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NATIONAL HEADQUARTERS

ABN 63 008 488 097

From: Rear Admiral Ken Doolan AO RAN (Retd)
National President

R2-10-1/dk
14 June 2012

NP: 094/12

Professor Rosalind Croucher
President
Australian Law Reform Commission
Level 40, MLC Centre
19 Martin Place
SYDNEY NSW 2000

Dear Professor Croucher,

Thank you for your letter of Thursday 24 May 2012 in which you invited the Returned & Services League of Australia (RSL) to make a submission about the Australian Law Reform Commission's Inquiry into Commonwealth legal barriers to older persons (45 years and over) participating in the workforce or other productive work.

The RSL appreciates this consultation but forwards the attached submission by the requested date with a caveat. The inordinately short period of time allowed for consideration of these complex issues has precluded our normal consultative processes with State and Territory Branch Executives and hence we reserve the right to amend and/or expand our submission after further internal consultation and deliberation.

We have examined the Issues Paper made available on your website; note that responses to this will feed into a Discussion Paper containing draft proposals for reform to be released in September 2012; and that there will be another opportunity for making submissions about these matters before the final recommendations for reform are made in March 2013.

As suggested, our submission comments on the two issues of the qualifying age for a Service Pension and the age based restrictions on compensation for military personnel under the *Military Rehabilitation and Compensation Act 2004* (C'wth).

Please note that copies of your letter, this letter and the attached submission will be posted on the RSL website www.rsl.org.au

Yours sincerely,

Ken Doolan

LEST WE FORGET

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Attachment: RSL Submission about the Australian Law Reform Commission Issues Paper into its Inquiry into Commonwealth legal barrier to older persons participating in the workforce or other productive work.

THE PRICE OF LIBERTY IS ETERNAL VIGILANCE

Submission
by
The Returned & Services League of Australia (RSL)
about
The Australian Law Reform Commission (ALRC) Issues Paper
concerning
An Inquiry into Commonwealth legal barriers to older persons
participating in the workforce or other productive work

Framing Principles

Paragraphs 24 to 35 of the ALRC Issues paper canvass a broad range of considerations covered by the title Framing Principles and end with a question.

The first paragraph, a statement of an overarching Government objective, calls into question the proposition that there can be any realistic framing principles.

This statement asserts that "In the context of Australia's ageing population the Government's overarching objective is to keep people in work and paying taxes longer – rather than being in receipt of old age pensions – and to support people in self funded retirement."

Though this is an understandable objective it is at odds with the subsequent well intentioned statements about framing principles because every other consideration must be subservient to this overarching objective.

The overarching Government objective cannot be a framing principle. It is the basis for the ALRC Inquiry, the reason the Attorney General established the Inquiry, and should be so specified.

Taking a broad approach the ALRC has identified as framing principles "participation; independence; self agency; system stability; system coherence; and fairness" and asks the question "are there other key principles that should involve the ALRC's deliberations?" As and of themselves these framing principles are unobjectionable. But this begs the question as to what the establishment of these (and possibly other) framing principles will mean

given the overarching Government objective? How can "independence" and "participation" be of any consequence when the overarching objective is to achieve a prescribed outcome?

The RSL is a consistent "participant" in national affairs and is proudly "independent." Our membership consists of former and serving members of the Australian Defence Force and our primary objectives include the welfare of the veteran and ex-service community and their dependants and the ongoing maintenance of a strong, well trained, adequately resourced and fully combat capable Australian Defence Force. As such we have a large stake in a fundamental aspect of Australia's future - the ongoing security of the nation and the well being of those Australians past and present whom Australian governments have sent in harm's way to defend our national interests.

The overarching objective of the Government makes no mention of national security. The framing principles make no distinction between the military and the civilian despite the fact that in almost all areas of legislation, the Commonwealth Parliament has enacted laws differentiating between the military and the civilian members of Australian society.

Since federation, the Australian people through their elected representatives in the Commonwealth Parliament have made a clear distinction between those in the uniform of the nation's armed forces, veterans and the general community. There is a plethora of Commonwealth legislation dating back to the *Defence Act 1903* which testifies to this difference. One complete Department of State, that of Veterans' Affairs exists because the Australian people have long accepted that veterans have special needs. And when legislation was put in place creating the Order of Australia, the legislators on behalf of the people specified that there be two divisions, one of which was restricted solely for those who serve in the armed forces.

The framing principles in the ALRC issues paper make no mention of this fundamental and legislated difference. The RSL recommends that this omission be corrected.

Another RSL concern about the framing principles is that they seem not to encompass the part played by volunteers. The annual economic and social benefit to Australian society of the work of the tens of thousands of RSL volunteers is enormous. These citizens, some in their 90s, give back to the Australian community far more than they receive – and they do it selflessly and without fanfare. They and the volunteers in the many other charitable and like organisations form that part of the ageing Australian population whose ongoing efforts are an exemplar of giving. Achieving the overarching government objective of keeping people in work and paying taxes longer will inevitably impact on the number of Australians who, after retirement, work long hours as volunteers for no reward for the overall good of the nation. It is not unreasonable to postulate that if Australia's volunteers ceased to give so generously of their time, expertise and effort, the nation would be very much the poorer not least because of the increase this would pose on the public purse.

The overarching Government objective makes mention of the need to support people in self funded retirement but is mute about the impact of its objective on elderly Australian volunteers.

Qualifying age for the Service Pension

An RSL Retrospective

The RSL considers it vital that the background to the Service Pension is taken into account by the ALRC Inquiry.

The Service pension was introduced for returned servicemen on 6 December 1935 by the Lyons Government and was enacted on 1 January 1936. It was first paid under the *Australian Soldiers' Repatriation Act 1935*

The system of Service Pensions was introduced primarily for those with "theatre of war" service. The Service Pension was subject to a means test taking into account income received and property held by the returned serviceman and his wife or partner.

The idea¹ for a special pension for servicemen who had not been wounded or developed a disease due to service was not solely an Australian initiative. In late 1929 and the early 1930s there was considerable debate in Canada, Britain and New Zealand as well as in Australia about the long-term effects of war service. It was argued that service led to premature ageing and earlier susceptibility to the disease which affected the aged. (See *further comment about this matter below from the Toose Report*).

Australian coined the phrase the "burnt out digger" syndrome. The then Minister for Repatriation the Rt. Hon W.M. Hughes supported the idea and Prime Minister Lyons said when introducing the Bill: *"It remains undeniable that (a veteran's) period of usefulness has been shortened when compared with that of the civilian, and it is also undeniable that the strenuous conditions of modern war are capable of hastening the process of decay which impairs organic functions"* (Australia HR Debates, Vol 148, 1814).

In the case of those who were permanently unemployable it was said that some compensation was owed for *"the stress and strain of their experiences"* (Hansard, HR Debates, Vol 148, 1809.)

The Commonwealth Statistician² made some calculations arising out of the census of 1933 into this problem by endeavouring to ascertain the comparative age of death of the ex-soldier and the civilian of the same age group. He reported that *"although it was not possible from these data to construct a life table comparable to the Australian Life Tables of 1932-34, it was possible to make some comparison between the two experiences – national*

¹ Veterans' Entitlement Law 2nd edition Robin Creyte & Peter Sutherland Part 111. Service Pensions

² The Veterans' Entitlement Act Monitoring Committee Reports (Toose Report 1988) para 2.16 Service Pensions.

and returned soldiers. It was ascertained, as a result of these calculations, that the mortality amongst returned soldiers since discharge exceeds that of a body of males of the same age constitution drawn from the general population by about 13 per cent."

An RSL Perspective

Military service³ is distinctly different from civilian employment. This is recognised in the separate and specific arrangements and legislation for members of the Australian Defence Force (ADF) for such matters as health services, pay and allowances, superannuation, governance and disciplinary/justice matters and compensation. The characteristics of service in the contemporary and former ADF sets it apart from other forms of employment. This difference is widely accepted and was identified in an earlier inquiry into military compensation arrangements.

The role of ADF requires that its members be fully effective in combat. Each member must maintain a high level of physical and psychological fitness, accept the demands of military discipline and be fully committed to the prospect of being sent in harm's way in defence of the nation at an instant's notice.

These demands have consequences one of which is the injury rate to service personnel.

A study by the then Lieutenant Colonel S. Rudzki⁴ into injury rates on Army personnel suggests that injury occurrence in the military is much higher than that which occurs in civilian life. His research was based on injury reports submitted over the period 1987 to 1991 and 1995/6 and showed that the injury rate per 1000 soldiers per year ranged between 133 and 247. The most comparable civilian data was from Worksafe Australia in 1993 where the highest reported rate was 65 injuries per 1000 workers per year.

This and other consequences have long been recognised and accepted by the Australian people and through their elected representatives, the Australian Parliament.

The original intent of the Service Pension was to compensate Australian veterans for the indefinable and intangible effects of war service that could lead to premature ageing and loss of ability to earn a living. Research⁵ has demonstrated that a veteran ages more quickly than the general population i.e. veterans develop the same diseases and disabilities as other Australians but the onset is at an earlier age (noting that it is not until veterans reach the age of 80 that the statistic realigns with that of the general population).

In this context it is important to note that during the past decade the experiences of members of the ADF deployed on operations i.e. sent in harm's way, has changed markedly.

³ The Review of the Military Compensation Scheme 1999 Part 2 – The Unique Nature of Military service page 19.

⁴ Department of Defence Inquiry into Military Compensation arrangements for the Australian Defence Force March 1997 page 9.

⁵ Toose Report 2.16

Their experiences suggest it is not unreasonable to contend that the men and women of the ADF are subjected to more stressful circumstances than in the past because

- they are exposed to danger on a 24/7 basis in a hostile environment where there is no "front Line" (as was most often the case in the past)
- they serve multiple lengthy deployments with many returning to the conflict up to 5 or more times
- the distinction between "friend" and "enemy" is not as clear cut as may have been the case hitherto and the strictures of the international laws of war are far more demanding than in the past

The implication is that the premature ageing of the veteran as compared to the rest of the population may have been exacerbated by this change in the stressfulness of contemporary combat experience i.e. there may be a case in the future based on sound research to consider the need for an earlier provision of the Service Pension than is currently available under existing legislation.

RSL response to Issues Paper Question – *Should the qualifying age for a Service Pension be raised incrementally to retain the 5 year relativity with the Age Pension?*

No – for the following reasons:

- The *Veterans Entitlements Act 1986* makes no mention of the eligibility for the service pension being 5 years before eligibility for the Age Pension. The legislation specifically states the age requirement as 60 for men. It is not linked in any way to the age eligibility for the Age Pension. There is no mention of the Age Pension in Section 5Qa. Also in the Explanatory Memorandum for the Bill no mention is made of linking the Age Pension to the Service Pension.
- A reading of all 22 Second Reading speeches in the House of Representatives and 181 in the Senate between 16 October and 28 November 1985 about the *Veterans' Entitlements Bill 1985* shows there is no mention of any linkage between the Age Pension and the Service Pension
- The arguments advanced in the RSL Perspective above
- The false and erroneous premise for the ALRC question. The rationale for the Service Pension has no connection with the ageing of the Australian population. It is a unique pension established for a unique purpose and any change to its entitlement would need to be justified solely on this basis. Indeed, as has been postulated above, there may be a need based on future research to consider lowering the age at which the Service Pension might be made available.

Aged Based restrictions on compensation for military personnel under the *Military Rehabilitation and Compensation Act 2004 (C'wth)*.

The more important aspects appear to have been summed up in the Issues Paper as:

- the reality that most jurisdictions have retirement provisions restricting access to workers compensation on attaining the age of 65
- the general rule that there is no limit to total incapacity payments or medical payments
- for members of the ADF who have attained the age of 65, compensation is not payable albeit that if a current or former ADF member who has reached 63 years of age suffers an injury, compensation may be payable for a maximum of 104 weeks thereby possibly extending the age of eligibility beyond 65.

The RSL also notes that the Issues Paper seeks an answer to Question 48:

"In what ways, if any, should retirement provisions in Commonwealth workers' compensation legislation be amended? For example, are any of the following approaches appropriate:

(a) removing all age based restrictions

(b) removing all age based restrictions, but imposing benefit period or amount restrictions;
or

(c) increasing the age at which compensation is no longer payable to age 67, except in certain circumstances?"

The ALRC use of the words "Commonwealth workers" in this question is unfortunate given that past and present members of the armed forces have separate acts of the Parliament for compensation designed specifically for their unique form of employment. They are not referred to in legislation as "Commonwealth workers."

This complex issue requires detailed consideration and broad consultation. The RSL therefore reserves the right to keep open any answer we might provide to Question 48 and to the broader issues about this topic raised in the Issues Paper.