; Accident Compensation Act 2001, ss 122–122A (in force 1 July 2010).

Possible exclusions

- 4.18 In our view it is necessary to consider excluding some type of activity that may cause injury or illness. The basis for determining whether certain activity should be excluded from coverage in the legislation should be whether it is just that the Government should be responsible for an injury resulting from that activity, bearing in mind that ACC, the public health system and the NZDF will continue to provide assistance regardless of whether a person's own acts contributed to the injury. We accept that there should be a relatively high threshold for the activities not covered by the veterans' scheme.
- 4.19 The RNZRSA has argued the veterans' scheme should provide no exceptions to coverage for the reason that ACC does not have exceptions and veterans should have better coverage than ACC. However, we consider that having a compensation scheme for veterans is a significant improvement upon the coverage available to the ordinary New Zealander. As described above, a veterans' entitlements scheme is not a no fault scheme but is related to the Government's responsibility arising from the its actions in respect of serving personnel. It appears to us that the actions of a service person could break the chain of causation between the Government's actions and an injury, and that it would be unjust for the Government to provide service-related assistance for injuries that service did not cause.
- 4.20 We think that the decision to exclude an injury or illness from coverage because of the activity through which it was caused should always be a discretionary decision. For all types of activity discussed below there may be circumstances that make it unjust for coverage not to be provided even if on the face of it the veteran's activity has precluded Government responsibility.

Illegal activity

- 4.21 Where a veteran is doing something illegal while on qualifying service, and the illegal activity results in an injury or illness, our view is that the injury or illness should not be covered. Illegal activity should include contraventions to both civilian and military law. The veteran who undertakes illegal activity is acting far outside the Government's intention in sending the person on the deployment. It cannot be just for the Government to be required to provide entitlements that were intended to compensate for harm to a veteran who served in a risky deployment. In this situation the harm has been caused not by the fact of the deployment but by the veteran's own choices. This ground of exclusion can be aligned to the wilful misconduct and absence without leave grounds that are in the current War Pensions Act and that would continue in Scheme One.
- 4.22 A number of submitters agreed that injuries or illnesses that resulted from illegal activity or from breaches of military discipline should be excluded from coverage. Some suggested that the exclusion should be confined to incidences where the service person is convicted of an offence in a military or civilian court. The NZDF submitted that coverage should be excluded where military discipline has been breached without operational justification. The RNZRSA's submission indicates that it prefers an approach that excludes injuries caused by serious crime,

including crime against military codes.³⁷ The RNZRSA was careful to point out that some breaches of military code can later be seen as justifiable given the psychological pressures on individuals. The residual discretion of the decision-maker would ensure that in justifiable cases coverage would still apply.

Self-inflicted injuries

- 4.23 Generally where a veteran deliberately inflicts an injury on him or herself, it is difficult to see why the Government should be responsible. The chain of causation between the Government's action in sending the veteran on the deployment and the injury is broken by the veteran's own actions. We consider that self-inflicted injuries should be excluded.
- 4.24 However, we do consider that there should be exceptions to this exclusion. Suicides that occur during qualifying operational service should be covered. Additionally, where a veteran deliberately injures him or herself, before excluding the injury from coverage, the veteran's mental state should be considered. If the veteran had a service-related psychological condition that resulted in or contributed to the self-inflicted injury, the injury should not be excluded from cover.
- 4.25 Many currently serving persons who considered this issue thought that, while self-inflicted injuries should be generally excluded, they should possibly be covered where they can be attributed to the psychological stress of the operational environment.

Alcohol

- 4.26 Injuries and illnesses related to excessive alcohol consumption, such as physical injuries from falls, motor vehicle accidents, and injuries from fights, as well as alcohol addiction, have been considered. Currently, such incidents are covered if they occur while the service person was serving in a war or emergency.
- 4.27 Those who use alcohol excessively expose themselves to greater risk of harm. The use of alcohol can be seen as breaking the chain of causation between the Government sending people to a deployment and the injury occurring. Nevertheless, the context of the alcohol intake is important. It can be argued that the increased pressure of an operational deployment leads to increased intoxication and that the NZDF makes alcohol available to service personnel. NZDF now declares most operations to be "dry", in that there is no alcohol available to service personnel while they are serving on the operation. Alcohol is sometimes made available to service personnel after they have completed a period of operational service, but before they return to New Zealand.

37 Submission of the Royal New Zealand Returned and Services' Association (submission received 19 December 2008) at 6.

- 4.28 The NZDF submitted that injuries resulting from substance abuse, including alcohol, arise from activities that are not related to duty or efficient service. It considers that substance abuse-related injuries should be generally excluded. However, it states that there could be benefit in retaining a degree of flexibility to cover some substance abuse-related injuries where it is justified.³⁸
- 4.29 We agree with the NZDF that alcohol-related injuries and illness should be excluded from coverage. However, as with self-inflicted injuries, if they are caused by a service-related psychiatric condition, the decision-maker should retain coverage.

Illegal drugs

- 4.30 As drug intake is not legal, the argument regarding whether injuries occurring because a person is under the influence of drugs is more clear-cut. Injuries or illnesses caused by this activity should be excluded.

Smoking

- 4.31 Currently, smoking-related conditions are covered under the War Pensions Act if the service facilitated and encouraged smoking and the veteran developed a service-related smoking habit that persisted long enough to contribute to the development of a medical condition. As cigarettes were only supplied to New Zealand service personnel up until service in Vietnam, smoking-related conditions are not covered for personnel serving after this time. Smoking does involve an element of choice. While in the past the dangers of smoking were not known, it has been publicly acknowledged for decades now that smoking is harmful to the health.
- 4.32 We recommend that, while Scheme One should retain coverage for smoking-related conditions where a service-related smoking habit has caused a medical condition, Scheme Two should exclude smoking-related injuries and illnesses.

Sexually transmitted infections

- 4.33 Sexually transmitted infections that are contracted while a serving person is serving overseas on qualifying service are another type of activity with the potential to cause impairment.
- 4.34 Two submitters explicitly stated that impairments caused by sexually transmitted infections should not be excluded. Their reasoning appears to be that use of prostitutes is an inevitable consequence of separating men from their families and placing them in a high stress environment. However, we consider that sexual activity is outside of the realm of what the Government should be responsible for and should generally be excluded.

38 Submission of the New Zealand Defence Force (submission received 12 March 2009) at 22.

Travel to and from a deployment, and playing sport

- 4.35 Submitters were overwhelmingly in favour of injuries occurring during travel to and from a qualifying operational deployment being covered.³⁹ The NZDF considered that travel to and from a qualifying deployment is a required component of supporting and participating in a qualifying operation. We consider that injuries or illnesses that occur because the veteran was transported to or from a deployment should not be excluded from coverage but should be covered on the same basis as service in the deployment.
- 4.36 The coverage of sports injuries was more contentious. The NZDF's view is that sport is a fundamental service activity that contributes to effectiveness through building unit cohesion and fitness. Provided that other applicable criteria are met, the NZDF considers that there are sound arguments for including these injuries.⁴⁰ An opposing view is that sporting injuries are just as likely to occur in New Zealand as they are while on an overseas deployment and that there is no special risk relating to being deployed in harm's way that has resulted in the injury.
- 4.37 We accept that sport plays an integral role in defence force life, including whilst serving personnel are deployed on operations, and that sport can not be separated from the other activities of a deployment. Consequently, we recommend that injuries caused by sport during a period of qualifying service should not be specifically excluded.

39 Thirty-five of 36 submitters on this issue were in favour of the scheme covering injuries incurred during travel to and from a qualifying operational deployment.

40 Submission of the New Zealand Defence Force, above n 38, at 22.

Chapter 5

Evidential standards and instruments

- INTRODUCTION 5.1 The basis on which injuries and illnesses are accepted as service-related is one of the most important aspects of this scheme. Section 19 of the War Pensions Act 1954 is the empowering provision that creates or negates entitlement to a pension. A pension in respect of the disablement or death of a member will be paid where:
- (a) the disablement or death occurred while the member was serving overseas as a member of the forces in connection with any war or emergency; or
 - (b) the disablement or death is attributable to service in New Zealand or overseas; or
 - (c) the disablement or death was aggravated by service in New Zealand or overseas.
- 5.2 In the case of (a) above, the disablement/death is deemed to be attributable to service, but the member (in the case of disablement) still bears the onus of first proving on a balance of probabilities that he or she is disabled in some way and that such disablement occurred while he or she was on service overseas in connection with a war or any emergency. If these prerequisites are met, there is no need for recourse to the provisions of sections 17(3) and 18.
- 5.3 Sections 17 and 18, relating to presumptions and rules, are subsidiary provisions to section 19.⁴¹
- 5.4 Section 17(3) contains a rebuttable presumption that operates to reduce the evidential threshold required to establish a claim for a Disablement Pension. This is a distinguishing feature of the war pensions scheme. The evidential threshold is commonly, but incorrectly known as the “reverse onus of proof”. It is held extremely dearly by the veteran community.
- 5.5 As we discussed in the Issues Paper, there are a number of issues with the current delineation and understanding of the evidential standards that must be addressed if any new legislation is to form the basis of a successful system.

⁴¹ *Nixon v War Pensions Appeal Board* HC Wellington CP360/91, 5 March 1993, at 15.

- 5.6 This chapter introduces and explains the important concepts related to evidential standards in decision-making. It then looks at how New Zealand's legislation has expressed its approach and compares this with the approach of other countries, particularly Australia. We then discuss our recommendations as to evidential provisions in new legislation and the introduction of statutory decision-making instruments to assist with the application of the evidential standard.

CONCEPTS

- 5.7 Before looking more specifically at New Zealand's approach to evidential standards, we consider that it is essential to explore the concepts that are central to decision-making in a scheme such as this one. New Zealand's legislation and that of other countries, either directly or implicitly refers to concepts such as onus of proof, standard of proof, inferences and presumptions. These terms all have specific legal meanings. It is important to understand these terms in order to ascertain the meaning of the evidential provisions relevant to a veterans' scheme.
- 5.8 In these schemes, specific evidential rules are rarely operating alone. Rather, it is a combination of different evidential rules that creates the overall framework in which decisions on impairment compensation claims are made.

Onus of proof

- 5.9 The term 'onus of proof' can have different meanings, and so it is vital that we clarify what is meant by this term. There are two main ways that onus of proof is understood: the legal onus; and the evidentiary onus. The legal onus is the burden of persuading the decision-maker. The evidentiary onus is the burden of producing evidence.⁴²
- 5.10 The evidentiary onus is a shifting onus, depending on the state of the evidence at any point in time.⁴³ One way of understanding the evidentiary onus is that it lies upon the party who would lose if no further evidence were introduced.⁴⁴ For instance, it is up to the claimant in a war pension claim to produce evidence that he or she has an injury or illness, and that he or she served in the armed forces. It is up to the claimant to produce some evidence that there is a relationship between the condition and service, as, if no evidence is produced whatsoever, the claim will fail. At a later stage in the decision-making, it may be up to the State to produce evidence that the condition was not related to service, otherwise the claimant will be successful.
- 5.11 In veterans' claims, the legal onus relates to who bears the ultimate burden of proving the relevant connection with service. Legislation generally only deals with the legal onus.⁴⁵ There is only one point in the determination of a claim where the location of the legal onus of proof is important. This is "when at the close of the evidence the mind of the trier of fact is in equilibrium upon the

42 Edmund M Morgan "Some Observations concerning Presumptions" (1931) 44 *Harv L Rev* 906 at 910.

43 Bruce Topperwein "Relaxed Evidentiary Rules in Veterans' Legislation: An Empirical Analysis" (Paper presented to 2004 Veterans' Law Conference, Banorra Point NSW, 5-6 November 2004) < www.vrb.gov.au > (accessed 25 June 2008) at 40.

44 Morgan, above n 42, at 910.

45 Topperwein, above n 43, at 40.

issue”.⁴⁶ In our context, this means the situation where, at the end of the consideration of all of the evidence, the evidence pointing towards a medical condition being related to service is equal to the evidence against it being related to service. In this case, the decision-maker would decide in favour of the party who did not have the legal onus of proving the claim. Such a situation will only occur rarely.

Standard of proof

- 5.12 The standard of proof is the level of certainty of the existence of a fact or proposition that the evidence must establish in order for that fact or proposition to be accepted as proven. In a veterans’ system, the required standard can be the civil standard, the balance of probabilities. This means that the fact or proposition at issue must be shown to be more likely than not to be true. Another standard used in some veterans’ systems is the reverse criminal standard, where a service-related cause must be disproved beyond reasonable doubt in order for a claim to be declined. The standard of proof determines how much evidence is required by each party.
- 5.13 Different standards of proof may apply to different elements of a claim. For instance, the balance of probabilities standard may apply to matters that are needed to establish the claim, such as the existence of a medical condition and qualifying service, and a lower standard of proof, such as a reverse criminal standard, to the question of the attributability of the medical condition.

Inferences

- 5.14 Legislative provisions that require a decision-maker to draw all reasonable inferences in favour of a claimant mean that a lesser standard of evidence is required in order to establish a fact that is inferred than would otherwise be required. Under these provisions, one fact or proposition can be supposed to be true on the basis of other facts that are already proven if it is a logical and reasonable conclusion to make.
- 5.15 An inference can be displaced by other evidence. The decision-maker must consider the weight and credibility of the evidence for and against the inferred fact or proposition in order to decide whether the inference should be displaced.⁴⁷

Presumptions

- 5.16 A presumption indicates that the decision-maker can assume the existence of a fact or proposition on the basis of the existence of another fact or group of facts.⁴⁸ A presumption affects the evidentiary onus of proof. It has the effect of shifting the evidentiary onus away from the party whom the presumption benefits.⁴⁹ Like an inference, a presumption also lowers the standard of proof required to

46 Morgan, above n 42, at 911.

47 Topperwein, above n 43, at 42.

48 Morgan, above n 42, at 906.

49 Topperwein, above n 43, at 40; Morgan, above n 42, at 920.

establish a fact from what it would otherwise be. Where a presumption applies and no evidence has been introduced in opposition, the decision-maker can presume the fact or proposition as if it had been proved.⁵⁰

5.17 Presumptions have been described in the following way:⁵¹

There is not only an element of arbitrariness or artificiality in presumptions, but also an element of bias. Given that there are two possible answers to the factual question under consideration, either 'yes' or 'no', the presumption rule is partial toward one of them and favors it in advance over the other. What we have here is not the proverbial situation of gauging, preferably blindfold, which side of an evenly balanced scale turns out to tip the balance. Rather, we are deliberately putting the thumb on one side of the scale to begin with.

5.18 There are a number of purposes for presumptions, including social policy, the balance of the ability of respective parties to obtain evidence, procedural convenience or logical considerations based on human experience.⁵² Statutory presumptions in veterans' legislation appear to fit within all or some of these purposes.⁵³

5.19 Legislative presumptions are often framed so that they are rebuttable. This means that if the required standard of opposing evidence has been produced, the presumption ceases to play a role in the decision and the claim will be determined on the basis of a normal weighing of evidence.⁵⁴

Benefit of the doubt

5.20 Under benefit of the doubt provisions, a relevant fact is presumed to be in the claimant's favour even though it has not been proved to the required standard and could not be inferred from other facts. The benefit of the doubt provision does not reverse the evidentiary onus of proof as it is still up to the claimant to produce sufficient evidence to lead the decision-maker to reach at least an evenly balanced position.⁵⁵

5.21 Provisions requiring a claimant to be given the 'benefit of the doubt' act as a presumption under New Zealand, Australian and Canadian veterans' legislation.⁵⁶ The effect of provisions that give veterans the 'benefit of the doubt' mean that if:⁵⁷

...after the evidence has been assessed for credibility and weight, reasonable inferences are drawn, and facts found, the decision-maker is in doubt as to an important fact upon which the success of the claim depends, that doubt must be decided in favour

50 Morgan, above n 42, at 913.

51 Edna Ullmann-Margalit "On Presumption" (1983) 80 *Journal of Philosophy* 143 reprinted in William Twining and Alex Stein (eds) *Evidence and Proof* (Dartmouth Publishing Co, Aldershot, 1992) at 430.

52 Morgan, above n 42, at 906; William Twining and Alex Stein (eds) *Evidence and Proof* (Dartmouth Publishing Co, Aldershot, 1992) at xvii.

53 Topperwein, above n 43, at 45.

54 Morgan, above n 42, at 913.

55 Topperwein, above n 43, at 44–45.

56 *Ibid* at 43.

57 *Ibid*.

of the claimant. In such a situation, prior to applying the benefit of the doubt, the matter is in equipoise, and the success of the claim depends on the finding of an ultimate fact upon which the evidence is uncertain or is equally divided or, where there is a statutory requirement to draw favourable inferences ..., the evidence is in such a state that no relevant inference can be drawn either for or against the claimant. The effect of the 'benefit of the doubt' is to permit a favourable inference to be drawn where none would otherwise be drawn.

Impact of beneficial evidential standards on evidence and proof

- 5.22 The Issues Paper outlined how beneficial or relaxed evidential provisions provide direction to decision-makers about where the balance should lie between all of the values that are important in decision-making on a veteran's claim, and that these rules inevitably result in some claims succeeding that in reality have no relationship to service. The Issues Paper commented that this is accepted by society on the basis that genuine claimants should not be turned away even if they are unable to prove their claims to the usual civil standard.⁵⁸

NEW ZEALAND APPROACH

- 5.23 The evidential provisions in our veterans' legislation have been New Zealand's approach to the concepts detailed above. The current evidential provisions in the War Pensions Act are set out in chapter 11 of the Issues Paper.

History of New Zealand's evidential provisions

- 5.24 Beneficial evidential provisions were first introduced into war pension legislation in 1923. The 1923 legislation introduced a section that is remarkably similar to section 17 of the War Pensions Act 1954, indicating that only minimal modifications of the wording have occurred since. Like the present sections, the provision applied only to the decision on the attributability or aggravation of a death or disability. It introduced the rebuttable presumption based on the production of "reasonable evidence" that the physical or mental condition had "probably been caused or aggravated by employment as a member of the Forces". It provided that the presumption could be rebutted by evidence that the condition was "due entirely to other causes".⁵⁹
- 5.25 In the 1943 rewrite of the War Pensions Act, Parliament introduced beneficial evidential provisions that were almost exactly the same as those that continue in the War Pensions Act today.⁶⁰ Since then the only significant amendment to the substance of the evidential provisions in war pension legislation was the restriction on the application of the rebuttable presumption in section 17 of the War Pensions Act 1954 to only death or disablement related to service "in connection with a war or emergency".⁶¹ This amendment occurred in 1976, following the introduction of the Accident Compensation Act 1972.

58 Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, Wellington, 2008) at 156.

59 War Pensions Amendment Act 1923, s 11.

60 War Pensions Act 1943, ss 14–15.

61 War Pensions Amendment Act 1976, s 2.

Current War Pensions Act provisions

Standard of proof

- 5.26 Under the War Pensions Act and War Pensions Regulations, matters must generally be proven to the balance of probabilities. The civil standard is the default standard of proof applying in this type of legislation. This standard relates to every question for decision under the Act or Regulations unless specifically stated otherwise. While there are other evidential rules that impact upon the amount of evidence required to prove the attributability or aggravation of an injury or illness, many questions for decision are solely governed by this rule, including proving the existence of a medical condition, qualifying service, a family relationship to a veteran, and the need for medical treatment, appliances or equipment.

Onus of proof

- 5.27 The only reference to the legal onus of proof in the Act is the rule that:⁶²

[In] no case shall there be on the claimant any onus of proving that the disablement or death on which the claim is based was in fact attributable to ... or aggravated by his service.

As discussed, this means that the claimant is not required to produce evidence sufficient to tip the balance of the decision in the claimant's favour. If the evidence is evenly balanced between a decision that the medical condition was related to service and a decision that it was not related to service, the decision-maker should decide in the claimant's favour.

- 5.28 There is an evidentiary onus on both the claimant and the Government in respect of different aspects of the claim for a Disablement Pension. If claimants want decisions in their favour, they must produce evidence that they have the medical condition, that they have service that qualifies them for consideration under the Act, and that the condition could have been attributable to or aggravated by their service. In practice Veterans' Affairs New Zealand (VANZ) assists claimants with some of this evidence by, for instance, obtaining service records and medical assessments for the claimant. If the Government wants to challenge claims for Disablement Pensions, it is likely that it would need to produce evidence that the condition is not related to service.

Rebuttable presumption

- 5.29 The rebuttable presumption for disablements or deaths related to war or emergency service in subsection 17(3) is the central beneficial evidential provision in the War Pensions Act. This provision was analysed in the Issues Paper, with discussion of a War Pensions Appeal Board decision that provides direction on the provision's interpretation.⁶³ The rebuttable presumption applies only to the question of whether a medical condition is attributable to or

62 War Pensions Act 1954, s 18(2)(a).

63 Law Commission, above n 58, at 150; *Jennings v Secretary for War Pensions* War Pensions Appeal Board, Auckland, 28 October 2004.

aggravated by service. Subsection 17(3) effectively provides a reduced evidential threshold for veterans with conditions that could be related to their war or emergency service. Claims do not have to be proved to the balance of probabilities. However, the presumption can be overridden by evidence that the condition was due entirely to other causes.⁶⁴

Substantial justice and merits of the case

- 5.30 The War Pensions Act provides that the Secretary and Appeal Board are to make the decision on the attributability of the medical condition to service “in accordance with the substantial justice and merits of the case, and shall not be bound by any technicalities or legal forms or rules of evidence”.⁶⁵ The provision relates particularly to the type of evidence that may be considered by the decision-makers. It ensures that claimants are not restricted in the type of information they can submit as evidence and that the decision-maker may put weight on. This type of provision is reasonably common to provisions applying to tribunals, where they have the purpose of reducing the potential burdens created by the law of evidence and to reduce the formality of the proceedings. However, it is rare for such a provision to apply to decision-making by a Government department on public entitlements.

Reasonable inferences

- 5.31 The War Pensions Act provides that, when considering the question of the attributability or aggravation of a medical condition, the decision-maker can draw all reasonable inferences in favour of the claimant from all the circumstances of the case, from evidence furnished, and from medical opinions submitted.⁶⁶ This provision assists the claimant by allowing one fact to be assumed to be true on the basis of another proven fact or group of facts, if it is logical and reasonable to do so. As discussed, an inference can be displaced by other evidence.

Benefit of any doubt

- 5.32 Finally, the Act provides that, in relation to the question of the attributability or aggravation of a medical condition, the claimant must be given “the benefit of any doubt as to the existence of any fact, matter, cause, or circumstance that would be favourable to him”.⁶⁷ As discussed, a benefit of the doubt provision such as this reiterates the onus of proof provision that means that if matters are balanced or in equipoise after the consideration of the evidence, the decision-maker must side with the claimant. While the provision stating that there is no legal onus of proof on the claimant relates to the overall question of whether the

64 The War Pensions Act 1954 also contains a presumption in subsections 17(1) and (2). This presumption allows a member of the forces to be presumed to have had absolute physical and mental fitness where the member was medically graded as fit for service at attestation. This presumption was subject to specifically recorded medical conditions at the time of medical grading, alterations in medical grading within two months of being actually attached to the forces for service but before being subject to conditions that have prejudicially affected his fitness and any false statement, non-disclosure or misrepresentation that resulted in erroneous grading. This presumption was relevant specifically during World War Two and is now used very seldom as the basis of a decision.

65 War Pensions Act 1954, s 18(1).

66 Ibid, s 18(2)(c).

67 Ibid.

condition is related to service, this provision relates to the proof of individual facts, matters, causes or circumstances. It allows the decision-maker to side with the claimant about the existence of such a fact if the evidence is evenly balanced as to whether the fact is true or not.

International comparisons

- 5.33 It is useful to look at the form of beneficial evidential provisions in other countries' legislation. All of the countries we have looked at with similar military and legal backgrounds have some method of benefiting claimants through reduced obligations regarding evidence and proof.

Australia

History

- 5.34 Australia first introduced relaxed evidentiary rules in 1929. The first iteration of these provisions applied just to the Appeal Tribunals operating in the Australian veterans' system. They allowed the tribunals to give an appellant the "benefit of the doubt" and created a rebuttable presumption for the appellant, such that if the claimant made out a prima facie case in support of the claim that the medical condition was related to service, the onus of proof to show otherwise lay with the Government.⁶⁸
- 5.35 Amendments in 1943 extended the beneficial evidential rules to other decision-makers. The provisions were also modified to specify that the "benefit of the doubt" was to be applied to "the existence of any fact, matter, cause or circumstance which would be favourable to the claimant" and "to any question whatsoever ... which arises for decision under his claim". The rebuttable presumption was removed and the ability to draw "from all the circumstances of the case, from the evidence furnished and from medical opinions, all reasonable inferences in favour of the claimant" was introduced.⁶⁹ It also provided that the legal onus of proof lay with the Government. It is interesting to note that this provision used the exact same wording that the current New Zealand evidential provisions relating to the benefit of the doubt and the ability to draw reasonable inferences, which were introduced in the same year as these Australian provisions.
- 5.36 An amendment in 1977 reintroduced the rebuttable presumption. It did so by providing a reverse criminal standard of proof whereby a claim would be granted unless the decision-maker is "satisfied beyond reasonable doubt, that there are insufficient grounds for granting the claim".⁷⁰ However, legislation was enacted in 1985 to limit the provisions because the effect of the 1977 amendment had been to open the evidential standards up far more than was intended.⁷¹

68 Australian Soldiers' Repatriation Act 1929 (Cth); Australian Soldiers' Repatriation Act 1920 (Cth), s 45W(2). The provision also provided that the Appeal Tribunals were not bound by any rules of evidence but should act according to substantial justice and merits of the case.

69 Australian Soldiers Repatriation Act 1920 (Cth), s 39B.

70 Ibid, s 47.

71 Topperwein, above n 43, at 32–34.

Current legislation

- 5.37 The 1985 legislation introduced the standard of proof of ‘reasonable satisfaction’ for service personnel without active or peacekeeping service.⁷² For service personnel with active or peacekeeping service, it introduced a rebuttable presumption based on a claimant producing evidence that raises a ‘reasonable hypothesis’. The Government has to show “beyond reasonable doubt that there are insufficient grounds for granting the claim” in order to rebut the presumption.⁷³ Since the enactment of the Veterans’ Entitlements Act 1986, the High Court of Australia has clarified that a “reasonable hypothesis” requires more than a “mere possibility” and must be pointed to by the facts, even though not proved upon the balance of probabilities.⁷⁴
- 5.38 While the wording of the Australian beneficial evidential provisions has shifted around much more than New Zealand’s, it appears that they have reached a position that is very similar to the rules that apply in New Zealand, although worded in a different way. The Australian legislation, like New Zealand’s, has a rebuttable presumption requiring the claimants with operational-type service to produce evidence of a relationship to service that is ‘reasonable’, which can only be negated by proving to a high standard of proof that the claimed condition is not related to service. The standard of proof in both countries for non-operational-type service is the balance of probabilities. Similarly to the War Pensions Act, the current Australian legislation retains provisions allowing the decision-maker not to be bound by formal rules of evidence and to take into account the effects of the passage of time and the deficiency of official records in providing evidence of a fact, matter, cause or circumstance.⁷⁵

United Kingdom

- 5.39 The United Kingdom’s evidential provisions are set out in the Issues Paper.⁷⁶ The main difference between New Zealand’s provisions and those in the United Kingdom’s War Pensions Scheme are that the War Pensions Scheme has a different standard of proof applying depending on whether a claim is made within seven years of service or not. A reverse criminal standard of proof and legal onus on the Government applies to claims made within seven years of service. For claims made outside of seven years of service, the onus is on the claimant to prove the claim to the balance of probabilities, although producing ‘reliable evidence’ that raises a ‘reasonable doubt’ in his or her favour is

72 The reasonable satisfaction standard of proof has been interpreted to equate to the civil standard or balance of probabilities in the decision of *Repatriation Commission v MJ Smith* (1987) 15 FCR 327, 74 ALR 537.

73 Veterans’ Entitlements Act 1986 (Cth), s120. The term ‘reasonable hypothesis’ was based on wording used by Brennan J in a dissenting judgement of the High Court of Australia in *Repatriation Commission v O’Brien* (1985) 155 CLR 422 at 438.

74 *Repatriation Commission v Bey* (1997) 149 ALR 721.

75 Veterans’ Entitlements Act 1986 (Cth), s 119. The latter provision is the latest iteration of the provision that evolved from the benefit of the doubt provision that was introduced in the 1943 amendment and was identical to the New Zealand provision introduced in the same year.

76 Law Commission, above n 58, at 155.

sufficient.⁷⁷ Consequently, under the War Pensions Scheme, claims made within seven years have more beneficial evidential standards than in New Zealand, but claims made outside of seven years are probably somewhat less beneficial.

- 5.40 The Armed Forces Compensation Scheme, which applies to members of the armed forces serving after 6 April 2005, does not have any beneficial evidential provisions.

Canada

- 5.41 The Canadian evidential provisions, applying to both the Pension Act 1985 and the New Veterans' Charter, are set out in the Issues Paper.⁷⁸ Under the Canadian legislation, the legal onus of proof is on the claimant to prove the claim to the balance of probabilities.⁷⁹ Similarly to New Zealand, the decision-maker is required to “draw from all the circumstances of the case and all the evidence presented ... every reasonable inference in favour of the applicant” and to give the benefit of “any doubt in the weighing of evidence, as to whether the applicant ... has established a case”.⁸⁰ Veterans Affairs Canada's policy document on this issue provides more guidance regarding these two provisions. It states that in many cases drawing a favourable inference will mean that if there is a medical condition and a factual circumstance that could be a cause of that condition and nothing that would lead to another conclusion, then it is incumbent upon the decision-maker to infer that the factual circumstance was the cause. The benefit of the doubt provision applies where the evidence for or against the claimant is approximately equal in weight.⁸¹
- 5.42 There are no presumptions applying in favour of claimants under the Canadian legislation. However, there is a rule requiring the decision-maker to “accept any uncontradicted evidence” that is considered “credible in the circumstances”.⁸² This is a different type of rule to others we have examined. Veterans Affairs Canada's policy document outlines that evidence is not “credible” where other already proven facts do not support the accuracy of the evidence or where a reasonable person using common sense would conclude that the information provided by that evidence is impossible or untrue. A medical opinion is not generally accepted as “uncontradicted” if it is contrary to medical consensus of the recognised specialists of that field.⁸³

United States

- 5.43 In the United States, the onus is on the claimant. There is a preliminary requirement that the claimant make out a prima facie case in the nature of a ‘well-grounded claim’ before the Government is required to assist the claimant in obtaining evidence of a service connection. Primarily, a balance of probabilities standard of proof applies to the ultimate question of the connection to service,

77 Topperwein, above n 43, at 41.

78 Law Commission, above n 58, at 155.

79 Topperwein, above n 43, at 40–41.

80 Pension Act RS C 1985 c P-6, s 5(3).

81 Veterans Affairs Canada “Article 5(3) – Benefit of Doubt” (VAC, Charlottetown).

82 Pension Act RS C 1985 c P-6, s 5(3).

83 Veterans Affairs Canada, above n 81.

with a benefit of the doubt in favour of the claimant if the evidence for both sides is in balance at the end of the consideration of evidence. There are presumptive rules that apply if the evidence shows on the balance of probabilities that the claimant falls within the scope of the presumptive rule. These rules work like rebuttable presumptions, whereby the claim will be granted unless the presumption is rebutted either by “clear and unmistakable evidence” or “clear and convincing evidence” (depending on the specific rule).⁸⁴ Unlike the rebuttable presumption in New Zealand’s legislation, these presumptive rules do not require any evidence regarding the causation of the medical condition before the presumption applies.⁸⁵

Problems with current approach

- 5.44 Although a cornerstone of New Zealand’s veterans’ scheme, there are a number of serious problems with the beneficial evidential provisions in the War Pensions Act. The provisions cannot be allowed to remain in their current form if New Zealand is to introduce a fair and workable scheme for the future.
- 5.45 Sections 17 and 18 of the War Pensions Act are extremely complex. As we have set out, the provisions require a balance of probabilities standard to all matters, but there are additional rules applying to the question of the causation of a medical condition. Proving individual facts about causation is subject to the benefit of any doubt in favour of the claimant if the evidence for and against that fact is balanced. Facts about causation can be inferred from other proven facts, where it is reasonable to do so. Causation can be presumed if the claimant produces evidence that is reasonable and the Government does not prove to the balance of probabilities that the condition was due entirely to other causes. Finally, if all of the evidence regarding causation is in balance at the end of the consideration, a favourable decision for the claimant can be made because there is no onus on the claimant to prove the causation. It is nearly impossible to work out how these rules should interact together. They are very difficult to understand and challenging to apply. The concepts involved in these provisions are usually the domain of judges rather than lay decision-makers.
- 5.46 With this complexity comes uncertainty about how the law applies in practice. The meaning of a number of terms in the provisions, such as “reasonable evidence”, “reasonable inferences” and “doubt”, are not self-evident and are, therefore, open to subjective interpretations. The language and structure of the way the evidential provisions are written, as the almost impenetrable 155 word sentence in subsection 17(3) illustrates, contributes to the uncertainty about their meaning. We are aware that uncertainty about how the beneficial evidential provisions should operate causes much difficulty with decision-making.
- 5.47 The beneficial evidential provisions also contribute to inconsistency in decision-making, which is something that creates unfairness between claimants. Different decision-makers operating at the same time may require different standards of evidence.

84 Topperwein, above n 43, at 40-1.

85 The United States’ presumptive rules are a form of decision-making instruments to assist application of beneficial evidential standards. Decision-making instruments are discussed later in this chapter.

- 5.48 Because the evidential provisions are challenging to understand and apply, decision-makers have at times strayed from a correct interpretation of the law. Myths have arisen amongst veterans and decision-makers alike as to the extent of the beneficial provisions, such that it has sometimes been supposed that no evidence at all of an association between a medical condition and service is sufficient for a claim to be accepted. Clearly, the legislation does not support such a position. However, the complexity of the provisions makes it very difficult to explain and apply the law.
- 5.49 It seems that some of the problems with the evidential provisions in the war pensions system are not peculiar to the New Zealand system, but are characteristics of beneficial evidential rules generally. It is very difficult to get away from the need for beneficial evidential provisions to require the weighing of evidence and the use of personal judgement. Additionally, these decisions are often, by nature, extremely complex questions of medical causation and scientific probabilities. In general, those making the decisions do not have much medical or scientific expertise. Decision-making using beneficial evidential rules is always likely to be difficult, prone to inconsistencies and open to subjective interpretations.
- 5.50 Because of these issues, Australia sought an alternative means of implementing beneficial evidential standards in their impairment compensation decision-making. A decision-making instrument known as statements of principles, which set out the factors that must be related to service before a service connection can be established, was introduced in 1994. The reason for the introduction of these instruments was because the Australian Government had a lack of confidence in non-medical tribunals to deal adequately with complex medical-scientific issues and increasingly fanciful hypotheses for connections between service and disabilities.⁸⁶
- 5.51 We consider that decision-making instruments are an important part of the answer to the serious issues that currently exist with consideration of evidence in veterans' disablement claims.

86 Topperwein, above n 43, at 45. The Explanatory Memorandum to the Veterans' Affairs (199405 Budget Measures) Legislation Amendment Bill 1994, no 37, which introduced SOPs quoted from a statement of reasons in an Administrative Appeals Tribunal case (*Re McIntyre and Repatriation Commission* [1990] AATA 225) where the Tribunal said on the nature of medical evidence and hypothesis put before it:

Such fanciful views, while bordering on an insult to the intelligence, do not advance the positions of ex-servicemen. Whilst recognising that our findings of the fact are final, whether right or wrong...the Tribunal is concerned that so much money is consumed in repeated and persistent attempts to persuade it that there is factual support for the hypotheses advanced in this matter. If weak minded Tribunals accept such material, this will only lead to increased money being spent on computer searches for papers and witnesses' expenses, while avoiding a review of the present legislation with its fictionalised method of determining war pension for veterans and their widows, who probably deserve them, for the service rendered, rather than for fanciful hypotheses advanced.

EVIDENTIAL PROVISIONS IN THE NEW LEGISLATION

- 5.52 We recommend that new legislation includes beneficial evidential provisions together with decision-making instruments, which are discussed below. These should achieve the same level of benevolence towards veterans' claims as those in the War Pensions Act. We consider that it is appropriate to have beneficial evidential provisions in this legislation as an acknowledgment of veterans being placed in harm's way in service of New Zealand. Beneficial evidential provisions assist veterans' claims because veterans do not have to produce proof of a relationship between a medical condition and service to the usual standard. The law fills in some of the gaps in proof. The law takes into account the difficulty for the veteran of obtaining information to support a claim.
- 5.53 Retaining the beneficial evidential provisions to the same standard as is in the current legislation would keep New Zealand's law aligned with the more generous evidential standards internationally. It has for a long time been accepted in many countries that veterans deserve lighter requirements of proof than apply in normal civil cases or claims for Government entitlements. We want to see that benevolence retained.
- 5.54 The provisions should be rewritten to overcome, as much as possible, the concerns that have arisen with them. They should be written in plain English. They should not be overly complex. They should state clearly what is meant rather than relying on technical legal understanding to elicit their intended meaning.

DECISION-MAKING INSTRUMENTS

- 5.55 Decision-making instruments are specific presumptive rules that guide decision-making on certain relationships between medical conditions and service. They translate the beneficial evidential provisions into more basic rules that are straightforward to apply and require minimal judgement and discretion in the decision-making. Two forms of decision-making instruments were discussed in the Issues Paper: statements of principles (SOPs) and presumptive lists. We believe that both of these should have a place in New Zealand's veterans' legislation.
- 5.56 VANZ has already made a step towards a presumptive decision-making instrument through the adoption of presumptive lists as a policy for decision-makers.⁸⁷ The Australian and United States systems provide useful models for how statutory decision-making instruments can operate.

⁸⁷ Law Commission, above n 58, at 152.

Examples of decision-making instruments

United States

5.57 From 1921, Congress and the United States' Veterans Affairs have established presumptions of service connection. They have done so for 150 different conditions. The process through which the presumptive decision-making instruments are established has evolved over time. The 1991 Agent Orange Act⁸⁸ introduced a model of decision-making that remains in place. Veterans Affairs contracts with an independent organisation, the Institute of Medicine of the National Academy of Sciences, to carry out reviews of scientific evidence. The Institute of Medicine provides reports to Veterans Affairs describing the strength of evidence linking exposures of concern to specific health conditions. Veterans Affairs then makes a decision to establish a presumptive rule.⁸⁹ The rules allow impairment compensation to be granted on the basis of service, diagnosis of the medical condition and exposure to the factor to which the presumption relates. No other evidence is required.

Review of US presumptive decision-making

- 5.58 In 2008, a Committee on Evaluation of the Presumptive Disability Decision-Making Process for Veterans was charged with reviewing how presumptions had been established in the past and with making recommendations for an improved scientific framework for determining whether presumptions should be made in the future.⁹⁰ The committee found that variable approaches had been taken to the type of scientific evidence that was required to establish a presumption. For instance, whether scientific evidence of causation of a medical condition was needed or whether evidence of an association between exposure and a medical condition was sufficient. The committee recognised a lack of consistency in decisions to establish presumptive rules and a need for better reviews of evidence and systems of classifying relationships to service. They were also concerned at the lack of scrutiny of Veterans Affairs decisions regarding presumptive rules.⁹¹
- 5.59 The committee devised principles that they suggested should be incorporated into the process of establishing presumptive rules. These were:⁹²
- (a) stakeholder inclusiveness – including input in the development of the rules from stakeholders who will be affected by the process;
 - (b) evidence-based decisions – using evidence of toxicological investigation and mechanistic evidence of how different agents and factors operate to cause medical conditions, rather than just using observational studies;
 - (c) transparency – assuring transparency at every stage of the decisions regarding the establishment of presumptive rules;
 - (d) flexibility – having the ability to adjust decisions when such a change is scientifically justified;

88 Agent Orange Act Pub L No 102-4, § 102, 105 Stat 11 (1991).

89 Committee on Evaluation of the Presumptive Disability Decision-Making Process for Veterans *Improving the Presumptive Decision-Making Process for Veterans* (National Academies Press, Washington DC, 2008) at 2.

90 *Ibid* at 1.

91 *Ibid* at 14.

92 *Ibid* at 313–317.

- (e) consistency – having a consistent approach to the process of establishing presumptive rules;
 - (f) causation, not just association, as the target for decision-making – clarifying the basis for making a decision to introduce a presumptive rule so that evidence of both the fact that a group of veterans were exposed to a potentially harmful agent or condition during service and that the agent or condition is able to cause the disease is required.
- 5.60 The committee recommended that, in considering whether to establish presumptive rules, the following types of evidence should be reviewed and evaluated:⁹³
- data on exposures of military personnel during service;
 - evidence of risks for disease coming from observational (epidemiologic) studies of military personnel;
 - other relevant epidemiologic evidence, including findings from studies of non-military populations exposed to the agent of interest or similar agents; and
 - findings relevant to plausibility from experimental and laboratory research.
- 5.61 The committee identified that presumptive decision-making instruments potentially result in two types of errors: “making a decision to compensate when the exposure has not caused the illness (*false positive*) and to not compensate when the exposure has actually caused the illness (*false negative*)”.⁹⁴ Both of these errors have costs. False positives result in the expenditure of public funds on cases of disease not caused by service. False negatives leave deserving veterans uncompensated. The committee recommended that any decision-making process consider the trade-off between the two errors and attempt to minimise both false positives and false negatives.⁹⁵
- 5.62 The committee also found a need for better classification of the types of evidence for a relationship between an agent or condition and service. They recommended a classification system that gives a scientifically coherent rendering of the language used in the law. They suggested the following categories for classifying the level of overall evidence for a causal relationship between exposure and health outcome:⁹⁶
- *Sufficient*: The evidence is sufficient to conclude that a causal relationship exists.
 - *Equipoise and Above*: The evidence is sufficient to conclude that a causal relationship is at least as likely as not, but not sufficient to conclude that a causal relationship exists.
 - *Below Equipoise*: The evidence is not sufficient to conclude that a causal relationship is at least as likely as not, or is not sufficient to make a scientifically informed judgment.
 - *Against*: The evidence suggests a lack of a causal relationship.

93 Ibid, at 15.

94 Ibid.

95 Ibid.

96 Ibid, at 195.

Australia

- 5.63 The Repatriation Medical Authority, a body of five preeminent medical experts, was established in 1994 to determine SOPs for injuries and diseases. SOPs set out factors that must be related to service before a connection can be said to exist. If a SOP is in place, the veteran must meet one of the factors for the claim to be granted. In effect, SOPs provide presumptive rules in relation to particular injuries and illnesses. The SOP acts as expert evidence concerning all possible causes of a disease in veterans as a group.⁹⁷
- 5.64 The Australian beneficial evidential provisions have, as discussed, a reasonable hypothesis standard for warlike service and a reasonable satisfaction test for peacetime service. There are SOPs for both standards for all medical conditions that are covered, with different levels of exposure to causative factors depending on the standard of proof that applies. The presumptions in the SOPs are still rebuttable as they can be challenged if it is proven (to the beyond reasonable doubt standard for warlike service or to the balance of probabilities standard for peacetime service) that the condition was due to a cause or causes that operated to exclude the contended service-related cause.⁹⁸
- 5.65 Individual veterans and veterans' organisations can apply to the Repatriation Medical Authority to review its decisions about SOPs or to investigate injuries or diseases for the purpose of making or amending SOPs.⁹⁹ They can also ask another statutory medical expert body, the Specialist Medical Review Council, to review a SOP.¹⁰⁰ The Council can make recommendations to the Authority in relation to the making of a SOP or it can require the Authority to make specific amendments of a SOP.¹⁰¹
- 5.66 The Repatriation Commission has also been given a statutory discretion to make determinations that have the same operative effect as SOPs to cover classes of veterans that may be excluded from obtaining a pension under a SOP.¹⁰²
- 5.67 The Australian SOPs are exhaustive, in that they set out all the possible service relationships for a medical condition, while the United States presumptive rules are not. This difference is partly due to the relative impacts of claims based on service-related smoking habits.¹⁰³ In Australia, as in New Zealand, a large number of claims are for smoking-related conditions. A 1993 Administrative Appeals Tribunal decision first allowed a smoking-related claim in Australia.¹⁰⁴ This decision

97 Topperwein, above n 43, at 37–38.

98 *Ibid*, at 38.

99 Veterans' Entitlements Act 1986 (Cth), s 196E.

100 *Ibid*, s 196Y.

101 *Ibid*, s 196W. For instance the Repatriation Commission has exercised this power in relation to Vietnam veterans who were exposed to Agent Orange and who have contracted particular types of cancer (acute myeloid leukaemia, chronic myeloid leukaemia, acute lymphoid leukaemia, and chronic lymphoid leukaemia).

102 *Ibid*, s 180A.

103 Topperwein, above n 43, at 46.

104 *Re Chandler and Repatriation Commission* (1993) 30 ALD 107.

was a trigger for the establishment of the Repatriation Medical Authority and SOPs. Exhaustive SOPs acted as a means of putting scientifically-based parameters around the extent of liability for smoking-related and other claims.

- 5.68 In the United States, smoking was only occasionally accepted as a service-related cause of medical conditions. Legislation passed in 1997 excluded smoking as a service-related cause for claims relating to service at any time. Australia passed similar legislation in 1997, but this only applied to service after 1 January 1998. In Canada and the United Kingdom, smoking is rarely accepted as being capable of giving rise to a service-related condition.¹⁰⁵
- 5.69 New Zealand is in the same position as Australia. A service-related smoking habit is likely to continue to be part of the accepted causation factors for medical conditions in veterans whose service led to the development of a smoking habit and that smoking habit caused the condition. Exhaustive SOPs give the best way of defining when smoking should be considered a service-related cause of a medical condition, using the best available scientific evidence assessed by preminent medical experts.
- 5.70 The Australian legislation uses the concept of “sound medical-scientific evidence” as the standard that is sufficient for a SOP to be established.¹⁰⁶ This concept was borrowed from the United States concepts of “sound scientific evidence” and “sound medical evidence”.¹⁰⁷

New Zealand

- 5.71 Presumptive lists were introduced as a policy to direct decision-making in 2007.¹⁰⁸ These lists borrowed from United States research and presumptive decision-making. Presumptive lists do not currently have any status under New Zealand law.

105 Topperwein, above n 43, at 46–47.

106 Subsection 5AB(2) of the Veterans’ Entitlements Act 1986 (Cth) provides:

(2) Information about a particular kind of injury, disease or death is taken to be **‘sound medical-scientific evidence’** if:

(a) the information:

(i) is consistent with material relating to medical science that has been published in a medical or scientific publication and has been, in the opinion of the Repatriation Medical Authority, subjected to a peer review process; or

(ii) in accordance with generally accepted medical practice, would serve as the basis for the diagnosis and management of a medical condition; and

(b) in the case of information about how that kind of injury, disease or death may be caused—meets the applicable criteria for assessing causation currently applied in the field of epidemiology.

107 Topperwein, above n 43, at 61. For example, 38 CFR § 311(c)(3) provides:

‘sound scientific evidence’ means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and **‘sound medical evidence’** means observations, findings, or conclusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

108 Law Commission, above n 58, chapter 11.

Interaction of decision-making instruments with evidence and proof

- 5.72 As discussed, presumptions tip the scales significantly in favour of the claimant in the matter of proving the relationship of a medical condition to service. Consequently, a system involving presumptions will inevitably enable some claims to succeed where there is actually no relationship to service. Although this means that the value of maximising accuracy in fact-finding is compromised, this is considered to be justified by the countervailing values of speed, efficiency, procedural fairness, humaneness, avoidance of vexation for claimants and the community's obligation to veterans.¹⁰⁹ The primary question for decision on impairment compensation is whether a condition is attributable to service. The decision-maker must ask whether the condition would have occurred without service. The answer for any particular veteran can never be known exactly because it is not possible to observe the same person with and without exposure to service.¹¹⁰
- 5.73 In 1997, Australian academic D'Arcy Holman made an estimate, based on principles of epidemiology, of the proportion of non-genuine cases that would succeed under Australia's SOPs. He estimated that generally for veterans who had rendered operational service, the truly causal cases would amount to between 5 % and 10 % of all accepted claims.¹¹¹ Presumptive instruments operate to allow all of the sufferers of a medical condition who were exposed to a service-related factor to be presumed to have it because of service, even where a proportion of them have the condition for reasons unrelated to service. It may be known that a service-related factor is one cause of a specific disease in a proportion of the veterans exposed to that factor and who have the disease, but not all of the veterans exposed to the factor will have the disease because of their service. Some would have developed the disease whether exposed to the service-factor or not.
- 5.74 In scientific and medical research, epidemiological principles are used to estimate the *proportion of people who develop a disease* due to being exposed to a *particular factor*. When making a decision about causation (or formulating presumptive rules about causation) on the basis of research about a disease, the question to be decided at a policy level is, how small must this proportion be before a decision-maker should reject claims that exposure to that factor caused any particular veteran's condition.¹¹² If a balance of probabilities test were applied, it is suggested that a 49 % proportion would be small enough that the claims should be rejected. If this threshold or lower were sufficient it would mean that it is more likely than not that the disease was caused by some other factor. If all claims for a disease are accepted based on research showing that a 51 % proportion of sufferers of that disease who were exposed to a particular factor and who have the disease because of that service factor, it would mean that in 49 % of accepted cases the disease would not actually have been caused by service. This level of unfounded acceptance appears to be politically acceptable for civil cases.¹¹³

109 Topperwein, above n 43, at 58–9. The values important in decision-making on veterans' claims were discussed in Law Commission, above n 58, at 156.

110 Committee on Evaluation of the Presumptive Disability Decision-Making Process for Veterans, above n 89, at 140.

111 Topperwein, above n 43, at 59.

112 Ibid, at 60.

113 Ibid.

- 5.75 Beneficial evidential standards require that medical evidence showing a lower proportion of genuinely service-caused cases of a disease than 51 % is considered sufficient for any individual with the disease and the exposure to the particular service factor to have their claim accepted. It is a matter of drawing a line at some proportion that will be considered sufficient to reflect the beneficial evidential standard. The level of evidence at which the standard is set is a matter of balancing the false positive and false negative errors. Presumptive decision-making instruments are benevolently set at fairly low levels of evidence.

Decision-making

- 5.76 It is also valuable for us to look behind the concept of decision-making and into what actually occurs when a decision-maker adjudicates on a claim. Decision-making is a form of human behaviour that has been well-researched. Because of the nature of human beings, decision-makers take into account factors in their decision-making that are not relevant to the actual decision at hand. Research has shown that factors that have been shown to influence decision-making include:¹¹⁴

... whether it is being made by a group or as an individual; the goal of the decision-making process; the importance of the decision; the complexity of the task; the personality and psychological state of the decision-maker; intellectual capacity; attitude of the decision-maker to the task ...; perceived attractiveness or deservedness of a person who might benefit from a particular decision; situational matters such as time and resource pressures; rules and customs applicable to the process; and the range of available choices.

- 5.77 Factors such as these influence decisions, although the decision-maker is usually unaware that they have been influenced. It is fair to say that decision-making in a veterans' system is no different.
- 5.78 The large subjective element in decision-making means that it is difficult to achieve consistency. Two decision-makers from different backgrounds with different opinions and experiences are likely to apply evidential provisions differently. Moreover, it is usually impossible to measure whether decision-makers are exercising the correct standard or not. The fact that this, like any decision-making, is subjective and unchallengeable, except by review or appeal, appears to cause much of the discontent among veterans regarding these decisions.¹¹⁵
- 5.79 We consider that instruments that remove the majority of the subjective element of decision-making are the only way to resolve this considerable challenge facing decision-making in the veterans' system.

114 Ibid, at 56. Many of these factors are discussed in Mark H B Radford 'Culture and its Effect on Decision Making' in Wing Hong Loke (ed) *Perspectives on Judgment and Decision Making* (Scarecrow Press Inc, Lanham, Maryland, 1996) 49–66.

115 Topperwein, above n 43, at 66. Jonathon Cohen 'Freedom of Proof' in William Twining and Alex Stein (eds) *Evidence and Proof* (Dartmouth Publishing Co, Aldershot, 1992) at 6 stated:

[D]isagreement about the norms of proof tends to generate a much deeper sense of injustice. This is because of the common belief in a universal cognitive competence whereby, given a proper presentation of all the relevant evidence about any particular factual issue, either every normal and unbiased person would come to the same conclusion about it or at worst everyone would agree that it was an issue about which the norms of proof are indeterminate and reasonable people might venture different conclusions. That belief supports the view that, if well-informed people continue to express serious disagreement about any norms of proof, someone is being unreasonable or dishonest.

Advantages of decision-making instruments

Consistency and equity

5.80 Presumptive decision-making rules reduce the number of facts that need to be proved by a claimant. This also means that there are fewer issues for the decision-maker to decide upon.¹¹⁶ Consequently, it is much more likely that different claimants will be treated equitably and decisions will be consistent. In a decision of the Australian Administrative Appeals Tribunal, Brennan J said:¹¹⁷

By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.

5.81 These instruments allow veterans to know in advance the rules that will be applied to their claims. This is likely to encourage the perception that the process is just and transparent.

Accuracy

5.82 Decision-making instruments allow medical experts to have a foremost role in guiding decision-making based on the most up to date and accurate medical and scientific information. Because many of the considerations involved in these decisions involve technical medical matters, these experts are in the best position to ensure that decision-making policy accurately reflects medical knowledge.

5.83 Decision-making will be perceived as more accurate if the system allows the presumptive decision-making rules to be updated or new rules to be added in line with developments in medical knowledge.¹¹⁸

Simpler decision-making

5.84 As the presumptive decision-making rules set out the circumstances in which they apply, it is relatively simple to see whether a veteran meets the criteria. Presumptive decision-making rules lead to quicker, less resource-intensive decision-making. Decision-making is far less complex than applying the extraordinarily difficult beneficial evidential standard. The use of an automated programme to assist decision-makers can also make the decision-making speedy and resource efficient.

116 Topperwein, above n 43, at 62.

117 *Re Drake and the Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at 640.

118 Topperwein, above n 43, at 68.

Addressing possible concerns about decision-making instruments

- 5.85 We are aware that some in the veteran community have had some concerns about the use of SOPs, which have been labelled a form of “prescriptive” decision-making. These concerns may have arisen from misunderstandings about the nature of SOPs.
- 5.86 The use of SOPs does not require the removal of the current beneficial evidential standard. Decision-making instruments like SOPs are founded upon beneficial evidential standards. Beneficial evidential standards are the very reason for decision-making instruments. SOPs and presumptive lists break down the complicated legal tests required to apply the beneficial evidential standards into clear, easy-to-apply rules. When medical experts set criteria for SOPs they are basing the presumptions on much lower levels of evidence than is required to prove a claim to the balance of probabilities. For instance, presumptive rules are often based on medical research indicating that exposure has caused or contributed to a medical condition in only a small proportion of those who were exposed and have the condition. The Chair of the Repatriation Medical Authority has indicated that the Authority aims to operate at a 5 % cut off level for claims relating to war-like service. This is consistent with a 20 to one chance that a service-exposure has caused a condition.¹¹⁹ SOPs certainly do not deny the beneficial evidential standard.
- 5.87 The introduction of SOPs in New Zealand would not mean a wholesale adoption of Australia’s decision-making rules. It would be an enormous amount of work to create New Zealand’s own SOPs and it would be preferable to borrow as much research and decision-making material from Australia as possible. However, New Zealand experts should still consider the rules in terms of New Zealand’s standards and conditions. New Zealand experts would be given the authority to decide whether to adopt, adjust or decline them. It makes a lot of sense to make use of research by eminent medical and scientific experts overseas, such as the Repatriation Medical Authority, which has already put considerable time, expense and expertise into this. Although there would be some work to be done by New Zealand experts, a large amount of the research and consideration can be borrowed. Moreover, 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.¹²⁰

119 Ibid, at 61. In *Byrnes v Repatriation Commission* (1993) 177 CLR 564 the High Court of Australia said:

It was not open to the Tribunal ... to say that the hypothesis relied on by the appellant was not reasonable because there was only a 20 to 1 chance of it being valid. A hypothesis within that degree of probability cannot as a matter of law be regarded as unreasonable for the purposes of s.120.

120 A concern has been raised that Australia’s approach is very different from New Zealand’s with respect to claims relating to service-related smoking habits. However, this is not the case. The Issues Paper pointed out at para 10.26 that there is an exclusion in the Australian legislation relating to use of tobacco products as a cause of service-related injury. This exception applies only to service after 1 January 1998. Like New Zealand, Australian service persons who were given cigarettes and developed service-related smoking habits can receive impairment compensation.

- 5.88 While SOPs remove the need for a medical opinion to be sought regarding every individual claim, they do not remove the informed judgement of medical professionals. With presumptive decision-making instruments the informed judgement of not just medical practitioners, but preeminent scientific and medical experts in relevant fields considering the body of research internationally, comes at an earlier stage so that it is not necessary in individual cases. The role of experts in this way contributes to the overall justice and consistency of the system. Topperwein argues that beneficial evidential rules create a form of “distributive justice” that is:¹²¹
- ... more likely to promote the intention of the legislature than a system where there is very individualised justice that is dependent on evidence being obtained in each case on technical medical or scientific issues of causation.
- 5.89 With SOPs it is still possible for the veteran perspective to have a role in the decision-making. The medical experts are informed by information on the nature of service from a medical and operational perspective.
- 5.90 The Royal New Zealand Returned and Services’ Association (RNZRSA) expressed some reservations regarding the introduction of SOPs in its submission on our Issues Paper.¹²² However, after careful consideration of the matter, the RNZRSA has now come to the view that SOPs are a superior decision-making method compared to the current system and that they would answer its current concerns relating to the wide discretionary powers in the present system.¹²³

Our proposals

- 5.91 We recommend that new legislation should introduce presumptive decision-making instruments. International research and the existing presumptive decision-making instruments from Australia and the United States should be reviewed by the expert medical panel.¹²⁴ The panel should have the power to decide to adopt or amend presumptive decision-making instruments, which would be binding under the legislation. The legislation would create a legal obligation for VANZ to publish the decision-making instruments on its website and to keep this up to date.
- 5.92 The legislation should require that any presumptive decision-making instruments are based on “sound medical and scientific research”, which should be defined. We suggest that the recommendations of the United States’ Committee on Evaluation of the Presumptive Disability Decision-Making Process for Veterans are closely examined and incorporated into the process for establishing presumptive decision-making instruments in New Zealand. The panel should share as much information as possible with the Australian Repatriation Medical Authority.

121 *Ibid*, at 64.

122 Submission of the Royal New Zealand Returned and Services’ Association (submission received 19 December 2008) at 13–14.

123 Robin Klitscher, National President, RNZRSA, to the Law Commission (8 December 2009) Letter.

124 Our proposals for an expert medical panel are discussed in more detail in chapter 8.

- 5.93 We recommend that the legislation allow individual veterans and veterans' groups to refer medical conditions to the panel for consideration of whether presumptive decision-making rules need to be adopted or adjusted. The Government should also be able to refer conditions to the panel and the panel should be able to self-refer conditions for consideration. Additionally, both veterans' groups and VANZ should be able to request that the panel review existing SOPs.
- 5.94 The panel should be able to review and update any existing presumptive decision-making instruments on the basis of new medical and scientific evidence.
- 5.95 We also recommend that the legislation include an appeal process for presumptive decision-making instruments. A review committee should be formed to consider requests for review. A veteran, veterans' organisation or VANZ should be entitled to request a review of the contents of a presumptive decision-making instrument within three months of it being made or amended by the expert medical panel. The grounds on which they can request a review should be that the instrument is not based on sound medical and scientific research or that the sound medical and scientific research is insufficient to justify the making of the instrument.
- 5.96 The legislation should require the appointment of a chair of the review committee who is a medical or scientific expert. The Minister of Veterans' Affairs should be required to appoint up to two additional reviewers, being medical or scientific experts in fields relevant to the medical condition being examined, when a review request is made. The review committee should be required to make a declaration in writing to give reasons for its decision and be able to make recommendations to the expert medical panel regarding that condition.
- 5.97 We recognise that considerable time and resources would need to be put into to setting up these instruments in New Zealand. This would need to be in place before the new legislation enters into force. The expert medical panel would need to be sufficiently resourced to carry out all of the tasks required in the set-up stage and after the new legislation is in place.

Statements of principles

- 5.98 We recommend that SOPs are introduced. The SOPs should be exhaustive, in that they would provide a complete list of the service-factors that link a condition with service. If not, it would defeat the purpose of these decision-making instruments, which is to overcome the difficulty of making consistent, legally correct decisions using the beneficial evidential provisions. However, if a claim is made for a condition for which there is no SOP, the claim would be determined as usual under the beneficial evidential provisions. This would require research of medical and scientific information to determine the claim. If a number of applications for a condition that is not covered by an SOP are received, this could be the impetus for the panel to consider creating a new SOP.

- 5.99 If possible, the Australian SOPs should be used as a starting point. If Australia agrees, we recommend that the panel adopt each Australian SOP unless it considers that there is a reason to depart from them in the case of a specific medical condition. The panel would be able to amend the Australian SOPs if they need to be adjusted to meet the needs of the New Zealand system. There is likely to be need for discussions between the New Zealand and Australian Governments regarding how the modalities of this arrangement would work. We suggest that the Government explore the possibility of borrowing the administrative tools used to assist with decision-making using SOPs from the Australian Government in order to make decision-making more efficient.

Presumptive lists

- 5.100 If the Expert Panel considers it appropriate, presumptive lists would apply instead of SOPs for veterans who have service in an applicable operation and have a condition for which a presumptive list has been established.¹²⁵ The legislation should set out the degree of relationship between a service factor and a medical condition that is sufficient for a presumptive list to apply. This should be a higher standard of evidence than for SOPs as presumptive lists allow the automatic acceptance of claims. The Panel should examine the United States presumptive rules and the research of the Institute of Medicine, along with other research, in determining whether to establish a presumptive list for the New Zealand system.
- 5.101 Presumptive lists should be rebuttable. If it is proved beyond reasonable doubt that a condition is caused by something entirely other than service, then it is unethical for the condition to be accepted as service-related, even if it is on a presumptive list.

¹²⁵ Presumptive lists are discussed in Law Commission, above n 58, at 152. VANZ currently has in place presumptive lists as a policy instrument to guide decision-making. There are presumptive lists for veterans with service as prisoners of war during World War II, with exposure to nuclear radiation, with service in Vietnam and with service in the Gulf War.

Chapter 6

Measuring impairment

- INTRODUCTION 6.1 The question of how accepted impairment is measured is significant as it determines how much compensation a veteran would receive.
- 6.2 The Issues Paper expressed the desirability of having a consistent method of assessing levels of impairment for the reasons of uniformity and equity. Using a tool which sets out the levels of whole person impairment to be assigned to different types of conditions appears to be the best method of achieving this.
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- AMERICAN MEDICAL ASSOCIATION GUIDES 6.3 We are in favour of using the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). This tool is already used within the war pension system to determine the percentage level of disablement for individual injuries and illnesses.
- 6.4 The *AMA Guides* contain a process for combining different percentages of impairment from different conditions to determine a person's whole person impairment. If used properly, the *AMA Guides* system provides for a maximum impairment level of 100 %.
- 6.5 The War Pensions Act is silent on whether a level of disablement of more than 100 % can be awarded, although it does specify that the maximum level of pension that can be paid is 100 %. Decision makers have added the disablement percentage relating to each accepted disability, rather than using the process for combining different awards. Consequently, the situation has evolved where disablement percentages in excess of 100 % are awarded. Many veterans have Disablement Pension ratings in excess of 100 %, ¹²⁶ and levels of disablement of more than 300 % are not unknown. This does not seem rational to us. The responses we received at consultation meetings overwhelmingly agreed with this.

126 As at 31 March 2010, 3,690 War Disablement Pension recipients received a War Disablement Pension of 100 % or more, which is 26 % of all recipients (figures provided by Veterans' Affairs New Zealand).

- 6.6 Using the whole person impairment process in the *AMA Guides* would remove this problem. It would allow for a rational system whereby a level of whole person disablement of 95 % to 100 % is a state approaching death. For practical purposes, a general maximum level of impairment of 80 %, like that used by the Accident Compensation scheme (ACC), is likely to be appropriate.
- 6.7 The submissions on the Issues Paper regarding this issue were predominantly in support of transferring to a whole person impairment system. Seventy-two percent of responses considered that a whole person system was a more fair and satisfactory means of assessing compensation entitlements than the current system.¹²⁷ The *AMA Guides* were preferred by the majority of submitters as the system for assessing whole person impairment. The Royal New Zealand Returned and Services' Association (RNZRSA) and the New Zealand Defence Force agreed that the *AMA Guides* were an appropriate tool to use. The RNZRSA would like the ACC Handbook to be used also and a veterans' supplement to the *AMA Guides* to be developed.¹²⁸
- 6.8 We recommend that the *AMA Guides* are adopted as the system used for assessment and calculation of whole person impairment for all new applicants because they are widely used overseas and in New Zealand in the ACC system. Many New Zealand medical practitioners are already familiar with the *AMA Guides* because of their use in the ACC system. The *AMA Guides* are as comprehensive as any system of assessment of impairment.
- 6.9 We understand that ACC is currently considering adopting the sixth edition of the *AMA Guides*. If the sixth edition is adopted by ACC, we would recommend that this version also be used in the veterans' scheme.
- 6.10 The new legislation should provide for entitlements on the basis of an assessment of degree of whole person impairment due to service based on the *AMA Guides*. Impairment compensation should be based on this percentage.

SUPPLEMENT
TO AMA
GUIDES

- 6.11 The ACC legislation provides for a User Handbook to supplement the *AMA Guides* to assist assessors in using the *AMA Guides*. The *ACC User Handbook* explains how the *AMA Guides* are to be used in the ACC system and assists assessors in navigating their way around the *AMA Guides*. It clarifies definitions. It describes how assessments of impairment are to be undertaken and the form that assessment reports should take.
- 6.12 Some aspects of the *ACC User Handbook* would be useful for assessors working under the veterans' scheme, such as the explanation of the whole person concept and the guidance on using the *AMA Guides*. However, there are aspects of the *ACC User Handbook* that are not relevant to a veteran's system, such as the descriptions of how the impairment assessment applies to ACC entitlements.
- 6.13 It would be very useful for medical practitioners assessing the impairment of veterans to have access to a handbook to assist them in applying the *AMA Guides*. We suggest that a veterans' scheme handbook to the *AMA Guides* be developed.

127 Thirty-one of 43 submissions on this issue preferred a whole person assessment system.

128 Submission of the Royal New Zealand Returned and Services' Association (submission received 19 December 2008) at 11; Submission of the New Zealand Defence Force (submission received 12 March 2009) at 25.

Much of this could be based on the *ACC User Handbook*. ACC's expertise in using the *AMA Guides* could be useful to Veterans' Affairs New Zealand (VANZ) in developing a handbook. The expert medical panel could provide guidance on this matter. If such a handbook is established, it should be available on VANZ's website.

OTHER COUNTRIES' ASSESSMENT TOOLS

- 6.14 Consideration has been given to creating an assessment tool such as those used overseas, Australia's *Guides to the Assessment of Rates of Veterans' Pensions (GARP)* or Canada's *Table of Disabilities*. *GARP* and the *Table of Disabilities* are very similar in form and scope, with the *Table of Disabilities* being based on the *AMA Guides* and *GARP*. The difference between these tools, which were specifically developed for use in a veteran's entitlements system, and the *AMA Guides* is that they are less comprehensive and allow for adjustment of the percentage based on types of harm other than physical or mental impairment.
- 6.15 However, it is considered that a specifically devised tool for the New Zealand system would not provide sufficient benefit to justify the enormous amount of work and expenditure that would be required considering that the overseas examples have differed very little from the *AMA Guides*. We favour the use of the *AMA Guides* rather than one of these tools because the guides are already commonly used by assessors under the ACC system.

WHO CARRIES OUT THE ASSESSMENT?

- 6.16 We recognise that there are some problems in the war pensions system with the assessment of levels of disablement. Where medical specialists are asked to assess disablement, there can be long delays before veterans can be seen by the specialists and before the specialists submit reports. This contributes to the delays in the processing of Disablement Pension claims. On occasions, medical practitioners provide opinions of the level of impairment without guidance from the *AMA Guides*. If decision-makers rely on the medical practitioners' opinions, this can result in inconsistency and inaccuracy in the percentages awarded.
- 6.17 We understand that VANZ is relying on the medical information of veterans' GPs more often now in an effort to speed up the processing of claims. While this move appears to have been successful, we realise that many GPs and some specialists have not been trained in using the *AMA Guides*.
- 6.18 We recommend that assessments are carried out by VANZ approved assessors. The legislation should provide for VANZ to appoint and pay as many assessors as are considered necessary. The legislation should direct that the assessor should use the assessment tool specified in the legislation to assess veterans.
- 6.19 There is expertise within ACC in the use of the *AMA Guides*. ACC assessors routinely use the *AMA Guides* to assess impairment. ACC has assessors throughout New Zealand. We suggest that VANZ consider utilising ACC expertise and assessment capabilities in this area. We suggest that VANZ should explore contracting ACC to carry out assessments of veterans in order to assess their impairments.

Chapter 7

Decision-making

- INTRODUCTION 7.1 The structures and processes for the determination of claims under the new veterans' legislation are very important for the successful operation of the scheme. Given that there have been problems and inadequacies with the statutory decision-making structure under the War Pensions Act 1954, we consider that replacing the current structures would be beneficial. The same decision-making system would apply to both schemes.
- 7.2 The operation of a veterans' scheme requires several types of decisions to be made. The decisions on whether to award impairment compensation to a veteran are very complex, involving consideration of whether a veteran has a medical condition, whether the condition is related to service and the degree of impairment. These decisions require the consideration of medical evidence and the application of difficult legal tests.
- 7.3 The decisions relating to the other entitlements and assistance, such as income replacement, rehabilitation and medical treatment, are mostly much simpler. These all involve the application of criteria that would be set out in legislation, rather than the exercise of judgement.
- 7.4 Decisions regarding the Veteran's Pension are a special case. As we propose that the Veteran's Pension retains a close relationship with New Zealand Superannuation, it would be best for these decisions to be made using the same processes as New Zealand Superannuation.
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- STATUTORY DECISION-MAKER 7.5 The statutory decision-maker is the person or body that is statutorily responsible for the administration of the legislation and that has the overall decision-making authority. In practice delegates of the statutory decision-maker are likely to make the actual decisions. The War Pensions Act places the Secretary for War Pension in this position and gives this individual large amounts of discretion. It is our view that in general discretion is unhelpful for achieving just, transparent, consistent decision-making. The new legislation should be modernised to avoid this problem.

Options considered

- 7.6 The first option was to vest the overall decision-making and administration authority in the Chief Executive of the department responsible for the administration of the legislation, in this case the Chief of Defence Force. While this approach did accord with the approach used in other legislation, such as the Social Security Act 1964 and the Accident Compensation Act 2001, there were concerns that this was not an appropriate role for the person responsible for military decision-making. Although there should be a degree of separation from the day-to-day operation of Veterans' Affairs New Zealand (VANZ), we agree with the Royal New Zealand Returned and Services' Association (RNZRSA) that there could be a perceived conflict of interest between the day-to-day financial needs of the serving military and the ongoing claims of veterans.
- 7.7 The second option, raised by the RNZRSA, sought to overcome the difficulty by giving another official within the department the responsibility. For instance, a continuation of the Secretary for War Pensions. Our view was that there is little benefit in creating a separate position from what exists as part of the Government structure. This would only mean that either there was one official with the statutory position and one who is the head of the responsible department, with possible problems in delineating the roles of each, or the statutory position is vested in the same person who is head of the department, as is the case currently.
- 7.8 The third option was that an independent body could be established to hold this position, similar to Australia's Repatriation Commission and Military Rehabilitation and Compensation Commission. A body that is a separate entity from the Department may be perceived as more independent and democratic.
- 7.9 However, the Australian model is only really in place because of historical reasons rather than for any practical benefit. Having a separate body as the central authority under the legislation may add an additional layer of bureaucracy and complication to the system, in addition to possible increased expense.
- 7.10 Preferences expressed in the submissions regarding the statutory decision-making were fairly evenly spread between the three options, with vesting the authority in the Chief Executive of the Department, the Chief of Defence Force, the most popular option.

Our preference

- 7.11 We favour a combination of options one and two in that the authority for the administration of the legislation and overall decision-making would be vested in the General Manager of VANZ.
- 7.12 The General Manager of VANZ would be in the best position to have the authority over the administration and decision-making of the legislation. This position is a step removed from the Chief of Defence Force but firmly within the New Zealand Defence Force's (NZDF's) authority. The position is at the head of the department that will in practice have the responsibility for administering the legislation, allowing the direct delegation of powers and functions to staff within the department.
- 7.13 The position should be described in the legislation as "the person designated as the General Manager of VANZ by the Chief of the Defence Force". As is the case currently, the General Manager will be a member of the civil staff of the NZDF.
- 7.14 The new legislation should have a section which sets out the functions of the General Manager. These should include:
- to grant compensation and other entitlements and assistance to veterans and certain other persons under and in accordance with the legislation;
 - to arrange provision of treatment, rehabilitation and other services for veterans and other persons under and in accordance with the legislation; and
 - to provide the Minister with information concerning, and to advise the Minister on, matters relating to the operation of the legislation.
- 7.15 The legislation should contain a provision similar to section 4(2) of the War Pensions Act, which provides:
- The Secretary, acting under the general direction and control of the Minister, shall be charged with the administration of this Act.
- 7.16 The General Manager should be provided with the power to correct administrative errors.¹²⁹

129 Section 65 of the Accident Compensation Act 2001 provides an example of a provision that may be a useful model:

(1) If the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error.

(2) The Corporation may revise a decision deemed by section 58 to have been made in respect of any claim for cover, but may not recover from the claimant any payments made by it, in respect of the claim, before the date of the revision unless the claimant has made statements or provided information to the Corporation that are, in the opinion of the Corporation, intentionally misleading.

(3) A revision may—

(a) amend the original decision; or

(b) revoke the original decision and substitute a new decision.

(4) Every amendment to a decision, and every substituted decision, is a fresh decision.

(5) Sections 19 to 23 of the Crown Entities Act 2004 do not limit this section.

- 7.17 The person or persons responsible for the initial decision-making on claims are delegated the authority to make decisions by the General Manager of VANZ. Under the current legislation, claims panels make the initial decision on claims for Disablement Pensions and the attributability of veterans' deaths. Staff at VANZ make the decisions on all other entitlements and assistance.
- 7.18 One of the most significant practical problems with the war pension system has been the considerable delays in the initial decision-making on claims for War Disablement Pensions. VANZ has given this considerable attention in the last 18 months and has, consequently, improved claim determination times. This has been achieved by providing applicants with more information about the evidence needed for an application and by requesting more medical evidence from the veteran's own GP at the outset. There continues to be some delays where veterans apply for a large number of medical conditions at once and where specialist assessments are needed.
- 7.19 Additionally, after observing this system, we have serious concerns about the quality of some of the decision-making on claims for War Disablement Pensions. As we have discussed, the decisions are very complex, requiring the application of a difficult legal test, the weighing of evidence, and the exercise of judgement akin to judicial decision-making. We understand that at times the current initial decision-makers on Disablement Pension claims have had difficulty understanding the legal test that they are required to use. This has resulted in inconsistency in decision-making, decisions to accept pension claims without any legal evidence, and poor explanations for decisions. There has also been, as a result, a growth of myths about the standard of evidence required for a successful Disablement Pension claim, which in actual fact bears no relation to the legal test outlined in the War Pensions Act.
- 7.20 The initial decision-making process for impairment compensation claims is an issue that requires reform and improvement under the new legislation. A system of initial decision-making must allow for fair, consistent decisions and must be efficient. Above all, every decision must be in accordance with the law. We have found that the best option to achieve this would be to have the initial decision-making authority vested in the General Manager of VANZ with the authority to delegate this function to staff in the department. Because we propose that the legislation would provide for instruments that set out the test for the relationship of medical conditions to service in a way that is much easier to apply, VANZ would be able to provide much more control over the decision-making, ensuring its quality.
- 7.21 When asked who should make the decision on whether a veteran should be awarded a Disablement Pension, 50% of submitters considered that the best option was a claims panel. The remaining submitters were split between VANZ, NZDF and doctors. More submitters thought that the decision on a claim should be made by several people as opposed to an individual.¹³⁰ Eighty four percent of submitters would prefer the claims panels to remain in some form. However, 69% of submitters consider that the decision on a claim can be made effectively

¹³⁰ Twenty-four of 34 submissions on this issue thought that the decision on a claim should be made by several people.

by staff members from VANZ. The majority of submitters were happy for the decision-making process to be centralised rather than the decisions being made throughout New Zealand as they are now.

- 7.22 In its submission on the Issues Paper, the RNZRSA stated that it considers the initial decision-making could be undertaken by VANZ staff, rather than panels, particularly in cases where presumptive lists apply, but also cases where presumptive lists do not apply. The RNZRSA advocates a system where claims panels have a review role in more complex cases, such as where the claimant does not have qualifying service.¹³¹
- 7.23 The NZDF would prefer that decisions on claims are made by delegates of the General Manager of VANZ. It considers that staff should be supported with information and guidelines for decision-making and there should be the ability to review decisions.¹³²

Analysis of options for impairment compensation claims

Option 1 – Retain claims panels

- 7.24 Under the War Pensions Act, all decisions on claims must be made by a War Pension claims panel. The panels are made up of a VANZ staff member, who is a registered nurse, and a nominee of the RNZRSA. The panellists must meet together and make a unified decision on each claim.
- 7.25 The argument that claims panels should be retained is based on the rationale that only those who have been service personnel in war or warlike situation really understand all of the impacts of service on other veterans and that this knowledge and understanding is necessary in order to work out whether the claimant is suffering from service-related impairment.
- 7.26 However, we are convinced that the claims panel system is intrinsically inefficient. Requiring two people to make the decisions on claims is always going to be slower than having one decision-maker. Additionally, a panel decision-making system will always be more expensive than single-person, departmental decision-making because of added costs such as travel, accommodation, couriering of files and payment to panel members. Centralisation would not remove the problem that panels, by their nature, process fewer decisions in a day than one decision-maker.
- 7.27 If there was a significant benefit to the quality of the decision-making produced by panels as opposed to other types of decision-makers or in the fairness of the system, then the additional costs of the claims panel system may be justifiable. However, this does not seem to be the case here. Our analysis has not indicated that panels make the decision-making more robust. Instead, panels are more likely to result in inconsistent decision-making and decisions that stray from the correct legal tests. We have considered whether service experience makes for better decision-making. A veteran decision-maker has some knowledge of what

¹³¹ Submission of the Royal New Zealand Returned and Services' Association (submission received 19 December 2008) at 12–13.

¹³² Submission of the New Zealand Defence Force (submission received 12 March 2009) at 44.

a claimant experienced, although this is likely to be limited to the decision-maker's own deployments, and a general understanding of service life and ethos.

- 7.28 Veterans often consider that a decision-maker who is a veteran is more likely to be sympathetic to their claims. However, we intend that there would be less scope for subjective judgements under the new evidential provisions. The defined beneficial evidential standard would set the necessary approach of benevolence towards veterans as an objective standard rather than a subjective one.
- 7.29 The involvement of a particular veterans' organisation in the initial decision-making appears to be unique to New Zealand. Veterans' organisations are not involved in the day-to-day decision-making in the veterans' systems of any other country we have examined.
- 7.30 We accept the importance of the perception that the understanding and views of veterans themselves are involved in the veterans' entitlements decision-making. Yet there are other ways in which this veterans' perspective can be involved. Veterans' organisations should be given the opportunity to contribute towards any development of instruments to guide decision-making.¹³³

Option 2 – Decision-making by delegates of the Department or Chief Executive

- 7.31 We favour the option of having delegates of the General Manager of VANZ make the decisions on claims. This approach is more efficient than a panel system as a single decision-maker will be able to make the decisions from the department, without need for joint decision-making and with the access to all of the information that is needed. The approach is cost-effective. VANZ will be able to adapt the number of decision-makers to the flow of claims at any particular time to reduce the chance of a backlog being created. The decision-making is likely to be quicker. The administrative follow-up to the decisions will be able to be carried out immediately.
- 7.32 Decision-making is likely to be more consistent as there are less people involved in the decisions. The General Manager will be able to exercise a degree of supervision to ensure consistency in decision-making between decision-makers, and can make available medical, legal and service expertise where this is necessary.
- 7.33 This model has been proven to work in other claims and entitlements systems in New Zealand, such as the Accident Compensation scheme (ACC) and the Ministry of Social Development. It is also the approach taken in overseas veterans' entitlements systems such as Australia, Canada and the United Kingdom.
- 7.34 The approach is most likely to be successful if the veteran perspective is incorporated into the system at other levels, such as providing input into decision-making instruments and at a review level.

¹³³ Chapter 5 discusses the evidential standard for impairment compensation claims, and the proposed instruments for translating this into easy to apply guidelines.

Details of first level decision-making

- 7.35 The new legislation would provide that the General Manager of VANZ is responsible for determining all claims for all assistance and entitlements. The Act would provide the General Manager with the authority to delegate this decision-making power to any employee of the department, and potentially to other departments.
- 7.36 A major component of the decision-making in an impairment compensation claim is the medical assessment of the level of impairment. Under the War Pensions Act, claimants are sent to medical specialists who provide an assessment of the level of impairment, which the Claims Panel may choose to adopt in awarding a pension. In order to reduce double-handling in the new system, it may be efficacious for the decision regarding the percentage impairment to actually be made by a medical assessor. One option is to contract ACC claims assessors to carry out these assessments. This is likely to be significantly more economical than the current method of sending many claimants to a separate medical specialist for every condition for which a claim has been made. If the claim was successful, the percentage awarded by the medical assessor could be adopted as a part of the decision.
- 7.37 The new legislation should also set out the following details relating to claims for any entitlement:
- (a) a claimant must make application for an entitlement;
 - (b) applications for entitlements are to be made in writing on a form specified by the department and must contain all of the necessary information;
 - (c) the date of lodgement is the date of receipt of the application form by the department;
 - (d) the General Manager has a responsibility to make decisions in a timely manner; and
 - (e) when being advised of a decision regarding an entitlement, a claimant must be advised of review rights.

REVIEW OF INITIAL DECISION

- 7.38 We consider that it is beneficial to have a review mechanism available to claimants who disagree with the first-level decision for most types of claim. In relation to impairment compensation, this intermediate level of decision-making is currently carried out by a National Review Officer. Veterans' organisations and the Government are keen to continue having a level of review in the new veterans' system.
- 7.39 One issue affecting the review structure is whether review decisions are carried out solely as an administrative function of the department or whether the mechanism is laid out in legislation. We consider that the legislation should outline the decisions that can be reviewed and how the review process works. Having statutory review rights makes the system clear for claimants and gives them the protection of knowing that decisions they are unhappy with can be reconsidered.

- 7.40 Seventy-seven percent of submitters were in favour of having some form of internal review process for when an applicant is dissatisfied with a decision. A clear majority of submitters considered that it was best to continue a statutory role for the reviewer.
- 7.41 In the Issues Paper entitled *Tribunals in New Zealand*, we noted that a neutral internal review, whether statutory or non-statutory, as a form of alternative dispute resolution was a helpful feature of administrative decision-making systems.¹³⁴ It allows claimants to have a second opportunity to have their case assessed. We advised that, in order to be effective, an internal review needs to be a neutral appraisal or reappraisal of the claimant's case. There must, therefore, be a high degree of detachment from the original decision-making process. We suggested that one internal level of review is generally sufficient, as more steps than this can run the risk of deterring claimants.

Scope of review

- 7.42 We are concerned that there are a number of areas of discretion and decision-making under the War Pensions Act for which there is no right of review or appeal. We recommend that the new legislation provides a much broader right of review regarding the entitlements provided under the legislation. Extending the right of review to cover most decisions under the legislation means that claimants will have greater confidence in the system.
- 7.43 We recommend that the following types of decisions are covered by the right of review:
- the eligibility of a veteran for any entitlement or assistance under the legislation;
 - the relationship of any medical condition to a claimant's service;
 - the claimant's service eligibility; and
 - the degree of impairment caused by a medical condition.
- 7.44 This would cover the majority of decisions under the scheme, and certainly those that most affect veterans' rights and require the most complex consideration.
- 7.45 There are some decisions that VANZ will make that should not be reviewable or appealable. These relate to specific types of assistance provided, such as treatment, rehabilitation and independence assistance. These decisions are based on assessments of veterans' needs. Questions regarding whether a veteran is eligible at all for these forms of assistance will fall under the reviewable decisions. However, the decision on the specific assistance provided to each veteran will not. It should be open for veterans and other recipients to request that VANZ reconsider a decision that they disagree with.

¹³⁴ Law Commission *Tribunals in New Zealand* (NZLC IP6, 2007) at 138–9 [*Tribunals in New Zealand*].

Review mechanisms

Decisions on relationship of medical conditions to service

- 7.46 We recommend that veterans who have a claim declined on the basis that a medical condition is not related to service and that medical condition is not covered by a decision-making instrument, such as a statement of principles (SOP) or presumptive list, should be able to request to have their claim reviewed by a review panel. These panels would be made up of one VANZ reviewer and one reviewer nominated by the RNZRSA. We accept that for historical reasons it may be desirable to retain a veteran presence in some aspects of the decision-making. This type of decision is one that necessarily involves a greater degree of consideration than other impairment compensation decisions. This is the role, therefore, in which a veteran nominated decision-maker can be of best use.
- 7.47 We recommend that both reviewers are suitably qualified, with either legal or medical expertise. The VANZ reviewer should not have been involved in the original decision-making. If the reviewers disagree, the General Manager of VANZ would be responsible for the overall decision.

Decisions on degree of impairment

- 7.48 The question of how impaired a veteran is as a result of a service-related injury or illness, and therefore what level of impairment compensation they are eligible for, is a question that relates solely to medical evidence. It is also a question that requires a specific type of expertise, the ability to assess impairment using the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA Guides)*.
- 7.49 We recommend that all reviews relating to impairment percentages are determined by medical assessors trained in using the *AMA Guides*. Where a veteran disagrees with the assessment of their level of impairment, they may have the assessment reviewed by another medical assessor who would produce a report. A VANZ medical reviewer would then provide a decision based on both of the assessments.

Other reviewable decisions

- 7.50 We recommend that all other reviews, including cases involving the presumptive lists or SOPs, are dealt with by reviewers within VANZ. VANZ should be responsible for appointing suitably qualified reviewers, who are independent from the original decision-making.

General provisions

- 7.51 The time frame for requesting a review should remain at six months from the date of the original decision. It should be free for the claimant to seek a review of the decision on his or her claim. The reviewers should consider the applications for review of decisions on the papers. The reviewers should be entitled to speak with the claimant or seek further medical information or opinion in considering the review.

- 7.52 In order for a review of a decision to be undertaken, the claimant who was affected by the decision should be required to request the review in writing and, where possible, on the department's specified application form. VANZ should be given the power to accept a late application for review in certain circumstances, such as where an agent of the claimant unreasonably failed to ensure the application was made within the required time or where the department failed to notify the claimant of the requirements for requesting a review. The claimant should be permitted but not required to have a lawyer prepare their review submission.
- 7.53 The reviewers should be required to provide notification in writing of the decision and the reasons for it. The claimant should also be advised of the right of appeal to the appeal tribunal.

APPEAL

- 7.54 We recommend that the War Pensions Appeal Board should be replaced with a new independent tribunal, named the Veterans' Appeal Tribunal. The right of appeal to a tribunal is an essential part of any decision-making process regarding the eligibility of individuals to Government assistance. Because the decisions under veterans' legislation affect individuals' rights, interests or legitimate expectations, there ought to be an opportunity for the decisions to be challenged through appeal.
- 7.55 The current War Pensions Appeal Board is established solely for the purposes of the War Pensions Act. The Act prescribes that two of the maximum of four members of the Board must be medical practitioners, and that one of those members should be a veteran's representative appointed on the nomination of the RNZRSA. The Board has the jurisdiction to consider appeals from decisions of the Secretary for War Pensions or National Review Officer in so far as the decisions consist of:¹³⁵
- (a) The rejection of any claim for a pension in respect of the disablement or death of a member of the forces on the ground that the disablement or death was not attributable to his service as a member of the forces or that the condition that resulted in his disablement or death was not aggravated by that service; or
 - (b) The assessment of a pension granted to any member of the forces in so far as the assessment is based on medical grounds; or
 - (c) The assessment of any additional pension for severe disablement under section 23 of this Act.
- 7.56 These restricted grounds for review mean that there are some decisions for which there is no right of appeal to the Board or any other tribunal.
- 7.57 Our concerns regarding the current form of the War Pensions Appeal Board relate to the possible perception that it is not independent from VANZ, the delays in hearing appeals and releasing decisions, and the lack of published decisions.
- 7.58 In order for an appeal of a decision to be heard, the claimant must first have had the decision reviewed by a review panel. Both the claimant and VANZ should have the right to appeal a decision of the review panel to the Veterans' Appeal

¹³⁵ War Pensions Act 1954, ss 16(1).

Tribunal. The Veterans' Appeal Tribunal would have the power to uphold or overturn the original decision. The claimant would have six months from the date on which he or she received notification of the review officer's decision to request an appeal. To make an appeal, the claimant would have to request an appeal in writing using the prescribed appeal form if possible. The claimant would be required to set out the grounds of appeal and the relief sought.

- 7.59 We recommend that the tribunal is not administered by VANZ. In order to be seen as completely independent of the department administering the legislation, tribunals should receive administrative support from another department. We propose that the Ministry of Justice, through the Tribunals Unit, provide administrative support to the Veterans' Appeal Tribunal.
- 7.60 The Law Commission, in conjunction with the Ministry of Justice, has reviewed tribunals in New Zealand as a whole. The study paper arising from this review, *Tribunal Reform*, recommends a unified tribunal service that would unite a large number of tribunals, arranged into divisions, under the leadership of a Principal Tribunals Judge.¹³⁶ The review found that the War Pensions Appeal Board, as an administrative review tribunal, fell within the scope of the tribunals that could be included in the unified tribunal service. In the event that the proposed unified tribunal is established as a distinct unit within the court system, the proposed Veterans' Appeal Tribunal could be incorporated into that structure.
- 7.61 *Tribunal Reform* also recommends a new legislative framework for all tribunals. This would contain core provisions that would apply to all tribunals included in their review. It would introduce consistent provisions to govern appointments of tribunal members and in respect of tribunal powers and procedures. We recommend that the Veterans' Appeal Tribunal follow the framework proposed in *Tribunal Reform*. We address the aspects of the framework that are applicable to the Veterans' Appeal Tribunal below.

Appointments

Merit-based appointments

- 7.62 We propose that appointments to the Veterans' Appeal Tribunal are independent and merit-based. Members should be selected because of their skills and ability. The appointment process should be open and give the opportunity for the appointing authority to assess candidates' abilities.

Appointing authority

- 7.63 *Tribunal Reform* concluded that “[t]o be perceived as truly independent and merit-based appointments need to be made by a disinterested party.”¹³⁷ The appointing authority should have independence from the department responsible for the decisions over which the tribunal has authority. Consequently, we propose that the Minister of Justice recommend appointments after

¹³⁶ Law Commission *Tribunal Reform* (NZLC SP20, 2008) [*Tribunal Reform*].

¹³⁷ *Ibid*, at 82.

consultation with the Minister of Veterans' Affairs. The responsibility for appointing members of the tribunal should be with the Governor-General on recommendation of the Minister of Justice.

Term of appointment

- 7.64 Security of tenure is necessary to ensure independence in adjudication, as otherwise there is a theoretical risk that the Executive could influence decisions by threatening to dismiss members.¹³⁸ We propose that members of the Veterans' Appeal Tribunal are appointed for a fixed term of three years and the chair has a fixed term of five years. The legislation should set out limited grounds for termination of appointment. The provisions should allow for removal on the basis of "just cause", which could be defined similarly to "just cause" under the Crown Entities Act 2004.¹³⁹

Panel size

- 7.65 The benefits of a having multiple members on a tribunal panel, such as providing a range of experiences and perspectives and increasing the prospects of balanced, consistent decision-making, needs to be weighed against the potential inefficiencies of a large panel. Panel size should not increase the cost of an appeal in a way that is disproportionate to the value or significance of the matters being dealt with.¹⁴⁰ We recommend that the Veterans' Appeal Tribunal have two or three members sitting at each hearing. This would allow a mixture of expertise without it being too large.

Panel composition

- 7.66 It is appropriate that the Veterans' Appeal Tribunal be multidisciplinary in that it have members who have expertise in different fields. Because this tribunal would be required to interpret and apply complex laws, and to apply statutory provisions to the facts of an individual case, it is necessary to have a least one member who has legal expertise. We propose that the new legislation make it a requirement that the chair of the Veterans' Appeal Tribunal have legal expertise.
- 7.67 Further, we consider that the Veterans' Appeal Tribunal should have members who have service and medical expertise. The current requirement that some of the members should be medically qualified should be retained. Additionally, the nomination of a medical member by the RNZRSA should be retained. This would allow for at least one member who has experience as a veteran to be included in the tribunal.

138 Ibid, at 84.

139 Crown Entities Act 2004, s 40 provides:

... just cause includes misconduct, inability to perform the functions of office, neglect of duty, and breach of any of the collective duties of the board or the individual duties of members (depending on the seriousness of the breach).

140 Law Commission *Tribunal Reform*, above n 136, at 86.

Rules of procedure

- 7.68 The New Zealand Bill of Rights Act 1990 requires that every person has the right to the observance of the principles of natural justice by any tribunal which has the power to make a determination in respect of that person's rights, obligations or interests, protected or recognised by law.¹⁴¹ With tribunals it is also important to have a procedure that is reasonably flexible and informal, as they are designed to be quick, efficient and accessible.¹⁴²

Informal and flexible procedures

- 7.69 The Veterans' Appeal Tribunal should be required to conduct hearings with as little formality as is consistent with a fair and efficient process.

Rules of evidence

- 7.70 Many tribunals have the power to accept evidence that would not be admissible in a Court. Indeed, the War Pensions Appeal Board is not bound by any legal forms or rules of evidence.¹⁴³ The reason for these provisions is that it focuses tribunals on whether the evidence or information is relevant rather than any technical question of admissibility.¹⁴⁴ We recommend that the Veterans' Appeal Tribunal retain this approach.

Minimise legal technicalities

- 7.71 The War Pensions Act contains a provision allowing the War Pensions Appeal Board to determine decisions on the attributability or aggravation of disablements or death to service in accordance with the substantial justice and merits of the case, and that the Board shall not be bound by any technicalities or legal forms or rules of evidence.¹⁴⁵ Several other tribunals have similar powers. Without a provision like this tribunals are thought to be generally bound by the Evidence Act 2006 in the type of evidence they can accept.
- 7.72 A provision like this one enables a tribunal to have flexibility about the information they consider as evidence and how this impacts upon their deliberations. There is some uncertainty as to what these provisions really mean and the extent and circumstances in which tribunals may depart from the application of strict legal principle.¹⁴⁶ It is likely that these provisions relate more to the process of the decision-making rather than the substance of the actual decisions. With administrative decision-making dealing with the entitlements of individuals and expenditure of public funds, it is evident that, in order to uphold fair and consistent decision-making, tribunals need to apply the substantive law.

141 New Zealand Bill of Rights Act 1990, s 27(1).

142 Law Commission *Tribunal Reform*, above n 136, at 89.

143 War Pensions Act 1954, s 18(1).

144 Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) at 72.

145 War Pensions Act 1954, s 18(1).

146 See discussion in Law Commission *Tribunal Reform*, above n 136, at 91–92.

7.73 In *Tribunal Reform*, we recommended that these provisions should be as consistent as possible across different tribunals and that there should be greater clarity of meaning in the provisions.¹⁴⁷ We consider that, if a provision like this is to exist in the new legislation, it should clearly state the circumstances when the application of strict legal technicalities can be relaxed and to what extent.

Investigative powers

7.74 The War Pensions Appeal Board currently has powers of investigation under the Commissions of Inquiry Act 1908, such as the power to require the production of papers, documents, records or things for inspection, and the power to call and examine witnesses.¹⁴⁸ The Board very seldom uses these powers.

7.75 We consider that the Veterans' Appeal Tribunal should have the power to call and examine witnesses, and to require the production of papers, documents, records and things for inspection by the tribunal. These powers should be set out in the legislation, rather than through cross-reference to the Commissions of Inquiry Act.

Requirements of natural justice

Adequate notice

7.76 The new legislation should set out the amount of notice of a hearing that the appellant must be given. Currently, the notice period is 14 days. We recommend that this period of notice be continued in the new legislation. There should be a requirement to inform the appellant of the time and place of the hearing and his or her entitlement to provide evidence.

Disclosure

7.77 The new legislation should require the tribunal to provide copies of any evidence, statements or submissions to the other party to the proceedings.

Opportunity to make submissions

7.78 The War Pensions Appeal Board gives appellants the opportunity to make oral submissions at a hearing if the appellant wants to. We recommend that the new legislation continues to allow this. We share the Legislation Advisory Committee's view that there should be an opportunity for an oral hearing where significant rights are at stake, and especially where credibility is in issue.¹⁴⁹

147 Ibid, at 92.

148 War Pensions Act 1954, s 13; Commissions of Inquiry Act 1908, ss 4B–4D.

149 Law Commission *Tribunal Reform*, above n 136, at 95; Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Legislation Advisory Committee, 2007) at 294.

Representation

- 7.79 Veterans are currently entitled to be represented by an advocate or lawyer at a War Pensions Appeal Board hearing. The Secretary for War Pensions or National Review Officer is also entitled to representation.¹⁵⁰ While in practice many veterans have representation, it is very seldom that VANZ is represented at appeal hearings. We consider that both the appellants and the department should have the option of having representation at an appeal hearing and this should be stated in the legislation.

Reasons for decision required

- 7.80 There is currently no requirement for the War Pensions Appeal Board to provide reasons for its decisions. However, in practice, the Board does provide written reasoning for its decisions. It is desirable to provide reasons in the interests of transparency, openness and as a basis for considering the appropriateness of exercising rights of appeal. We previously proposed that it should be mandatory for all tribunals to provide reasons for decisions in writing.¹⁵¹ The new legislation should require the Veterans' Appeal Tribunal to provide reasons in writing for its decisions.

Powers

- 7.81 Our earlier report recommended that all tribunals have the following core powers:¹⁵²
- to summon witnesses, administer an oath or affirmation and take sworn evidence;
 - to require parties and witnesses to produce information and documents;
 - to require the disclosure of information between the parties to proceedings; and
 - to exclude people when they are abusive or disruptive and generally maintain order during proceedings.
- 7.82 While it is unlikely that these powers would be needed often in the Veterans' Appeal Tribunal, there may be occasions where the tribunal should have these powers in the interests of obtaining all relevant evidence and conducting a fair and orderly hearing. We, therefore, propose that the new legislation include these powers.
- 7.83 At present, some of the powers of the War Pensions Appeal Board are conferred by reference to the Board being deemed to be a commission of inquiry under the Commissions of Inquiry Act.¹⁵³ This was the result of legislative practice that developed early in the history of New Zealand's tribunals as a convenient way of applying a menu of powers to tribunals. The Law Commission's *Issues Paper Tribunals in New Zealand* questioned the value of using the Commissions of Inquiry Act's powers. Our view is that it is undesirable to incorporate powers

¹⁵⁰ War Pensions Regulations 1956, reg 30.

¹⁵¹ Law Commission *Tribunal Reform*, above n 136, at 96.

¹⁵² *Ibid*, at 104.

¹⁵³ War Pensions Act 1954, s 13.

to a tribunal by reference to other legislation as it renders the law less accessible to the public, and can cause difficulty where the analogy between a tribunal and a commission of inquiry is not exact.¹⁵⁴

Openness

- 7.84 The current legislation does not state whether War Pensions Appeal Board hearings are to be closed or open. The Board generally holds hearings in private. In general, we consider that there should be a presumption of openness in relation to tribunal hearings and only where there is an overriding interest requiring otherwise should this not be the case.
- 7.85 However, appeals under the veteran's system are likely to involve individuals' medical histories and personal information. This is a strong reason for allowing hearings to be closed to the public.
- 7.86 We, therefore, consider that in this particular context, there needs to be a presumption that hearings of the Veterans' Appeal Tribunals will be closed. However, like the Social Security Appeal Authority, the tribunal should be able to open a hearing to the public in some instances. To balance the presumption of closed hearings, we recommend that public access to the decisions should be allowed. Decisions of the Veterans' Appeal Tribunal that have value as precedents, should be published on the VANZ website.

Costs

- 7.87 In having the powers of a commission of inquiry under the Commissions of Inquiry Act, the Board has the power to award limited costs.¹⁵⁵ We recommend that the Veterans' Appeal Tribunal be given limited powers to award costs, such as where a party has caused unnecessary expense by bad faith or by taking a claim without substantial merit. This approach is in line with our recommendations in *Tribunal Reform*.¹⁵⁶

Further appeal

- 7.88 There is currently no further appeal available after decisions of the War Pensions Appeal Board. We propose that an appeal on matters of law only from decisions of the Veterans' Appeals Tribunal should be introduced in the new legislation. In *Tribunal Reform*, we recommended that certain tribunals, including the War Pensions Appeal Board, have further appeals to the High Court on matters of law only. This facilitates some oversight of this tribunal, whilst optimising certainty and avoiding the endless re-litigation of factual matters. This is particularly appropriate to this tribunal, because it is already an appeal body from the earlier level of review. In the interests of finality, there should be limits placed on the number of times the facts of a case can be reviewed.¹⁵⁷

154 Law Commission *Tribunals in New Zealand*, above n 134, at 112–113.

155 Commissions of Inquiry Act 1908, s 11.

156 Law Commission *Tribunal Reform*, above n 136, at 103.

157 *Ibid*, at 107–108.

PREVIOUSLY
DECLINED
IMPAIRMENT
COMPENSATION
CLAIMS

- 7.89 The process of authorising the reconsideration of previously declined impairment pension claims, or “reopening” as it is known, is discussed in the Issues Paper.¹⁵⁸ As was discussed in the Issues Paper, these cases are problematic because of the large discretion relating to what constitutes new evidence or the interests of justice sufficient for reopening. VANZ is often inundated with requests for reconsideration of previously declined claims. These claims are very difficult and time-consuming, and the threshold has been prone to different interpretations at different times.
- 7.90 The reopening process has also been subject to ‘doctor-shopping’ by veterans and their advocates. If a claimant had at one stage received an unfavourable specialist report, it is open to him or her to search for a sympathetic doctor to provide a report and submit this for reopening. Such an approach does not promote consistency or accuracy in the decision-making.
- 7.91 We consider that previously declined impairment compensation claims should only be able to be reconsidered in certain defined circumstances. It is very important to remove as much discretion and arbitrariness as possible from these decisions. We suggest that claimants should only be able to request that their previously declined impairment compensation claims are reconsidered in the following situations:
- (a) where an administrative error has materially affected the original decision (“administrative error” should be defined to exclude contended errors relating to the substance of the decision, and should include only errors relating to missing or incorrect information relating to service or diagnosis of a condition);
 - (b) where a presumptive decision-making rule (such as a presumptive list or SOP) has been introduced or amended, and the original claim would have been materially affected by the rule; and
 - (c) where a new declaration of qualifying operational service has been made, and the original claim would have been materially affected by the declaration.
- 7.92 Decisions on whether a claim should be reconsidered should be made by the General-Manager of VANZ.
- 7.93 In the case where a previously declined claim is reconsidered and accepted, the commencement date of the pension should be the date of the original application for that exact medical condition.

¹⁵⁸ Law Commission *Towards a New Veterans’ Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 254–5.

DECISIONS ON THE VETERAN'S PENSION

- 7.94 The provisions of the Veteran's Pension in the proposed new legislation would continue to closely reflect the provisions of the New Zealand Superannuation and Retirement Income Act 2001. Currently, the Ministry of Social Development administers the Veteran's Pension. VANZ provides the Ministry of Social Development with advice regarding a claimant's service when this is needed. We envisage that this arrangement could continue under the new legislation. Consequently, Veteran's Pension claims would not follow the same decision-making structure as other entitlements.
- 7.95 We consider that it makes sense for the decision-making processes relating to the Veteran's Pension to be the same in most respects as for New Zealand Superannuation. The decision as to whether an applicant has eligible service for the Veteran's Pension is the only part of the decision that should be VANZ's responsibility. The initial decision on entitlement to a Veteran's Pension should be made by the Ministry of Social Development, with VANZ advising on whether the service eligibility is met. If a veteran disagrees with a decision relating to their service eligibility, the decision should be reviewed by VANZ reviewers. An appeal on this decision should be to the Veterans' Appeal Tribunal.
- 7.96 For all other aspects of the Veteran's Pension, the decision-making structure applying under the Social Security Act 1964 should apply. This means that veterans should be able to request reviews of the initial decision from a benefits review committee. Appeals would be to the Social Security Appeal Authority.¹⁵⁹

JURISDICTION OF THE OMBUDSMEN

- 7.97 The Office of the Ombudsmen has raised an issue regarding the Ombudsmen's jurisdiction to investigate decisions under the War Pensions Act. The Ombudsmen ordinarily have jurisdiction to investigate the procedural aspects of any decision relating to a matter of administration made by a Government department that affects a person. They cannot investigate matters relating to decisions for which there is a right of appeal.¹⁶⁰
- 7.98 VANZ is subject to the Ombudsmen Act 1975 and Official Information Act 1982.¹⁶¹ However, a provision of the War Pensions Act deems the Secretary for War Pensions to be a commission of inquiry under the Commissions of Inquiry Act. The Office of the Ombudsmen considers that they do not have jurisdiction to look at decisions of commissions of inquiry, including decisions of the Secretary of War Pensions, as these do not relate to matters of administration.¹⁶²

¹⁵⁹ Social Security Act 1964.

¹⁶⁰ Ombudsmen Act 1975, s 13.

¹⁶¹ *Ibid*, sch 2.

¹⁶² *Ibid*, s 13(1); Official Information Act 1982, s 2(6); John Belgrave, Chief Ombudsman, to Sir Geoffrey Palmer, President of the Law Commission "War Pensions Act 1954 – Ombudsmen's Jurisdiction" (1 October 2007) Letter; Beverley Wakem, Chief Ombudsman, to Sir Geoffrey Palmer, President of the Law Commission "War Pensions Act 1954 – Ombudsmen's Jurisdiction" (2 September 2008) Letter.

- 7.99 While we understand that the Office of the Ombudsmen has, by agreement with VANZ, continued to investigate decisions of the Secretary for War Pensions, the Office of the Ombudsmen has asked us to consider the appropriateness of this jurisdictional limitation. We do not think that it is appropriate for VANZ to be excluded from the ambit of the Ombudsmen's investigative powers through the Commissions of Inquiry Act. In including VANZ in the list of organisations the decisions of which the Ombudsmen may investigate, it was the legislature's intention that the Ombudsmen be able to review the administrative decisions of VANZ.
- 7.100 The Ombudsmen should have jurisdiction to investigate the decisions of VANZ that are not covered by a right of appeal. The General Manager of VANZ should not be deemed to have the powers of a commission of inquiry under the Commissions of Inquiry Act. In *A New Inquiries Act*, we recommended replacing the outdated Commissions of Inquiry Act with new legislation, which would provide for one-off inquires but would not be used to provide powers of inquiry to a wide range of bodies through reference to this new Act.¹⁶³ We do not think that the incorporation of powers to a body under one Act by reference to another Act is desirable.¹⁶⁴ Consequently, we recommend that there is no reference to the Commissions of Inquiry Act (or its successor) in the new veterans' legislation, and that any powers of VANZ or any other decision-maker are set out in the legislation rather than through reference to other legislation. This would resolve the issue of the Ombudsmen's lack of jurisdiction in this area.

Veterans' Ombudsman

- 7.101 It has been suggested in submissions that a specific Veterans' Ombudsman be established. We do not see that this is necessary if we ensure that the Office of the Ombudsmen has jurisdiction to consider complaints regarding VANZ's decisions, as this is part of the Office of the Ombudsmen's existing role.

163 Law Commission *A New Inquiries Act* (NZLC R102, 2008) at 190. The Inquiries Bill 2008, no 283-2 is currently before Parliament. The Government Administration Select Committee reported on the Bill on 20 November 2009.

164 See paragraph 7.83 regarding the appeal tribunal.

Chapter 8

Administration

INTRODUCTION 8.1 This chapter discusses the proposed features of the new legislation that would operate to make it a more robust and effective scheme. We discuss case management, the expert medical panel, the advisory board, the code of claimant's rights, research and monitoring, and Veterans' Affairs New Zealand's (VANZ's) relationship with other agencies.

CASE MANAGEMENT 8.2 Case management is key to ensuring that veterans' legislation operates successfully and best meets the needs of those it provides for. A structure of case management falls under the department's ambit. VANZ already operates a reasonably successful case management system. Case management needs to be flexible enough to adapt to changing veteran populations and degrees of need among veterans. Consequently, we do not think that the legislation needs to detail how case management will operate.

8.3 However, we do recommend that the new legislation contain a requirement to provide all veterans who are receiving assistance under the scheme with a case manager as a part of fulfilling the Government's responsibility towards impaired veterans.

EXPERT MEDICAL PANEL 8.4 Much of the decision-making in this scheme involves the analysis of medical evidence. Some of the issues of causation of impairments are very complex. Much of the research that is available is overseas-based. New Zealand does not have the capacity or veteran population to do much veterans research in our own country. Consequently, it is important that international sources of medical and scientific research are relied on to give a sound basis to our scheme.

8.5 We recommend the establishment of a statutory expert medical panel in the new veterans' legislation. An expert medical body would provide a facility for translating international medical and scientific research into useable advice and guidelines for decision-makers. Incorporating up to date research material into the decision-making process would assist in making decisions more robust and accurate. It would also help the veterans' system to adapt to take into account new medical problems as they arise.

8.6 Sixty-one percent of submitters considered that an expert medical body could have a role in directing how the decision-making on claims is made. Almost all submitters thought that the medical expert body should have a statutory role.

Role of the panel

- 8.7 In other chapters we discuss the potential for the expert medical panel to have certain roles. The legislation should set out these functions. The panel should have a range of functions to allow for medical expertise to influence the system to a broad extent.

Reviewing research and proposing decision-making instruments

- 8.8 The expert medical panel should be responsible for reviewing international medical and scientific research relating to the impacts of service on veterans' health. As a result of this research, it is expected that the panel would be able to formulate guidelines to assist decision-making. In chapter 5, we proposed that the veterans' legislation incorporate decision-making instruments that translate the evidential standard required for a successful claim into rules that can be applied to all claims. The possibility of establishing a close relationship between the panel and the Australian Repatriation Medical Authority, which fulfils a similar role in Australia, should be explored.
- 8.9 Additionally, the expert medical panel should have the authority to create guidelines for conditions where sound scientific and medical research supports the conclusion that any deterioration in the condition after a veteran has left service should not be considered service-related. This role is discussed further in chapter 9.

Commissioning research

- 8.10 Under the War Pensions Act, the War Pensions Advisory Board has the responsibility for administering the War Pensions Medical Research Trust Fund.¹⁶⁵ This fund was established in 1968 using unpaid pension payments. Under the Act, the fund is used to provide grants for research on veteran-related matters. The fund is used to finance individual research projects or fellowships to qualified persons.¹⁶⁶
- 8.11 This fund, which we consider should be renamed the Veterans' Medical Research Trust Fund, needs to be continued in the new legislation. The purposes of the fund should continue in a similar form to those in the War Pensions Act. The current provisions to allow for expenditure on the making of grants or awards for the purpose of medical research beneficial to former members of the forces, the provision of fellowships to qualified persons who will contribute to such research and the costs incurred in the administration of the fund could be retained with minimal adjustment. We consider that it is more appropriate that a body with medical expertise make the decisions about how grants from the fund should be used. Consequently, we recommend that the expert medical panel have responsibility for deciding how research grants are made from the fund. The legislation should make VANZ responsible for the administration of the fund.

165 Law Commission *Towards a New Veterans' Entitlements Scheme: A Discussion on a Review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 263.

166 War Pensions Act 1954, s 18L.

- 8.12 The panel should also have additional funding for research so that other projects, such as literature reviews of international research, can be undertaken where they consider it necessary.

Guidance on monitoring and treatment of veterans

- 8.13 We suggest that the expert medical panel should have a role in providing the Minister of Veterans' Affairs and the Chief of Defence Force with guidance regarding the monitoring of veterans, including which groups to monitor and the type of examinations or treatment that should be provided to veterans as a part of monitoring programmes.
- 8.14 In addition, we suggest that the expert medical panel provide information to medical practitioners about the treatment of veterans. One possibility could be to establish a website that medical practitioners can access that provides links to helpful research.

Advice

- 8.15 The expert medical panel should have a role in providing advice to the Minister of Veterans' Affairs and Chief of Defence Force on issues relating to the medical impacts of military service, both past and present. We believe that it is important for the Minister and Chief of Defence Force to have access to advice from leading medical experts as it is likely to assist with quality decision-making.

Expert Panel on Veterans' Health

- 8.16 In 2009 a panel of preeminent medical experts in fields relevant to veterans' health was established. This was as a result of a commitment by the Government in the Memorandum of Understanding with Vietnam veterans and their families in December 2006. The Expert Panel on Veterans' Health is a Ministerial advisory committee with the role of providing independent external advice to the Minister of Veterans' Affairs. It can look at:¹⁶⁷
- the way in which veterans' specific service-related health conditions should be addressed in the war pensions and veterans support systems;
 - preventative measures for managing exposure to possible environmental contaminants;
 - the management of service-related health conditions to promote wellness and mechanisms for rehabilitation; and
 - submissions on contemporary battlefield hazards in relation to their potential effect on veterans' health.

¹⁶⁷ Minister of Veterans' Affairs *Terms of Reference for the Expert Panel on Veterans Health* (Wellington, 20 April 2009).

- 8.17 The expert panel is directed by requests from the Minister to provide information on specific issues, and can also address the submissions of individuals and groups. The current panel comprises eight members, who have been selected for their expertise and knowledge. In addition to medical experts in particular fields relevant to veteran's health, the panel includes a lay person familiar with the effects of military service on veterans and families, and the New Zealand Defence Force (NZDF) Director-General of Defence Health. Members are appointed for a two-year term and are nominated by the Royal New Zealand Returned and Services' Association (RNZRSA). The panel may make recommendations to the Minister of Veterans' Affairs.

Details of new expert medical panel

- 8.18 We consider that the expert medical panel in the new legislation could be based upon the current Expert Panel on Veterans' Health. The legislation should outline the panel's role, membership, tenure and appointment processes and remuneration of members.
- 8.19 We recommend that the statutory expert medical panel have a similar membership to the current panel, including medical experts in different fields, the NZDF Director-General of Defence Health and a lay member with relevant expertise. We recommend that the Minister of Veterans' Affairs appoint the panel members. Nominations should come from both the RNZRSA and the General-Manager of VANZ.
- 8.20 We recommend that the Government resource the panel so that it has administration and research support available to it. This support could be provided through VANZ. We consider that it is essential that the expert medical panel have sufficient research capabilities to be able to assess large amounts of international medical and scientific research material. As it is likely that the members of the panel itself would be appointed on a part-time basis only, it may be necessary to appoint staff members, who are responsible for administration and research to support the panel.
- 8.21 The panel could have an association with the Repatriation Medical Authority in Australia, which similarly reviews international research and creates decision-making instruments. The ability to share information with the Repatriation Medical Authority would extend the panel's capabilities.
- 8.22 VANZ estimates that the cost of administering the expert medical panel and the veterans' advisory board (discussed below) would be about \$2 million per year.

VETERANS' ADVISORY BOARD

- 8.23 A veterans' advisory board would be a helpful aspect of new veterans' entitlement legislation. The legislation should establish an independent board with the role of providing advice to the Minister.
- 8.24 Nearly all submitters thought that there was a need for this body and that the advisory board should be included in the legislation.
- 8.25 This board should be completely independent from VANZ in order to provide a mechanism through which veterans can have a direct voice to the Minister. While this occurs to some extent currently, the relationship between the Minister of Veterans' Affairs and the RNZRSA is informal and could change depending on the preferences of each Minister and Government. Codifying this role in the new legislation would provide a safeguard for this relationship.
- 8.26 The board would replace the current War Pensions Advisory Board. It is acknowledged that the War Pensions Advisory Board has for some time served very little useful purpose. The War Pensions Advisory Board is made up of the Secretary for War Pensions, National President of the RNZRSA and a medical member. Consequently, it is not a veterans' representative body, but more of a communication vehicle between VANZ and the RNZRSA. The current Board has the statutory role of advising the Minister on policies relating to war pensions and allowances, approving guidelines for determining and assessing war pensions, advising on any matters assisting the administration of war pensions and administering the War Pensions Medical Research Trust Fund.¹⁶⁸
- 8.27 We consider that medical and funding functions of the War Pensions Advisory Board are better placed with the expert medical panel, while raising awareness of veterans' issues could be better carried out by an advisory board that is representative of veterans.
- 8.28 The new advisory board should have the function of advising the Minister of Veterans' Affairs on issues concerning the legislation and its administration, as well as on other veteran-related issues. The advisory board should have up to six members who are nominated by the RNZRSA or other veterans' organisations and appointed by the Minister. The legislation should provide for appointment and vacancy processes, tenure and remuneration. The board should meet approximately five times per year. VANZ would provide administrative support to the advisory board.

CODE OF CLAIMANTS' RIGHTS

- 8.29 The new legislation should require VANZ to develop a code of claimants' rights that is similar to the ACC Code of Claimant Rights. This code would confer rights on claimants and impose obligations on VANZ in relation to how it should deal with claimants. In order to make the code robust, it should set out a procedure for lodging and dealing with complaints regarding a breach of the code. The code should be developed in consultation with the RNZRSA.

¹⁶⁸ War Pensions Act 1954, s 5I.

- 8.30 Eighty-nine percent of submitters supported the creation of a code of claimant's rights for veterans. Some thought that the veterans' code should go further than ACC's by outlining the special status of veterans within society. The comment was made several times that the code should include responsibilities that are reciprocal to those rights.

RESEARCH AND MONITORING

- 8.31 In the Issues Paper, we set out our view that the New Zealand veterans' system could be improved by having an increased amount of research in issues relating to veteran's health and monitoring of the health of veterans who have been to specific deployments.¹⁶⁹ We continue to hold this view.
- 8.32 Having facilities available for research in New Zealand and for obtaining information from international research has several benefits. Research can inform the decision-making, improving the accuracy and quality. It ensures that the Government is in the position to address any new service exposure issues as soon as they become apparent. The most up-to-date treatment methods can be offered to our veterans.
- 8.33 Monitoring veterans' health is an important part of fulfilling the duty of care that the NZDF and Government have towards New Zealand veterans. Monitoring groups of veterans who have been exposed to a particular factor means that health problems can be identified and treated early. Submission responses were very supportive of the Government taking more action in the areas of research and monitoring.¹⁷⁰

Recommendations

Centre for Military and Veterans' Health

- 8.34 In addition to the research-related roles we recommend for the expert medical panel, we think that closer ties with the Australian Centre for Military and Veterans' Health could be beneficial.¹⁷¹ This facility is carrying out research that is very relevant to the New Zealand veterans' system. Because of the greater scale of the defence force and veterans' system in Australia, it is likely that New Zealand could never establish a facility like this on its own.
- 8.35 We understand that the NZDF already has links with the Centre. We would encourage a strengthening of the cooperation with this facility and the sharing of as much information as possible. It may be helpful for both the NZDF and VANZ to be involved with the Centre, as well as the expert medical panel.

¹⁶⁹ See Law Commission, above n 165, at chapter 21.

¹⁷⁰ All 37 responses regarding the desirability of the Government investing in research on the medical impacts of deployments agreed that this was desirable. Thirty-four of 35 responses regarding the desirability of monitoring veterans' health agreed that this was desirable.

¹⁷¹ Law Commission, above n 165, at 264–5.

Registration

- 8.36 Registering veterans and their family members could be a useful process that would assist with the monitoring of veterans' health. The NZDF should keep a register of all veterans known to have been exposed to certain factors during qualifying operational deployments. We understand that this is already occurring to some extent. We would support the NZDF considering wider registration of all veterans with qualifying operational service either after they return from these deployments or when they leave the defence force. Registration would need to be optional and to meet requirements of the Privacy Act 1993.

Veterans' Card

- 8.37 The NZDF should also consider providing all veterans who leave the NZDF with a Veterans' Card. This could provide information for the veteran on who to contact if they do have a health problem in the future. The card could carry information on the veteran's service and medical details, if the veteran permitted this.

RELATIONSHIP BETWEEN VANZ AND NZDF

- 8.38 VANZ is no longer a semi-autonomous agency, but is fully a part of the NZDF. This allows the Chief of Defence Force to have responsibility for the wellbeing of veterans from the time that they enter service until they die. VANZ does retain a measure of independence as a unit of the NZDF. This is in many ways necessary because of the different type of business and client-base that VANZ has in comparison with the core business of the NZDF. However, we would recommend greater cooperation between VANZ and the NZDF in several key areas. This is especially important in relation to our recommendations for Scheme Two.
- 8.39 We have noted that internationally there is a trend toward closer relationships between veterans departments and defence departments. The need for interdepartmental collaboration has been a consistent theme behind proposals for changes in the United Kingdom, Canada and the United States. The WestWood Spice review of veterans' systems, *Disability in the 21st Century: Constructive Approaches to Disability*, notes that "implementing preventative programs as well as smooth transition services requires significant collaboration with the relevant Department of Defence, which may have its own philosophy, agenda and priorities".¹⁷²
- 8.40 Canada has moved a long way towards close cooperation between Veterans Affairs Canada and the Department of National Defence. They have established governance infrastructure, such as the Veterans Affairs Canada – Canadian Forces Partnerships Directorate, which allows these two separate departments to collaborate on issues of importance to both agencies. Veterans Affairs Canada advised that this coordinated approach ensures that the services provided meet the needs of veterans and their families, is effective and efficient and supports successful transition to civilian life.¹⁷³

172 WestWood Spice *Disability in the 21st Century: Constructive Approaches to Disability – A review carried out for the Australian Department of Veterans' Affairs* (WestWood Spice, NSW, 2008) at 58–59.

173 Briefing from Veterans' Affairs Canada (Charlottetown, 24 June 2009).

- 8.41 Areas of cooperation and coordination between Veterans Affairs Canada and the Department of National Defence include:¹⁷⁴
- mental health – jointly operating the Operational Stress Injury Clinics, Operational Stress Injury Social Support programme and Mental Health Advisory Committee;
 - “living charter” – working together to identify areas within the legislation that may require amendment to improve the supports for veterans and their families;
 - electronic health and administrative records – improving the interoperability between the departments by exploring how to better share electronic data and records management;
 - support to families – identifying areas for improvement for both departments;
 - casualty and transition management – working together to provide an integrated, seamless “Government of Canada” approach to the care of ill and injured veterans, including establishing Integrated Personnel Support Centres on Canadian Forces bases staffed by both National Defence and Veterans’ Affairs Canada together.
- 8.42 We think that the NZDF and VANZ can learn from these initiatives. New Zealand is in a much better starting position than most countries as our veterans’ and defence agencies are within the same department. There are a number of key issues where we see that there is potential for increased cooperation between VANZ and NZDF.

Transition assistance

- 8.43 In chapter 21 we make recommendations for expanded assistance at the time of a veteran’s transition from the military to civilian life.¹⁷⁵ Our recommendations require the involvement of both VANZ and the NZDF to implement.

Decisions on service eligibility

- 8.44 We believe that the NZDF is in the best position to make decisions on the service eligibility for veterans’ assistance for new veterans. As soon as a veteran returns from a qualifying operational deployment, the decision could be made that he or she has eligibility for the veterans’ scheme. This decision could be noted on the veteran’s file. The NZDF are in the best position to know exactly what service a member has completed. This makes establishing service eligibility if and when the veteran requires it in the future much more straightforward than the current system, whereby VANZ often has to make a decision from service records many years after the service occurred.

¹⁷⁴ Ibid; Briefing from Veterans’ Affairs Canada and Canadian Department of National Defence (Ottawa, 26 June 2009).

¹⁷⁵ See chapter 21.

Case management

- 8.45 Case management should be available to currently serving veterans. We understand that this occurs to some extent currently. However, among members of the NZDF there is not wide knowledge of the services that VANZ offers.

Identifying veterans who need VANZ assistance

- 8.46 Currently, the NZDF manages the ACC entitlements of members of the forces. NZDF would also need to ensure that it is also identifying veterans who may be able to receive entitlements under veterans' legislation, instead of or in addition to ACC entitlements. This would require NZDF and VANZ to put in place processes that allow for shared information about injured veterans. It is likely that there would be a need for NZDF staff and VANZ case managers to communicate regarding the assistance that is given to an injured veteran to ensure that it coordinates and that the veteran is getting all he or she is entitled to.
- 8.47 It would be unhelpful for veterans for the assistance offered by NZDF, VANZ and ACC to be given in silos. Approaches to treatment and rehabilitation should be coordinated to give veterans the best opportunities to recover. Veterans would quickly become frustrated if they need to go to several different sources of information and administration in order to get all of the assistance they require. Consequently, we recommend that NZDF and VANZ work together to create a seamless approach to providing assistance to currently serving veterans.

Mental health

- 8.48 Mental health impairments appear to be a major health issue for modern veterans. If New Zealand is to keep at the forefront of the best approaches for treating and assisting veterans with mental health injuries, VANZ and the NZDF will need to continue to work together in this area. The developments occurring in Canada with Operational Stress Injury clinics and social support programmes, could be of use in guiding New Zealand's direction on these issues.
- 8.49 The use of the term "operational stress injury" in Canada to describe post traumatic stress disorder and other service-related stress injuries, could be worth considering. Veterans Affairs Canada has found that this term is helpful in reducing stigma about service-related mental health issues.¹⁷⁶

Electronic records

- 8.50 The administration of the veterans' legislation would be greatly assisted if the NZDF digitised the paper-based service and medical records of veterans with older service. We understand that modern service and medical records are in electronic form and that some of this information is made available to VANZ. Electronic records would improve the efficiency of the system.

¹⁷⁶ Briefing from Veterans' Affairs Canada (Charlottetown, 23 June 2009).

RELATIONSHIP
BETWEEN VANZ
AND ACC

- 8.51 Because of the close interaction between the proposed Scheme Two and the assistance available through ACC, it would be necessary for VANZ and ACC to have a close relationship. The details of this relationship would need to be negotiated between VANZ and ACC. However, there are a few key matters that should be addressed.
- 8.52 VANZ and ACC would have to share information about veterans in Scheme Two in order to ensure that all of these veterans are receiving all that they are entitled to under both legislative schemes. This would require veterans to be advised on application forms or other documents that their information may be shared between the two agencies. Veterans would need to complete privacy declarations authorising the use of their personal details in this manner.
- 8.53 A veteran under Scheme Two may have a case manager through ACC and a case manager through VANZ. The two agencies would need to reach an agreement about how case management would work in these cases. We would not want to see the service to the veterans become over-complicated because of the shared responsibility for the needs that arise from the same service-related injury. Consequently, it would be important to bear in mind the need to make the interaction between the veteran and these Government agencies as simple and user-friendly as possible.
- 8.54 We think that it could also be helpful for VANZ to explore the possibility of using ACC's supply arrangements for different types of treatment, rehabilitation and independence assistance, as ACC has well-developed networks for supplying these services.



Part 2
SCHEME ONE

Part 2: Scheme One

An introduction

Part 2 discusses the assistance that would be available to veterans and former members of the armed forces under Scheme One. This would provide assistance to those who served prior to the introduction of the Accident Compensation scheme on 1 April 1974.

The chapters in Part 2 cover the following:

- Compensation for the impairment resulting from service-related injuries and illnesses (chapter 9);
- Compensation for the loss of income as a result of service-related impairment (chapter 10);
- Health care for qualifying veterans (chapter 11);
- Practical assistance for veterans to allow them to maintain independence (chapter 12);
- Rehabilitation for veterans with an impairment that can be rehabilitated (chapter 13); and
- Assistance for family members of veterans (chapter 14).

Chapter 9

Compensation for impairment

INTRODUCTION 9.1 Compensation for impairment addresses the pain and suffering, and loss of enjoyment of life that results from an injury or illness. Many of those who will be eligible for entitlements under Scheme One are already in receipt of a War Disablement Pension, under the War Pensions Act 1954. The War Disablement Pension is a permanent or temporary tax-free periodic payment paid at a rate based on the level of impairment caused by the veteran's service-related disabilities. Given that so many already receive this entitlement, it is necessary to consider how current War Disablement Pensions would be translated to a new compensation entitlement.

9.2 We recommend that for those on Scheme One impairment compensation should continue to be in the form of a periodic payment. In accordance with the proposal to use the combined impairment percentage process from the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA Guides)* as the means of determining a claimant's level of whole person impairment, the maximum rate of impairment would be 100 %.

OPTIONS CONSIDERED 9.3 The Issues Paper raised several options for the future of compensation for impairment but most related to a scheme for the younger veterans. When examined from the perspective of those who already receive entitlements under the War Pensions Act for service prior to 1 April 1974, the majority of these options do not seem a good fit.

9.4 The options of "ACC with additional entitlements" and "ACC equivalent with additional entitlements" were designed to relate specifically to those who qualify for ACC compensation or who suffer an impairment as a result of service where those involved can qualify for ACC.¹⁷⁷ Clearly these do not apply to Scheme One veterans. Consequently, these were not considered viable options for Scheme One.

¹⁷⁷ Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, Wellington, 2008) at chapter 13.

- 9.5 The flat rate for all over-65 veterans was not a popular option.¹⁷⁸ The large majority of those already receiving entitlements under the War Pensions Act are over 65 years. The feeling was that the degree of impairment should continue to be recognised and that those who had greater service-related impairment should receive more compensation than those who were less impaired or not at all impaired. While the option would have simplified the administration of the system by reducing the need for claims for compensation and decisions regarding attributability, the option had the potential to be costly. It appears that there will always be a group of veterans who are not impaired as a result of service and who will not apply for any compensation. This option provided compensation equally to these veterans. The option would effectively mean that the entitlement was no longer related to the principle of providing compensation for harm done to service personnel as a result of service.
- 9.6 The four-tiered approach and the 10 % increments to 100 % with three additional tiers approach were variations on the existing War Disablement Pension.¹⁷⁹ An option like this that is similar to the existing pension was preferred by the majority of submitters. Our view is that this type of periodic payment should continue.
- 9.7 Thinking on these options has been refined through consultation, submissions and further research, such that it is now thought that none of these options provides the best fit with other aspects of the new scheme. The main factor driving the shape of this entitlement is the way that impairment is calculated under the combined values system in the *AMA Guides*. Retaining a periodic payment approach with a maximum of 100 % appears to be the most sensible option.
- 9.8 Most submitters were keen that those receiving entitlements under the War Pensions Act should at least be given the option of transferring to a new method of calculating impairment compensation.¹⁸⁰ However, it would be very difficult to allow current recipients to choose the method by which their percentage is calculated. This would require the retention of the current method, with its irrationally inflated percentages of disablement, in addition to a new calculation method. Having two calculation methods operating concurrently for those currently receiving entitlements would create unnecessary administrative complications. Consequently, we recommend that all current recipients of the War Disablement Pension are transferred to a Disablement Pension under Scheme One.
- 9.9 The Disablement Pensions should remain tax free in recognition of the special status of veterans. The Inland Revenue Department has advised that this is consistent with New Zealand's taxation strategy as these are not payments to replace income.

178 *Ibid*, at 181.

179 *Ibid*, at 182.

180 Thirteen of 35 submitters on this issue thought that those receiving entitlements should transfer to a new method of determining impairment compensation and 13 of 35 thought that they should be given the choice.

- 9.10 We favour retaining periodic payments as compensation for impairment under Scheme One. Having a Disablement Pension that correlates to the existing War Disablement Pension, makes the translation to the new scheme much simpler than if lump sum compensation were introduced. Translating existing periodic payments to lump sums would be complex. It would have to be considered whether an 85 year old and a 55 year old in receipt of the same level of pension should receive the same lump sum payment as a replacement for their pension given the difference in life expectancies and in the length of time that they have suffered from their impairments.
- 9.11 Throughout the consultation it was also clear that, especially among the senior veterans, periodic payments were a far more popular choice. Periodic payments offer a consistent source of extra income. They create an ongoing benefit for the recipient. There is less risk of all of the veteran's impairment compensation being used up in an unproductive manner, than there is with a lump sum payment.
- 9.12 From the Government's perspective, lump sums are much simpler and more efficient to administer. Lump sums do provide a significant benefit to the recipient in that they provide the flexibility of a larger payment that can be used to make a greater difference to the recipient's quality of life. However, weighing against these factors was the concern that there are many elderly people in receipt of War Disablement Pensions under the current scheme. Many would find a change in the way that they are compensated for their impairment most unwelcome.
- 9.13 During our consultation meetings at RSAs throughout New Zealand, mixed views were expressed about whether compensation should be provided in a lump sum or periodic payment. Generally, it seemed that periodic payments were preferred because it was too easy for a person to quickly exhaust a lump sum while the effects of a disablement were usually ongoing.
- 9.14 We consider that there may be occasions where one year's worth of pension could be paid as a lump sum and that this possibility should be allowed for in the new legislation.
- 9.15 We recommend that in most cases the Disablement Pension should commence from the date of receipt of a written application for the pension. The written application marks the point where a veteran recognises that he or she has been diagnosed with a medical condition that could be related to service. This approach is consistent with other Government entitlements, such as those available under the Social Security Act 1964.¹⁸¹ We do not consider that there should be a discretion regarding the commencement date, as this does not assist with consistent and just decision-making. Any exceptions to this date of commencement should be clearly outlined in the legislation. An earlier commencement date should apply where a previously declined claim is accepted following recognition of an administrative error by Veterans' Affairs

¹⁸¹ Social Security Act 1964, ss 80 and 80AA.

New Zealand (VANZ) when the original decision was made or where an administrative error by VANZ has led to a veteran not submitting a written application at an earlier date. In these cases, we believe that it is fair to commence the pension from the earlier date because the claimant is verified as having the medical condition at that date and the condition has been accepted as being due to service.

- 9.16 The pension should cease on the death of the recipient. We suggest Scheme One provide that the payment continues for four weeks after the veteran's death in order to help ensure that VANZ is informed of the death prior to needing to cease the pension. This will alleviate the current problem where VANZ is required to recover the debt resulting from a pension continuing to be paid into the deceased veteran's bank account in the weeks following his or her death prior to VANZ being informed that the death has occurred. This measure is supported by consultation and submission comment.

PENSION PERCENTAGES

- 9.17 There are some aspects of the War Disablement Pension that are unacceptable in a modern scheme and should not be continued. The War Disablement Pension is awarded in percentages for each of the recipient's impairments. These are added cumulatively such that total percentages of War Disablement Pension may exceed 100%, and have been known to reach up to 400%.¹⁸² As discussed, under a correct implementation of the *AMA Guides* system, total level of impairment should not exceed 100%. This accords with logic as it is very difficult to conceive how a person can be more than 100% impaired. The vast majority of participants in our consultation meetings agreed that this should not be allowed to continue. Consequently, we recommend that the percentages of Disablement Pension under Scheme One not exceed 100%.
- 9.18 Throughout the consultation process we heard comment on the increments at which a Disablement Pension should be awarded. While there has been some suggestion that increments larger than the 5% steps currently used under the War Pensions Act could be beneficial, the majority of comments favoured retaining 5% increments. We see no issues with having increments of around this size.

Additional pension

- 9.19 Another problematic aspect of the War Pensions Act's War Disablement Pension is the additional War Disablement Pension available under section 23 of the Act. The additional pensions are a significant area of administrative difficulty for VANZ. The criteria for the additional pension are unclear and provide the decision-maker with a large amount of discretion regarding whether a claimant qualifies and if so, what level of pension can be awarded.
- 9.20 The legislation appears only to allow an additional pension of an extra 60%.¹⁸³ This payment is for the very seriously disabled veterans. The first and third grounds for the additional pension are clear. The extra 60% is paid where someone is totally blind or permanently bedridden because of accepted

¹⁸² Law Commission, above n 177, at 162.

¹⁸³ War Pensions Act 1954, s 23. Law Commission, above n 177, at 178–9.

disabilities.¹⁸⁴ However, the second and fourth grounds (having two or more serious disabilities, and being so restricted in their activities and pursuits that they are prevented from engaging in normal social and recreational activities) require interpretation, as the key terms are not defined.¹⁸⁵ The statutory context suggests that a veteran must be at a level of impairment that is equivalent or near to being permanently bedridden or totally blind before any additional pension can be awarded. However, because of the lack of clarity, the second and fourth grounds of section 23 have been loosely interpreted to allow some veterans who have the ability to work or who are no worse off than an ordinary person of the same age to be awarded additional pensions. The ambiguity in section 23 has caused a large amount of inconsistency in the way that the additional pension is awarded. Moreover, rather than awarding a 60 % additional pension to veterans who fully meet the legislative criteria, lower levels of additional pension between 5 % and 55 % have been awarded to veterans with 100 % War Disablement Pensions who are less seriously disabled.

- 9.21 The purpose of section 23 of the War Pensions Act appears to be to provide additional compensation to those who are most severely impaired and who have impairments that are creating the greatest impact on their lives. The principle that those with the greatest impairment should be provided with proportionally greater compensation for their impairment is one that we consider should be included in the legislation. It has partly been the unusual way of cumulatively adding impairment percentages that has increased the demand for additional pensions under section 23. Payments to recipients of the War Disablement Pension whose impairments exceed 100 % are capped at the 100 % rate. It has become common for veterans to have impairments totalling in excess of 100 % and these veterans to seek higher payments by applying for an additional pension.
- 9.22 We consider that the additional pension no longer fulfils the purpose for which it was intended and is no longer necessary as our proposed new scheme would have higher rates of pension for the most impaired veterans. However, those already on the additional pension should have their current rates grandparented to ensure they are not worse off under the new legislation.

Proposed new Disablement Pension percentages

- 9.23 We considered whether the cumulative percentage process described in the *AMA Guides* should be applied to all current recipients of a War Disablement Pension. We realised that it would prove complicated to translate the rates of pension and to ensure that no veteran would be worse off. The process of translating the rates to cumulative whole of person rates affects different veterans in different ways depending on the makeup of their pension percentages. The translation process would decrease some veterans' pension percentages significantly and others not at all. Consequently, we prefer the option of simply grandparenting current rates for existing recipients and introducing a new scale for new recipients, as discussed further below. Any method of translating current percentages to a new scale would be complex, confusing and have the potential for unfairness.

184 War Pensions Act 1954, s 23(1)(a) and (c).

185 *Ibid*, s 23(1)(b) and (c).

New Disablement Pension recipients

- 9.24 Any new applicants for the Disablement Pension after the introduction of the proposed new legislation should be assessed on the basis of whole-person impairment, using the assessment tools discussed in chapter 6. The maximum Disablement Pension should be paid when a veteran has 80 % or higher service-related impairment. Eighty percent is the highest level of impairment used by ACC for its impairment compensation. Eighty percent represents a meaningful level of serious impairment. Having 80 % as the effective maximum level removes the irrationality of having a maximum level of impairment at or above 100 %, which should represent death. The rate of the new 80 % Disablement Pension should be at least equivalent to the former 100 % War Disablement Pension rate.
- 9.25 We agree with the principle, based on the modern understanding of impairment systems discussed further in chapter 15, that a scheme that provides proportionally higher levels of impairment compensation to those with higher levels of impairment is beneficial. For new recipients of the Disablement Pension a payment scale that provides proportionally higher levels of Disablement Pension to those with the highest levels of impairment should be considered.

Current Disablement Pension recipients

- 9.26 We recommend that in transferring to the new legislation, no current recipients of the War Disablement Pension should be worse off in the level of pension payment they receive. It would be unfair and destabilising to do this to people who have been advised that they will receive a permanent pension of at least a particular level for as long as they have a particular degree of service-related impairment. Submitters and people making comments at consultation meetings were overwhelmingly supportive of transferring to a whole person system of measuring impairment so long as current recipients did not receive a reduction in their level of pension.
- 9.27 The best way to ensure that no current Disablement Pension recipient is worse off under new legislation is to grandparent their current rates of pension. Existing recipients, including those on the additional pension under section 23, would continue receiving their current rate of pension plus any across-the-board increase agreed to by the Government (discussed later in this chapter).
- 9.28 If current recipients seek a review of their pension after the enactment of new legislation, either for the addition of new conditions or because of the deterioration of accepted conditions, they should be assessed using the whole-person impairment assessment method. If their new assessed percentage of impairment correlates with a higher level of pension payment under the new scale, their pension payments would increase to this. However, if the new percentage correlates with the same or a lower level of pension payment, their pension would not decrease but would remain at its current level.

TEMPORARY PENSIONS

- 9.29 We consider that the ability to award a pension as either permanent or temporary should be retained under new legislation. Temporary pensions are an appropriate form of compensation where a person is suffering from a degree of service-related impairment from an injury or illness that is likely to improve or may not have reached its final state. It makes sense to award temporary Disablement Pensions where the recipient is undergoing treatment or rehabilitation that may improve the state of the injury or illness. For instance, where a recipient is undergoing surgery to correct or treat an injury or illness, it is not clear prior to the surgery what the ongoing impact of the injury or illness will be.
- 9.30 The legislation should provide that, where a temporary pension is awarded, a decision must be made regarding the appropriate period after which the level of impairment should be reassessed. At this point it is likely that a medical report would be needed to determine whether there is any permanent impairment or whether the injury or illness is likely to improve further. The decision-makers should be able to extend the temporary pension where there is a likelihood that the level of impairment will continue to change. After a medical assessment showing that the injury or illness has reached a stable, permanent state, the decision-maker should determine whether there is ongoing impairment. If there is not because the treatment has successfully resolved the injury or illness, the temporary pension should be ceased. If there is ongoing impairment, the decision-maker should award a permanent pension at the ongoing level of impairment.
- 9.31 Those awarded a temporary pension should be given a treatment or rehabilitation plan by VANZ staff and have their level of impairment reassessed once this has been completed.

REASSESSMENT

- 9.32 The ability of Disablement Pension recipients to have their level of impairment, and therefore, level of pension, reassessed is something for which we think the new scheme should allow. It is accepted some service-related injuries or illnesses may become worse or improve even where it was thought that an injury or illness had reached its final state. Other service-related injuries or illnesses can develop after a person has first been awarded a Disablement Pension.
- 9.33 The ability to have impairment compensation reassessed is appreciated by recipients under the War Pensions Act. It also ensures that veterans are accurately compensated for the impact of their service-related impairments. However, it is also apparent that this facility causes problems. Some veterans regularly request reviews of the level of disablement caused by their accepted conditions. At times, the large number of “review of condition” applications has contributed to the delays in processing of claims. It has been noted that it is only a portion of the veteran population that request reassessment of their accepted conditions. A large number of veterans have been awarded a War Disablement Pension and have never sought a review.

- 9.34 It is recommended that Scheme One should only allow reassessment of a Disablement Pension after at least two years have elapsed since that veteran has had his or her whole person impairment assessed or reassessed. The two year restriction would prevent an inundation of claims from the small group of veterans that continually apply for reviews. The two year minimum period for reassessment is proposed because it is considered that levels of impairment will generally not change to a great extent in less than two years.
- 9.35 However, an exception should be available for those that do have a marked change in level of impairment in less than two years. It should be possible for Disablement Pension recipients to request reassessment of their level of service-related impairment within two years of their last assessment if there is evidence that their impairment has significantly increased and that this is due to service-related conditions. “Significantly” should be defined as an increase of 10 or more percent in whole body impairment. This level of increase in impairment is significant enough to create a noticeable effect on a veteran’s health and well-being and to make the reassessment worthwhile.
- 9.36 In order that the system does not become overloaded with spurious requests for reassessment within two years of previous assessments, the responsibility for producing medical evidence that indicates a service-related increase of 10 or more percent in whole body impairment should lie with the veteran.
- 9.37 VANZ should also have the ability to initiate a reassessment of the level of impairment if it considers that the level has changed. If it is found, based on clear medical evidence, that a veteran is no longer suffering from a disability or that level of impairment has significantly improved (that is, by greater than 10% of whole person impairment), VANZ should have the authority to decrease the level of pension. As with the War Pensions Act, a relatively high threshold of evidence should be required before a decision allows the reduction of a permanent Disablement Pension.
- 9.38 We think that there is a case for allowing the expert medical panel, the statutory expert advisory body discussed in chapter 7, to produce guidelines regarding any specific medical conditions where it should be presumed that any deterioration in the condition after a veteran has left service is not service-related. The guidelines should be based on the accepted scientific and medical consensus. If guidelines are in place regarding a specific condition, it would be presumed that veterans cannot have their impairment reassessed on the basis of deterioration in that condition, unless they have medical evidence regarding why the deterioration of their condition is service-related.

AGE-
RESTRICTION
ON PENSION
APPLICATIONS

- 9.39 In recent years the war pension system has laboured under a large burden of new pension applications from World War Two veterans and other senior veterans who are well into their 80s. Many of these veterans had never before applied for a War Disablement Pension. A number of the applications were for ten or more medical conditions. This led to significant delays in the processing of applications and frustration with claims not being accepted because they cannot be related to service. A huge amount of administrative and medical time and resources are expended on these claims. Relatively few result in War Disablement Pensions.

- 9.40 We know that as people age they have an increased likelihood of becoming impaired. In fact, people over 85 years have the highest rate of impairment of any age group at 87%.¹⁸⁶ This tells us that it is probable that veterans are going to have medical conditions when they are in their 80s. Clearly, many of these medical conditions are going to have a large age component in their causation. It can be very difficult to assess whether service has made any contribution to the causation of these disabilities. The 60-plus years that have elapsed between service and the onset of these conditions inevitably makes a connection between service and the disability more unlikely. It also makes providing any reasonable evidence that links the causation of the disability with service very difficult. A number of medical specialists are becoming frustrated with being asked to assess the causation of disabilities of veterans in their 80s when these disabilities are very common to non-veterans and there is no indication that service has played a role in the disabilities. The War Pensions Act simply does not allow the disabilities of elderly veterans to be accepted for pensions without any evidence of a link to service. Medical specialists and VANZ are being placed in a position where they can be accused of being ungenerous towards a vulnerable population of elderly veterans simply because the Disablement Pension is being asked to achieve something for which it was never designed.
- 9.41 Clearly, a number of elderly veterans reach a point in age and health status where they desire assistance from VANZ. Unfortunately, the War Pensions Act is not equipped to deliver the type of assistance elderly veterans, whose age-related disabilities cannot be related to service, need. We consider that this problem is likely to continue unless fundamental changes are made to rules around the Disablement Pension. We see the solution to this issue as changing the focus of the scheme for elderly veterans somewhat.
- 9.42 We propose that Scheme One would not allow applications for new medical conditions or reviews of existing accepted conditions after veterans have reached the age of 80 years. Any Disablement Pension that has already been awarded would continue to be paid and would be increased each year through the annual rates adjustment process to take account of inflation. The rationale behind this is that by 80 years old it is reasonable to expect that all service-related medical conditions will have already arisen and that any further deterioration in health is associated with aging. Veterans who are over 80 years have already exceeded the current life expectancy.¹⁸⁷ Although this is prima facie discrimination on the basis of age under the New Zealand Bill of Rights Act 1990, we think this can be demonstrably justified in a free and democratic society.
- 9.43 However, we do propose replacing this with generous general medical and independence assistance to all veterans over 80 years who have a War Disablement Pension. This would provide the practical assistance that elderly veterans really need in their twilight years, and remove the delay and frustration associated with pension applications.

186 Office for Disability Issues "Brief facts about disabled people" (Office for Disability Issues, Wellington, 2005).

187 Statistics New Zealand "Hot Off the Press – Births and Deaths: December 2009 quarter" (press release, 22 February 2010). Life expectancy at birth for males is 78.4 years and for females is 82.4 years. Male Cohort Life Tables and Female Cohort Life Tables (< www.statistics.govt.nz >) show that a male born in 1920 could expect to live 63.7 years and a female 71.7 years, and a male born in 1930 could expect to live 69.3 years and a female 74.7 years.

ANALOGOUS
PENSIONS

- 9.44 Section 81 of the Act prevents veterans who have a war pension or allowance from another country from receiving as an aggregate of their New Zealand war pension and overseas pension a rate that exceeds the maximum rate that a veteran could receive if he or she were only receiving the New Zealand pension. This provision is akin to provisions applying under social security legislation to prevent persons who receive periodic payments from overseas governments as well as from New Zealand from being advantaged over those who only receive New Zealand payments.
- 9.45 We do not think that this policy is appropriate for Disablement Pensions under veterans' legislation. There are a few veterans who receive Disablement Pensions for New Zealand service and an equivalent type of pension from another country for service in a separate deployment. We consider that this group should be entitled to receive their overseas pension for disability related to service from the overseas government as well as the New Zealand Disablement Pension for a separate disability related to service in the New Zealand forces. The service and disability resulting in the overseas pension are distinct from the circumstances establishing entitlement to the New Zealand Disablement Pension. We would recommend that this policy be reconsidered. Where service for two or more countries has contributed to the same disability, the current policy should continue.

LUMP SUM
PAYMENT FOR
TERMINAL
ILLNESS

- 9.46 We agree with submitters and with the current practice at VANZ that those who have a service-related condition that has been diagnosed as 'terminal', should be treated as being at the highest level of impairment because of the significant impact that their injury or illness has on their life. The payment of the highest level of Disablement Pension may, therefore, be warranted. At RSA consultation meetings, those present generally preferred periodic payment as the method of impairment compensation, but commonly suggested that lump sum payments should be available for those who are terminally ill. When a person has a limited life expectancy, an ongoing amount of pension may be less useful than a more significant lump sum. A larger lump sum payment allows the freedom to do something meaningful that is outside of the veteran's usual means.
- 9.47 Consequently, we recommend that those diagnosed with a terminal injury or illness should have the option of electing to receive one year's worth of the maximum rate of the Disablement Pension, paid as a lump sum to cover the period of one year following the terminal diagnosis. This would be paid instead of the periodic payment of the Disablement Pension and would be paid regardless of the actual length of time that the recipient lives. VANZ estimates that this would be an additional cost of between \$0.60 million and \$0.86 million per year.
- 9.48 The legislation should provide a definition of the word "terminal". It should provide that to be "terminal" life expectancy should be one year or less. If a person who receives the terminal lump sum payment lives longer than one year following the payment, the periodic payment of the Disablement Pension should resume.

- 9.49 The rate of the Disablement Pension was the subject of many submissions. While setting the rates of pension will ultimately be a matter for Parliament, we have a responsibility to fully discuss this issue because of the part that the Disablement Pension plays in the context of the proposed system as a whole.
- 9.50 In its submission, the Royal New Zealand Returned and Services' Association (RNZRSA) has suggested that the current 100 % War Disablement Pension should be increased to the equivalent of 50 % of the average wage plus an addition of 10 %.¹⁸⁸ The 100 % War Disablement Pension is currently paid at the rate of \$191.86 per week.¹⁸⁹ The RNZRSA suggests that the average wage for males in the New Zealand Income Survey, which is currently \$866.00 per week, should be used as the index. This would result in a 100 % War Disablement Pension of \$433.00 per week.¹⁹⁰
- 9.51 The RNZRSA raises two arguments in justification of this proposal. Firstly, it maintains that in 1916 and 1954 the 100 % War Disablement Pension was at a rate equivalent to 50 % of the average wage. It acknowledges that the rate was never formally pegged at this standard, however. Secondly, the RNZRSA considers that setting the 100 % War Disablement Pension at 50 % of the average wage inevitably results in the maximum War Disablement Pension and additional pension, currently set the rate of a 160 % War Disablement Pension, being set at 80 % of the average wage, and that this accords with the Accident Compensation scheme's (ACC's) weekly compensation benchmark.
- 9.52 Research and analysis of relevant legislation does not support these arguments. There is no evidence that the 100 % rate of War Disablement Pension was ever deliberately linked to the average wage, and this is accepted. Calculations indicate that, while the value of the Disablement Pension has declined in comparison with wage rates, the current 100 % rate of War Disablement Pension has nearly kept pace with the past rates in relation to Consumer Price Index (CPI) inflation and the purchasing power of the dollar. The comparison with ACC weekly compensation is not appropriate because of the fundamentally different natures of ACC weekly compensation and the Disablement Pension.

Nature of the Disablement Pension

- 9.53 The War Disablement Pension and the proposed Disablement Pension under Scheme One are forms of non-economic compensation. This is because the pension compensates not for loss of income or other economic benefit, but for the pain and suffering and loss of enjoyment of life caused by the injury or illness. In contrast, in the war pension system, economic pensions are the payments that have been for the purpose of economic compensation. In the current legislation, it is the Veteran's Pension that has this role. Because the Disablement Pension is non-economic compensation and is not a replacement for income, it is not subject to taxation.

188 Submission of the Royal New Zealand Returned and Services' Association (submission dated 19 December 2008) at 15–17.

189 War Pensions Act 1954, sch 1.

190 Submission of the Royal New Zealand Returned and Services' Association, above n 188, at 15 (wage figures updated using Statistics New Zealand "Hot Off the Press – New Zealand Income Survey: June 2009 Survey" (press release, 8 October 2009) at 4).

Comparison to ACC weekly compensation

- 9.54 The comparison of the rate of weekly compensation payable by ACC under the Accident Compensation Act 2001 with the rate of War Disablement Pension is problematic. The War Disablement Pension is a compensatory payment recognising the non-economic impacts of an impairment. ACC provides a lump sum payment with a current maximum of \$120,664.65 as compensation for permanent impairment.¹⁹¹ This payment is the theoretical equivalent of the War Disablement Pension, as it is non-economic compensation, paid purely for the fact of a permanent impairment.
- 9.55 ACC weekly compensation is paid on a different basis. It is paid where a working age claimant is unable to work because of his or her injury. It is paid only for the period that the claimant has incapacity for work. The rate is based on 80 % of the claimant's income prior to sustaining the injury. Its purpose is to provide income support for the claimant while he or she is unable to earn income. ACC weekly compensation is abated dollar for dollar on income earned by a claimant who resumes some work once the total income from the employment income and the weekly compensation exceeds the claimant's pre-injury earnings.¹⁹² The equivalent payment under the War Pensions Act is the Veteran's Pension for under 65 year olds.
- 9.56 As they are payments of a different nature, the rate of ACC weekly compensation is not a useful comparison for the rate of the War Disablement Pension.
- 9.57 It is more meaningful to compare the historical rates of ACC non-economic compensation from the times in the past when this was in the form of a periodic payment. This payment was known as the independence allowance. From 1992, the maximum rate of the independence allowance was \$40 per week. From 1 July 1997, it was \$60 per week.¹⁹³ During this period, the maximum rate of the War Disablement Pension increased from \$131.27 to \$144.41 per week. Under the Accident Insurance Act 1998, the maximum rate of independence allowance was \$61.68.¹⁹⁴ This rate remained in place until the Accident Compensation Act 2001 replaced the independence allowance with lump sum payments. Consequently, where it has been possible to compare non-economic compensation under the War Pensions Act with non-economic compensation under ACC, the War Disablement Pension has been significantly higher.

191 Accident Compensation Act 2001, sch 1, cl 56. This is the maximum rate from 1 July 2009 to 30 June 2010.

192 *Ibid.*

193 Accident Rehabilitation and Compensation Insurance Act 1992, s 54.

194 Accident Insurance Act 1998, sch 1, cl 62.

Comparison to historical War Disablement Pension rates

- 9.58 It is clear that in order to fully take stock of the current value of the War Disablement Pension, the payment's history needs to be closely examined.¹⁹⁵ The War Disablement Pension was introduced in the War Pensions Act 1915. The maximum War Disablement Pension at this time was £1 15s per week.¹⁹⁶ There was no regular system of annual review and indexation at this time, as was also the case with other Government support payments.
- 9.59 The pension was increased to £2 in 1917 and then to £3 in 1943. It was further increased to £3 10s in 1949.¹⁹⁷

Lee Commission

- 9.60 In August 1950, the Government appointed a commission to analyse the effectiveness of the war pensions system, including the adequacy of the rates of pensions. The three-person commission became known as the Lee Commission, after its chair, Mr E A Lee, a Stipendiary Magistrate.¹⁹⁸ All of the three members of the Commission were veterans of World War Two. The Commission heard argument from service groups regarding the historical rates of the War Disablement Pension and economic pensions, an income support payment that was one of the predecessors to the Veteran's Pension, and the value of retaining both forms of pension. In considering these matters, the Lee Commission's report in 1951 highlighted the difference between the War Disablement Pension, which was assessed on the basis of loss of functioning, and the economic pension, which was assessed in relation to the means of the pensioner.¹⁹⁹
- 9.61 While the New Zealand Returned Services Association (NZRSA), later renamed the RNZRSA, supported the retention of a separate economic pension in addition to the War Disablement Pension in its submission to the Commission, a number of smaller veterans' organisations proposed the abolition of the economic pension and suggested that a higher War Disablement Pension should be provided instead. Several of these proposals attempted to equate the maximum War Disablement Pension to some standard of average earnings.²⁰⁰ The Lee Commission report described these proposals as follows:²⁰¹

All involve the abolition of the economic pension as it has up to now existed, and all involve the alteration of the character of the basic pension from a payment which is purely compensation to a payment which becomes economic in character.

195 The history of the war pensions scheme is set out fully in chapter one of Law Commission, above n 177.

196 War Pensions Act 1915, sch 1.

197 War Pensions Amendment Act 1917, sch 1; War Pensions Act 1943, sch 1; War Pensions Amendment Act 1949, sch 3.

198 Stephen Uttley *An Enduring Obligation: A History of War Pensions* (Victoria University of Wellington, 1994) at 36.

199 *Ibid.*, at 42.

200 Commission to Inquire Into and Report Upon the War Pensions Act and Regulations *Report of the Commission to Inquire Into and Report Upon the War Pensions Act and Regulations* [1951] AJHR H-46 at 10.

201 *Ibid.*

- 9.62 After considering the different options, the Lee Commission concluded that:²⁰²
- ... in principle and in practice the best system is that which now exists – namely, the provision of a basic disablement pension, compensatory in character, together with, in appropriate cases, a further pension which is economic in character.
- 9.63 Given their preference for retaining the two types of pension, the Commission discarded the option of markedly increasing the War Disablement Pension and equating it with some standard of average earnings. In light of their conclusion not to change the fundamental basis of pension, the Commission considered the scales of pensions.²⁰³
- 9.64 The NZRSA submitted that the 100 % War Disablement Pension should be increased by 10s per week to £4. Its principle ground for arguing for the increase was the decline in purchasing power of the pound. The NZRSA argued that if a 100 % pension equated to £2 in 1917, it should be more than £3 10s at the time of its submission in 1950.
- 9.65 In determining this issue the three Commissioners were divided. The majority view of the chair and Mr H R C Wild, Wellington lawyer and later Solicitor General and Chief Justice, was that:²⁰⁴
- ... if the sum of £2 fixed in 1917 was decided in relation to some particular standard then, there might well be a case for an increase now – but the majority of the Commission *is not satisfied that the original sum was so fixed*, and, even if it were, they do not know of the particular standard adopted.
- It is generally accepted that this pension is compensatory in character. The Commission does not think, however, that it is compensatory in the sense that damages awarded by a Court of law for personal injury are intended to be compensatory as making good, as far as money can do it, the injury that a person has suffered. The Commission feels rather that this pension is compensatory in the sense of being an acknowledgment by the State, as the New Zealand Returned Services Association puts it, that the recipient “bears the scars of war,” but not an attempt by the State to make full compensation in money value. It could never have been suggested in 1915 that the pension of £1 15s. per week was full compensation, nor can it be suggested now that even if the pension were increased to £6 per week every pensioner would be fully compensated for his particular loss and suffering.
- 9.66 The majority concluded that for those whose disablement did not affect their earning power, an increase in the rate of Disablement Pension could not be justified. The War Disablement Pension was paid in addition to their normal income and their normal income can be regarded as having increased along with wage and salary increases. The majority considered that any additional funds available for war pensions should “go to those in the greatest need – that is, to those receiving the economic pension – rather than making a general increase to those receiving Disablement Pensions.”²⁰⁵

202 Ibid.

203 Ibid, at 17.

204 Ibid, at 17–18 (emphasis added).

205 Ibid, at 18.

- 9.67 The minority view of Palmerston North lawyer Mr B J Jacobs was slightly different. While Mr Jacobs agreed with the other Commissioners that the Disablement Pension had never at any time been fully compensatory for the more serious disabilities, he considered that it was logical to equate the current rate of pension with the past rates and apply increase it by “any appreciable variation in the ‘value’ of the pound.”²⁰⁶ Mr Jacobs was not advocating a change in the nature of the War Disablement Pension or a marked increase in the War Disablement Pension to reflect some standard of average wage, but that the payment should be adjusted to take into account inflation. Additionally, he agreed with the majority that any increase of the Disablement Pension should not operate to increase automatically existing pensions of an amount less than 40 % of the maximum.

Government’s response

- 9.68 In 1951 the Government accepted the unanimous and majority views of the Lee Commission and considered that the rates of War Disablement Pension were adequate at this time. At this time the Government accepted the general proposition that economic pensions should be changed to reflect changing economic circumstances but that Disablement Pensions should not.²⁰⁷

1963 agreement

- 9.69 The Lee Commission report and the Government’s response were met with dissatisfaction from veterans groups, particularly because the Government had failed to provide the majority of war pensioners with increased rates of pension through a general increase to the Disablement Pension.²⁰⁸ As a result, the NZRSA continued to argue for increases to the Disablement Pension throughout the 1950s and early 1960s. Not long after its initial decision in response to the Lee Commission report, the Government determined to alter its position. It did this by increasing the War Disablement Pension at certain points as the value of the currency changed. In 1954 the rate of the 100 % pension was increased to £4 per week.²⁰⁹ The rate was further increased to £4 10s in 1957.²¹⁰ In increasing the rate, the Government moved closer to the minority view of the Lee Commission. However, the decisions to increase the rate of the pension continued to be sporadic and arbitrary.

206 Ibid, at 37.

207 Uttley, above n 198, at 48.

208 Ibid.

209 War Pensions Act 1954, sch 1.

210 War Pensions Amendment Act 1957, sch 1.

- 9.70 The NZRSA wanted the War Disablement Pension to be pegged to a certain standard and to ensure the regular adjustment of the pension. A deputation to the Minister responsible for War Pensions in April 1961 argued for a substantial increase in rates of War Disablement Pension and that subsequently these pensions should be linked to the purchasing power of the currency, as opposed to economic pensions, which were linked to changes in wages. Following a petition to Parliament by the NZRSA in June 1962, the Government agreed to further increase rates of pensions.²¹¹
- 9.71 Government negotiations with the NZRSA led to an agreement in 1963 on the rate of the War Disablement Pension and its regular adjustment.²¹² The NZRSA and the Government accepted an increase to £5 5s per week for the 100 % War Disablement Pension,²¹³ and that this represented an adequate and reasonable rate at this point in time.²¹⁴ This rate was reached through analysis of the historical rates of War Disablement Pension against the purchasing power of the pound. The Cabinet Paper from the Minister in Charge of War Pensions outlining the agreement on the rate of War Disablement Pension described the proposal to set rates at this level as follows:²¹⁵
- The NZRSA proposals would stabilise the value of the pension at something below the 1915 levels but above the average over the 48 years from 1915 to 1962. It seems desirable that values should be stabilised as much as practicable, and I felt the proposition has some merit ...
- In the past pension adjustments have more or less kept pensions in line with living costs, and no doubt successive Governments have taken into account the various economic factors in fixing rates.
- 9.72 After establishing the new rates of the War Disablement Pension, the Government sought agreement with the NZRSA on the periodic review of the pension rates. The NZRSA proposed that the War Disablement Pension and War Widows' Pension "be reviewed biennially, and that on such reviews the amount of these pensions be adjusted having regard to the movement in the Consumer Price Index". It suggested that the rate of War Disablement Pension which had been agreed to, £5 5s per week, and the average cost of living index number for the first two quarters of 1963 should be accepted as the statistical base for all movements of the pension. The NZRSA was willing to concede that pensions would be reviewed and not automatically increased in the event of a major or unusual fluctuation in the CPI such as would occur from a revaluation of the

211 Uttley, above n 198, at 49.

212 *Ibid*, at 50.

213 War Pensions Amendment Act 1963, sch 1.

214 Cabinet Minute "Periodic Review: Rates of Disablement and War Widows Pensions" (20 November 1963) CM (63) 44.

215 Cabinet Paper "Periodic Review: Rates of Disablement and Widows Pensions" (18 October 1963) CP (63) 972.

New Zealand pound.²¹⁶ Despite concerns from some parts of the Government that having regular CPI adjustment for the War Disablement Pension and War Widows Pension would lead to pressure to extend this to other types of Government pensions and benefits, Cabinet agreed to the NZRSA's proposals on 20 November 1963.²¹⁷

- 9.73 A letter from the Minister in Charge of War Pensions, Hon A E Kinsella, to the Dominion President of the NZRSA, Sir Hamilton Mitchell, on 5 November 1963 stated the Government's agreement in principle that "the intrinsic value of these pensions should always be maintained". The letter stated that the Government recognised that the current rate of War Disablement Pension of £5 5s per week was reasonable in terms of present money values. Additionally the Minister agreed to biennial adjustments of the rate in accordance with movements in the CPI and stated that this agreement was a "special concession to those war pensions which are 'sacrosanct', a concession which, for practical considerations, cannot be applied to other pensions or benefits paid out of public moneys". The letter included the proviso that:²¹⁸

This will not prevent intermediate reviews in the event of major changes in money values or other conditions affecting the economy, nor on the other hand will Government necessarily feel bound to vary rates immediately if at the moment of review the variation is contraindicated because of budgetary or other significant considerations.

- 9.74 A letter from Sir Hamilton Mitchell to the Minister in Charge of War Pensions dated 6 November 1963 advised that the Dominion Executive Committee adopted the following resolutions:²¹⁹

That proposals as set out by the Minister be accepted and the Government be thanked for the action taken.

- 9.75 The press statement outlining the agreement on pension rates contained the following description of the purpose of pensions:²²⁰

"Disablement and widows pensions," said Mr Kinsella, "are in a unique category. Their function is not to provide a living. Other benefits and economic pensions designed to maintain living standards were reviewed and adjusted frequently in the light of changing economic conditions, including wage order pronouncements, but there has never been a formula for reviewing disablement and widow pensions. Although not based on loss of earnings capacity in the same way as workers' compensation, these pensions are nevertheless compensatory in character for loss of enjoyment of a normal life as a result of disablement or ill-health and for the death of the husband in the service of the country.

216 Ibid.

217 Cabinet Minute "Periodic Review: Rates of Disablement and War Widows Pensions" (20 November 1963) CM (63) 4.

218 A E Kinsella, Minister in Charge of War Pensions, to Mr H Mitchell, Dominion President, NZRSA, (5 November 1963) Letter.

219 Hamilton Mitchell, Dominion President, New Zealand Returned Services Association, to the Minister for War Pensions, (6 November 1963) Letter.

220 Hon A E Kinsella, Minister in Charge of War Pensions (press statement, 7 November 1963).

“The Government agrees,” concluded Mr Kinsella, “that the value of war disablement and war widows pensions should be maintained. These pensions are a recognition of the State’s continuing obligation to those who suffered personal loss in the service of New Zealand, and should never be allowed to lose their value.”

Adjustment since 1963

- 9.76 From the time of this agreement more than 45 years ago, the War Disablement Pension has been adjusted in accordance with the CPI. For the first ten years after the agreement the adjustment was biennial. Adjustment in accordance with the CPI soon became a wider norm for Government benefits and pensions. Historian Stephen Uttley states “the system of regular reviews became more generous as the underlying principle of indexation was extended beyond war pension to cover many aspects of the general social security system”.²²¹ The Government introduced annual indexation for war pensions in 1973 and the range of war pension provisions being indexed was broadened to include other allowances.
- 9.77 The only interruption to annual CPI adjustments of Disablement Pensions when the Government exercised its right under the proviso to depart from the agreement because of economic circumstances occurred after the Government’s decision in December 1990 to freeze all pension levels.²²² Rather than increase pension levels from 1 April 1991, the rates remained at the level that had been introduced from 1 April 1990. Adjustment in accordance with the CPI was reintroduced from 1 July 1992,²²³ and has continued with new rates being introduced every 1 April since.

Purchasing power versus changes in the value of wages

- 9.78 We have sought advice from Statistics New Zealand on the different measures that can be used for the indexation of Government payments, and information on the historical wage rates. Information provided by Statistics New Zealand shows that as a proportion of average weekly wages the Disablement Pension has reduced. Statistics New Zealand has been able to provide an indicative measurement of the average wage going back to 1946. In 1946, the rate of the maximum War Disablement Pension was approximately 48 % of the average weekly wage payout. In 2009, the proportion of the average weekly earning of the maximum War Disablement Pension is approximately 21 %.²²⁴

221 Uttley, above n 198, at 53.

222 Ibid.

223 War Pensions (Rates of Pensions and Allowances) Order 1992, sch 1.

224 Information provided by Statistics New Zealand. In April 1946, the average wage based on information collected by the Department of Labour was £6 5s 10d (or \$12.58 in decimal currency). The weekly payment of the maximum disablement pension in 1946 was £3.

- 9.79 However, the purchasing power of the currency is measured by the CPI. A comparison of the relative values of the maximum rate of the War Disablement Pension at different times shows that there has been no significant decline in its value. The current rate of a 100 % War Disablement Pension is \$191.86 per week. It is calculated that the 1917 rate of £2 is equivalent to \$216.11 today.²²⁵ The 1953 rate of £4 is equivalent to \$194.61 today and the 1963 rate of £5 5s is equivalent to \$186.58.²²⁶
- 9.80 The reason for the decline of the pension as a proportion of weekly wages is that from the mid 20th century New Zealand became wealthier and wages significantly increased as a result. The cost of living did not rise in proportion to wages. The fact that the maximum rate of the War Disablement Pension has maintained relativity with the CPI but not with wages shows that the cost of living rose more slowly than wages.
- 9.81 The Government has consistently used indexation to changes in the CPI to retain the relative purchasing power of public payments. The exceptions to this are payments which are intended as income replacement. These are often indexed to a wage measure. For instance, the economic compensation payment under the War Pensions Act, the Veteran's Pension, is indexed to changes in the CPI and the average ordinary time weekly earnings.²²⁷

Suggested adjustment payment

- 9.82 The RNZRSA considers that, although the pension may have maintained relativity with the purchasing power of the currency, the reduction in value in relation to wages has meant that some veterans have been disadvantaged. In addition to proposing that the Disablement Pension is pegged to an average wage index from this point on, it has proposed an adjustment or "solatium" payment for all veterans receiving a Disablement Pension for an injury or illness relating to service prior to 1 April 1974. It suggests the payment should be three times a Disablement Pension recipient's annual Disablement Pension rate, after the rate has been increased under the RNZRSA's proposals to more than twice the current rates. The RNZRSA argues that this payment is justified because veterans who served prior to the introduction of ACC have been "short-changed for years" because of an erosion of the value of the pension relative to wages and the disparity with ACC compensation.²²⁸
- 9.83 As we have discussed above, we do not consider that the Disablement Pension has eroded in relation to the value of the currency and we do not consider that Disablement Pension has had a lesser value than ACC impairment compensation. Consequently, there is no justification for such a solatium payment and we do not recommend it.

225 Reserve Bank of New Zealand *New Zealand Inflation Calculator* < www.rbnz.govt.nz > . Between April 1946 and June 2009, the average weekly wage grew by approximately 7500 % (data obtained from Statistics New Zealand). Over the same period the value of the currency as reflected by the Consumer Price Index increased by 3600 % . This indicates that the change in wage far outstripped the change in the value of the currency.

226 Ibid.

227 War Pensions Act 1954, s 74C.

228 Submission of the Royal New Zealand Returned and Services' Association, above n 188, at 17–18.

9.84 We consider that there may be a group that can be perceived to have been disadvantaged by the history of the war pension legislation. This group does not include all War Disablement Pension recipients, but only those who had incapacity to work sometime during the period between 1974 and when they reached the retirement age due to a service-related impairment that occurred prior to 1974. It is now impossible to tell who these veterans were, how many of them there were and whether they are still alive. These veterans probably received income support through a social security-type payment, such as the Invalid's Benefit. This was the same as for any other person in New Zealand who was impaired prior to 1974 and unable to work. However, from 1 April 1974 all persons, including veterans, who had incapacity for work as a result of an accident received income replacement based on 80 % of wages. The potential disadvantage for this group was not related to payment of the War Disablement Pension but to payment of the Veteran's Pension and its predecessor economic pensions.

Conclusions

9.85 The history of the rates of War Disablement Pensions shows that at no time has the rate of the pension been linked to 50 % of the average wage or any other wage measure. The War Disablement Pension has been considered throughout its history to have a different basis and purpose to income support payments such as the economic pension and the Veteran's Pension (for under 65s). A tie to movements in wages has not been considered appropriate for the rates of the War Disablement Pension, as it is a compensatory pension for the non-economic impacts of service-related injury and recipients are not disqualified from receiving an income through wages or salary in addition to their pension. ACC's non-economic compensation and assistance is also indexed to the movements of the CPI, while ACC weekly compensation is indexed to movements of the national average weekly earnings.²²⁹ In Australia, disability pensions for veterans who served prior to 1 July 2004 have been indexed with reference to both the CPI and male average weekly earnings since 2008. However, the impairment compensation lump sums for veterans serving after this date are indexed to the CPI alone.²³⁰

9.86 At several points in the War Disablement Pensions history, the Government, in consultation with the NZRSA, has examined the present rate of the pension to assess whether it is a fair and reasonable rate. Based on the agreement with the NZRSA, the Government has since 1963 adjusted the rate of the War Disablement Pension in accordance with movements in the CPI. The Government decided that it was not appropriate to link the pension to wage movements. Movements in the CPI reflect the changes in the purchasing power of the currency. Indexing the pension to the change movement in the CPI has ensured that the pension has maintained its relative value. There is no evidence that there has been a general erosion in the purchasing power value of the War Disablement Pension.

229 Accident Compensation Act 2001 ss 115 and 116.

230 Veterans' Entitlements Act 1986 (Cth), s 198; Veterans' Entitlements Amendment (Disability, War Widow and War Widower Pensions) Act 2007 (Cth); Military Rehabilitation and Compensation Act 2004 (Cth), s 404.

- 9.87 Our view is that neither the history of the rate of the pension nor the comparisons with ACC compel a different approach to be taken to the Disablement Pension's rate. Despite this, we do recommend that some meaningful increase to the rates of the Disablement Pension be considered.
- 9.88 The first reason for this is that, in proposing Scheme One, we are recommending a restructuring of the entitlements available to veterans who are already in receipt of assistance under the War Pensions Act. Chapter 12 discusses the independence assistance that would be available to veterans instead of allowances. If there are any savings as a result of this restructuring, these should be used to increase the rate of the Disablement Pension.
- 9.89 Secondly, we recommend that the rate of the Disablement Pension is increased to acknowledge the service and suffering of the Disablement Pensioners under Scheme One. Nearly all of this group are over 65 years and the majority are over 80 years. We suggest that the Government benevolently consider increases to the rates of Disablement Pension in consideration of the advanced age of Scheme One recipients and the reducing numbers of recipients in this group.
- 9.90 The nation owes these veterans a debt of gratitude for their role in ensuring the security of New Zealand. Increasing the rate of the Disablement Pension would be a gesture that shows the nation's appreciation for this important service. It is also clear to us that this issue is one that veterans and veterans' groups feel very strongly about. In recognition of the significance of the Disablement Pension to veterans, we would support an increase to the current rates.
- 9.91 The cost of any increase to the Disablement Pension depends on the size of the increase and the number of claimants. VANZ estimates that based on the current number of claimants an across-the-board increase to the pension of 10 % would cost an additional \$10.9 million per year.
- 9.92 We recommend that the Disablement Pension continues to be indexed annually to changes in the CPI. Given our findings about the nature of the Disablement Pension as a form of non-economic compensation, we do not consider that indexation to the average wage is appropriate. An association with average wage would confuse the basis for the pension and align it more with an income replacement payment, increasing the likelihood that it would need to be taxed under the Government's taxation policy.
- 9.93 The RNZRSA has a different view. It would like the Disablement Pension to be indexed in a way that takes into account changes in the average wage, possibly in the same way that New Zealand Superannuation and Veteran's Pension are indexed to both changes in the CPI and changes in the average wage.

FORMER
PRISONERS OF
WAR

- 9.94 It has been submitted that the new legislation should provide a special payment for former prisoners of war of Germany and Italy during World War Two or their surviving spouses if they are deceased. The argument for this is that these veterans suffered greater harm than other veterans because of being held as a prisoner of war.
- 9.95 In 2001, the Government awarded a \$30,000 ex gratia payment to former prisoners of war and civilian internees of Japan during World War Two, or their surviving spouse if deceased. The basis for this payment was “recognition of the extreme severity and harshness of the conditions of those who were held in captivity by Japan”.²³¹ The extraordinary conditions of detainment by the Japanese were seen as justifying the payment for this group, and distinguishing them from other prisoners of war.
- 9.96 While we recognise that prisoners of war are a class of veterans who are likely to have experienced harm as a result of their service, we do not think that it is appropriate for veterans’ legislation to compensate one group of veterans above other groups on the basis of their experiences during service. Entitlement to compensation under this scheme should not be granted solely on the basis of the nature of service performed or experienced by a veteran. However, the nature of service is a relevant factor to be taken into account when deciding whether impairment has resulted from service. Former prisoners of war can receive the Disablement Pension and other assistance. Relaxed evidential standards, such as the current presumptive list applying to former prisoners of war during World War Two, can be used to facilitate the claims of certain groups. However, special payment for a particular group should not be part of veterans’ legislation. The payment of an ex gratia payment in these circumstances is a political issue for the Government’s consideration.

231 Helen Clark, Prime Minister “Ex gratia payments to ex-POWs and civilian internees of Japan” (press release, 23 April 2001).

Chapter 10

Compensation for loss of income

- INTRODUCTION 10.1 The history of the War Pensions Act 1954 explored in the Issues Paper shows that from the time of World War One, both compensation for impairment and economic support for those in need because of the impacts of service have been a part of the war pension scheme.²³² Along with impairment compensation, we recommend the retention of income support in the new veterans' entitlements scheme. As with the historic equivalents of income support for veterans and with the Accident Compensation Scheme (ACC), income support should be available for those with particular income needs or disadvantage because of their service-related impairment.
- 10.2 Under the War Pensions Act, the income-related entitlement is the Veteran's Pension. This has been available to veterans under 65 and veterans over 65 on quite different bases given the different needs of these two groups. The Issues Paper noted the concerns of veterans' groups with the seemingly inconsistent eligibility criteria for Veteran's Pension depending on whether the recipient was older or younger than 65 years. This was also reflected in the consultation and submissions. We see this issue as arising from the unusual way that two entitlements with very different eligibility criteria are provided under the same broad title – the Veteran's Pension. This approach is not rational. It creates confusion and the perception of inequalities.
- 10.3 We recommend creating separate entitlements for under 65 year old veterans and over 65 year old veterans in order to make their distinct criteria and purposes clear. In doing so, we recommend maintaining the distinction between those under the retirement age and those over the retirement age. This approach accords with the New Zealand Government's longstanding general policy relating to income support. This is not a policy from which we could or should recommend departure.

232 Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at chapter 1.

VETERANS
UNDER 65
YEARS

- 10.4 The income support assistance for veterans under 65 years is a form of economic compensation as a replacement for lost income for those unable to work because of impairment. It would be paid in addition to the Disablement Pension.

Options considered

- 10.5 The options discussed in the Issues Paper were not specifically designed to address the situation of those with service prior to the introduction of ACC who are still of working age but who are unable to work. The options discussed, the ‘enhanced ACC’ and the ‘equivalent of enhanced ACC’, can not be applied directly to these persons because they do not qualify for ACC weekly compensation in respect of their injuries.²³³ These options are more applicable to Scheme Two.
- 10.6 The third option in the Issues Paper, creating a separate income support pension for veterans under 65, works best here. We propose that an income support entitlement that is designed similarly to ACC weekly compensation be introduced to provide compensation for lack of income for those veterans who are unable to work because of service. This should be paid instead of Veteran’s Pension. While some submissions stated a preference for the entitlement for under 65s being the same as for veterans over 65, many considered that the entitlement should be aligned to ACC weekly compensation.

Eligibility

- 10.7 In carrying out the review, we found that those who are unable to work are likely to be those who are most in need of assistance. Veterans who are unable to work and are presently in receipt of the Veteran’s Pension, are likely to be those that are most disadvantaged in comparison with those in the general population who qualify for ACC weekly compensation because they had an accident after 1 April 1974. They are likely to be better off, however, in comparison with other New Zealanders who were injured outside of military service prior to 1 April 1974. These New Zealanders are likely to qualify only for the Invalid’s Benefit, which is paid at a lower rate than Veteran’s Pension.
- 10.8 We consider that a new income support payment, known as Veterans’ Weekly Income Compensation (VWIC) be available only for those who served in qualifying operational service, as is the case with Veterans’ Pension currently. This significant entitlement should only be available to those who have been placed in harm’s way by the Government by being sent to a theatre where there is a significant risk of harm. The qualifying service criteria could be the same as that used for compensation payments.
- 10.9 The key gateway into this entitlement must be that the person is unable to work. This threshold would be similar to that used by ACC. The Accident Compensation Act 2001 provides that the question for ACC to determine is “whether the

233 *Ibid*, at chapter 14.

claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury”.²³⁴ We suggest that similar wording should be adopted.

- 10.10 This is something that many doctors should be experienced in certifying. In order to verify that a person is unable to engage in employment, medical certification should be required. In some cases being unable to work will not be a permanent state, especially if the person is undergoing rehabilitation or treatment for their impairment. Consequently, it is necessary for the legislation to establish regular assessment of the person’s inability to work where this is necessary.
- 10.11 A change that we consider is essential is that the legislation clarifies that only those who are unable to work because of their service-related impairment qualify for the entitlement. The Veteran’s Pension for under 65s currently does not require that the medical condition that causes the inability to work be related to service. This does not appear to accord with the principle of providing assistance to those who have been harmed because of service.
- 10.12 Our research indicated that the “prevented from being able to undertake employment” criterion derived from the criteria for the War Service Pension and War Veterans’ Allowance, the predecessors to the Veteran’s Pension. The War Veterans Allowance was introduced in 1935 to provide income support for veterans who had engaged with the enemy in World War One and were subsequently permanently unfit to work because of physical or mental incapacity.²³⁵ This allowance was intended for a group known as “burnt out soldiers” who for unidentifiable reasons were no longer able to work, and therefore needed income support.²³⁶ The same eligibility criteria introduced with this entitlement exist now in the Veteran’s Pension. With modern medical developments, it appears clear that the “burnt out soldier” phenomenon can be explained through diagnoses such as post traumatic stress disorder and other service-related psychological conditions. Additionally, degenerative orthopaedic conditions, such as lumbar spondylosis, are known to prevent veterans from working. These conditions are now commonly accepted as service-related and veterans receive impairment compensation for them. Consequently, it does not appear necessary for veterans income support to be available to persons who are unable to work where the cause of the inability to work has nothing to do with service.
- 10.13 Paying veterans’ income support to persons who have a mental or physical impairment that is unrelated to service is neither rational nor justifiable. It is difficult to see why these veterans, who have not been injured as a result of service, should be in a different position to other New Zealanders. The submissions comment confirmed this view. The majority of submitters, who were mostly individual veterans or veterans’ organisations, considered that there should be a requirement that the impairment resulting in a veteran being unable to work should be attributable to or aggravated by his or her service.

234 Accident Compensation Act 2001, s 103(2).

235 Stephen Uttley *An Enduring Obligation: A History of War Pensions* (Victoria University of Wellington, 1994) at 29.

236 *Ibid*, at 29.

- 10.14 The Royal New Zealand Returned and Services' Association (RNZRSA) submission questions the need for a link between receiving a certain level of Disablement Pension and qualifying for a Veteran's Pension.²³⁷ We agree that, given the apparent purpose of the Veteran's Pension for over 65s, linking the two does not work for income support for over 65s. However, our view is that service-related impairment and income support for the inability to work are undeniably linked for under 65s. The Government's responsibility for paying income support for veterans over and above what is available to all New Zealanders through the social security system stems solely from the possibility that veterans have suffered injury or illness that prevents them from working as a result of the risks of service.
- 10.15 We recommend that VWIC is payable only where the cause of the inability to work is the service-related impairment. Those who are unable to work for other reasons will qualify for either Invalid's Benefit or ACC weekly compensation.
- 10.16 Veterans under 65 years, who are currently in receipt of the Veteran's Pension, would be eligible to apply for VWIC. Those who are assessed as meeting the qualifying criteria would be able to transfer to the higher payment. Those who choose not to apply for VWIC would remain on Veteran's Pension, with the current rules for that payment continuing to apply. As VWIC is not a social security pension, spouses would not be able to be included in VWIC payments. Veterans whose spouses are included in their Veteran's Pension payments would have to work out whether they are better off receiving VWIC or the couple rate of Veteran's Pension.

Entitlement

Rate

- 10.17 The main problem with the Veteran's Pension for under 65s is that the rate of payment is too low to adequately compensate veterans who are unable to work because of their service-related impairments. A more generous approach would be to reflect the ACC weekly compensation entitlement. Consequently, we recommend that the entitlement be set at 80% of the average wage. The average wage should be used as the benchmark for this entitlement rather than each individual's entitlement because there are a number of veterans who have not worked for many years that would qualify for this entitlement. It would be difficult to verify past income and to adequately take into account changes in wage rates and inflation. Eighty percent of the average wage provides a fair entitlement.
- 10.18 The RNZRSA's submission proposed a very similar solution for under 65s income support.²³⁸ We agree with the RNZRSA that the objections to the Veteran's Pension's abatement regime have arisen, not because abatement exists at all, but because the rate of the income support is low considering the responsibilities of those who are of working age.

²³⁷ Submission of the Royal New Zealand Returned and Services' Association (submission dated 19 December 2008) at 19–20.

²³⁸ *Ibid*, at 22.

10.19 It is acknowledged that this would result in a significant increase from the current single rate of \$342.58 weekly before tax.²³⁹ However, we consider that this increased expenditure is warranted given the greater relative need that many of this group has.

Age cut-off

10.20 Because VWIC is income support to replace employment income, the entitlement should cease when the veteran is no longer of working age. At age 65, all New Zealanders are entitled to the universal retirement income support, New Zealand Superannuation. It is accepted by the Government that from age 65 income support should no longer be related to employment income, but is paid on a universal basis. Consequently, it is appropriate for recipients of this veterans' income replacement payment to cease to receive this entitlement when they turn 65 and be transferred to the Veteran's Pension like other veterans of this age.²⁴⁰

Abatement

10.21 A veteran who has been unable to work because of service-related impairment may be able to begin working again on a part-time basis before having sufficiently recovered for full-time work. Given that the entitlement is in lieu of receiving employment income, it would be unfair to allow a veteran to continue receiving the full income replacement entitlement as well as receiving a significant amount of employment income. This would be giving the veteran a significant economic advantage over other New Zealanders and would be contrary to the purpose of the entitlement. As the RNZRSA acknowledges, State assistance is intended for income replacement, not income enhancement.²⁴¹ Consequently, it is necessary for the entitlement to be reduced proportionally once a veteran's income exceeds a certain amount, but without reducing the total income that the veteran receives from all sources. This process is called abatement. The abatement scheme for the Veteran's Pension for under 65s has been unpopular. Several submitters suggested the abolition of the abatement system. For the reasons mentioned, this is neither possible nor desirable.

239 War Pensions Act 1954, sch 11.

240 Any change to the commencement age of New Zealand Superannuation would need to be reflected in this legislation.

241 Submission of the Royal New Zealand Returned and Services' Association, above n 237, at 20.

- 10.22 There is a question of what abatement scheme should be used. The Veteran's Pension has used the same abatement scheme as that used for the Invalid's Benefit. However, given that the new entitlement would better reflect ACC weekly compensation, adopting ACC's abatement scheme may be a better option. ACC's abatement has in the past not allowed recipients to earn as much income before abatement commences as the Veteran's Pension has. This changed from 1 August 2008 with the introduction of the following provision:²⁴²
- (2) In calculating weekly compensation under this Part, the Corporation must reduce the amount of weekly compensation paid to a claimant so as to ensure that the total of the claimant's weekly compensation and earnings after his or her incapacity commences does not exceed the claimant's weekly earnings as calculated under clauses 33 to 45 or 47.
- 10.23 Clauses 33 to 45 and 47 of Schedule 1 of this Act are the provisions outlining how to calculate earnings. In practice this results in a dollar for dollar decrease in the payment after earnings and the payment combined exceed the amount the claimant earned before the injury.

Portability

- 10.24 Through the consultation and submissions on the review of the War Pension Act, it became clear that an area of considerable concern was the issue of the portability overseas of the Veteran's Pension for under 65s.
- 10.25 A recipient of Veteran's Pension can only continue to receive Veteran's Pension for 26 weeks while they are absent from New Zealand. If they reside overseas, Veteran's Pension will only be payable in accordance with certain rules. These rules exactly mirror New Zealand Superannuation rules. New Zealand Superannuation legislation provides that a recipient:²⁴³
- residing in New Zealand receives the full rate of New Zealand Superannuation;
 - residing in a country with which New Zealand has a social security agreement (such as Australia or the United Kingdom) receives New Zealand Superannuation in accordance with the agreement;
 - residing in a specified Pacific country receives the full rate of New Zealand Superannuation; and
 - residing in one or more other overseas countries receives a proportional rate of New Zealand Superannuation based on their length of residence in New Zealand.²⁴⁴
- 10.26 The portability arrangements appear to create little concern for Veteran's Pension recipients who are over 65 years. The majority of those eligible for the Veteran's Pension who are over 65 years and live overseas are in Australia, the United Kingdom or the Pacific Islands. These persons generally continue to receive the full rate of Veteran's Pension or a payment equivalent to what persons in their

242 Accident Compensation Act 2001, sch 1, cl 51.

243 New Zealand Superannuation and Retirement Income Act 2001, ss 26, 26A and 30–32.

244 This was introduced by the New Zealand Superannuation and Retirement Income Amendment Act 2009 and War Pensions Amendment Act 2009. Prior to this law change, recipients in these circumstances received 50% of the full rate.

position receive in their country of residence.²⁴⁵ Veteran's Pension recipients under 65 receive the pension on the same basis as New Zealand Superannuation if they are in a specified Pacific country or a country with which New Zealand does not have a social security agreement. The issue arises with those who qualify for Veteran's Pension but who move to a country with which New Zealand does have a social security agreement, such as Australia. Social security benefits, of which the Veteran's Pension is considered one, can only be paid in accordance with these agreements. As countries like Australia do not have a veteran-specific equivalent to the Veteran's Pension for under 65s as a social security payment, the agreement does not allow New Zealanders living in Australia to receive the Veteran's Pension for under 65s from the New Zealand Government. They may qualify for their country of residence's equivalent of the Invalid's Benefit but only if they meet eligibility criteria relating work capacity, income and assets, and residence status.

- 10.27 It appears that there could be a number of New Zealanders, particularly in Australia, who fall into this category.
- 10.28 The issue has really stemmed from the close association of the Veteran's Pension with other social security payments, such as New Zealand Superannuation. While this does not cause many problems for those over 65s, it is not an easy fit for those Veteran's Pension recipients under 65 and appears to disadvantage some with more limited portability of the pension.
- 10.29 We consider that it is more appropriate to adopt ACC portability rules when it comes to the income replacement payment for veterans under 65 years. ACC legislation allows ACC entitlements to be paid to a claimant who is residing overseas. However, the following condition applies:²⁴⁶
- If weekly compensation or lump sum compensation is payable outside New Zealand and the claimant's right to receive the compensation is to be assessed, the Corporation is not required to meet—
 - (a) any costs incurred by the claimant overseas; or
 - (b) any costs relating to the return of the claimant to New Zealand for assessment.
- 10.30 Adopting a provision like this for the veterans' income replacement entitlement would allow payment of the entitlement to those overseas for as long as they continue to meet the eligibility criteria. Any costs incurred regarding medical assessment and travel costs that are necessary in order to determine eligibility or assess continuing eligibility for the entitlement will be borne by the veteran and not the Government.
- 10.31 This would remove the barrier to residing overseas for those who are under 65 and unable to work because of their service.

245 Work and Income < www.workandincome.govt.nz > .

246 Accident Compensation Act 2001, s 127(4).

Rehabilitation

- 10.32 As a prerequisite for receiving the veterans' income replacement entitlement, all recipients should be required to have a rehabilitation programme in place. Research has shown that programmes which have returning to work as the optimal outcome have a better success rate for restoring health and participation in society.²⁴⁷ The rehabilitation programme, managed through Veterans' Affairs New Zealand (VANZ) case management and targeted to the veteran's needs and capabilities, should:
- provide treatment and rehabilitation services for the veteran;
 - place obligations on the veteran to participate in the programme; and
 - provide for regular reassessment to determine ability to work.
- 10.33 The rehabilitation programme would have the aim of assisting the recipient back into work where this is possible. Consequently, for many recipients of the veterans' income replacement entitlement, the payment would only be necessary for a temporary period prior to the veteran returning to full-time work.

**VETERANS 65
YEARS AND
OVER**

- 10.34 We suggest that the Veteran's Pension for veterans aged 65 years and over should be retained. There were a number of submissions that reflected the importance of this entitlement to veterans. The majority of submitters considered that veterans should receive a different entitlement at age 65 to other New Zealanders.²⁴⁸ One submitter commented that the entitlement for veterans is intrinsically different to New Zealand Superannuation and should remain so because veterans should be given appropriate recognition for their service to the nation. We see the purpose of the Veteran's Pension primarily as recognition of service. The distinction created by Veteran's Pension between veterans and other superannuitants is valued by veterans. We favour an approach that continues to provide Veteran's Pension as an alternative to New Zealand Superannuation for those that qualify.
- 10.35 The option of all veterans 65 years and over receiving New Zealand Superannuation instead of the Veteran's Pension was considered. This approach had advantages as it would be simpler and less costly from an administrative perspective. However, it was clear the veteran community preferred to retain the Veteran's Pension as a distinct entitlement from New Zealand Superannuation conveying recognition for service.

Veteran's Pension*Eligibility*

- 10.36 The main issue with the eligibility criteria of the current Veteran's Pension relates to the requirement that, in order to receive the Veteran's Pension, a veteran must receive a Disablement Pension of at least 70%. The 70% threshold is seen as unprincipled. The RNZRSA has argued that this criterion

²⁴⁷ See chapter 15.

²⁴⁸ Twenty-seven of 32 submitters on this question considered that veterans should receive a different entitlement to other New Zealanders entitlement at age 65.

implies a component of compensatory payment for impairment as opposed to being an income measure. The RNZRSA argues that there should be no link between impairment compensation and income support payments.²⁴⁹

- 10.37 We agree that given the nature of the Veteran’s Pension entitlement there is little purpose in requiring a degree of impairment for a veteran to be eligible. We have looked at what the essential purpose of the Veteran’s Pension is and the role it should play in a veterans’ entitlements system. The value of the Veteran’s Pension entitlement seems to be in providing a mark of recognition for veterans because they have served. This view is supported by the understanding of the Veteran’s Pension that is reflected in comments by the RNZRSA. The RNZRSA argues that the 70 % threshold should be removed because it is arbitrary and does not fairly recognise the service given by veterans.²⁵⁰
- 10.38 In order to better represent this principle of recognition, it is recommended that the Veteran’s Pension be available to any veteran who meets a service qualification and is over 65 years. This is a way of acknowledging the contribution of these veterans to the nation.²⁵¹ Additionally, it removes the 70 % threshold as a target for veterans, something that the RNZRSA recognised as having the unfortunate effect of clogging up the system with speculative claims.²⁵² Our view is that pension thresholds that create perverse incentives should be removed as they motivate a veteran to be “sicker” in order to receive a higher rate of pension and, thereby, qualify for the Veteran’s Pension.
- 10.39 This altered eligibility criteria would vastly expand the number of persons who will receive the Veteran’s Pension. This has an impact on the viability of any potential additional corollary entitlements that could be attached to the Veteran’s Pension.
- 10.40 It is suggested that the service criteria for the Veteran’s Pension be ‘qualifying operational service’. This would be defined in the same way as qualifying operational service for the purpose of entitlement for a Disablement Pension in Scheme Two. This approach would roughly accord with the current service criteria, service in a “war or emergency”, for Veteran’s Pension entitlement under the War Pensions Act.
- 10.41 Currently the over 65 year old spouse or partner of a veteran in receipt of Veteran’s Pension or who was or could have been in receipt of Veteran’s Pension prior to death is also entitled to choose to be on Veteran’s Pension. There does not appear to be a strong reason for this. It certainly makes little sense when the spouse or partner would otherwise be able to receive New Zealand Superannuation anyway. With the move to align the Veteran’s Pension more clearly with the principle of recognition of service in a theatre of qualifying service there appears to be less reason for granting this entitlement to spouses and partners also. Ideally, the Veteran’s Pension should only recognise those who have qualifying operational service.

249 Submission of the Royal New Zealand Returned and Services’ Association, above n 237, at 22.

250 Ibid, at 20.

251 Law Commission, above n 232, at 188

252 Submission of the Royal New Zealand Returned and Services’ Association, above n 237, at 20.

- 10.42 However, there is currently a large number of spouses and partners and surviving spouses and partners of veterans who are receiving Veteran's Pension. It is not the intention that this entitlement be removed from these spouses and partners. Consequently, we suggest that spouses and partners currently in receipt of Veteran's Pension remain on the Veteran's Pension under the new legislation. However, the new legislation should not allow new spouses and partners to be granted Veteran's Pension.

Nature of pension

- 10.43 The Veteran's Pension under the proposed new legislation would continue to be paid in lieu of New Zealand Superannuation as the income support available from the Government for New Zealanders 65 years and over. As with Part 6 of the War Pensions Act, it makes sense for the provisions relating to this entitlement to mirror those relating to New Zealand Superannuation in the New Zealand Superannuation and Retirement Income Act 2001.

Portability

- 10.44 There has been some discussion regarding the rules of portability of the Veteran's Pension and whether the New Zealand Superannuation rules on this should not be applied to Veteran's Pension. Many submitters felt that New Zealand veterans living overseas should receive the same entitlements as New Zealand veterans living in New Zealand. However, as discussed, the main problems in relation to this were more likely to affect under 65 year old recipients of the Veteran's Pension rather than over 65 year olds. The New Zealand Superannuation rules on portability allow payment overseas at a full rate to eligible New Zealanders who are now living in a country with which New Zealand has a social security portability agreement or that is one of 24 specified Pacific countries.
- 10.45 It appears that most over 65 year old Veteran's Pension recipients who are living overseas are not disadvantaged by the portability rules. A recent law change now allows a proportional rate of pension to be paid to those who are living overseas in more than one country or travelling to more than one country based on the length of their residence in New Zealand.²⁵³ Another proposed law change would allow New Zealanders who move to specific Pacific countries to be able to apply for New Zealand Superannuation and Veteran's Pension from these Pacific countries rather than having to be resident in New Zealand at the time of application. These amendments are likely to iron out most of the dissatisfaction regarding portability for over 65 year old Veteran's Pension.

253 New Zealand Superannuation and Retirement Income Amendment Act 2009; War Pensions Amendment Act 2009.

10.46 Because Veteran's Pension is an equivalent alternative to New Zealand Superannuation, it would not be possible for persons who do not meet New Zealand Superannuation residency criteria to receive Veteran's Pension. It is not the role of the veterans' system to alter the Government's mandate to provide retirement income by expanding the group over which the Government has responsibility. There are consequences in terms of the retirement income available from the New Zealand Government for any New Zealander who chooses to reside in another country. Veteran status cannot change this.

Additional benefits

10.47 Veteran's Pension currently provides three additional entitlements above New Zealand Superannuation – a non-income tested Community Services Card, no reduction in the rate of the Veteran's Pension after a recipient has been in long-term hospital care for three months and a lump sum payment on the death of the veteran or his or her spouse or partner. We consider that these benefits should continue as advantages of the Veteran's Pension over New Zealand Superannuation. The increased number of people eligible for the Veteran's Pension would increase the cost of these benefits, particularly the lump sum payment on death. However, it is important to retain these as a measure of distinction and advantage between Veteran's Pension and New Zealand Superannuation. The recognition of all veterans with qualifying service is worth this expenditure.

10.48 The lump sum payment on death would be of a similar value to the lump sum payment on death available to Veteran's Pension under the current legislation. The payment should be made to the veteran's surviving spouse, if there is one, when the veteran dies, or to the veteran when his or her surviving spouse dies. All Veteran's Pension recipients will also continue to be eligible for the Veterans' SuperGold Card.²⁵⁴

10.49 It is estimated that the cost of widening the eligibility to the Veteran's Pension, for both Scheme One and Scheme Two, which arises from the widened eligibility for the lump sum payment on death would be up to an additional \$21.51 million per year.

Rate of payment

10.50 One of the RNZRSA's proposals identified in the Issues Paper was for Veteran's Pension to be paid at a higher rate than New Zealand Superannuation. Its suggestion was that Veteran's Pension should be paid at 10% higher than New Zealand Superannuation. This option was the subject of much discussion and submissions. Unsurprisingly, the majority of submissions favoured the Veteran's Pension being paid at a higher rate than superannuation. Suggestions for the increased margin ranged from an additional 10% on top of New Zealand Superannuation to a payment of more than double the current rate of New Zealand Superannuation.

254 The SuperGold Card allows its holders access to a wide range of business discounts and facilitates easy access to government and local council services, entitlements and concessions < www.supergold.govt.nz > . It also replaces both the Community Services Card and NZ Super Card currently issued to New Zealand Superannuation and Veteran's Pension recipients. Discounts include free off-peak travel on regional council public transport.

10.51 We consider that it is not feasible to set the rate of Veteran's Pension at a higher rate than New Zealand Superannuation. The enlarged eligibility criteria for the Veteran's Pension mean that there are up to 40,000 people that would be eligible for the Veteran's Pension. Consequently, any increase to the rate of Veteran's Pension above New Zealand Superannuation would have enormous cost implications. In its new form, the rationale for the Veteran's Pension would be to recognise the service of any veteran with qualifying service. It is not compensation for the impact of service because there is no impairment criterion. Paying the Veteran's Pension at even 10% higher than New Zealand Superannuation would be a large new cost of the revised veterans' scheme. Because of the broad eligibility criteria for the Veteran's Pension and the universal, non-income tested nature of income support for over 65 year olds in New Zealand, this expenditure would not be targeted at those who are in need because of greater impairment or financial limitation. We consider that a better use of resources is to target any additional funding available to serve those with greater impairment and need for treatment or services. Additionally, the Ministry of Social Development identified a risk that if the rate of Veteran's Pension was increased to a higher rate, the Government would come under significant pressure to equal this rate for all other superannuitants. We, therefore, recommend that the rate of Veteran's Pension remain equivalent to the rate of New Zealand Superannuation.

Administration of the Veteran's Pension

10.52 Currently, while the majority of veterans' entitlements are administered by VANZ, the Ministry of Social Development administers the Veteran's Pension and the Veterans' SuperGold Card. We recommend that this continue for the Veteran's Pension for over 65s under Scheme One but that VWIC should be administered by VANZ. The reason for this is that we are proposing that the Veteran's Pension maintain a close relationship with New Zealand Superannuation, while VWIC would be quite different. Like New Zealand Superannuation, the Veteran's Pension is retirement income. It is paid at the same rate as New Zealand Superannuation. It is subject to a range of entitlement criteria and administrative provisions that are identical to New Zealand Superannuation. The same payment system is used for paying both New Zealand Superannuation and the Veteran's Pension. Transferring the Veteran's Pension to the administration of VANZ would require the development of a new payment system and the sharing of a large amount of information between agencies. We do not see that such a costly and time-consuming exercise is necessary.

10.53 We also consider that veterans would be advantaged by continuing to have the Veteran's Pension administered by the Ministry of Social Development. The Ministry of Social Development is the primary Government agency that provides social support to senior citizens in New Zealand. As the number of New Zealanders 65 years and over continues to grow both in total and as a proportion of New Zealand's population, the Ministry of Social Development will have an increasing responsibility to provide for the needs of this group. The Ministry of Social Development has advised that it plans to put in place measures that assist seniors in engaging with them. It hopes to institute a "one-stop-shop" website for all of the services and entitlements available to seniors.

The Ministry of Social Development has recognised that some clients require extra support because of their high needs. It plans to offer face-to-face case management and multi-agency assistance to these clients, and, in doing so, to provide “wrap-around” support that encompasses a number of different needs.

- 10.54 The Ministry of Social Development considers that the Veteran’s Pension fits well within its programme for seniors. Veterans over 65 years are a subset of New Zealand seniors. Veterans can be greatly assisted by the developments for seniors, which the Ministry of Social Development is working towards. The Ministry of Social Development has already introduced a “0800” telephone number specifically for veterans, which is allocated only to those staff who have been trained in administering the Veteran’s Pension and other associated allowances. It is currently investigating further ways of making the interaction of veterans with the Ministry straightforward and needs-sensitive.²⁵⁵
- 10.55 We were impressed by the suggestion from the Ministry of Social Development that they could work with VANZ to ensure that seniors who are veterans are identified and provided with information on how to access their veteran-specific entitlements. It suggested that veterans could have the option of being given special status as high-needs clients. This would mean that they could receive face-to-face case management, if this is introduced.

TAXATION AND INDEXATION

- 10.56 Unlike the other payments under the proposed legislation, the Veterans’ Pension and VWIC are income support payments or payments for economic loss. Consequently, under the Government’s taxation policy, they are the type of payments that must be taxed. This would not be a change to the current situation.
- 10.57 All payments, other than those that are for an income support or economic compensation purpose, are generally subject to annual indexation to increases in the Consumer Price Index. This is the case currently for payments, such as the Disablement Pension, Surviving Spouse Pension, Children’s Pension and allowances under the War Pensions Act. We recommend that this form of indexation continue for all payments other than the Veteran’s Pension and VWIC.
- 10.58 In order that the Veteran’s Pension retains relativity with the value of the currency and levels of wages, we recommend that the new legislation retain the current method of indexing the Veteran’s Pension under section 74C of the War Pensions Act. This is the same method that applies to indexation used for New Zealand Superannuation. It requires that the couple rate of the pension is not less than 65 % or more than 72.5 % of the average ordinary time weekly earnings (males and females combined) as determined by the last Quarterly Employment Survey of wages. We also recommend that the rate of the VWIC be adjusted annually so that it retains the value of 80 % of the average ordinary time weekly earnings (males and females combined) as determined by the last Quarterly Employment Survey of wages.

²⁵⁵ Ministry of Social Development “Improving Services for Veterans” (Wellington, 16 October 2008).

Chapter 11

Health care

- INTRODUCTION 11.1 Health care of veterans will form a significant part of the assistance available to veterans who suffer an impairment as a result of service. As was discussed in the Issues Paper, the health care benefits available to veterans under a veterans' entitlements system cannot be viewed in isolation from the wider New Zealand health care system. As New Zealanders, veterans will continue to receive the health and disability services that are available to the general population. This includes hospital care, subsidised General Practitioner (GP) visits and pharmaceutical prescriptions, elective services, including surgery in the public hospital system, and disability services. The health care assistance provided to veterans would be in addition to these services. Where medical treatment should be funded through the veterans' entitlements system, this would cover the costs that veterans otherwise would have to cover themselves.
- 11.2 Comment in submissions indicates that health care is universally valued by veterans as extremely important.²⁵⁶ Although the majority of veterans are already reasonably satisfied with the health care assistance they receive under the current scheme, we consider that some improvements can be made.

TREATMENT FOR ACCEPTED CONDITIONS

- 11.3 Scheme One would continue to provide treatment for veterans' accepted disabilities because of the Government's obligation to veterans who have been harmed as a result of service. Once a condition has been accepted as "covered", the veterans' entitlements system should pay for the costs of the treatment for this condition so that the veteran does not have to meet the cost.
- 11.4 We suggest that at the time that a medical condition is accepted for Disablement Pension, Veterans' Affairs New Zealand (VANZ) makes a decision on the treatment that is approved for that condition. This decision should be made on the basis of medical advice. VANZ could approve GP visits, prescription pharmaceuticals, specialist or long-term treatment, surgery and possibly other forms of treatment. The treatment decision should specify the details of the length or course of treatment that is approved. The exact treatment that is approved for each veteran should be targeted to the veteran's medical needs and circumstances. We suggest that VANZ records this information on a database, which would contain all of the information on treatment approvals

²⁵⁶ All 38 submitters on this issue agreed that the provision of health care is very important.

for every veteran with accepted medical conditions. VANZ should also advise the veteran and the veteran's GP of the treatment that has been approved so that they have certainty about what treatment costs VANZ will cover.

- 11.5 The provision of health care benefits can be improved further by providing veterans with a treatment card that allows health care providers to access information on exactly what medical treatment VANZ has approved for each veteran. We recommend that health care providers be able to contact VANZ either by telephone or online for clarification on the treatment that has been approved for a veteran. The treatment card would provide a reference number or code that would allow easy access to this information for health care providers. Consideration should be given to having a microchipped card that can be read by doctors. Any information contained on a treatment card would need to be protected in accordance with the Privacy Act 1993.
- 11.6 VANZ should be able to consider paying for treatment costs additional to those that are approved at the time of the acceptance of the condition but only after special application by the veteran or his or her GP. We suggest that the legislation set out criteria against which all treatment should be considered. The legislation should be specific in setting out the type of treatment for which VANZ is liable to pay. ACC legislation provides useful direction on the factors that should guide a decision on approving treatment. The guidance in the legislation regarding the type of treatment that is for this purpose could include that:²⁵⁷
- the treatment is necessary and appropriate, and of the quality required, for this purpose;
 - the treatment will be performed only on the number of occasions necessary for this purpose;
 - the treatment will be given at a time and place appropriate for this purpose;
 - the treatment is of a type normally provided by a treatment provider;
 - the treatment is provided by a treatment provider of a type who is qualified to provide that treatment and who normally provides that treatment; and
 - the treatment is provided after VANZ has agreed to it (unless special conditions apply regarding urgent treatment).
- 11.7 In making this decision VANZ should take into account:²⁵⁸
- (a) the nature and severity of the injury;
 - (b) the generally accepted means of treatment for such an injury in New Zealand;
 - (c) the other options available in New Zealand for the treatment of such an injury; and
 - (d) the cost in New Zealand of the generally accepted means of treatment and of the other options, compared with the benefit that the claimant is likely to receive from the treatment.

257 Based on Accident Compensation Act 2001, sch 1, cl 2.

258 Ibid.

- 11.8 A supplementary benefit to the provision of treatment for accepted disabilities should be the travel costs required to receive treatment where the veteran is required to travel away from home. We suggest that ACC regulations on this are used as a model for the rules relating to when and to what extent travel costs are paid.²⁵⁹
- 11.9 VANZ should establish regulations and policy that set out what health care assistance is covered by this entitlement. These regulations should define “treatment” and the exact bounds of what is covered by each type of assistance. They should set out cost limits for what will be paid. They could borrow from Canada’s Veterans Health Care Regulations and Veterans Affairs Canada policy. This details the assistance provided to a veteran who is eligible, including as follows:²⁶⁰
- aids to daily living;
 - hearing services;
 - dental services;
 - medical supplies;
 - nursing services;
 - prescription drugs;
 - prosthetics and orthotics;
 - related health services, such as psychology, massage, occupational therapy;
 - special equipment; and
 - vision care.
- 11.10 We recommend ACC Regulations could provide guidance on treatment cost limits to place in these regulations.

HEALTH CARE BENEFITS FOR OVER 80S

- 11.11 We recommend that wider health treatment entitlements should be provided to veterans who are 80 years of age and over. Under Scheme One it is proposed that veterans would not be able to apply for new Disablement Pension conditions after they reach 80 years.²⁶¹ As a replacement, we suggest that veterans 80 years and older have access to broad health care assistance. Veterans, along with other New Zealanders, are very likely to develop many medical conditions after they reach 80 years. Often the motivation for veterans seeking a Disablement Pension is to obtain coverage of health care costs from VANZ.
- 11.12 We propose that a health care benefits package be introduced for all veterans over 80 years with qualifying operational service who have at least one accepted disability. This would provide a number of free health care benefits for medical conditions that the veteran is suffering, regardless of whether the conditions are related to service, where this care is not provided in the public health system. The programme would target health care costs that are common to elderly persons. It would add to the existing funding and subsidies available from the Government for persons in this demographic.

259 Injury Prevention, Rehabilitation, and Compensation (Liability to Pay or Contribute to Cost of Treatment) Regulations 2003.

260 Briefing from Veterans Affairs Canada (Charlottetown, 24 June 2009).

261 See chapter 9.

- 11.13 This entitlement would provide recognition and real assistance to any veteran who has received any service-related impairment. The initiative would remove the need for continued investigations into the relationship of service to new impairments that arise after a veteran reaches the age of 80 years, from which age most people have deteriorating health, reducing administrative and decision-making costs. Offering a broad health care entitlement was popular among submitters.²⁶² We have considered whether such assistance could be offered to a wider group than just over 80 year old veterans. However, this would prove prohibitively expensive. This assistance could only be affordable in combination with the restriction on applications for pensions after the age of 80 years.
- 11.14 The cost of this assistance is dependent on the extent of the medical procedures covered. A comprehensive health care assistance package, including the full range of private hospital surgeries, is estimated to be an additional cost of between \$40 and \$70 million per year on top of the existing estimated cost of \$21.3 million in the 2009/10 year. Assistance that spends \$3,500 per veteran each year on average would result in an estimated increase of \$30 million.²⁶³

Details

- 11.15 We have taken advice about the type of medical assistance that is likely to be the most helpful to veterans once they reach 80 and which would be a manageable expense for the Government.
- 11.16 As with the health care benefits for accepted disabilities, the details of what is provided should be set out in regulations.
- 11.17 We propose that this package would include automatic funding of:
- (a) GP visits (the co-payment amount that the veteran would otherwise have to pay);
 - (b) pharmaceuticals that are subsidised through Pharmac (the co-payment costs for pharmaceuticals that the veterans would otherwise have to pay); and
 - (c) specialist consultations with a registered medical practitioner.
- 11.18 In addition, while treatment should be sought first through the public health system, private hospital treatment should be funded for elective services if they cannot be obtained through the veteran's local District Health Board (DHB) within a 'reasonable time'. This assistance should apply to some surgical procedures. We recommend that the following types of surgery are considered for inclusion in this entitlement:
- cataract removal;
 - skin cancer removal;
 - joint replacements;
 - prostate surgery; and
 - cardiac interventions.

The new regulations should set out exactly which types of surgeries are covered.

262 Twenty-nine of 43 submitters who responded to this question considered that veterans should be provided with fully funded treatment for all medical conditions.

263 Estimate provided by Veterans' Affairs New Zealand (April 2010).

- 11.19 We have been advised that these elective services are the most common for people in this age group and that most are generally cost effective procedures for the assistance they give to the patient. Other surgeries that could be common to this group are likely to be carried out urgently, such as cancer surgeries, and would not be considered elective services. We expect that there are some cardiac interventions which the Government may want to exclude from this assistance because of their expense if the assistance proves otherwise unaffordable.
- 11.20 We recommend that the new Act require the regulations to set the time frames that constitute a reasonable time for a veteran to wait to receive surgery through the public system before private surgery is funded for each type of surgery. We think that six months could be an appropriate time frame, but this is likely to differ depending on the procedure. An analysis of current District Health Board waiting times for each of the surgical procedures would assist with determining the appropriate timeframe for each.
- 11.21 Our rough calculation of the cost of the provision of the above surgeries, using the numbers of these types of surgeries performed on persons in the 80 years and over age group by Capital and Coast District Health Board in 2009 as a base, indicates that the provision of private surgery would be an additional cost of \$14 to \$20 million to VANZ. If cardiac surgeries were not included, the additional cost would be around \$6 to \$9 million.
- 11.22 We recommend that the Government should look at funding the full cost of these surgeries through Vote Veterans' Affairs rather than Vote Health for veterans who qualify for this assistance. This would provide VANZ with the full funding subsidy available from the Government so that private surgery can be obtained if necessary. This process would be similar to the way that surgery under the Accident Compensation scheme is funded, but on a smaller scale. It would require some diversion of budget from the Ministry of Health to VANZ.
- 11.23 This package of assistance should also allow the funding through the private system of a veteran's first specialist assessment for surgery in relation to the surgical procedures listed above. Often one of the main points of delay in getting surgery in the public health system is the delay in having a first assessment by a surgeon. Getting this assessment done privately for veterans that require these surgeries gives them a much better chance of being given surgery promptly in the public system.
- 11.24 We suggest that the treatment cards provided to these veterans indicate that they qualify for this assistance, in a similar way to how the treatment cards provide the information on treatment for accepted conditions.
- 11.25 We think that it will be necessary in the future to review the age at which veterans qualify for this assistance. As life expectancy increases the proportion of veterans living into their 80s and 90s and beyond could make this assistance no longer economically viable.

- 11.26 The background to the residential care facilities that specialise in providing residential care to veterans was discussed in the Issues Paper.²⁶⁴ We have considered whether the veterans' homes and hospitals should have a role in the new scheme.
- 11.27 We received a number of submissions on this issue. Views about the veterans' homes were mixed. Several submitters considered that the veterans' homes made a valuable contribution to the health care options available to veterans and that they could continue to do so in the future. A number of others questioned the ongoing significance of the veterans' homes as the numbers of elderly veterans diminish. We received submissions from each of the three veterans' homes²⁶⁵ arguing for a statutory role for the homes and hospitals to provide residential care for veterans and to coordinate the delivery of health and rehabilitation services to younger veterans.
- 11.28 We recognise that the three homes have a valuable role in providing a residential care option for veterans with significant health care needs in their regions. However, we do not propose to make them a formal part of the new veterans' scheme. The homes are private organisations. VANZ may wish to contract with the homes for the provision of services. This would be a matter for VANZ to determine rather than a matter for the statutory scheme.

264 Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 229.

265 Ranfurly Veterans Home and Hospital in Auckland, Rannardale Hospital and Home in Christchurch and Montecillo Veterans Home and Hospital in Dunedin.

Chapter 12

Independence assistance

- INTRODUCTION 12.1 We propose the introduction of an innovative approach to helping disabled veterans with their greatest care needs. Veterans with disabilities, particularly elderly veterans covered by Scheme One, often need practical assistance with daily living. We propose introducing a programme of assistance with the purpose of helping veterans to maintain their independence and ability to remain in their own homes for as long as possible.²⁶⁶ This assistance should be called the Veterans' Independence Programme (VIP).
- 12.2 The current legislation does not provide this type of assistance very well. Different entitlements have been stretched to cover this assistance, such as treatment for accepted disabilities, aids and appliances, attendant allowance and Veterans' Affairs New Zealand (VANZ) discretionary funding. We consider this to be unsatisfactory. Some of the current payments may not actually be a legal use of the attendant allowance or provision of treatment or an aid or appliance. VIP would provide assistance in a way that is much more fair, transparent and targeted to address needs than is the case now. Some of the current assistance is available only where a veteran has a Disablement Pension of at least 100%. For many of these veterans, the real cause of their need for Government assistance is the frailty that comes from aging. Independence assistance that is provided only once a person obtains a certain level of Disablement Pension simply drives more pension applications, even where these are unlikely to be accepted. The VIP assistance we propose would act as a corollary to the removal of the ability to make Disablement Pension claims after the age of 80 years. Elderly veterans who receive a Disablement Pension could receive VIP without their needs having to relate to an accepted disability.

266 In accordance with the Government's Positive Ageing Strategy < www.osc.govt.nz > .

Eligibility

- 12.3 The VIP would be specifically directed to help veterans who have a significant health need to maintain their independence. The assistance would be provided on the basis of an assessment of a veteran's needs.
- 12.4 Veterans would qualify for VIP on one of two bases. The first group who qualify would be any recipient of a Disablement Pension. This group would qualify for independence assistance that is associated with the accepted disability or disabilities. The second group are veterans with qualifying operational service who are over 80 years old and in receipt of a Disablement Pension. This group would receive assistance based on needs arising from any medical condition.

Details of assistance

- 12.5 All veterans qualifying for VIP will have a case manager from VANZ. The case manager would arrange for a comprehensive needs assessment to be undertaken. Based on the needs assessment and the veteran's eligibility, VANZ would determine the VIP services to which the veteran is eligible. VIP assistance would augment existing assistance from the District Health Boards and Ministry of Social Development.²⁶⁷ Consequently, the case manager will communicate with other Government agencies, external service providers and the veteran's GP to determine which services the veteran may be able to obtain funding for from other sources. Where possible, the case manager will coordinate the provision of services.
- 12.6 We recommend that the extent of the assistance provided under VIP is set out in Regulations. This programme would be similar to ACC's social rehabilitation,²⁶⁸ and Canada's Veterans Independence Program.²⁶⁹ In these schemes, legislation sets out cost and frequency limits and definitions of the types of assistance provided. We recommend that these be used as a model.
- 12.7 We envisage that our VIP would include:
- (a) section maintenance – the activities regularly required to maintain the section immediately surrounding the veteran's primary residence;
 - (b) home help – routine domestic tasks required to support the veteran in remaining at their primary residence;
 - (c) personal care – assistance with the tasks of daily living;
 - (d) modifications to the home – adaptations to the veteran's primary residence to assist the veteran to live as independently as possible; and
 - (e) transport for independence – assisted transport for social purposes those for whom social isolation is harmful to the health.

267 This is discussed in Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 66 and 230–2.

268 Accident Compensation Act 2001, s 81 and sch 1, cls 12–23.

269 Veterans Health Care Regulations SOR C 1990 c 594.

- 12.8 We recommend that all of these terms are carefully defined with sufficient specificity in regulations.
- 12.9 By being established as a programme of assistance with clear criteria and funding levels, VIP would overcome some of the current problems with the use of VANZ discretionary funding and the attendant allowance. VIP would be fairly applied to all veterans based on eligibility criteria and needs assessment. Veterans, VANZ and service providers will have certainty in knowing what the Government would be responsible for.

Veterans' in residential care

- 12.10 VANZ currently allows the attendant allowance to be paid to residential care providers in some cases. The attendant allowance is provided as a subsidy for veterans who require additional residential care services, on top of the Ministry of Social Development Residential Care Subsidy. This assistance should continue to be available to veterans in residential care due to service-related impairment.

Special assistance for those not on a Disablement Pension

- 12.11 We understand that VANZ case management is currently available for any war or emergency service veteran, regardless of whether they have service-related disability. We recommend that veterans with qualifying operational service continue to receive assistance under the new legislation. A special category of independence assistance should be provided for veterans who are not in receipt of a Disablement Pension, but who have qualifying operational service. These veterans would be eligible to have a case manager and to receive some VIP services on a discretionary basis, especially once they are over 80 years.

ADDRESSING THE ADDITIONAL ALLOWANCES

- 12.12 The Issues Paper discussed the additional allowances available under the War Pensions Act 1954. It noted that this was an area of concern with the current scheme because the allowances are not effectively delivering extra assistance to those most in need of it. The allowances require intensive administration and in many cases deliver a fairly minimal benefit to a broad range of recipients who meet the eligibility criteria, regardless of their need for assistance with clothing, travel and attendant care.
- 12.13 During the consultation meetings at RSAs throughout New Zealand there was general agreement that there should not be such a bureaucratic, complicated system. Many participants appeared open to accepting different solutions to the needs currently addressed by allowances.
- 12.14 We are firmly of the view that the allowances should not continue in their current form. The allowances are a cause of inefficiency and delay in the system. The allowances are not effectively delivering assistance to those that need it. Rather they are simply providing an increased pension payment for those who manage to fall within the qualifying criteria.
- 12.15 We considered the option of cashing up allowances and using the additional money to increase Disablement Pensions. This would remove the need for the administrative complexity relating to the granting and continued payment of the allowances. As most of the allowances are payable to those with high rates

of War Disablement Pension, the extra money available from the cashing up of allowances could be targeted at those with higher levels of Disablement Pension. However, this would be making the additional care and welfare needs that seriously impaired veterans have the veterans' own responsibility. For some of the seriously disabled veterans, especially those who are elderly, this may be too difficult. It also relied upon the Disablement Pension as the gateway to assistance. We have discussed how this leads to perverse incentives in the system. We also want to shift the focus of Scheme One away from the Disablement Pension as the central way to assist elderly veterans.

- 12.16 Consequently, we believe that VIP is the best option for addressing the needs currently falling within the ambit of the attendant allowance, travel allowance, and motor vehicle loans, as well as VANZ discretionary funding. It means that the Government would be fulfilling its duty of care towards those who are most in need because of the impacts of their service and would be providing generous assistance to senior veterans on the basis of frailty.
- 12.17 The Issues Paper asked submitters to provide opinions on each of the allowances currently paid under the War Pensions Act. Sixty-eight percent of submitters considered that the assistance currently provided through the attendant allowance could be provided just as well or better on a rehabilitation or needs basis. While more than 90 % of submitters thought that it was important to provide assistance to veterans with special clothing needs, 83 % of these considered that the assistance could be provided to individuals on the basis of need. Submitters were almost unanimous in thinking that assistance with motor vehicles can be provided effectively on an individual basis to those with a need for a modified vehicle.²⁷⁰

Travel assistance

- 12.18 Our Issues Paper discussed problems associated with travel concessions under the War Pensions Regulations 1956.²⁷¹ Many strong and varied views were expressed in submissions regarding the travel concessions. Eighty-one percent of submitters felt that the Government did have a responsibility to provide free or discounted travel to disabled veterans, but some of these thought that this benefit should apply only to the seriously disabled. Sixty percent of submitters wanted the travel concession to be retained in its current form or to be retained and have its scope extended. Some submitters commented that the travel concession unevenly benefits those who live in urban areas, and does not provide as great a benefit to those in isolated rural areas. Some submitters noted that the travel concession was from a completely different time in history when Government-run train and service cars were the most common form of transport, but that this situation does not exist anymore. Some considered that the introduction of the SuperGold card free off peak travel is an adequate replacement for the concession. The fact that the travel concession is open to abuse from some veterans was also noted. It was clear that the travel concession was providing a significant benefit to many of the submitters and they were reluctant for this to be changed in any way that would result in a reduced benefit to them.

270 Thirty of 31 submitters expressed this view.

271 Law Commission, above n 267, at 199–200.

- 12.19 The travel concessions were introduced by Cabinet decision in 1922. The decision to provide rail passes was an extension of the policy during and immediately following World War One to provide serving personnel with free rail passes to return home and for 28 days following discharge. The War Pensions Regulations 1945 legislated for the travel concession for the first time.²⁷² The Regulations did not materially alter the travel concession policy that had existed prior to this date. In 1976, the Regulations were amended to allow veterans with travel concessions to receive warrants for fares for travel on privately-owned transport services on routes where New Zealand Railways rail or road services had previously been withdrawn.²⁷³ This was in response to increasing privatisation of transport services. When the New Zealand Government Railways rail and bus services were privatised, reimbursement for the cost of the fares were provided, rather than a travel warrant or pass.
- 12.20 We found a number of problems with the way that the travel concession was operating at the time of our review. The use of the travel concession did not reflect the wording of the War Pensions Regulations 1956. The policies allowing the reimbursement of travel in a private vehicle and the use of regional boundaries to determine whether payment under the travel concession can be made were legally questionable and problematic. Some veterans received travel concession payments that exceeded the actual cost of the travel in a private vehicle. In 2008, 27 veterans received more than \$5,000 in travel concession payments for the year, and six of these received more than \$10,000 and one person received \$19,010.²⁷⁴ The use of the travel concession had departed significantly from the original intent of the assistance. The assistance itself had not been adapted to meet the changing circumstances and technology associated with transport in New Zealand and accessibility for people with disabilities. The administration necessary for the concession meant that it was resource-intensive and slow. It was also open to abuse from individuals who are untruthful about their travel claims.
- 12.21 Since publication of the Issues Paper, the travel concession has been the subject of considerable attention. On 15 December 2009, the Government announced its intention to amend the War Pensions Regulations 1956 in order to make the travel concession system fairer to veterans and legally compliant.²⁷⁵ The amended regulations will allow the travel concession to be claimed for:
- travel in a private vehicle for journeys over a distance of 80 kilometres each way, or a 160 kilometre round trip, paid at 22.5 cents per kilometre;
 - travel on public transport that is not covered by the SuperGold Card, for journeys over a distance of 80 kilometres each way, or a 160 kilometre round trip, paid at the cost of the fare; and
 - travel by air for distances over 80 kilometres, a 160 kilometre round trip, paid at 22.5 cents per km or the actual airfare, whichever is the lesser amount.

272 War Pensions Regulations 1945, sch 1, cl 9.

273 War Pensions Regulations 1956, Amendment No 17, reg 3.

274 Figures provided by Veterans' Affairs New Zealand.

275 Hon Judith Collins, Minister of Veterans' Affairs "New travel regulations fairer for veterans" (press release, 15 December 2009).

- 12.22 This amendment should be an improvement upon the previous regulations. It should mean that the assistance is available more fairly and evenly. It recognises modern transportation practices and existing Government assistance. We recommend that this framework for the travel concession be incorporated into the new legislation. The legislation should ensure that veterans must provide sufficient proof of their travel so that the assistance cannot be fraudulently exploited and that the administration of the concession is not too burdensome.

Decoration allowance

- 12.23 Difficulties with the decoration allowance were noted in the Issues Paper. To be awarded a decoration allowance a veteran must have a War Disablement Pension. There seems to be no principled reason for linking the gallantry acknowledged by a decoration with disablement. Additionally, the modern New Zealand gallantry awards introduced in 1999 have not been included in the list of awards that qualify a recipient for the allowance.
- 12.24 Submission responses regarding the decoration allowance were mixed. Slightly more submitters were of the view that there should be no additional entitlement for those who have received a gallantry award.²⁷⁶ Most considered that, if there was an entitlement, disablement should not be a criterion.²⁷⁷ The most telling response was that 66 % of submitters considered that recognising and rewarding acts of gallantry was outside the purpose of the new Act. Some submitters commented on the uneven and political nature of the award of gallantry awards, and that many deserving cases have not been given awards for various reasons.
- 12.25 We have reached the view that a decoration allowance has no place in a veterans' entitlements scheme that has the purpose of providing entitlements to those who have suffered impairment as a result of service. The majority of submitters agree. We recommend that the Government incorporate a decoration allowance into other legislation not administered through VANZ.

276 Sixteen of 30 submitters who commented on this issue considered that there should be no additional entitlement for veterans who had received a gallantry award.

277 Twelve of 14 submitters who commented on this issue considered that disablement should not be a criterion.

Chapter 13

Rehabilitation

- 13.1 We propose that rehabilitation should be central in the new veterans' system as a whole. Rehabilitation has never been explicitly incorporated into the war pensions system. A separate rehabilitation scheme provided financial assistance for homes, businesses and training to veterans, particularly those of World War One and Two, until the early 1970s.²⁷⁸ However, veterans' legislation has never overtly assisted with the rehabilitation of a veteran's own physical and mental capabilities. We consider that veterans' legislation should do this as it can be one of the key forms of assistance to injured or ill veterans.
- 13.2 Rehabilitation services are for veterans who sustain an injury or illness that impairs their ability to function as they were previously. Rehabilitation is more applicable to Scheme Two than Scheme One, as it relates to the assistance given to restore a newly injured or sick person as much as possible to his or her original capabilities. Veterans covered by Scheme One will have served at least 35 years ago. It is likely, therefore, that relatively few Scheme One veterans will develop new disabilities from which they can be rehabilitated. Most Scheme One veterans will instead be receiving compensation, health care and independence assistance for their permanent impairments.
- 13.3 Rehabilitation is also discussed in detail in chapter 16. The standard for rehabilitation and components of rehabilitation that would apply to Scheme Two would be replicated in the Scheme One legislation. Scheme One veterans who qualify for rehabilitation services would have the same rights and obligations in relation to that rehabilitation as veterans under Scheme Two, and would have a rehabilitation plan put in place.

²⁷⁸ Discharged Soldiers Settlement Act 1915; Rehabilitation Act 1941.

- 13.4 Whether a disabled veteran with needs for assistance qualifies for rehabilitation services or the Veterans' Independence Programme (VIP) would depend on whether the veteran is assessed as being able to be rehabilitated. If the veteran cannot be rehabilitated, but needs assistance because of frailty, VIP will apply. If the veteran is able to rehabilitate from a service-related disability, he or she is likely to be granted a temporary pension and, if he or she has incapacity for work, Veterans' Weekly Income Compensation. A rehabilitation plan will be put in place. The veteran would be reassessed once the rehabilitation plan is completed in order to see whether he or she has recovered or has a permanent impairment.
- 13.5 Vocational rehabilitation would apply only to those who are of working age.

Chapter 14

Families

- INTRODUCTION 14.1 We propose that Scheme One provide a range of entitlements for the immediate family members of veterans. Where service has taken a veteran from his or her family members through injury or illness, the Government has a responsibility to provide some assistance to the immediate family.
- 14.2 The consultation meetings and submissions have emphasised to us the value that is placed on family members by veterans, and the concern that veterans' legislation take care of families.

SURVIVING SPOUSES AND PARTNERS

Surviving Spouse Pension

- 14.3 When a veteran dies there should be some occasions where compensation payments are made to the veteran's surviving spouse or surviving partner. Under the War Pensions Act 1954, the entitlement that fulfils this role is the Surviving Spouse Pension. The Surviving Spouse Pension is a tax free, periodic payment, which is paid for the duration of the spouse or partner's life if he or she remains widowed, or until he or she remarries or enters a new relationship.

Purpose of a Surviving Spouse Pension

- 14.4 Through analysis of this entitlement and receipt of comment in submissions and consultation, it is apparent that people consider that the Surviving Spouse Pension has several purposes. Firstly, the pension is a compensation payment for the loss of the veteran where the veteran has died prematurely because of service. Secondly, the pension is seen as financial support for the spouse or partner because she or he will be in a worse financial position as a result of the veteran's death. Thirdly, it appears that many consider the pension to include an element of reward for the spouse or partner for years of caring for a veteran who has been significantly disabled.
- 14.5 However, none of these purposes sit comfortably with the nature of the entitlement, and, in particular, the eligibility criteria. The Surviving Spouse Pension would be a compensation payment for the loss of the veteran if it applied only when a veteran died during service or has a shortened life because of a service-related cause of death. Yet many spouses and partners qualify for the pension in respect of veterans who live well into their 70s, 80s and 90s, and cannot be said to have died prematurely. Additionally, many receive the Surviving Spouse Pension where the veteran died of a cause that either

cannot be related to service, or has only a tenuous link to service and many non-veterans the same age as the veteran die from the same condition. Younger spouses and partners, who may be raising a family and lose the veteran at a much earlier age than the current life expectancy, receive the same payment as elderly spouses and partners for whom the loss of a spouse or partner is a likely event.

- 14.6 If the Surviving Spouse Pension is an entitlement to provide financial support for a spouse or partner, one would expect an income or asset testing requirement to determine whether the spouse or partner is in financial need. However, there is no element of income or asset testing in the Surviving Spouse Pension. A spouse or partner will be eligible for the entitlement regardless of his or her income, assets, employment status and financial need. The eligibility criteria for the Surviving Spouse Pension relate solely to the cause of death or level of disablement of the veteran. If financial circumstances were to be relevant to the entitlement, it would be expected that these would form part of the eligibility criteria.
- 14.7 The characterisation of the Surviving Spouse Pension as a reward payment or payment of compensation for effort expended in caring for a disabled veteran is also problematic. There is no requirement that the relationship have been for a significant duration before a spouse or partner will qualify for the pension (other than the exception for relationships of less than one year).²⁷⁹ Consequently, a wife who has cared for a veteran for forty years will qualify for the same entitlement as a spouse from a two-year relationship. The eligibility criteria do not examine whether the veteran's disablement and circumstances have in reality required a greater amount of care from the spouse or partner than is the case in any other spousal relationship.
- 14.8 It is likely that originally, when the forerunner to the Surviving Spouse Pension, the War Widow's Pension, was introduced, it was more clear-cut who the entitlement was intended to assist. The spouses of those who died during World War One or World War Two were clearly deserving of assistance. The veterans' lives were significantly cut short. Many spouses would have had children to raise. The veteran was most probably the family's breadwinner, and the financial circumstances of the spouse were likely to be severely impaired by the loss of the veteran. Where veterans died in the ten or fifteen years following World War One or World War Two, the situations would have been similar. However, while it is accepted that some families now may be in similar circumstances to these, the current situation is generally quite different. Most veterans remaining are living beyond the average life expectancy, and well beyond the age that they could have been expected to live when they were born.²⁸⁰ The Government provides income support of various forms, including

279 War Pensions Act 1954, s 34.

280 Statistics New Zealand "Hot Off the Press – Births and Deaths: December 2009 quarter" (press release, 22 February 2010). Life expectancy at birth for males is 78.4 years and for females is 82.4 years.

universal New Zealand Superannuation for the elderly and various payments to assist those raising children. Many women now have careers and are not “kept” by their husbands. It is necessary to revisit the intention of this entitlement in the current era and what should be achieved through it.

- 14.9 These difficulties regarding the purpose of the existing Surviving Spouse Pension, have made determining the future of an entitlement for surviving spouses and partners complex.
- 14.10 As discussed in the Issues Paper, we have had to consider whether a scheme that gives generously to a small group of people or a scheme that gives less to a greater number of recipients is more beneficial and effective. The Royal New Zealand Returned and Services’ Association (RNZRSA) has advocated both broadening the eligibility for the pension to any spouse or partner of a deceased veteran with qualifying operational service, and increasing the rate of the pension to 60 % of the earnings of the deceased veteran prior to death.²⁸¹
- 14.11 Our views are that the Surviving Spouse Pension should not be altered significantly from its current form for veterans and spouses in Scheme One. There are 6006 current recipients of this pension and many more who expect to receive it if their veteran partner predeceases them. The majority are elderly and need the certainty of this continued payment. It would be disruptive and insensitive to greatly alter this entitlement. Although it is difficult to characterise and provide a clear rationale for the Surviving Spouse Pension, it is highly valued by veterans. Many spouses rely on it now. Many veterans rely on it for the future if they should predecease their spouse. We see the Surviving Spouse Pension as recognition of a veteran’s service and an acknowledgement that the veteran spouse has been impaired or died from a service cause, and think it should continue as periodic payment similar to the current Surviving Spouse Pension.

Eligibility

- 14.12 The Surviving Spouse Pension should continue to be paid to the person who was either the legal spouse or the civil union partner or the de facto partner of the veteran at the time of the veteran’s death. There does not appear to be any desire to change this. The only difficulties arise in situations where it is unclear whether a de facto relationship existed or not. This could be ameliorated through careful, clear definitions in the new legislation, which are consistent with other New Zealand legislation.
- 14.13 We recommend that all current recipients of the Surviving Spouse Pension should continue to receive the Surviving Spouse Pension under the new legislation. This will ensure that existing recipients are not disadvantaged by the new legislation.
- 14.14 We recommend that all spouses and partners of veterans who have a Disablement Pension receive some entitlement. The sole qualifying criterion would be that the veteran was in receipt of any rate of Disablement Pension.

281 Submission of the Royal New Zealand Returned and Services’ Association (submission received 19 December 2008) at 24.

- 14.15 Clearly, this would result in a greater number of spouses and partners qualifying for the entitlement. Consequently, the extent of entitlement would have to be adapted appropriately. A greater number of spouses and partners would qualify for a smaller entitlement. We recommend that each spouse or partner receive an amount of pension that is proportional to the level of Disablement Pension that the veteran was receiving prior to death. Fifty percent could be an appropriate proportion. Costing estimates provided by Veterans' Affairs New Zealand (VANZ) indicate that the likely additional cost of this proposal would be approximately \$3.6 million per year.
- 14.16 It is most important to provide for the surviving spouses or partner of veterans who are killed during their qualifying service or whose lives are significantly cut short by service. However, as this scheme relates only to those who served prior to 1 April 1974, it is now at least 35 years since the veterans' service. The new surviving spouses and partners qualifying under this scheme will not have had their veteran partners killed during service and it cannot be said that the veterans' lives were considerably cut short. Consequently, there is less need to provide a compensatory entitlement for loss of a veteran spouse under this scheme. The new Surviving Spouse Pension would provide acknowledgement for the role that the spouse has played in the veteran's life.

Remarriage or new relationship

- 14.17 Considerable argument has been heard on whether a Surviving Spouse Pension should cease after the recipient remarries or enters a new relationship. During the consultations at RSAs throughout New Zealand, different views about whether the Surviving Spouse Pension should continue after a recipient enters a new relationship were expressed. Interestingly, the majority of participants in the South Island considered that the pension should cease upon remarriage or new relationship. The majority of women at the consultation meetings also thought that the entitlement should cease. The RNZRSA's submission stated:²⁸²

... the RNZRSA believes that 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.

- 14.18 The RNZRSA suggests that the Surviving Spouse Pension should continue for two years if the surviving spouse enters into a new relationship. If the new relationship then ended for any reason and if the surviving spouse was over 65, the payments would recommence.²⁸³

282 Ibid, at 23.

283 Ibid.

- 14.19 We consider the entitlement should cease if the surviving spouse or partner remarries or enters a new civil union or de facto relationship. A lump sum payment of two year's worth of Surviving Spouse Pension should be paid when the spouse or partner in receipt of the Surviving Spouse Pension enters a new relationship. This measure gives spouses a financial boost prior to the ceasing of their Surviving Spouse Pension.
- 14.20 We recommend that once the Surviving Spouse Pension has ceased because of a new relationship, it should not be reinstated if the new relationship ends. The only justification for such an approach is that the spouse is being "kept" by the new partner and, therefore, is in greater financial need when the new relationship ends. Given that such a justification is now archaic and not in accord with modern views on women and relationships, we do not consider that we can support this type of provision.

CHILDREN

- 14.21 Assistance for children applies where the veteran dies with a service-related death or disablement and leaves a child or children.

Parent's Allowance and Children's Pension

- 14.22 There are currently 21 children of veterans who served prior to 1 April 1974 for whom entitlements are being paid under the War Pensions Act. It is unlikely that this number will increase. Few Scheme One veterans have school aged children. However, it is necessary to retain entitlements to ensure that these children are provided for.

Eligibility

- 14.23 We recommend that the pension for qualifying children of deceased veterans should be paid to children of veterans with a service-related death or who received a Disablement Pension for impairment equivalent to the current 70 % level. We support the use of a fairly broad definition of "child". This should make it clear that adopted children and step-children are included. A child should be a child up until he or she turns 18 years of age. This is consistent with ACC legislation.²⁸⁴

Combined payment

- 14.24 Currently, a surviving spouse who is the parent of the deceased veteran's child receives a Parent's Allowance of \$150.27 per week for the first child and \$23.93 per week for each additional child in addition to the Surviving Spouse Pension. A Children's Pension of \$8.86 per week is also paid in respect of each child. In order to simplify the administration of these payments, it is suggested that they are combined into a single Children's Pension.
- 14.25 The comment from submissions on the Issues Paper indicates that most people support the pension in respect of children of a deceased veteran being separate to the surviving spouse's entitlement.

²⁸⁴ Accident Compensation Act 2001, sch 1, cl 70.

- 14.26 We recommend that the Children’s Pension should attach to the child rather than to the surviving spouse. This would help ensure that the child receives the benefit of the pension regardless of who is caring for them. It is conceivable that a child of a veteran may be living with a parent or guardian who is not the deceased veteran’s surviving spouse or partner, but a former spouse or partner. It should be a simple matter for the pension that attaches to a child to be paid to the person caring for the child.

War Bursaries

- 14.27 The War Pensions Regulations provide for War Bursaries to children who qualify for Children’s Pension and Parent’s Allowance.²⁸⁵ This is an annual payment while a child is in secondary or tertiary education (up until age 23).
- 14.28 We recommend that the payment of the War Bursary is retained for the 54 recipients of this, and any future children who meet the eligibility criteria. We suggest that the amount of the bursaries is increased to reflect the greater costs of education. It is acknowledged that the War Bursary is a contribution to the costs of the child’s education. However, this contribution should be more than token.

FUNERAL GRANTS

- 14.29 The war funeral grant is currently available under the War Pensions Regulations only where the veteran’s death is attributable to service or where there is a spouse or partner who meets the criteria for the Surviving Spouse Pension.²⁸⁶
- 14.30 We consider that a funeral grant should be used as an element of recognition to all veterans, regardless of impairment. A funeral grant would be paid in respect of any person that dies if he or she had qualifying operational service. This would, therefore, provide veterans with a benefit that is above that of ordinary New Zealanders. In order to ensure that there was no double-dipping with respect to the veteran’s funeral, any social security or ACC funeral grant that was payable should be deducted from the veteran’s funeral grant.
- 14.31 We consider that the current rate of the war funeral grant is insufficient. The grant should be based on the actual costs of the funeral up to a specified maximum. The ACC maximum of \$5,429.92 could be used and the amount increased by annual Consumer Price Index changes. Any funeral grant paid by ACC or the Ministry of Social Development would be deducted from this total.
- 14.32 Currently those with routine service can qualify for a funeral grant if their death is attributable to service or if they meet a certain Disablement Pension threshold. We recommend that those who qualify under the current legislation retain eligibility.
- 14.33 VANZ estimates that widening the eligibility for the funeral grant as we propose would increase costs from the current \$10 million per year to \$19 million per year.

285 War Pensions Regulations 1956, reg 46.

286 Ibid, reg 45.

INDEPENDENCE
ASSISTANCE

- 14.34 We recommend that VIP services are also provided for spouses or partners of deceased veterans immediately following the veteran's death if they qualify for the Surviving Spouse Pension. This would provide some practical assistance for recently bereaved spouses. It would be an acknowledgement of the likely frailty of the surviving spouse population because most are now elderly when their veteran spouses die and in need of extra assistance in the period following a veteran's death.
- 14.35 To qualify for the assistance, the spouse or partner would need to be assessed as having a need for independence assistance. A case manager would be assigned to the spouse and would be able to liaise with other Government agencies to ensure that the spouse is receiving all of the assistance to which she or he is entitled.
- 14.36 We suggest that this assistance should be available for up to one year after the veteran's death. We also consider that VANZ should continue to provide support to former spouses or partners of veterans through case management, by funding counselling sessions where this is needed because of the impacts of a veterans' service.

INTERGENERA-
TIONAL EFFECTS
OF SERVICE

- 14.37 We have considered the issue of possible intergenerational effects of service on veterans' descendants. We received several submissions on this issue. Some submitters would like impairment compensation to be provided to children of veterans who have an impairment that has been caused by their parent's service. This particularly relates to children of Vietnam and nuclear test veterans.
- 14.38 The difficulty with the claims that veterans' children have physical impairments because of their parents' service is that the causation is very difficult to establish. While it is clear that veterans have many conditions that may be related to service, research establishing a causative relationship between parents' service exposure and children's health is not as advanced. No other country that we have looked at has included impairment compensation for children of veterans in their veterans' scheme.
- 14.39 We do not recommend that impairment compensation for children of veterans be included in the proposed veterans' legislation. As discussed in the Issues Paper,²⁸⁷ it is more appropriate for these matters to be dealt with separately as a matter of policy.
- 14.40 This is clearly a matter that many people hold very strong views about. It is an issue that can lead to much fear and worry. Consequently, we suggest that international research on this subject is monitored closely by the expert medical panel. We recommend that VANZ continue to provide funding to cover the medical expenses relating to the five specific medical conditions to children of Vietnam veterans and nuclear test veterans. The provision of counselling and genetic counselling to these children should continue also.

287 Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 185.



Part 3
SCHEME TWO

Part 3: Scheme Two

An introduction

Part 3 relates to the assistance proposed for veterans under Scheme Two. This assistance would be for veterans who have served on or after 1 April 1974.

Part 3 covers the following:

- A discussion of the concepts of disability and wellness, and how these relate to veterans' schemes (chapter 15);
- The assistance proposed for the rehabilitation of veterans (chapter 16);
- Compensation for loss of income due to service-related impairment (chapter 17);
- Compensation for permanent impairment due to service-related injury or illness (chapter 18);
- The health care assistance available to qualifying veterans (chapter 19);
- Practical assistance for maintaining independence (chapter 20);
- Assistance with transitioning from military to civilian life (chapter 21);
- Entitlements for senior veterans that recognise service (chapter 22); and
- Assistance to family members of deceased veterans (chapter 23).

Chapter 15

Disability and wellness

INTRODUCTION 15.1 We are convinced that modern ideas for conceptualising disability and wellness, and the contemporary aims of schemes for assisting impaired persons should underpin our proposed new legislation. New Zealand has the opportunity to adopt a modern, well-founded scheme that is designed to bring about the best outcomes for those who are injured and ill. This chapter discusses the concepts behind our proposals for Scheme Two. It discusses models for thinking about disability, the New Zealand Disability Strategy, the concept of wellness and approaches to military disability schemes. While we have accepted the need for Scheme One to maintain consistency with the current legislation, we consider that Scheme Two should be based around new concepts and approaches.

DISABILITY 15.2 The concept of “disability” is at the heart of the veterans’ scheme. The purpose of the veterans’ system is to recognise that some veterans will have disability as a result of their service, and to address the needs that result from this disability. Disability is a complex concept. Academics and researchers have presented several perspectives on what disability is.²⁸⁸ There are three major models for thinking about disability.

288 WestWood Spice *Literature Review for Australian Department of Veterans’ Affairs: Disability in the 21st Century*, (WestWood Spice, NSW, 2008) at 6 [*Literature Review*].

Models for thinking about disability

Medical model

- 15.3 The medical model of conceptualising disability focuses on ideas of individual deficiency.²⁸⁹ It emphasises the individual and his or her impairments. Disability is viewed as a feature of a person, directly caused by disease, trauma or health condition.²⁹⁰ This model advocates treatment as the only method of addressing the problem. This model has been criticised for failing to address social or environment barriers for people with disabilities.²⁹¹

Social model

- 15.4 The social model challenges the medical model by considering the source of disability to be the limitations imposed on a person by society.²⁹² This model developed from those advocating the human rights of people with disabilities. One definition of disability from this model is as follows:²⁹³

The disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities.

- 15.5 Proponents of this model believe that the best way of addressing the problems of disability is through social action.²⁹⁴ While the medical model continues to dominate most Government responses towards disability internationally, the social model has become central to law and policy aiming to reduce discrimination against people with disabilities.²⁹⁵

Biopsychosocial model

- 15.6 The biopsychosocial model has developed as a result of the views of some that neither the medical nor the social model alone is an adequate response to the issue of disability. One such academic wrote:²⁹⁶

There is a medical component to disability even though there are significant insights to be gained from understanding that society does actually create much of the disadvantage that those who live with impairments experience.

289 I Dempsey and K Nankervis (eds) *Community Disability Services An Evidence-based Approach to Practice* (UNSW Press, Sydney, 2006) at 7.

290 World Health Organisation *Towards a Common Language for Functioning, Disability and Health* (World Health Organisation, Geneva, 2002) at 8.

291 WestWood Spice *Literature Review*, above n 288, at 41.

292 Dempsey and Nankervis, above n 289, at 12.

293 Michael J Oliver “Capitalism, disability and ideology: A materialist critique of the Normalization principle” in Robert J Flynn and Raymond A Lemay *A Quarter-Century of Normalization and Social Role Valorization: Evolution and Impact*(1999) at 8 < www.independentliving.org > .

294 WestWood Spice *Literature Review*, above n 288, at 9.

295 Ibid, at 13.

296 Christopher Newell *Encountering Disability in Australian Society* (Australian Disability Clearing House on Education and Training, 2003) at 6 < www.adcet.edu.au > .

- 15.7 This approach appears to have been adopted by the World Health Organisation in its *International Classification of Functioning, Disability and Health*.²⁹⁷

New Zealand Disability Strategy

- 15.8 For most of the 20th century the medical model of conceptualising disability predominated. However developments throughout the century, such as the improvements in medical treatments, increased survival of disabled people, decreased stigma and more support organisations, led to changes in attitude towards disability in New Zealand. The Government's approach to disabled people shifted from segregating and institutionalising, to having a community and rights focus.²⁹⁸

- 15.9 The New Zealand Disability Strategy, introduced by the Government in 2001, showed a move towards a social model of disability. It states:²⁹⁹

Disability is not something individuals have. What individuals have are impairments. ...

Disability is the process which happens when one group of people create barriers by designing a world only for their way of living, taking no account of the impairments other people have.

- 15.10 The Strategy discusses barriers at different stages of disabled people's lives. Disabled people are less likely to be employed and more likely to have lower incomes, with which they must bear the financial cost of disability. Older disabled people are often denied the opportunity to rehabilitate and to 'age in place' in their own homes. Accessing Government services can be disabling because sometimes they are not flexible enough to meet individual needs.³⁰⁰ The Strategy contains 15 objectives aimed at encouraging participation of disabled people and removing barriers in society for disabled people, including fostering an aware and responsive public service, creating long-term support systems centred on the individual and supporting quality living in the community for disabled people.³⁰¹

Impairment

- 15.11 The Office for Disability Issues describes "impairments" as characteristics people have that can lead to them experiencing disability.³⁰² Impairments can be intellectual, psychiatric, physical, neurological or sensory, and be temporary, intermittent or ongoing.

297 World Health Organisation *International Classification of Functioning – Introduction* (World Health Organisation, Geneva, 2008).

298 Office for Disability Issues *Including a Disability Perspective: A toolkit for policy makers* (Office for Disability Issues, Wellington, 2005) at 8–11.

299 Minister for Disability Issues *The New Zealand Disability Strategy: Making a World of Difference* (Ministry of Health, Wellington, 2001) at 3.

300 Ibid, at 7–9.

301 Ibid, at 11–13.

302 Office for Disability Issues *Including a Disability Perspective: Key concepts* (Office for Disability Issues, Wellington, 2005) at 2.

WELLNESS

What is wellness?

- 15.12 Wellness is the concept of what makes a person healthy. In 1958, the World Health Organisation defined wellness as “a complete state of physical, mental, and social well-being, not merely the absence of disease or infirmity”.³⁰³ Different academics have suggested many different elements that make up a person’s wellness. Commonly accepted elements of wellness include physical, psychological and emotional, social, intellectual and mental, spiritual, occupational and environmental.³⁰⁴ A person’s overall wellness can depend on their well-being in each of these aspects.
- 15.13 It has been noted that some people with severe impairments are able to function relatively well while others with lesser impairments are unable to function well. Research has found that “self-efficacy, self esteem and social connectedness play a major mediating role in accounting for variance in health outcomes”.³⁰⁵

Strategies to facilitate wellness

- 15.14 A person’s wellness is affected by barriers to achieving well-being and facilitators of wellbeing. These barriers and facilitators can operate at a personal, community and systems level. At a personal level, stress, depression and frustration are barriers to wellness, while maintaining physical and mental health and participating in and contributing to society are facilitators. Social supports from family, friends, community groups and health care providers encourage wellness at a community level, but lack of knowledge or responsiveness from medical practitioners can impede wellness at this level. The systems level refers to Government assistance and institutions and financial issues. To facilitate wellness, institutions must minimise frustrations with physical access and difficulties with financial support.³⁰⁶
- 15.15 This research points to the importance of having Government and other support that provides opportunity and assistance to decrease the barriers to wellness and facilitate the activities that encourage wellness.

APPROACHES
TO MILITARY
DISABILITY
SCHEMES

- 15.16 In recent years, the countries with similar histories, law and military disability and compensation schemes, have moved to modernise their schemes. Australia, the United Kingdom and Canada have each introduced new veterans’ schemes, all of which address the needs of their modern veterans.³⁰⁷ These developments, along with research conclusions and changes in disability and compensation systems generally show a shift in the attitudes and themes influencing veterans’

303 World Health Organisation (1958) cited in WestWood Spice *Literature Review*, above n 288, at 62.

304 WestWood Spice *Literature Review*, above n 288, at 63.

305 M Nosek “Health Constructs and Measurement project” in RRTC Health and Wellness Consortium Forum Report (Rehabilitation Research and Training Center, Oregon, 2003) at 8–10.

306 WestWood Spice *Literature Review*, above n 288, at 66–67.

307 See Law Commission *Towards a New Veterans’ Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at chapter 6.

schemes. In 2008, the Australian Department of Veterans' Affairs commissioned an independent review on approaches to disability in veterans' schemes.³⁰⁸ This chapter borrows much from the research undertaken and conclusions drawn in this review.

- 15.17 There are common factors that have led to the pressure for reviews of veterans' systems in Australia, the United Kingdom, Canada, the United States and here in New Zealand. Like New Zealand, other countries were faced with system failures and the inadequacy of current systems to provide for people with severe disabilities or for the needs of younger veterans. This combined with new understandings about disability and wellness, and the recognition that current systems rewarded unwellness and dependency.³⁰⁹ Veterans and veterans' organisations have supported the drive to modernise these systems.³¹⁰

New approach

Basis for new approach

- 15.18 A considerable amount of research has been undertaken to determine the best approaches for disability management. It is recognised that the payment of loss compensation can delay recovery. Research has shown that whether or not a claimant received earnings-related compensation was the strongest determinant of whether a case would be closed within 12 months.³¹¹ Also, workers have been found to be more likely to remain away from work longer when compensation for lost earnings is increased.³¹² The Royal Australian College of Physicians has stated that “[a]lthough most people who have compensable injuries recover well, a greater percentage of these people have poorer health outcomes than do those with similar but non-compensable injuries”.³¹³
- 15.19 Research has also indicated that compensation processes tend to contribute to claimants taking a ‘sick role’.³¹⁴ A system that rewards unwellness by providing more benefits for people who can prove they are least well, is likely to perpetuate the claimant’s sick role.³¹⁵

308 WestWood Spice *Disability in the 21st Century: Constructive Approaches to Disability – A review carried out for the Australian Department of Veterans' Affairs* (WestWood Spice, NSW, 2008) [*Disability in the 21st Century*].

309 Ibid, at 37.

310 Ibid, at 31.

311 H K McNaughton, A Sims and W J Taylor “Prognosis for People with Back Pain under a No-fault 24 hour Cover Compensation Scheme” (2000) *Spine* 2510 1254.

312 B T Hirsch “Incentive Effects of Workers' Compensation” (1997) 336 *Clinical Orthopaedics and Related Research* 33.

313 Royal Australian College of Physicians *Compensable Injuries and Health Outcomes* (Royal Australian College of Physicians, 2001) at 2.

314 American College of Occupational and Environmental Medicine “Preventing Needless Work Disability by Helping People Stay Employed” (2006) *Journal of Occupational and Environmental Medicine* 977.

315 WestWood Spice *Disability in the 21st Century*, above n 308, at 27.

- 15.20 Loss compensation systems necessarily involve delays before claims are resolved, as shown in the current war pension system. In addition to causing frustration, these delays create incentives for the claimant to maximise the incapacity caused by the injury. The focus on wellness and recovery, the outcomes that are going to be the most beneficial for the claimant's long-term health, is delayed until compensation is finalised.³¹⁶
- 15.21 The initial response and subsequent case management of those responsible for managing the scheme has been found to be important for directing how a claimant will respond and commit to rehabilitation.³¹⁷
- 15.22 The Royal Australasian College of Physicians identified several factors that contribute to recovery following injury or illness. The earlier rehabilitation and recovery can commence, the better the outcomes.³¹⁸ Rehabilitation can be most effective when it is in the workplace. Good case management is a key to the process.³¹⁹

Resistance to new approach

- 15.23 The research conducted by WestWood Spice on the law reforms in Canada, the United States, Australia and the United Kingdom suggests that compensation continues to be viewed as an entitlement by many veterans and veterans' organisations.³²⁰ It has been suggested that the sense of entitlement to compensation stems in part from the concept of military uniqueness.³²¹ Military personnel have a unique role. The language used by governments to provide a rationale for veterans' systems refers to their moral obligation towards injured veterans.³²² Some experts have argued that this military uniqueness can lead to a culture where veterans view the Government as adversary and assist each other to 'get the most out of the system'.³²³ The lifestyle of the military may

316 J Dereby and W Tullis "Delayed Recovery in the Patient with a Work Compensable Injury" (1983) 25 *Journal of Occupational Medicine* 829; T Hanson-Myer "The Worker's Disability Syndrome" (1984) 50 *Journal of Rehabilitation* 50..

317 Royal Australian College of Physicians, above n 313, at 4 and 20.

318 Veterans Affairs Canada "Diagnostique: Evidence-based problems" (Veterans Affairs Canada, PEI, 2004) at 3.

319 Royal Australian College of Physicians, above n 313, at 4 and 20.

320 WestWood Spice *Disability in the 21st Century*, above n 308, at 31.

321 Christopher Dandekar, Simon Wessely, Amy Iverson and John Ross "Improving the delivery of cross-departmental supports and services for veterans: a joint report of the Department of War Studies and the Institute of Psychiatry, Kings College" (London, 2003) at 17 <www.veterans-uk.info> .

322 For instance, in the UK, the Military Covenant, which is an unwritten contract of mutual obligation between the Armed Forces and the public, has been described as follows:

Service personnel agree to sacrifice certain civil liberties and to follow orders; including orders to place themselves in harm's way in the defence of others. In return, the Nation promises to help and support people in the Armed Forces and their families when they need it most. (The Royal British Legion Honour the Covenant: Campaign Overview (September 2007) <www.thecovenant.org.uk>)

The United States Institute of Medicine publication of the Committee on Medical Evaluation of Veterans for Disability Compensation *A 21st Century System for Evaluating Veterans for Disability Benefits* ((National Academies Press, Washington DC, 2007) at 22) makes it clear that:

... any comparisons between the veterans' disability compensation program and similar disability assistance programs ... are bound to fall short. The standard is just not the same ... these programs are but one way that a "grateful nation" attempts to repay its indebtedness to those who serve in the military.

323 WestWood Spice *Disability in the 21st Century*, above n 308, at 33.

also contribute to a culture of dependency that can make transitioning to civilian life more difficult.³²⁴ There is evidence that veterans' organisations can in some ways perpetuate a culture of disability and entitlement to compensation. The experience in other countries has shown a tendency for veterans' organisations to be reluctant to move away from the focus on compensation and towards wellness, and to be suspicious of change.³²⁵

Emerging themes

15.24 From the new legislation in Australia, the United Kingdom and Canada as well as other approaches, the WestWood Spice review has noted a number of emerging themes of schemes that promote wellness. These themes include the following:³²⁶

- (a) recognition for impact on quality of life – generally a lump sum payment to take account of this impact;³²⁷
- (b) focus on people with severe disabilities – a shift of resources to favour those with more severe disabilities;
- (c) focus on the period of transition from military to civilian life;
- (d) new gateways – shifting from a claim for disability entitlements, such as compensation, being the gateway to receiving rehabilitation to rehabilitation becoming the gateway to compensation;
- (e) transition payments – income replacement to enable and encourage veterans to undertake rehabilitation;
- (f) abatement regimes – systems that allow veterans to resume work without losing all of their income replacement payments;³²⁸
- (g) holistic approaches to rehabilitation;
- (h) case management;
- (i) family support;
- (j) peer support/mentoring; and
- (k) lump sum payments – mandatory lump sum payments for non-economic loss rather than periodic payments.

Canada

15.25 The review notes that Canada's New Veterans Charter is the scheme that has moved the furthest towards promoting wellness.³²⁹ We have examined the Canadian scheme closely. We are impressed with the approach taken.

15.26 The reforms in Canada arose after recommendations for change in a number of research reports and reviews from the late 1990s onwards. These culminated in the appointment of the Veterans Affairs Canada – Canadian Forces Advisory

324 R Jolly *Changing Step: from Military to Civilian Life: People in Transition* (Brassey's, London, 1996) at 10.

325 WestWood Spice *Disability in the 21st Century*, above n 308, at 34–35.

326 *Ibid*, at 46–64.

327 WestWood Spice notes that it accepts that these systems should recognise the quality of life impact of a disability, but considers that the payments should be framed positively, such as enabling payments, rather than as impairment compensation (*Ibid*, at 47).

328 New Zealand's Veteran's Pension provisions are noted as a good example of this. (*Ibid*, at 50).

329 *Ibid*, at 37–38.

Council, a body of academics, researchers, practitioners, veterans' representatives and Government department representatives, to review Canada's veteran's system. The Council produced a report with a number of key findings, including that the veterans' system should:³³⁰

- acknowledge the contributions made by spouses and families, and where possible, provide them with benefits and services;
- meet needs (without reference to income) as they arise from modern military service and be designed to offer “opportunity with security” to departing members;
- reflect the results of a holistic assessment of clients' needs and incorporate best practices in modern case management, including continuity of care, client engagement and client self-determination;
- be informed by modern disability management practices;
- support clients' quality of life and the opportunity to enjoy a meaningful role in Canadian society;
- take account of existing federal and provincial benefits and services and avoid duplicating these wherever possible;
- harmonise or integrate existing federal benefits and services, while eliminating duplicate administrative procedures to create a “one-stop” approach; and
- be based on valid and reliable research and should reflect best practices.

15.27 As a result of this review, in 2006 Canada introduced new legislation, known as the New Veterans Charter. Rather than being focused on one or two types of assistance, the New Veterans Charter introduced a suite of benefits. The assistance provided is based on need. The scheme works to ensure a seamless transition from military to civilian life and ongoing support if needed. It offers comprehensive support that helps restore and maintain independence and quality of life. The New Veterans Charter's programmes and services include comprehensive rehabilitation, income support benefits, lump sum disability awards, health benefits such as membership of an insurance scheme, job placement assistance, one-on-one case management and family support.³³¹

15.28 The New Veterans Charter's rehabilitation programme provides holistic support, case management and support for family members. Rehabilitation, rather than disability compensation, has become the gateway to accessing other assistance. The system offers a broad range of benefits to family members of veterans, such as access to rehabilitation services, group family health insurance, survivor benefits and case management.³³² Recognition of the significance of operational stress injuries has led to the establishment of the Operational Stress Injury Social Support programme to help veterans and their families. This includes a Peer Support Network that enables veterans and family members to contact others who know firsthand what they are going through.³³³

330 Veterans Affairs Canada – Canadian Forces Advisory Council *Honouring Canada's Commitment: Opportunity with Security for Canadian Forces and their Families in the 21st Century* (VAC-CFAC, Ottawa, 2004) at 29–34.

331 Briefing from Veterans Affairs Canada (Charlottetown, 22 June 2009).

332 Ibid.

333 WestWood Spice *Disability in the 21st Century*, above n 308, at 58.

Disability and wellness

- 15.29 The discussion about disability and wellness indicates that there is a need to have an understanding of disability that is broader than just an individual's physical or mental problem. It is vital to recognise the role of society in creating disability as well as the role of medical issues. An individual's impairments should be addressed in view of the individual's own context.
- 15.30 The proposed veterans' legislation should accord with the New Zealand Disability Strategy by reducing barriers where possible. This would mean that the scheme should create opportunities for employment, provide appropriate financial support and financial assistance with the cost of disability, allow older people to age in place and provide Government assistance that is flexible and responsive to an individual's needs.
- 15.31 The scheme should aim to encourage wellness in a broad sense. It should recognise that there are many elements to wellness. An individual's circumstances need to be viewed as a whole and holistic assistance should be provided.
- 15.32 We consider that it is appropriate to use the term "impairment" rather than "disability" to describe the physical or mental injury or illness that is creating a limitation.

Modern approaches to military disability schemes

- 15.33 We recommend that the New Zealand Government take on board the new approaches to veterans' disability schemes that encourage wellness and recovery. The new legislation for Scheme Two should shift the focus away from compensation towards rehabilitation. However, the view that veterans are entitled to compensation is likely to be entrenched. It is likely to be too difficult to shift away from this completely.
- 15.34 Scheme Two should provide a suite of different types of assistance that address the holistic needs of veterans. It should incorporate processes that allow for early intervention to assist veterans to recover. Scheme Two should incentivise wellness. Rehabilitation should be used as the gateway to other assistance. The scheme should encourage a return to work as the optimal outcome for most veterans.

Chapter 16

Rehabilitation

- INTRODUCTION 16.1 Rehabilitation is central to the proposed Scheme Two. One of the main purposes of the scheme would be to restore veterans who are injured as a result of qualifying service to their pre-injury capabilities to the maximum extent possible. Providing assistance that rehabilitates a veteran is the best way of equipping the veteran for the future and minimising the impacts of an injury or illness. Every veteran who has a service-related injury or illness and is assessed as being able to rehabilitate would be entitled to rehabilitation services.
- 16.2 Submitters on the Issues Paper unanimously supported the inclusion of rehabilitation in the new legislation. The New Zealand Defence Force's (NZDF's) submission to the Issues Paper "recommends that the emphasis be on rehabilitation in the broad sense rather than compensation, focusing on a needs-based approach that aims at restoring the Service member's quality of life".³³⁴ The Royal New Zealand Returned and Services' Association (RNZRSA's) submission supported the inclusion of rehabilitation, stating "[r]ehabilitation 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".³³⁵
- 16.3 The provisions relating to rehabilitation in the new veterans' entitlements legislation should closely reflect those in the Accident Compensation Act 2001. The Accident Compensation scheme (ACC) is already a significant provider of rehabilitation services to New Zealanders and may already provide rehabilitation services to veterans.
- 16.4 The scheme would have a multifaceted approach to rehabilitation. Like ACC, Scheme Two would cover treatment, social and vocational rehabilitation.³³⁶ If a veteran is assessed as needing them, services would be provided that meet each of these functions with the aim of restoring to the extent possible the veteran's physical, mental, social and vocational wellbeing.

334 Submission of the New Zealand Defence Force (submission received 12 March 2009) at 35.

335 Submission of the Royal New Zealand Returned and Services' Association (submission received 19 December 2008) at 30.

336 Accident Compensation Act 2001, s 6 (definition of "rehabilitation").

STANDARD FOR REHABILITATION

- 16.5 We consider that the legislation should adopt a high standard for the rehabilitation of veterans. Like ACC and Australian legislation,³³⁷ the veterans' entitlements scheme should aim to restore the veteran's health, as well as the veteran's ability to participate in society. The standard for rehabilitation of an impaired veteran should be at least the level of health, wellbeing and participation in society that the veteran had prior to the injury or illness. Like ACC legislation, the new veterans' legislation could use a standard such as "to the maximum extent practicable" to express the standard to which the veteran will be assisted to recover.³³⁸
- 16.6 The RNZRSA agrees that there should be a high aim for rehabilitation.³³⁹ The NZDF supports an approach that aligns the aim and components of rehabilitation with the existing ACC scheme "to ensure a consistent approach for Service members who may be entitled under both schemes, and provide the best treatment for all eligible personnel".³⁴⁰

COMPONENTS OF REHABILITATION

- 16.7 The veterans' entitlements legislation should provide for three aspects of rehabilitation: medical rehabilitation, psycho-social rehabilitation and vocational rehabilitation. This takes into account the veteran's holistic needs.
- 16.8 Medical rehabilitation is to a large extent encompassed by the health care entitlements. Medical rehabilitation should allow for medical or surgical attention to restore a veteran's physical and mental health following a service-related injury or illness. This aspect of rehabilitation covers the entitlement to the costs of treatment for all injuries and illnesses that are service-related. The purpose is to restore a veteran's physical or mental health to the extent possible following an injury or illness. This is the most direct method of addressing the harm caused by service. For veterans still serving in the NZDF, this entitlement may be provided through NZDF medical services.
- 16.9 In recognition of the relatively common occurrence of psychiatric conditions in veterans and the need to address the mental as well as physical aspects of impairment, the second aspect of rehabilitation should be named "psycho-social rehabilitation" under the veterans' entitlements scheme. As with ACC's social rehabilitation,³⁴¹ psycho-social rehabilitation services would be for the purpose of restoring a veteran's independence to the maximum extent possible.

337 Military Rehabilitation and Compensation Act 2004 (Cth), s 38. See Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 211.

338 Accident Compensation Act 2001, s 70.

339 Submission of the Royal New Zealand Returned and Services' Association, above n 335, at 25.

340 Submission of the New Zealand Defence Force, above n 334, at 35.

341 Accident Compensation Act 2001, s 79.

- 16.10 Psycho-social rehabilitation is about restoring the veteran's independence and social adjustment. This may involve psychological as well as social intervention. Psycho-social rehabilitation could include:
- aids and appliances, such as wheelchairs, hearing aids, glasses;
 - attendant care;
 - education support;
 - home help to assist with everyday activities in the home;
 - modifications to the home;
 - training for independence;
 - assistance with transport;
 - counselling; and
 - addiction treatment.
- 16.11 The types of psycho-social rehabilitation services should be dependent on the nature and severity of the veteran's condition and the veteran's everyday needs arising out of the impairment.
- 16.12 Vocational rehabilitation is to assist the veteran in returning to appropriate employment given the veteran's impairment and the veteran's education, skills and experience. Vocational rehabilitation would assist the veteran in maintaining employment, obtaining employment or regaining or acquiring the vocational independence to return to work. Depending on the veteran's impairment, it may or may not be appropriate for the veteran to return to the same employment or the same type of employment that he or she had prior to illness or injury. In some cases it may be more beneficial to the veteran to be assisted to enter a different type of employment.
- 16.13 We consider that vocational rehabilitation under the veterans' entitlements scheme should offer extended vocational development assistance for veterans where this is the best option for the veteran returning to work. The recent review of ACC identified the need to offer extended vocational development assistance in some cases. The report suggested that ACC offer vocational development service and training that:³⁴²
- ... extend beyond a claimant's pre-injury employment, experience, education, training and skills but which seek to restore and perhaps even extend past the claimant's pre-injury vocational situation in terms of participation, flexibility and opportunity.
- 16.14 This could involve the veteran retraining or undertaking an educational programme to gain the education, skills and experience needed for a new type of employment. The assistance should be flexible so that it can best assist each veteran in whatever circumstances and with whatever impairment they have. Vocational rehabilitation should have a future outlook such that assistance is provided with a view to best taking account of the veteran's capabilities and aims.
- 16.15 The exact parameters of the types of assistance provided as medical, psycho-social and vocational rehabilitation should be set out in regulations.

342 PriceWaterhouseCoopers *Accident Compensation Corporation New Zealand: Scheme Review* (PriceWaterhouseCoopers, Sydney, 2008) at xxxi.

DUTY AND
OBLIGATION TO
REHABILITATE

- 16.16 Scheme Two should place an obligation on the Government to rehabilitate veterans who become impaired as a result of qualifying service. This is a fundamental obligation that arises as a result of the Government placing serving personnel in harm's way. Rehabilitation is the best way of undoing some of the harm done by the service-related illness or injury because it attempts to restore the veteran to the same capabilities as before the injury or illness.
- 16.17 Similarly, the veterans' entitlements legislation should obligate veterans who want to receive entitlements to cooperate with Veterans' Affairs New Zealand (VANZ) to determine the rehabilitation services that would assist and to participate in these. This legislation would best achieve its purposes if veterans are being restored as much as possible to full health and full participation in the community, rather than being dependent on Government assistance long-term. Consequently, we consider that there needs to be some responsibility on veterans to assist with their own rehabilitation to the extent that they can.
- 16.18 The majority of submissions on this issue were in favour of a degree of responsibility for rehabilitation to be on the veteran and for the veteran to be subject to consequences if he or she refused rehabilitation.³⁴³ The NZDF submitted that veterans should be "required to agree and sign a rehabilitation plan", which they will have a duty to undertake, and that "in order to be effective, the rehabilitation plan may require associated penalties or sanctions for non-compliance". In focus groups undertaken at NZDF bases, currently serving NZDF members resoundingly stated that members should be expected to undertake rehabilitation "not only in the spirit of fairness, but even more so to live up to the values and ethos characteristic of military personnel". However, they also emphasised that rehabilitation should not be used as a tool to deny financial rehabilitation.³⁴⁴

EARLY
INTERVENTION

- 16.19 Under our proposals, Scheme Two would require that veterans are assessed to determine whether they are able to rehabilitate as soon as is practical after an injury or illness. The decision on cover would also be made within a short time frame. Veterans who suffer an injury or illness would be referred for veterans' entitlements through NZDF medical services, if they are currently serving, or would apply directly for a condition to be covered. Applicants would be asked to provide up-to-date medical reports with their application. The NZDF medical records for the veteran would also be sought as soon as the referral or request is received. Using ACC as a model, we consider that in most cases a decision on coverage of the injury or illness should be able to be made shortly after the referral or application is received.
- 16.20 An assessment of the veteran's medical condition and ability to rehabilitate would be carried out as soon as possible after the referral or application is received and cover is accepted. For currently serving veterans, this assessment may be able to be completed by the NZDF medical staff.

343 Twenty-nine of 37 submitters on the issue of the veteran's obligations in relation to rehabilitation thought that there should be an obligation on veterans to rehabilitate.

344 Submission of the New Zealand Defence Force, above n 334, at 36–37.

- 16.21 The Australian Department of Veterans' Affairs has advised that rehabilitation of currently serving members of the defence force is one of the most crucial aspects of a scheme for younger veterans. It is vital that VANZ works closely with the NZDF to ensure that opportunities for rehabilitation are not lost.³⁴⁵

ESTABLISHING
COVER

- 16.22 In order to allow a speedy response to be made when service-related injuries or illnesses occur, a more relaxed process would apply to determining whether a veteran's impairment is covered for rehabilitation purposes as opposed to the evidential standard needed for impairment compensation to be paid. The General Manager of VANZ would have the authority to provide rehabilitation services to any injured or ill veteran with qualifying operational service who is in need of rehabilitation. The General Manager would need to be satisfied that provision of rehabilitation services to the veteran would restore his or her physical or mental health, wellbeing and participation in society, and that the injury or illness is likely to be caused by service, such that a claim for impairment compensation would be tenable if the impairment proved permanent. A rehabilitation needs assessment would be used in all cases to determine whether rehabilitation is needed. Because the test for eligibility to rehabilitation would be more relaxed, it would not necessarily follow that a veteran who receives rehabilitation services would qualify for impairment compensation, ongoing treatment or other assistance.

REHABILITATION
PLAN

- 16.23 Under Scheme Two VANZ would have an obligation to make sure that a rehabilitation plan is put in place for each veteran who qualifies for rehabilitation services. The plan would be based on the extent of the veteran's incapacity and their ability to rehabilitate. The rehabilitation plan would be developed in consultation with the veteran and appropriate medical practitioners. This means that the plan can be shaped to the individual veteran's needs, capabilities and preferences.
- 16.24 In order to incorporate best practices from overseas rehabilitation schemes, the rehabilitation programmes should be required to encourage the participation of the veteran in the development of the programme and in particular the aims of the rehabilitation.³⁴⁶ Empowering the impaired veteran to become independent in conducting their own affairs should be central to the aims of the rehabilitation programme.³⁴⁷ Both the veteran and VANZ would have to agree to carry out their roles under the plan. As with ACC's rehabilitation entitlements, this would create obligations for the veteran to provide relevant information, undergo assessment, cooperate in the development and implementation of the plan, and participate in the rehabilitation. We see this element of responsibility for the rehabilitation as an essential factor in a veteran's process of recovery. We also understand that the military fosters in serving personnel a strong work ethic and sense of responsibility for their own wellbeing that correlates well with an obligation to rehabilitate. Veterans would be regularly assessed to ensure that beneficial changes are resulting from the rehabilitation services.

345 Letter from Ian Campbell, Secretary of the Department of Veterans' Affairs to Sir Geoffrey Palmer, President of the Law Commission regarding the review of the War Pensions Act 1954 (9 February 2010).

346 PriceWaterhouseCoopers, above n 342, at 211–212.

347 *Ibid* at xxxi.

16.25 Research has indicated that maintaining contact with the workplace assists in an injured person making a successful recovery.³⁴⁸ We suggest that, where possible, a veteran's employer should be involved in the rehabilitation plan.

TYPES OF REHABILITATION PROGRAMMES

16.26 While the rehabilitation plan would address only the veteran's service-related medical condition or conditions, we suggest that VANZ takes a broad approach to the type of rehabilitation that is made available to veterans. A person is more likely to achieve recovery to the maximum extent possible if the assistance received addresses not only the need to return to employability but the needs of the whole person. There should, therefore, be a holistic approach to rehabilitation. A range of programmes and services should be available to veterans. The department can contract community service providers to deliver these. VANZ may be able to work with ACC to utilise ACC's existing network of providers.

16.27 A feature of most of the more progressive injury entitlement systems is an emphasis on psycho-social rehabilitation services. This includes individual counselling, relationship counselling, mental health treatment, drug and alcohol programmes, peer support and life skills coaching.³⁴⁹ Whatever the type of injury or illness, these services may be helpful for assisting veterans to reintegrate into their families and communities.

16.28 Special programmes focussing on psychiatric conditions, such as Post Traumatic Stress Disorder, have also been a feature of modern veterans' entitlements schemes overseas. These provide treatment such as counselling and support groups for veterans and their families. The feasibility of such a programme here should be considered.

16.29 Where appropriate, vocational rehabilitation may involve assistance in searching and applying for jobs and career counselling.

REHABILITATION THROUGH ACC

16.30 The rehabilitation entitlements provided to a veteran under Scheme Two should coordinate with any rehabilitation entitlements that the veteran has under ACC. For those who continue serving in the NZDF, the NZDF has an obligation to provide rehabilitation entitlements as an ACC accredited employer. If rehabilitation is being provided by ACC and additional services outside of those funded by ACC are necessary, VANZ would fund these. VANZ and ACC would need to make arrangements for the management of these cases, given their dual responsibility.

³⁴⁸ WestWood Spice *Disability in the 21st Century: Constructive Approaches to Disability – A review carried out for the Australian Department of Veterans' Affairs* (WestWood Spice, NSW, 2008) at 29.

³⁴⁹ *Ibid.*, at 51.

CASE
MANAGEMENT

- 16.31 We recommend that Scheme Two provides every veteran who is undergoing rehabilitation with a case manager. Case management is an important part of the rehabilitation process, as most veterans appreciate a single point of contact and a person to manage the delivery of rehabilitation services. Successful rehabilitation requires strong case management.
- 16.32 The new legislation should allow a degree of flexibility around case management, as a veteran's circumstances would direct how the case management is provided. Veterans who are injured while serving in the NZDF are likely to qualify for rehabilitation entitlements from ACC. As an accredited employer for ACC, the NZDF would provide the rehabilitation services, rehabilitation plan and case management if veterans are receiving rehabilitation entitlements from ACC or from both ACC and VANZ. Nearly all submitters considered that the NZDF should continue to be responsible for the rehabilitation of currently serving veterans.³⁵⁰ For those no longer employed by the NZDF, the rehabilitation entitlements would be managed by ACC if the veteran qualifies for ACC entitlements as well, and VANZ if he or she does not.

GATEWAY
TO OTHER
ASSISTANCE

- 16.33 We see a key innovation of Scheme Two as being the shift in the gateway to accessing financial assistance from a claim for compensation for permanent impairment to a claim for rehabilitation. This approach means that very soon after an injury or illness the focus becomes getting well and recovering capabilities.
- 16.34 This approach would improve the veterans' scheme by allowing the focus to be on a veteran getting well from an early stage, rather than incentivising greater levels of disability. The RNZRSA's submission illustrates the drawbacks of the current scheme in discussing the income support payment, the Veteran's Pension:³⁵¹
- One of the effects of [making a 70% war disablement pension the threshold for eligibility for over 65 Veteran's Pension] is that it creates a target. Many veterans including eligible service folk will strive to get their rating 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 those whose ratings are within reach of 70% it encourages speculative claims in the hope of reaching the target but which can clog the system unnecessarily.
- 16.35 Scheme Two would make rehabilitation the key to receiving financial assistance. When a veteran has been accepted for rehabilitation services and he or she is unable to work while they are rehabilitating, Scheme Two would provide income replacement compensation during the period of rehabilitation. After a veteran has completed a rehabilitation plan, or has received a medical assessment showing that their impairment has reached a permanent status, the veteran could then be assessed for non-economic impairment compensation. In some circumstances, a veteran may be assessed as having a service-related permanent impairment but the impairment does not create a barrier to re-establishment in civilian life until a later time. In these cases, the impairment compensation would be provided before the rehabilitation services.

350 Thirty-five of 36 submissions on this issue were in favour of rehabilitation of currently serving veterans being the responsibility of the NZDF.

351 Submission of the Royal New Zealand Returned and Services' Association, above n 335, at 20.

REHABILITATION
FOR FAMILIES

- 16.36 We propose that Scheme Two provide psycho-social rehabilitation for veterans' family members. A holistic view of rehabilitation encompasses the veteran's adjustment within his or her family, and the family's adjustment to the veteran's condition. Consequently, services to family members, such as counselling could be appropriate.
- 16.37 We recommend that Scheme Two provide vocational rehabilitation to a veteran's spouse or partner if the veteran is assessed as being unable to make use of rehabilitation because of serious, permanent incapacity that causes the veteran to be unable to work. The purpose of this entitlement would be to reduce the financial impact of the veteran's incapacity on the veteran's family.

Chapter 17

Compensation for loss of income

INTRODUCTION 17.1 Where service-related impairment prevents a veteran from being able to work, the Government has a responsibility to provide a replacement for the income the veteran would have earned if he or she was not prevented from working. Under Scheme Two, income assistance would be available to those who are of working age. Income support for veterans over 65 years will be dealt with in chapter 22. Because many veterans covered by Scheme Two would be eligible for Accident Compensation scheme (ACC) entitlements also, the assistance for veterans must take into account and work with the potential for dual entitlement.

VETERANS' WEEKLY INCOME COMPENSATION 17.2 There are currently two standards for the level of income support in New Zealand: the social security standard and the accident compensation standard. The social security standard is based on the income required to reach an adequate standard of living.³⁵² This does not take into account the income a person was earning before he or she was unable to continue to work.

17.3 In contrast, from 1 April 1974 the Government has paid income support for those unable to work because of injury resulting from an accident at a rate of 80 % of the claimant's pre-injury income. This standard, therefore, aims to maintain the injured person's income at something close to the level received prior to the injury. The ACC scheme's weekly compensation has been described as "income replacement" for those who had earnings prior to an injury.³⁵³

17.4 As with income replacement for working age veterans under Scheme One, we consider that veterans under Scheme Two who are unable to work because of service-related impairment should be provided with assistance that is in line with the ACC standard of income support rather than the social security standard. The accident compensation standard of income assistance would provide a more generous, compensation-based payment than a social security-based payment would. This payment would be closer to the income that the

³⁵² Royal Commission to Inquire into and Report upon Social Security *Social Security in New Zealand: Report of the Royal Commission of Inquiry* (Government Print, Wellington, 1972) at 181.

³⁵³ *Ibid*, at 177.

veteran has lost as a result of the income or injury. This standard is appropriate to Scheme Two because it reflects the Government's responsibility for the economic loss to a veteran when the veteran is injured or ill because of service to the point that they cannot work.

- 17.5 We recommend, therefore, that Scheme Two introduce Veterans' Weekly Income Compensation (VVIC). This would be a payment that coordinates with and enhances ACC weekly compensation. It would have similarities to the VVIC that we propose for Scheme One.

Options considered

- 17.6 We favour the option of providing an ACC-equivalent weekly compensation at a higher level than ACC. ACC provides weekly compensation at a rate of 80 % of a person's pre-injury weekly earnings for as long as the person is unable to work in his or her pre-injury employment. This would allow those that qualify for ACC to receive the ACC payments and an additional amount as their veterans' entitlement, and those that do not qualify for ACC to receive the equivalent amount to this total. This approach, therefore, coordinates with ACC but ensures that those veterans who do not qualify for ACC receive the same compensation as those that do not.
- 17.7 This approach provides veterans with an advantage because they are veterans, in accordance with the principles of community responsibility and veterans who have been harmed deserving something extra than the ordinary population.
- 17.8 The rate of weekly compensation paid would be dependent upon what the recipient was earning prior to his or her impairment. While this could be said to be unequal treatment of veterans dependent on income, it accords with the New Zealand Government's approach to compensation for loss of earnings generally. Individuals and families are kept at a level of income that is similar to that which they had prior to the injury or illness. Additionally, because of the additional proportion of earnings paid to veterans, all veterans will be better off than other comparable New Zealanders.
- 17.9 ACC compensation works well as a means of providing income support for an injured person while it is necessary. The veterans' entitlements system can emulate and enhance this for veterans who are unable to work.
- 17.10 This approach was preferable to providing a separate income support pension for veterans because of the difficulties of the interaction with ACC that will arise regardless of whether the new veterans' income support is designed to coordinate with ACC. Some veterans will be eligible for ACC weekly compensation as a result of their service-related injuries. The nature of other service-related impairments will mean that some veterans do not qualify for ACC weekly compensation. To make a separate income support pension for veterans fair and to remove the inequality of some veterans qualifying for ACC and some not qualifying, veterans would have to not come under the ACC system for weekly

compensation at all. This would require Veterans' Affairs to be funded to a much higher rate and would create complication in ACC legislation and administration. Given ACC's universal approach to compensation for injuries and the complex system of funding and levies, it is neither necessary nor desirable to exempt a certain portion of the population from ACC. Providing an income support entitlement that is equivalent to ACC's weekly compensation means that a coordinated approach can be taken to the income support that veterans receive from different Government agencies.

- 17.11 The New Zealand Defence Force (NZDF) submission supports our preferred option, and states:³⁵⁴

...the ability to guarantee a Service member adequate financial support in the event of impairment is critical to building a confident and capable force. In the case of service-related impairment a Service member – and even more so their family – needs to know they will be taken care of. ...[T]he NZDF recommends that income support be provided to the ACC standard, with the possibility of additional support as recognition of qualifying operational service.

Details of weekly compensation

Eligibility

- 17.12 For a veteran to receive VWIC, he or she must meet the qualifying operational service criteria for eligibility for Scheme Two, be unable to work because of a service-related injury or illness and be participating in a rehabilitation plan.

Unable to work

- 17.13 We consider that veterans who are unable to work in their previous employment, because of their service-related condition, should receive compensation for loss of income. For these veterans, the service-related injury or illness has made a significant impact on the financial independence of themselves and their families. The Government has a responsibility to provide for the day-to-day financial needs of these veterans for as long as they are unable to work.
- 17.14 The definition of “unable to work” would be the same as that used in Scheme One for VWIC, which would be based on ACC's definition.³⁵⁵ Having a consistent test for inability to work would simplify the assessment process for this entitlement.

Participating in a rehabilitation plan

- 17.15 We propose that, in order to receive VWIC, a veteran must be participating in a rehabilitation plan under Scheme Two. We see providing income replacement as an important part of the rehabilitation process. The aim of linking entitlement to VWIC with rehabilitation is to make participating in the rehabilitation plan as easy as possible for the veteran to allow the greatest chance of recovery.

³⁵⁴ Submission of the New Zealand Defence Force (submission dated 12 March 2009) at 31.

³⁵⁵ See chapter 10.

It assists with the aim of early intervention, as a veteran will receive income assistance as soon as a rehabilitation plan is in place, rather than waiting for a potentially complicated decision on causation of an impairment for the purposes of impairment compensation.

- 17.16 We acknowledge that this would create a relatively low evidential threshold for the relationship of the injury or illness to service for eligibility to income replacement. The lighter evidential test that applies to rehabilitation eligibility would flow through to the VWIC. We consider that this is justified given the importance of assisting veterans to access rehabilitation.

Rate of payment

- 17.17 The veterans' entitlements legislation should provide for veterans to receive weekly compensation at a rate of 100 % of their earnings prior to the service-related injury or illness that has made them unable to work. Weekly compensation would be paid at this rate for either:

- one year; or
- the period during which the veteran is receiving rehabilitation services, whichever is the shorter.

- 17.18 After this period, veterans who:

- continue to have a rehabilitation plan in place and have incapacity for work; or
- are unable to rehabilitate further and have incapacity for work,

would continue to be eligible for VWIC, but at 85 % of pre-incapacity earnings. This is a higher rate than the 80 % of earnings paid under ACC.

- 17.19 Providing VWIC initially at 100 % of pre-incapacity earnings provides veterans with a significant advantage in comparison with the general population immediately following an injury. Following this, the 85 % of earnings was considered to be appropriate ongoing weekly compensation because it still provides veterans with a distinct advantage over other New Zealanders, but provides an incentive to return to work.

- 17.20 If a veteran receives ACC weekly compensation for the same condition, ACC would pay weekly compensation at the rate of 80 % of the veteran's earnings prior to the injury. Veterans' Affairs New Zealand (VANZ) would pay the additional 20 % of earnings to take the veteran's total payment to 100 % of earnings.

- 17.21 There may be some cases where a veteran does not qualify for ACC entitlements. This could be in cases of some illnesses or mental health conditions. In these cases, VANZ would pay for the full amount of weekly compensation.

17.22 After a person is released from the NZDF, the total amount of VWIC alone or VWIC plus ACC weekly compensation that may be paid should be capped on the basis of the maximum annual income at which ACC's weekly compensation is capped.³⁵⁶ We recommend that further details of this payment relating to minimum payments, maximum payments, calculation of earnings for persons in various employment situations and indexation (which relates to the Labour Cost Index) reflect the provisions of the Accident Compensation Act 2001.

When the payment ceases

17.23 The income support payment would continue for as long as the veteran has incapacity for work because of the service-related injury or illness. VWIC would cease after the veteran is assessed as no longer having incapacity for work. ACC weekly compensation also ceases at this point.³⁵⁷ Veterans would be given ongoing assessments to determine if they have capacity for work. If a veteran, who has been provided with rehabilitation assistance and has recovered the ability to work, has not returned to work after this point, the only income support for which they may qualify would be social security payments.

17.24 Under ACC, a weekly compensation recipient can elect to continue receiving weekly compensation for one year after he or she turns 65 instead of receiving New Zealand Superannuation. We recommend that VWIC ceases when the veteran turns 65 or when the veteran turns 66 if he or she elects to continue receiving VWIC instead of the Veteran's Pension. Because VWIC is closely linked to a veteran's employment income prior to sustaining an impairment, it not appropriate for it to continue once a person has reached the age of retirement, which in Government policy is 65 years. At the age of 65, all New Zealanders become eligible for New Zealand Superannuation (or Veteran's Pension).³⁵⁸ This is another form of income support. The Government's philosophy in paying New Zealand Superannuation (or Veteran's Pension) from 65 years of age is that all New Zealanders should receive income support when they are no longer of working age. Because this entitlement is provided to all New Zealanders, there is no longer a need for weekly compensation to be paid.

17.25 We recommend that Scheme Two incorporate the same exception to this age limit as ACC. As with ACC, the payment could cease at age 65, or, if the veteran chooses, at age 66.³⁵⁹ This would allow one additional year's payment of income compensation rather than a retirement benefit. At this point the veteran would begin receiving the Veteran's Pension as the veterans' retirement age income support payment.³⁶⁰

356 Accident Compensation Act 2001, sch 1, cl 46. This is currently set out \$1,692.59 per week.

357 Ibid, ss 52 and 53.

358 New Zealand Superannuation and Retirement Income Act 2001, s 7. It is envisaged that the cut-off age for VWIC would be increased in line with any future increase in the commencement age for New Zealand Superannuation.

359 Accident Compensation Act 2001, sch 1, cl 52 and 53.

360 See chapter 22.

Treatment of earnings

- 17.26 We propose that under Scheme Two, recipients of VWIC would be able to resume working part time and continue to receive some of their VWIC. The method of abating the payment based on additional earnings should be based on that used in ACC legislation. Payments would be abated so that the total VWIC and earnings after the incapacity do not exceed the claimant's total weekly earnings prior to the incapacity.
- 17.27 Veterans receiving VWIC would not qualify for other forms of Government income support, such as the Invalid's Benefit or Sickness Benefit. This approach is consistent with the way the Veteran's Pension works under the War Pensions Act 1954. It also ensures that veterans do not have their income support requirements provided for more than once.

Residency

- 17.28 As with VWIC under Scheme One, recipients who live outside New Zealand would be able to receive the payment. Because the payment is separate from the social security system, there should be no residency requirements. The basis of the payment is injury as a result of service in the New Zealand forces rather than where a veteran chooses to live.
- 17.29 However, if there are additional costs that arise as a result of the recipient living overseas, such as the cost of assessments for capacity to work, veterans should be responsible for paying these.³⁶¹

RETIREMENT LUMP SUM

- 17.30 We recommend that a payment be made to long-time recipients of VWIC when they reach the retiring age. This payment would be recognition that these veterans have earned less than they otherwise may have. The lump sum is intended to boost the recipient's retirement savings.
- 17.31 It would be made to those who have received VWIC for 10 years or more. A payment of approximately \$25,000 may be appropriate. It would be paid when the veteran reaches the age of 65.
- 17.32 We suggest that this payment should only be paid if the veteran meets an appropriate asset test. This is because the purpose of this payment is to target those who are in an objectively disadvantaged position because of their limited ability to earn. Veterans who have income or assets of above this level must be considered relatively well off and should not qualify for the additional assistance.

³⁶¹ See chapter 10.

Chapter 18

Compensation for permanent impairment

- INTRODUCTION 18.1 Compensation for permanent impairment will continue to have a role in the veterans' scheme applying to those who served after 1 April 1974. The purpose of this assistance is to improve the quality of life for these veterans by providing a payment in order to address, to the degree possible, the permanent physical or mental damage caused by service. The two main issues for consideration for Scheme Two impairment compensation are whether lump sum compensation or periodic payments should be paid, and how this compensation should interact with Accident Compensation scheme (ACC) lump sum compensation.
- 18.2 We recommend that lump sum payments for compensation for impairment should be a part of Scheme Two. These would be a similar type of payment to ACC lump sum compensation but should take into account what ACC will provide for the same impairment.
- 18.3 It must be borne in mind that there is a group life insurance policy for death or total and permanent disablement of members of the New Zealand Defence Force (NZDF) under the Armed Forces Superannuation Scheme and NZDF Superannuation Scheme.³⁶² If a member of the forces dies or becomes totally and permanently disabled before the cessation of service and before the normal retirement date (currently 65 years), a cash lump sum will be paid equal to four times the member's annual salary. This lump sum payment is in addition to impairment compensation or survivor payments under the proposed veteran's scheme.

362 See Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 70; New Zealand Defence Force Personnel Branch "Superannuation Schemes" (Wellington, 2008).

OPTIONS CONSIDERED

- 18.4 The Issues Paper discussed a number of options for compensation for permanent impairment. One of these provided an additional amount of lump sum compensation on top of ACC lump sum compensation. Another suggested an equivalent total lump sum for veterans who do not qualify for ACC but qualify for veterans' lump sum compensation. We consider these two options to be the most appropriate for Scheme Two, given that ACC legislation applies to all of those who qualify for entitlements under Scheme Two.
- 18.5 ACC provides compensation simply for the fact that an injury has occurred through an accident. A veterans' scheme may provide compensation for exactly the same injury. The reason for the veterans' assistance is because the Government placed the veteran in harm's way. As the same circumstances are giving rise to two different types of compensation, we cannot consider veterans' impairment compensation separately from ACC compensation. There are some instances where ACC compensation does not apply, but many other instances where both do apply. Where ACC does not apply, the veteran should not be worse off than a veteran to whom ACC does apply, and a veteran who qualifies for both ACC and veterans' entitlements should receive greater amounts of compensation for the same injury than he or she would under ACC alone. The current situation, which allows dual entitlement, has arisen because the criteria for war pension compensation has not been adjusted to reflect the parallel system of compensation provided to veterans by ACC.
- 18.6 Our suggested approach provides the fairest method of giving veterans' impairment compensation in an ACC environment. Few submitters supported this approach. However, it appears that, rather than answering from the perspective of future veterans and those who do not already receive entitlements, submitters' preferences were directed to older veterans currently receiving pensions who are dealt with under Scheme One.

Lump sum versus periodic payment

- 18.7 The issue of whether lump sum payments or periodic payments should be available under the veterans' entitlements scheme was also discussed in the Issues Paper. We favour the use of lump sum payments as compensation for impairment. Lump sum payments mean that the veteran gets a bigger payment at one time and that this occurs at the point that he or she is coming to terms with the impairment and adjusting to a new way of life. The veteran can do more with the money as a lump sum than with periodic payments, and it provides a more tangible benefit. The experience from other jurisdictions, such as Australia,³⁶³ shows that where a choice is given between a lump sum and a periodic payment, lump sums are chosen on nearly all occasions.

³⁶³ Briefing from the Department of Veterans' Affairs (Canberra, May 2008).

- 18.8 Compensation for impairment is not intended to be income support to provide the veteran with the necessities of everyday life. Veterans will always have a source of income that is separate from the impairment compensation, such as employment income, Veterans' Weekly Income Compensation or a social security benefit. Consequently, the veteran should not reach a point in the future where the lump sum money is gone and he or she has no means of survival.
- 18.9 A lump sum provides significant advantages in terms of efficiency to the Government. The majority of the cost associated with the payment can go into the payment itself rather than its ongoing administration.
- 18.10 Lump sum payments may mean that Veterans' Affairs New Zealand (VANZ) loses contact with veterans, as it would not continue to provide compensation payments. However, there are potentially other means for ensuring that veterans continue to be "on the system", such as through a registration and monitoring process or income replacement.
- 18.11 Another advantage of lump sum payments is that they treat all people with the same level of impairment equally, regardless of how long they live. This is especially advantageous for a veteran with a condition that leaves him or her with a shortened life expectancy. If periodic payments were made, there would only be a very limited benefit within the veteran's lifetime when compared with a veteran who lives for many decades following an impairment. A significant lump sum payment provides the veteran with more options and financial freedom at this important time in life.

DETAILS OF LUMP SUM COMPENSATION

- 18.12 The new Scheme Two legislation should provide for lump sum compensation to be paid at a rate dependent upon the level of whole person service-related impairment.

Payment timing

- 18.13 The lump sum payment should only be made once the condition has settled into a stable level of impairment. The reason for this is that following many injuries, it is not possible to assess the permanent impact of the injury. In some cases a veteran may be able to make a full recovery from a condition following the appropriate treatment. Some conditions require a period of time before the long-term impacts are apparent. Other conditions will be able to be treated medically or surgically with the potential for improvements in the level of impairment caused by the condition. The nature of lump sum compensation is such that it is providing compensation at one point in time for the future impacts of a condition. Until the likely extent of the future impact of the condition is known, an accurate calculation of the level of whole person impairment is not possible. Consequently, it may not be possible to pay the lump sum compensation for permanent impairment for some time after the injury occurs.
- 18.14 Scheme Two is designed to assist veterans as much as possible immediately following injuries and illnesses in order to rehabilitate and restore the veterans. Veterans would get all the assistance needed for this to happen. Impairment compensation is not the focus at this point. It only becomes relevant after an impairment proves permanent.

- 18.15 This may mean that the veteran is required to undergo treatment or rehabilitation before the lump sum payment is made. The legislation should oblige the veteran to undergo treatment that would reasonably improve his or her condition, as the current Act does.
- 18.16 The amount of time it takes for the permanent impairment arising from a condition to become apparent is likely to vary between veterans and different types of injury. The decision regarding when a condition has reached a permanent state should be made by a doctor. In this way the new veterans' legislation should emulate ACC legislation, which provides that ACC must not assess a person's entitlement to lump sum compensation until a certificate has been received from a medical practitioner stating that the condition has stabilised and that there is permanent impairment.³⁶⁴ This legislation also allows ACC to pay lump sum compensation if a medical practitioner certifies that two years has passed and the condition has not stabilised, but that it is clear that there is permanent impairment.³⁶⁵

Taxation and indexation

- 18.17 We recommend that the lump sum payments be tax free. We see no reason for a departure from current taxation policy in the Income Tax Act 2007, which exempts compensatory pensions under the War Pensions Act 1954 from income tax. The non-taxable character of these pensions recognises the special status of veterans, and has long been a feature of the war pensions scheme. We consider that this special status should be maintained with respect to payments of compensation for impairment.³⁶⁶ ACC lump sums are also tax free.
- 18.18 We recommend that, like the ACC lump sums, the lump sum compensation payments for permanent impairment under Scheme Two legislation are adjusted annually in accordance with movement in the Consumer Price Index. This method of adjustment should also apply to the lump sum compensation for families and the funeral grant discussed in chapter 23.

Interaction with ACC lump sum compensation

- 18.19 Compensation is already given in New Zealand for physical impairment caused by accident. Many of those who qualify for compensation as veterans will also qualify for ACC. We are not recommending that veterans' entitlements legislation removes the eligibility of veterans for ACC. ACC is a comprehensive injury compensation scheme for all accidents occurring in New Zealand and to New Zealanders who are working for a New Zealand employer overseas. This clearly includes members of the New Zealand armed forces deployed overseas. Veterans have as much right to ACC entitlements as other New Zealanders.

364 Accident Compensation Act 2001, sch 1, cl 57.

365 Ibid.

366 Income Tax Act 2007, s CW28. Under the Income Tax Act 2007, income support payments, such as the Veteran's Pension are taxable. This is in accordance with taxation policy which distinguishes payments that are primarily for income replacement from those that are for compensation for non-economic loss.

- 18.20 However, in order for the veterans' entitlements scheme to be robust, coherent and fair within New Zealand's entitlements provision as a whole, the problems of some people being able to qualify for both ACC and veterans' entitlements must be resolved. Currently, which veterans qualify for both ACC and entitlements under the War Pensions Act depends on the nature of the injury and when the injury occurred. This can create vast discrepancies between the total entitlements that different veterans receive. We are keen to make eligibility for entitlements fairer between veterans, regardless of the type of impairment.
- 18.21 We accept that veterans should receive something additional to the impairment compensation received by ordinary New Zealanders. We recommend that lump sum compensation for impairment under the new veterans' entitlements scheme should be set at a level that is equivalent to the ACC lump sum amounts with an additional percentage, perhaps 20 %, on top of this. This margin of advantage is fairly significant but is within the realm of what the New Zealand Government has accepted as fair compensation for permanent impairment. The majority of submitters, including the NZDF,³⁶⁷ supported the approach of providing ACC compensation payments plus an additional component.³⁶⁸
- 18.22 We believe that there is a case for the higher levels of impairment to receive proportionally higher amounts of lump sum payment. For instance, those with 80 % or higher service-related impairment could receive a lump sum amount equivalent to the ACC lump sum plus an additional percentage of greater than 20 %. This would mean that more resources in the scheme are focused on those with most severe impairment, which accords with one of the emerging themes for this type of scheme.
- 18.23 ACC lump sum compensation is not available at certain increments of impairment, but aligns directly with the percentage of whole person service-related impairment. For instance, a 46 % impairment results in a lump sum that is linked to 46 % impairment, rather than being rounded down or up. If veterans' impairment compensation under Scheme Two is to relate directly to ACC lump sum compensation, then veterans' compensation would also need to be paid at 1 % increments. As ACC pays compensation after a minimum level of impairment of 10 %, Scheme Two should also begin its compensation from 10 %.
- 18.24 Unlike ACC, veterans' lump sum compensation should be available for any type of condition that is found to be attributable to or have been aggravated by service. This means that some conditions for which veterans' lump sum compensation would be paid, especially psychiatric conditions and diseases, would not receive ACC. It is important not to disadvantage veterans with these conditions when compared with veterans who receive ACC in addition to veterans' entitlements for the same condition.

367 Submission of the New Zealand Defence Force (submission dated 12 March 2009) at 26.

368 Twenty of 34 submissions agreed that future veterans should access ACC compensation plus an additional component. Most submitters preferred an additional 10 % on top of ACC, with the range from an additional 10 % to an additional 50 %.

18.25 Veterans' entitlement lump sum compensation needs to take account of compensation received from ACC for the same impairment. Consequently, where a condition is covered by ACC and a lump sum is paid pursuant to the ACC scheme, VANZ would pay the additional percentage as lump sum compensation. If the veteran does not qualify for an ACC lump sum payment but qualifies for veterans' lump sum compensation, the full lump sum of the ACC amount plus the additional percentage would be paid by VANZ.

Reassessment

18.26 As with Scheme One, we consider that a process for the reassessment of levels of service-related impairment should be a part of the veterans' entitlements scheme. With the system involving lump sum compensation for whole person impairment, veterans would need to be able to receive additional lump sum compensation if their level of service-related whole-person impairment increases.

18.27 We recommend that, if a veteran who has already been paid lump sum impairment compensation develops another impairment that is found to be service-related or the level of impairment from an accepted condition becomes worse, an additional lump sum payment, reflecting the new level of whole body impairment, can be awarded. Veterans would be able to request a review of their level of accepted impairment. However, they must wait at least two years from the date of their previous assessment before a further claim can be considered.

18.28 If the new whole person impairment percentage aligns to a higher percentage of lump sum payment, the difference between the new level of payment and the original payment would be paid to the veteran. Again, any additional compensation paid by ACC for the same conditions would be taken into account.

18.29 The proposed two-year time limit for reassessment is consistent with Scheme One.³⁶⁹

18.30 As with Scheme One, an exception should be available to allow for veterans in some circumstances to be reassessed at an earlier time than two years after their previous assessment. It should be possible for veterans to request a reassessment of the level of their service-related impairment within two years of their last assessment, if there is medical evidence that their impairment has significantly increased and that this is due to service-related conditions. "Significantly" could be defined as an increase of 10 or more percent in whole body impairment. This level of increase in impairment is significant enough to create a noticeable effect on a veteran's health and well-being and to make the reassessment and consideration of whether further compensation could be paid worthwhile.

369 See chapter 9.

Age cut-off

18.31 To maintain consistency with Scheme One,³⁷⁰ the lump sum payments should only be available while a veteran is under 80 years. Once a veteran reaches 80 years, he or she can no longer apply for further impairment compensation for new or accepted conditions. Instead, veterans 80 years and over would be entitled to significant health care benefits and independence assistance.

FINANCIAL ADVICE

18.32 Given the shift to lump sum payments under Scheme Two, we consider that the Government should fund some financial advice for recipients of impairment compensation to a set maximum amount. Providing a lump sum payment gives recipients the flexibility to make significant improvements to their quality of life. However, there is a risk that some recipients may squander the lump sum without getting any long-term benefit from it. Scheme Two would provide optional financial advice up to a certain value for lump sum recipients. This assistance would allow the Government to exercise some responsibility for helping veterans to use the lump sum wisely, but allowing veterans the autonomy to use their compensation as they wish.

18.33 We recommend the legislation provide for an appropriate maximum sum that can be paid to assist with the cost of financial advice, where financial advice is in fact sought.

³⁷⁰ See chapter 9.

Chapter 19

Health care

TREATMENT FOR ACCEPTED IMPAIRMENTS

- 19.1 Like Scheme One, Scheme Two would provide funding for the costs of medical treatment for accepted impairments. Whereas the rehabilitation assistance would cover the medical attention required to restore capabilities to the extent possible following an injury or illness, this assistance would ensure that a veteran with an accepted permanent impairment does not have to bear the ongoing costs of medical attention to maintain his or her health.
- 19.2 A veterans' health care card would be used to indicate what types of treatment are covered by this assistance so that Veterans' Affairs New Zealand can be charged for the costs that the veteran would otherwise have to bear.³⁷¹

HEALTH CARE ASSISTANCE FOR OVER 80S

- 19.3 Scheme Two should also provide an extensive medical entitlement from the age of 80 years for all veterans with qualifying operational service who have an accepted impairment. These veterans would qualify for a number of free health care benefits regardless of whether their medical conditions are service-related. This assistance and the rationale for it is detailed in chapter 11. It would remove the need for continued applications from elderly veterans for reassessment of service-related impairment in order to seek treatment.
- 19.4 As with this assistance in Scheme One, regulations would establish a programme of health care benefits. It is envisaged that this assistance would cover significant health care costs that are common to over 80 year olds.

³⁷¹ See chapter 11.

Chapter 20

Independence assistance

VETERANS' INDEPENDENCE PROGRAMME

- 20.1 We recommend that the Veterans' Independence Programme (VIP), discussed as a part of Scheme One in chapter 12, should be incorporated into Scheme Two. VIP would be an innovative approach to providing veterans with a form of assistance that is vital to minimising the impacts of impairment. VIP is a way of honouring our veterans with practical assistance.
- 20.2 VIP under Scheme Two would offer the same type of assistance as under Scheme One. The assistance available to each veteran would be based on an assessment of need.
- 20.3 VIP would be available to two groups under Scheme Two:
- (a) veterans with an accepted permanent impairment, for needs associated with their accepted impairment; and
 - (b) veterans who have had any accepted permanent impairment and have reached the age of 80 years, for needs arising from any medical condition.
- 20.4 As with Scheme One, regulations would set out the types of assistance available under VIP. The assistance would be delivered through VANZ case managers, who would liaise with other Government agencies and coordinate the assistance that the veteran may qualify for, under veterans' entitlements legislation, as well as through the Ministry of Social Development and District Health Boards.

VIP for accepted permanent impairment

- 20.5 Many Scheme Two veterans, who are permanently impaired as a result of service, will have independence needs because of their impairment. Where a veteran has a permanent impairment, Scheme Two should help reduce the burden of the impairment by providing assistance targeted at helping the veteran to be as independent as possible.

20.6 This assistance would be similar to social rehabilitation assistance provided following a service-related injury or illness. The difference between VIP and social rehabilitation would be the availability of VIP once the veteran is assessed as having a permanent service-related impairment from which he or she is unable to rehabilitate. The rehabilitation plan is likely to cease at this point. VIP would take over as the method of delivering independence assistance to the veteran.

VIP for veterans over 80 years

20.7 As New Zealand's younger veterans who have served in qualifying operational service after 1 April 1974 age, they will have increasing independence needs related to increasing impairment. While some of this impairment may be service-related, other impairment will simply be that arising from age. Consequently, we consider that a broad independence assistance programme should be available to Scheme Two veterans also. This assistance would take the same form as that discussed for Scheme One.³⁷²

372 See chapter 12.

Chapter 21

Transition assistance

INTRODUCTION 21.1 We recognise that there is a need to assist all of those who serve in the armed forces at the point when they leave the forces. We recommend that Scheme Two include a Transition Assistance Programme with benefits available to all current service personnel in the New Zealand Defence Force (NZDF).

21.2 The point of transition from military to civilian life is a time of potential vulnerability for any member of the forces. We understand that a service career differs from most others. The military offers an all-encompassing lifestyle, and its own culture and expectations. Civilian jobs do not have these. This can mean that some members experience difficulties when they leave the military. If certain issues are not dealt with properly, it can adversely impact on the success a former member of the forces has in living and working as a civilian. We consider that some of these difficulties can be alleviated by offering a wide range of assistance at the time of discharge from service.

21.3 We suggest that this assistance should not be limited to only those who have qualifying operational service. While those with service in areas of particular risk could be expected to have increased health problems, the issues of transition are likely to be common to all serving personnel.

21.4 In its report on approaches to veterans' disability schemes, WestWood Spice found that:³⁷³

A smooth process which is sufficiently flexible to meet the needs of individual service members can have a huge positive impact both in terms of the veteran's long-term health outcomes, and ... reducing the likelihood of long-term dependency on compensation.

21.5 Overseas, particularly in Canada and Australia, it has been recognised that transition is a "whole of person" issue. Of the Canadian veterans it has been said that:³⁷⁴

[V]eterans are not in need of complex rehabilitation services (medical or vocational) but require support for societal reintegration and civil re-establishment. For some individual family units in transition, assistance in navigating the external environment may be all that is required but it is a significant need and shouldn't be undervalued.

373 *WestWood Spice Disability in the 21st Century: Constructive Approaches to Disability – A review carried out for the Australian Department of Veterans' Affairs* (WestWood Spice, NSW, 2008) at 48.

374 E Brintnell "Ability management of Canadian Forces veterans" (Veterans' Affairs Canada, 2001) at 19.

Bridging services to connect with community resources are important, as is the time to adapt to changes in role “performance”. The change in environment will have cultural impacts on behaviours of the entire family and this needs to be addressed openly and in a manner that is seen as positive and healthy.

- 21.6 In Canada, the Department of National Defence and Veterans’ Affairs Canada (VAC), two completely separate government agencies, have implemented a joint venture to assist Canadian Forces members and their families with the transition from military to civilian life. The service is open to any Regular or Reserve Force members who medically release or voluntarily release. It aims to ensure a seamless transition to civilian life through providing information on VAC services and benefits, a transition interview, referrals to other service providers and referrals to Canadian Forces case managers and programmes. Recently, VAC case managers have been permanently located at Canadian Forces bases to assist with the transition programme.
- 21.7 The Australian Department of Veterans’ Affairs considers that the arrangements in place for assisting with a veteran’s transition out of the defence force is one of the most critical facets of a legislative scheme for younger veterans. Australia’s Transition Management Service comprises one-on-one base interview visits and group sessions to assist with the lodgement of claims for assistance and discussion of eligibility and compensation issues.³⁷⁵
-
- 21.8 It may not be appropriate for the new legislation to detail the types of assistance offered. However, we suggest that Scheme Two at least contain an obligation on the NZDF to assist serving personnel with their transition from military to civilian life. The NZDF already carries out this role, but we think there is merit in linking this obligation to the veterans’ assistance scheme. We suggest that the transition assistance offered under Scheme Two build upon the existing transition services offered by the NZDF. The NZDF currently provides resettlement training seminars for military personnel returning from overseas service.
- 21.9 We consider that it is vital for the NZDF to own this programme in its entirety. The programme would be most successful if it is clearly communicated through existing leadership and communication channels within the NZDF. Some of the aspects of the programmes may require the NZDF and Veterans’ Affairs New Zealand (VANZ) to work together closely to deliver the assistance.
- 21.10 The assistance should be offered to all military NZDF personnel, including the Reserve Forces. Information about the programmes offered should be made available to members throughout their careers, and particularly at the point that they indicate that they are leaving or considering leaving the NZDF.

TRANSITION ASSISTANCE PROGRAMME

³⁷⁵ Letter from Ian Campbell, Secretary of the Department of Veterans’ Affairs to Sir Geoffrey Palmer, President of the Law Commission regarding the review of the War Pensions Act 1954 (9 February 2010).

Elements of the Transition Assistance Programme

Transition

21.11 The NZDF's transition assistance should be expanded if necessary. All members of the forces should be offered resettlement training. This could include education on topics such as financial management, cultural reintegration,³⁷⁶ family relationships, physical wellbeing and psychological wellbeing. Counselling, for individuals and for families, could also be offered. VANZ could contribute to the enhancement of the existing resettlement training by identifying areas of need from the veterans' perspective.

Job placement

21.12 We recommend that job placement assistance should be available to all members of the forces. The Canadian New Veterans Charter includes a job placement programme for all of its Canadian Forces members. This programme provides a useful model for what we propose.

21.13 The assistance should be available for members at any point in their careers, so that they will benefit at the point that they choose to leave the forces.

21.14 The assistance should include:

- job search training – to provide assistance with identifying transferable skills, writing a CV and preparing for a job interview;
- career counselling – to help a member determine their employment goals and direction as they enter the civilian workforce; and
- job-finding assistance – to assist with finding jobs to apply for.

21.15 The job placement assistance should be provided by the NZDF, possibly using private providers where it is helpful and efficient to do so.

VANZ education

21.16 The NZDF and its personnel have identified the need for more information to be provided at the point of transition about the services and assistance offered by VANZ.³⁷⁷ It is important that eligible personnel are aware of their legislative entitlements. There is currently a lack of knowledge of what VANZ does and how this could benefit current and former serving personnel.

³⁷⁶ Serving personnel identified that there is a need for assisting transitioning serving personnel with cultural reintegration, in particular for Māori who have had long careers with the NZDF: Submission of the New Zealand Defence Force (submission dated 12 March 2009) at 39.

³⁷⁷ Ibid.

21.17 This education should be targeted at those who meet the qualifying operational service criteria, as these are the veterans who are covered by Scheme Two. We recommend that the NZDF identify all of those who meet the qualifying operational service criteria prior to their discharge. We suggest that NZDF and VANZ coordinate to carry out educational activities for this group, such as running seminars about legislative entitlements and VANZ services, offering interviews with VANZ liaison staff within the NZDF and offering serving personnel the opportunity to make contact with a VANZ case manager. Promoting knowledge of VANZ assistance is likely to require VANZ staff, or VANZ-trained NZDF staff, to liaise on NZDF bases throughout New Zealand.

Chapter 22

Recognition of service for senior veterans

VETERANS 65 YEARS AND OVER

- 22.1 We recommend that Scheme Two maintains a special status for veterans who are over the retirement age. This should be done in recognition of veterans' service for the nation.
- 22.2 This recognition is independent of whether or not a veteran was impaired as a result of service. We consider that it is important to have elements in Scheme Two that apply to all veterans with qualifying operational service, regardless of any impairment, as a mark of the nation's respect and gratitude for the role veterans have played.
- 22.3 This should come with several benefits to provide some practical advantage to veterans.

Options considered

- 22.4 We have considered several options for income support for over 65 year old veterans, including providing additional entitlements on top of New Zealand Superannuation and paying a higher rate of New Zealand Superannuation. Our preference is to retain a Veteran's Pension that is similar to New Zealand Superannuation but with additional entitlements. Chapter 10 discusses the roles of New Zealand Superannuation and Veteran's Pension.

Veteran's Pension

Eligibility

- 22.5 As with the Veteran's Pension under the War Pensions Act 1954 and under the proposed Scheme One, Scheme Two's Veteran's Pension would be an alternative to New Zealand Superannuation for veterans with qualifying operational service. There would be no requirement that a veteran must have received impairment compensation to receive Veteran's Pension. It would be simply a payment in recognition of service.

Additional benefits

- 22.6 The Veteran's Pension for veterans 65 years and over under the War Pensions Act does not provide additional income to veterans. The three points of distinction which the Veteran's Pension provide in comparison with New Zealand Superannuation are:
- an automatic Community Services Card;
 - continued payment of the pension when a person is in hospital for more than 13 weeks; and
 - a lump sum payment on death.
- 22.7 All of these benefits should be available for veterans under Scheme Two. We recognise that in time a relatively large group of veterans will meet the eligibility criteria for the Veteran's Pension. At this point the benefits of the Veteran's Pension, particularly the lump sum payment on death, would become a significant cost. The lump sum payment on death would be identical to that available under the Veteran's Pension in Scheme One.³⁷⁸
- 22.8 In addition, all veterans who qualify for the Veteran's Pension would be entitled to a Veterans SuperGold Card.³⁷⁹

Rate of payment

- 22.9 As with Scheme One's Veteran's Pension, the Veteran's Pension under Scheme Two would be paid at the same rate as New Zealand Superannuation. This matter is discussed in chapter 10.

³⁷⁸ See chapter 10.

³⁷⁹ Social Security (SuperGold Card) Regulations 2007, reg 8.

Chapter 23

Families

INTRODUCTION 23.1 The importance of family members to veterans and, indirectly, the nation has been reiterated to us through the submissions, consultation and research. For Scheme Two to be an effective and fair system of assistance, it needs to support a veteran's family if the veteran dies.

23.2 We recommend that Scheme Two provide entitlements that take account of and enhance the entitlements provided by the Accident Compensation scheme (ACC). This approach is similar to that recommended for the impairment compensation and income replacement. ACC is entrenched in the New Zealand Government's provision of assistance to all New Zealanders. The families of some deceased veterans will be eligible for ACC entitlements. Depending on the cause of death, other families will not be eligible for ACC entitlements. This inequality needs to be addressed by a system that takes account of ACC entitlements and provides extra on the basis of the special status of veterans and the impairment they have suffered.

SPOUSE OR PARTNER

23.3 It is important that veterans' entitlements legislation acknowledges the impact of a veteran's service-related death on the deceased's surviving spouse or partner. Spouses and partners have a variety of needs following the loss of a veteran. We accept that spouses or partners should be given compensation to recognise their loss and suffering, economic assistance to help them with the costs of everyday life given their changed circumstances and practical assistance.

Eligibility

Relationship

23.4 We consider that the surviving spouse, civil union partner or de facto partner of a veteran who has died as a result of service should qualify for entitlements. This would retain consistency with the current legislation and ACC.

Cause of death

- 23.5 We propose that spouses or partners of veterans with a service-related death should be eligible. We recommend that Scheme Two define a service-related death as:
- death during qualifying service;
 - death within 10 years of qualifying service from a condition that was attributable to or aggravated by qualifying service; or
 - death more than 10 years after qualifying service from an accepted late onset condition.
- 23.6 In assessing which spouses and partners should be eligible for compensation and entitlements following a veteran's death, we considered whether the eligibility criteria should remain similar to that of the Surviving Spouse Pension under the War Pensions Act or whether another approach is more principled. It is clear that spouses of veterans who are killed during the veteran's eligible service should be covered. These spouses lose a partner suddenly and directly as a result of service in a way that will have significant financial implications for their families. A trade-off must be made between providing generous compensation to a smaller number of other spouses and partners who have lost a veteran because of service and spreading the available resources among a wider group of spouses. We believe that the assistance should be targeted at those whose veteran spouses have had a significantly reduced life period because of qualifying service and should provide for them to a standard that will allow them to recover from the loss and regain financial independence.
- 23.7 We accept that there are some deaths that occur some time after the veteran returns from the eligible service that are sufficiently proximate in causation and time that the deceased veterans' spouses are deserving of entitlements. However, it cannot be said that all spouses of veterans who die of a condition that is found to be attributable to or have been aggravated by their service ought to be provided with assistance upon the veteran's death. Given the beneficial evidential threshold for the acceptance of medical conditions, veterans, particularly elderly veterans, may receive entitlements for conditions, which later cause death, that have only a slim causal link to service. When non-veterans are dying at a similar age of the same condition, the provision of entitlements, such as compensation, to a surviving spouse does not seem justifiable. Elderly surviving spouses are financially provided for by the Government's income support and disability services.

- 23.8 Consequently, the time limit of 10 years from the date of the eligible service until the date of death from a condition that is found to be attributable to or have been aggravated by service for eligibility of a spouse to entitlements is recommended. This time limit is more generous than that of Canada, where a service-related death must occur within 30 days after the day on which the injury occurred or the disease was contracted,³⁸⁰ and the United Kingdom, where the death must be within five years of service.³⁸¹ If a veteran dies of a condition that has been found to be attributable to or have been aggravated by service within 10 years of service, there is a sufficient causal and temporal link between the death and service to warrant additional entitlements in relation to the death.
- 23.9 Although we consider that 10 years would usually be a sufficient time period for service-related deaths to occur, we accept that there are some diseases that have a long period of latency, but which could have their genesis in a service activity or exposure. Therefore, it would be necessary to have an exception to the 10 year time limit for specific late onset conditions. The United Kingdom allows a similar exception to their five year time limit in the Armed Forces Compensation Scheme. The Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 provides that:
- A “late onset illness” is –
- (a) a malignancy, or a disorder of the liver, kidneys or central nervous system, in each case which is capable of being caused by an occupational exposure occurring more than 5 years before the onset of the illness or the date of death as the case may be;
 - (b) a mental disorder which is capable of being caused by an incident occurring more than 5 years before the onset of the illness; or
 - (c) a mental disorder capable of being caused by an incident occurring less than five years before the date of onset of the illness, which disorder is capable of causing the person suffering from it to be unable to seek medical help for the disorder within 5 years of the date of onset of the illness.
- 23.10 We suggest that Scheme Two incorporates a similar definition. Establishing a list of late onset illnesses for which the 10 year time limit does not apply or a comprehensive definition of late onset illnesses could be a task for the expert medical panel as this is something that is likely to require significant research and expertise. The list should be set out in regulations.

Lump sum compensation

- 23.11 The new veterans’ legislation should provide for a lump sum compensation payment to be made to the surviving spouse or partner of a veteran whose death is service-related. Lump sum compensation would be consistent with the impairment compensation available for veterans in Scheme Two. This would also allow coordination with ACC entitlements. A lump sum payment would provide a significant one off payment at the time of real need following the loss of a veteran partner. Lump sum payments are a more efficient way of providing compensation than an ongoing pension. They also provide more assistance in

380 Canadian Forces Members and Veterans Re-establishment and Compensation Act RS 2005 c21, s 57.

381 Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (UK), art 3.

a way that can make a bigger financial impact. It was considered that the purpose of entitlements for spouses of deceased veterans should not be to provide an ongoing source of income indefinitely at a relatively low level but to provide effective assistance at the time of need.

- 23.12 The amount of the lump sum could be around \$20,000. The ACC survivor's grant is currently paid at \$5,821.57. Consequently the Scheme Two payment is significantly more generous than ACC to reflect the circumstance of the veteran's death.
- 23.13 Where a spouse qualifies for ACC in respect of the veteran's death, ACC will pay their survivor's grant. If the spouse also qualifies for entitlements as a surviving spouse under the veterans' entitlements legislation, Veterans' Affairs New Zealand (VANZ) would pay the additional amount of lump sum compensation to take the total lump sum paid in respect of the veteran's death up to the lump sum prescribed in this legislation.
- 23.14 It is important that those spouses or partners of veterans whose deaths do not qualify them for ACC survivor's grants are not worse off than spouses of deceased veterans whose deaths are covered by ACC. Families of veterans who die as a result of service should not be disadvantaged because their deaths do not meet ACC's definition of death by injury. Consequently, where a surviving spouse qualifies for veterans' entitlements lump sum compensation, but not an ACC survivor's grant, VANZ would pay the full amount of the lump sum. This effectively extends ACC-type coverage to spouses of veterans who do not die through accidents and significantly enhances the benefits paid.
- 23.15 It should be borne in mind that surviving spouses and partners of veterans who die during service in the New Zealand Defence Force (NZDF) are likely to also qualify for a payment equal to four times the veteran's annual salary.³⁸²

Weekly income compensation

- 23.16 Following the pattern of assistance available to veterans as income replacement under our proposed Scheme Two,³⁸³ and under ACC's weekly compensation, we recommend the introduction of surviving spouses' weekly income compensation. The details of this payment should reflect the structure of the ACC income compensation to spouses, but enhance it.
- 23.17 Spouses and partners of deceased veterans should also be provided with weekly income compensation at a rate of 60% of the veteran's earnings. This entitlement would last for five years or for as long as the spouse is caring for a child of the veteran who is under 18 years, regardless of whether the surviving spouse turns 65. The weekly income compensation would be compensation for loss of income and financial assistance during a period that could be financially difficult without the deceased's income.

382 Law Commission *Towards a New Veterans' Entitlements Scheme: A discussion paper on a review of the War Pensions Act 1954* (NZLC IP 7, 2008) at 70.

383 See chapter 17.

- 23.18 Where ACC has covered the veteran's death, it will pay weekly compensation at a rate of 60 % of 80 % (equivalent to 48 %) of the veteran's pre-injury income. In this case, VANZ would pay the additional weekly compensation to take the total weekly income compensation to 60 % of the veteran's income prior to death. If ACC is not providing entitlements, the full amount of weekly income compensation would be provided by VANZ.
- 23.19 As with ACC weekly compensation, this payment would not cease if the spouse remarries or enters a new relationship.

Independence assistance

- 23.20 In addition to lump sum and weekly compensation for surviving spouses or partners who qualify for entitlements under the new veterans' entitlements legislation, we recommend that spouses should be entitled to the Veterans' Independence Programme (VIP) services for up to one year following the veteran's death. The spouse would have a case manager who can liaise with all of the Government agencies and service providers who may provide entitlements or services which the spouse needs at this potentially difficult period in his or her life.
- 23.21 Additionally, the Government should fund needs-based services, such as home help and section maintenance, for those with practical needs. The extent of the services would be based on assessment of the spouse's needs and would vary depending on the spouse's circumstances. The regulations in place for VIP would specify the assistance available to surviving spouses.
- 23.22 Surviving spouses should also be able to access counselling through this programme. The counselling should be available where the spouse has a need arising from the veteran's death or service.

Vocational rehabilitation

- 23.23 Scheme Two would allow the surviving spouse to receive vocational rehabilitation services. This would be similar to vocational rehabilitation for veterans. It would cover assistance with finding work and retraining or re-educating. The aim of this entitlement will be to allow the surviving spouse to increase his or her independence and earning capabilities following the change of circumstances as a result of the veteran's death.
- 23.24 Vocational rehabilitation must have begun within one year of the veteran's death. We consider that a time limit is needed for this entitlement to ensure that it is dealing solely with the impacts of the veteran's death and not other events in the spouse's life. One year should be an adequate time for the spouse to recover sufficiently from the loss of the veteran to be able to make decisions about his or her future.
- 23.25 Vocational rehabilitation would be facilitated through case management. This would give the spouse someone who can provide information relating to entitlements, and with whom to talk through decisions.

- 23.26 This initiative was supported by a large majority of submitters, including the Royal New Zealand Returned and Services' Association (RNZRSA) and the NZDF.³⁸⁴

Child care subsidy

- 23.27 Where a veteran's death is covered by ACC, the surviving spouse or partner is eligible for weekly payments to assist with child care.³⁸⁵ We recommend that the veterans' legislation should replicate this entitlement for surviving spouses who do not qualify to receive it through ACC but do qualify for assistance under the veterans' legislation.

CHILDREN

- 23.28 Scheme Two must take account of the possibility that a veteran will die leaving behind dependent children. Again, we recommend that this assistance should follow the structure of ACC assistance for dependent children.

Eligibility

- 23.29 We propose that the children of a deceased veteran with a service-related death should qualify for entitlements until they turn 18 years old. Children should be given a broad definition that includes natural children, step-children and adopted children. Where a child of the veteran is conceived prior to a veteran's death but not born until after the veteran has died, this child should also qualify for entitlements from birth.
- 23.30 For children to qualify, the veteran's death should be service-related. The definition of "service-related death" applicable to assistance for surviving spouses should apply here.

Lump sum

- 23.31 We recommend that every child of the deceased veteran who qualifies for entitlements under this legislation and is younger than 18 years should receive a lump sum payment. This could be set at \$5,000.
- 23.32 Where the child qualifies for an ACC survivor's grant in respect of the veteran's death, ACC will pay the survivor's grant, which is currently \$2,910.80 per child. If the child qualifies for entitlements as the deceased veteran's child under the veterans' entitlements legislation, VANZ should pay an additional amount of lump sum compensation to take the total lump sum paid in respect of the veteran's death up to the total set in this legislation.
- 23.33 As with spouses, we consider that the children of veterans whose deaths do not qualify them for ACC survivor's grants should not be worse off than spouses of deceased veterans whose deaths are covered by ACC. Consequently, where a child qualifies for veterans' entitlements lump sum compensation, but not an ACC survivor's grant, VANZ should pay the full amount of the lump sum.

384 Thirty-four of 35 submitters on this issue supported this proposal; Submission of the New Zealand Defence Force (submission dated 12 March 2009) at 37; Submission of the Royal New Zealand Returned and Services' Association (submission dated 19 December 2008) at 25.

385 Accident Compensation Act 2001, sch 1, cl 76. ACC currently pays \$123.79 weekly for one child, \$148.52 for two children and \$173.31 for three or more children.

- 23.34 If the child is under 16 years, payment of the lump sum should be made to the child's caregiver.

Weekly compensation

- 23.35 Under Scheme Two, weekly compensation of a share of 20% of the veteran's earnings prior to death would be divided equally between the children of the deceased veteran as weekly income compensation. Like ACC weekly compensation, this would be paid to each child until he or she turns 18 years, or 21 years if he or she continues in education. For a death covered by ACC, ACC will pay 20% of 80% (equivalent to 16%) of pre-injury earnings. VANZ would pay the balance to take the total to 20% of earnings if ACC is also paying entitlements.

FUNERAL EXPENSES

- 23.36 We recommend that, like Scheme One, Scheme Two should introduce a funeral grant that is available for any veteran with qualifying operational service. This assistance would then become a mark of recognition and respect for veterans.
- 23.37 We consider that a funeral grant at the same level as the ACC funeral grant should be available under the veterans' entitlements scheme. The ACC funeral grant is currently paid at up to \$5,429.92, in comparison to the war funeral grant of \$2,268.38 under the War Pensions Act. This disparity should be amended so that the funeral grant available under the veterans' entitlements scheme reflects the true cost of a funeral.
- 23.38 Like the ACC funeral grant, the veterans' entitlements legislation should cover the actual costs of the funeral up to the maximum amount payable. Evidence of actual expenses should be required in order for the funeral grant to be paid.
- 23.39 The funeral grant should be paid to the deceased veteran's estate. This means that the assistance will be available to whoever is bearing the costs of the funeral. Any funeral grant paid by ACC or the Ministry of Social Development would be deducted from the total paid by VANZ.



Appendices

Appendix A

Wars and emergencies under the War Pensions Act 1954

WAR OR EMERGENCY	DATES OF SERVICE
World War I	4 August 1914 – 11 November 1918
World War II	3 September 1939 – 14 August 1945 (J Force 1946 – 1952)
Korea	23 August 1950 – 27 July 1957
United Nations Military Observer Group in India and Pakistan (UNMOGIP) and United Nations India-Pakistan Observation Mission (UNIPOM)	January 1952 – 31 March 1974
United Nations Truce Supervision Organisation (UNTSO), and its detachments: United Nations Yemen Observer Mission (UNYOM), United Nations Observation Group in Lebanon (UNOGIL) or United Nations Operation in the Congo (UNOC)	July 1954 – 31 March 1974
Operation Grapple	1957 – 1958 on HMNZS ROTOITI and PUKAKI
The Malayan Emergency	18 June 1948 – 31 July 1960
Thai/Malay Border	31 July 1960 – Mid June 1964
Indonesian Confrontation	1 August 1964 – 31 December 1966
Vietnam	29 May 1964 – 31 December 1972
Vietnam – Air Force service in 41 Squadron	1 January 1973 – 21 April 1975
Vietnam – service with the civilian surgical team at the Qui Nhon Provincial State Hospital	December 1963 – March 1975
Mururoa	22 July 1973 on HMNZS OTAGO 28 July 1973 on HMNZS CANTERBURY
Gulf Conflict	20 December 1990 – 13 April 1991

WAR OR EMERGENCY	DATES OF SERVICE
Angola – United Nations Verification Missions in Angola (UNAVEM II & III) or United Nations Observer Mission in Angola (MONUA) or National Institute for the Removal of Obstacles and Explosive Ordnance in Angola (INAROOE)	July 1991 – June 1999
Bosnia – United Nations Protection Force (UNPROFOR)	From 23 March 1992
Sierra Leone – United Nations Observers Mission in Sierra Leone (UNOMSIL) or United Nations Mission Sierra Leone (UNAMSIL)	From 11 August 1998
East Timor	From 30 August 1999
Deployed outside the territory of New Zealand as part of Operation Enduring Freedom	From 12 December 2001
Iraq – as part of Task Group Rake and UNMAS	From September 2003
Solomon Islands – New Zealand Defence Force personnel deployed as part of Operation Rata	From July 2003

Appendix B

List of submitters

Claire Acott	Coromandel RSA Welfare Committee	Paul Harman
Donald Allan	Leslie Coutts	William Henderson
George Barclay	Terry Culley	P J Hogg
Marian Barclay	Malcolm Daly	Kevin Holley
Ian Beker	Devonport RSA	Barry Inglis
Dennis Bell	Ray Dines	Bruce Isbister
Doug Belsham (4)	Trevor Doel	Victor Johnson
Noel Benefield (4)	Donald Donaldson	Kim Keane
Allan Birstwhistle	Ellesmere RSA	N C Kelly
Ian Blackman	Ex-Vietnam Service Association	Douglas Kerr
Sidney Bourne	O R Farrell	King's Empire Veterans Wanganui Branch
Kevin Bovill	R B Farrell	King's Empire Veterans Whangarei Branch
L M Boyle	Terry Farrell	Korean Veterans Association Auckland Area Branch
Susan Braggins	Margaret Faulkner	Elizabeth Lancaster
Derek Briggs	Noeline Fenwick	P B Loader
S A Britton	Kevin Flanagan	J W Longman
Maggy Brownlie	Arthur Fletcher and Dennis Warren	Rowan MacDonald
D J Brunton	Peter Fox	Stephen Maire
Russell Byrne	Sydney Giles	R W A Malcolm
CMT and National Service Association (2)	J W Gilmore	Eru Manuera
Laurie Collier	Warren Gould	J D Matthews
Gary Collins	Andrew Greig	Brendan McConnell
Russell Cook	Lin Hall	
Neville Copeland		

Graeme McKay	Rannerdale Veterans Hospital and Home	Beverly Wakem, Chief Ombudsman
Dr Brian McMahon		
Ross Miller	Barry Renshaw	Wanganui Malayan Veterans Association
Lawrence Mitten	Samuel Richards	Joe Watt
Geoffrey Monks	R D Rooderkerk	Wellington RSA
Montecillo Veterans Home and Hospital	Rotorua RSA	Collin West
Mount Maunganui RSA Welfare Trust	Royal New Zealand Air Force Association	West Auckland RSA
John Mountain	Royal New Zealand Artillery Association	Bernice Wright
Wayne Myers	Royal New Zealand Navy Women's Association	Gerry Wright
Napier RSA		Ken McKee Wright
G David Neil (2)	Royal New Zealand Returned and Services' Association	1 anonymous submission
Eugene Nelson	Ruatoria RSA	
New Zealand Audiological Society	Russian Convoy Club	
New Zealand Defence Force	Sandy	
New Zealand Federation of Brevet Clubs	Lindsay Skinner	
New Zealand Malayan Veterans Association Waikato Branch	K St Just	
New Zealand Nuclear Test Veterans Association	Yvonne Stewart	
Jim Newman	Tairāwhiti Vietnam Veterans	
John Noble	James Takarangi	
John O'Reilly	Paora Tau	
Paparua Templeton RSA	Andrew Tewano	
Morris Parker	Rick Thame	
M D Parson	Ian Thompson	
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