# SUBMISSION
# ON
# A NEW INSTITUTE OF VETERANS' ADVOCATES

**Lake Legal**
Level 2, 280 Flinders Street, Townsville
QLD 4810
PO BOX 401, Garbutt East QLD 4814
Phone: 07 4740 4040
[redacted]
Ref: 24-1423

## TABLE OF CONTENTS

## EXECUTIVE SUMMARY

While promoting and maintaining standards of professional training and practice of advocacy services for veterans is a laudable goal, in its current form the proposal captures the regulation of solicitors and poses several risks. This submission emphasises that existing legal regulations are sufficient with respect to solicitors and that any additional regulation should be carefully considered to avoid overlap, confusion, and undue burden on legal practitioners, ensuring that access to justice for veterans is not compromised. It seems that any attention on accountability in the veteran advocacy space should be focused on the non-legal fee-for-service commercial operators.

With the proposed Institute, DVA is intended to be the ultimate beneficiary of an efficient and effective regulatory regime for advocates. A successful regulatory regime will provide DVA with greatly enhanced productivity gains ultimately resulting in the requirement for less Full Time Equivalent Australian Public Service staff. The real question is, will those perceived gains outweigh the budget required to achieve it?

The benefits to be derived from the proposed system however, are purely illusory to veterans as while it may result in reduced DVA processing of claims, the burden of delays are instead shifted onto the veterans and their advocates while at the same time holding advocates to be more accountable.

### Major Concerns with the Proposal – Regulation of Solicitors

**Overlap with Existing Regulation**: The legal profession is already highly regulated, and additional registration requirements may cause confusion and conflict with existing standards.

**Barrier to Access to Justice**: Additional registration requirements may restrict the number of solicitors able to represent veterans, potentially increasing costs and reducing access to quality legal advice.

**Potential for Overreach**: Government regulation could undermine the independence of the legal profession and influence legal strategy adversely.

**Administrative Burdens**: Additional regulatory demands could impose undue administrative and financial burdens on solicitors, leading to inefficiencies and increased costs for clients.

**Conflict with Professional Regulation**: Duplicating the regulatory framework and standards can erode professional independence and create confusion.

**Potential Bias and Reduced Representation**: Government control over registration to the Institute might lead to bias in the advocacy process.

**Duplicated Efforts and Costs**: Maintaining multiple registrations will complicate efforts, inflate costs, and possibly reduce consumer protections.

**Double Jeopardy**: Solicitors might face dual disciplinary actions for the same conduct under separate regulatory regimes.

**Legal Professional Privilege**: Requests for access to a solicitor's documents might infringe on the Legal Professional Privilege protecting solicitor-client communications.

**Constitutional Issues:** The proposal may fall foul of the implied freedom of political communication necessary to sustain representative government.

**Specific Issues with DVA**

**Set-Off:** DVA senior executives should consider if the potential productivity gains of the proposal far outweigh any costs to implement and support the Institute. What is the net benefit to DVA in real terms?

**Specific Issues with Institute**

**Budget:** The proposal is silent on a budget required to achieve its objectives.

**The Board:** There is no proposal to have someone with legal expertise included on the Board. Given the issues raised in this paper it should be clear that this should be a requirement.

**Appeals:** There is no mention of any appeal mechanism.

**Advocates:** 1/3 will retire in the next year. Many are themselves beneficiaries of DVA claims and legislatively prohibited from working more than 1 day each week. The likely pool then for employed advocates is small.

**Competition Law:** The proposal raises some interesting competition law issues related to exclusive dealing.

**Non-legal fee-for-service commercial operators:**

**Unconscionable Conduct:** Some of their conduct with veterans is at risk of breaching the equitable doctrine of Unconscionable Conduct.

**Providing Legal Services:** Some conduct by non-legal fee-for-service commercial operators could well be in breach of various state law provisions relating to providing legal services whilst not being entitled to provide legal services. Instances of such conduct should be reported by DVA to the relevant state regulators.

**Consumer Law:** Current non-legal fee-for-service commercial operators maybe engaged in misleading practices and their contracts with veterans for service provision may well fall foul of the Unfair Contract provisions. Either report the conduct or DVA should prosecute the conduct through their right of private action.

**Provision of Legal Services:** Some of their conduct may well be in breach of the various state regulatory regimes in terms of being in 'legal practice' and/or the 'practice of law'.

**SUBMISSION: INSTITUTE OF VETERANS' ADVOCATES**

**Introduction**

1. On 23 August 2024 the Department of Veteran's Affairs (DVA) made public through their website that it is considering creating an 'Institute of Veterans' Advocates' (the Institute) to enhance support for veterans and their families. In the Consultation Paper it is stated that the proposal of the Institute was made by the Ex-Service Organisations Round Table (ESORT) Advocacy Working Group.[1]

2. It follows that the proposal seems to have come about through DVA and not ESORT given DVA advised the Royal Commission into Defence and Veteran Suicide (the Commission) that it was:[2]

> 'aware of concerns raised about services provided by individual advocates, specifically the quality, consistency and availability of services'. In response, it has established a working group with representatives from the ESO and veteran community 'to develop an independent veterans' advocacy professional association'. This is intended to 'further develop and promote a professional network of qualified, credible and reliable' advocates, including compensation and wellbeing.[3]

3. In its advice to the Commission, DVA advised that the Institute would be responsible for:[4]

    a. Setting and overseeing ethical and service delivery standards for veterans' advocacy services;
    b. Promoting the professional interests and development of its members by encouraging, supporting and facilitating the provision of high-quality advocacy services to veterans and their families;
    c. Setting, upholding and advancing the standards of professional practice in veteran advocacy to ensure veterans and families receive the support they need and are confident with the level of service from members;
    d. Providing accreditation for the providers of veteran advocacy services;

[1] See 'A new Institute of Veterans' Advocates' (the Consultation Paper), page 1.
[2] Footnotes omitted.
[3] Royal Commission into Defence and Veteran Suicide. (2024). *Final Report* (Vol. 5, p. 451, para. 74). Australian Government Publishing Service.
[4] Ibid.

e. Promoting the profession of veteran advocacy and services of its members, including ensuring veterans and their families were informed regarding the advocacy services available to them;
f. Contributing to the design and outcomes of the ATDP (namely, supporting the development of the training syllabus, in line with the needs of its members). This is expected to include contributing to a comprehensive review of training to support the implementation of the proposed legislative reforms (if enacted);
g. Supporting the wellbeing, capability, and capacity of members, including through the establishment of a professional community through which members can access assistance, advice, and support;
h. Advocating on behalf of veteran advocates on key policy, service delivery, and other matters, by liaising with Government or other key bodies and forums regarding the interests of veteran advocates; and
i. Subject to final confirmation through the ESO Round Table, DVA anticipates the professional body being established in the third quarter of 2024.

4. The Consultation Paper indicates that the ESORT Advocacy Working Group has proposed that the Institute would provide leadership, set training standards, and accredit and register advocates. DVA now seeks feedback on the proposal and the final decision will consider input from the ESORT, public feedback, and recommendations from the Commission into account.[5] DVA has made the Consultation Paper 'A new Institute of Veterans' Advocates' (Consultation Paper) available on its website through which it articulates further details of the proposal which it anticipates will form the basis for any subsequent submissions.[6]

5. It is further noted that the Consultation Paper provides that:

> These claims-related and welfare advocacy services are provided by a range of individuals from *ex-service organisations (ESO) and commercial providers*. While DVA currently provides training programs to ESOs, veterans' advocacy services are not

[5] See: https://www.dva.gov.au/news/latest-stories/institute-veterans-advocates-consultation accessed on 3 September 2024.
[6] See: https://www.dva.gov.au/sites/default/files/2024-08/consultation-paper-a-new-institute-of-veterans-advocates.pdf.

> regulated, and professional oversight of advocates' work standards and/or conduct is limited. These factors have an impact on the quality of advocacy services provided to veterans and families and have the potential to lead to poor outcomes.[7]

6. What the Commission Final Report does not touch upon, is many of the current advocates are themselves beneficiaries of the DVA claims system and are legislatively restricted to between 8-10 hours of paid employment per week.

## The Drivers for Change

### The Proposal

7. Despite the fact that DVA appears to have proposed the changes, and not the ESORT,[8] the Consultation Paper provides:

> the ESORT working group considers that the creation of the Institute is intended to enhance the quality of services provided by, and availability of, trained veterans' advocates around Australia, and to ensure there are proper mechanisms in place to address concerns raised by the veteran community regarding the conduct of individual advocates.[9]

### ATDP Advocates Currently

8. In 2019 Productivity Commission highlighted the issues associated with current funding model for claims advocacy and this was noted by the Commission.[10] At that time it recommended that DVA

> should fund professional claims advocacy services in areas where it identifies unmet need. Services should be delivered through ex-service and other organisations in a contestable manner similar to the National Disability Insurance Scheme Appeals Program and the National Disability Advocacy Program. DVA should also take a more active role in the stewardship of these services

9. The Commission further noted a 2021 University of New South Wales (UNSW) study that 'paid advocates assist around three times as many veterans or family members

---

[7] My emphasis.
[8] See footnote 3.
[9] Consultation Paper p.1.
[10] Royal Commission into Defence and Veteran Suicide. (2024). *Final Report* (Vol. 5, p. 445, para. 37). Australian Government Publishing Service.

each than volunteer advocates'.[11] It also suggested that having paid advocacy positions would better attract and retain younger veterans. DVA did not formally respond to the report.[12] The report noted that:

a. 43% of compensation advocates were aged 70 or older
b. 27% of compensation advocates were 61 to 70 years old
c. nearly one-third of compensation advocates were likely to retire by 2025[13]

10. As a result, there is likely to be a loss of skills unless trained advocates are replaced. Overall, the UNSW study found that with expected declines in the existing advocacy workforce, there is a risk of it becoming unsustainable.

11. The Commission indicated that it was unclear as to why more paid advocacy positions were emerging and noted that a rise in numbers did not appear to be linked to government funding as it had not increased significantly in the past decade.[14]

**Drivers for Change**

12. As a service delivery agency, DVA engages with claimants and their advocates throughout the process of veterans submitting claims for various service-related ailments. It seems to me that, over the years as part of that process, it has identified a number of efficiencies which can be gained, to its benefit, as part of the lodgement process. One of those efficiencies would doubtless have been the introduction of the advocacy system as it stands today.

ATDP

13. The regime of the Advocacy Training and Development Program (ATDP), which offers nationally accredited training in military advocacy and support through DVA partnering with a Registered Training Organisation, is just one of those efficiency programs that DVA introduced as part of the pre-claims process. The training is designed to ensure that advocates meet national standards before they give advice

[11] Ibid para 41.
[12] Ibid.
[13] Ibid 47.
[14] Ibid para 46.

to the veteran community. I understand that professional indemnity insurance is also offered by DVA to the Ex-Service Organisations (ESOs)(ESO) provided their advocates are trained and accredited through the ATDP program.[15]

14. The ATDP program limits an advocate's scope of work according to their individual accreditation level and in any event, in terms of claims, they are accredited and insured only to lodge claims by veterans with DVA – not with any other entity or organisation.

15. It is also relevant to note that ESOs, have also created an ATDP "ESO Advocate Code of Ethics" which has seemingly been endorsed by DVA. The aim of the ATDP program is to have Advocates trained to:

    a. Lodge claims under the *Veterans' Entitlements Act 1986* (VEA), the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and the *Military Rehabilitation and Compensation Act 2004* (MRCA); and

    b. Be able to access a wide array of Federal, State and Local government and community services, including those that are available from DVA which support wellbeing.

ATDP Benefits to DVA

16. The underlying benefits of the current ATDP system to the DVA, which have not been clearly articulated, can be said to include:

    a. **Increased Accuracy and Completeness:** Advocates are trained and experienced in DVA claims and procedures. This reduces the likelihood of errors or omissions in applications, which could lead to delays or rejections. DVA receives more accurate and complete applications, minimising administrative burdens.

    b. **Efficiency in Processing:** Advocates are familiar with the specific requirements of different legislation and types of claims. This knowledge helps

[15] https://web.atdp.org.au/docs/pdf/ESOACodeofEthics.pdf.

them submit well informed and prepared applications, leading to faster decision-making by DVA.

c. **Reduction in Administrative Burden:** Dealing with experienced advocates who are accountable will doubtless reduce the number of direct DVA inquiries and requests for further information, as advocates are generally better prepared and able to provide all required documentation upfront and inquiries the claimant veterans may have. This helps to streamline communication between DVA and the applicant.

d. **Compliance with Legal Standards:** Advocates are trained and must adhere to their ESO professional code of ethics. This helps to ensure that applications are lodged ethically, legally, and in compliance with the relevant legislation and policies, thereby reducing potential issues related to fraudulent or misleading applications.

e. **Clear Communication:** Advocates act as intermediaries between DVA and the claimant veteran applicants, translating complex legal language and processes into more understandable terms. This helps to reduce the chances of miscommunication or misunderstandings. They would also be required to manage claimant veteran's expectations.

f. **Improved Client Satisfaction:** By having advocates ensure applications are prepared accurately and submitted correctly, DVA can experience fewer issues related to applicant dissatisfaction, complaints, or appeals.

17. It can thus be said that DVA has a not insubstantial beneficial interest in ensuring that the ATDP system results in quality service provision to claimants as they are the ultimate beneficiary of all the benefits cited above at paragraph 16.

Illusory Benefits

18. While a more efficient and regulated ATDP system may directly reduce processing times for claimant veterans, and by default DVA, the benefits are ultimately illusory for the veterans themselves. The delays are instead shifted onto the veterans and their

advocates, who must gather sufficient information and evidence to submit a claim so that the advocate can avoid potential disciplinary action for submitting an incomplete claim. In the ATDP system it is the Advocates who interact with the claimant's, not DVA. They must also manage the expectations of veteran claimants. All of this frees DVA resources.

19. It is clear that the primary beneficiary of the current, and an enhanced ATDP program, will be DVA as its claim processing times will be reduced without any additional effort. Instead, the wait time has shifted to pre-lodgement with the burden shifting to advocates, who will be held more accountable under the proposed changes.

Why Change

20. What emerges, when juxtaposed with the statement in the Consultation Paper at enumerated paragraph 5 together with paragraph 3 above, is that the key drivers for changing the current ATDP system appear to be that DVA will gain direct productivity benefits by further pushing the burden onto advocates making them more accountable. More precisely, they appear to be that the:

    a. Training of advocates is inadequate – despite DVA currently partnering with a Registered Training Organisation (RTO) and providing training to ESOs;

    b. Registration of trained advocates alone is insufficient regulation;

    c. ATDP system currently lacks professional oversight of advocates' standards and conduct;

    d. Claims made by applicants are made, not just by veterans alone, but through a variety of ESO trained advocates and fee-for-service commercial operators. The current system does not and cannot regulate fee-for-service commercial operators in this space; and

    e. Proposed Institute aims to improve service quality and availability of trained veterans' advocates and address concerns about advocates' conduct – including those fee-for-service commercial operators.

**ATDP**

**Current Issues**

ESOs Only

21. It is noted that the ATDP, as it currently stands, is only available to ESO members. I have earlier noted the increasing trend of ATDP trained advocates moving away from ESOs and entering into private business, either as the Principal/Director or as an employee, by providing a non-legal fee-for-service advocate service to veterans. Many of those non-legal fee-for-service advocate organisations submit claims to both DVA and to the Commonwealth Superannuation Corporation (CSC). ATDP advocates with ESOs are limited in their scope of work according to their individual accreditation level and, in any event, they are only accredited to lodge claims by veterans against DVA and not CSC.

22. As I understand the position, in order to provide the ATDP training to ESO members, DVA have partnered with an RTO. Once these ATDP trained advocates either become or are employed by a non-legal fee-for-service commercial operator it is invariably the case that either they and/or the non-legal fee-for-service commercial operator will hold out and/or advertise that they are ATDP trained. This of course would be done in order to gain some form of competitive edge in the market given that competition in a commercial market is driven principally by two things: Price and Service.

23. Unfortunately, the professional indemnity insurance which is provided by DVA to the ESOs as part of the ATDP program is not portable and therefore does not follow an advocate in these circumstances. They are, in effect, using their ATDP credentials to tout for business among the veteran community as a means of garnering confidence in their service provision and expanding their services so that they can lodge claims with CSC.

Funding

24. The DVA Building Excellence in Support and Training (BEST) program supports ESO compensation and wellbeing advocates. As noted by the Commission in its Final Report, there has not been a significant increase in funding to ESOs as the overall

funding allocation for BEST grants in the past decade. In 2023–24, BEST grants provided total funding of $4.731 million, compared to $4.05 million in 2014–15.[16]

25. What is striking is that the Consultation Paper is completely silent in terms of a budget; not just in terms of creating an Institute, but also in terms of supporting advocate training to achieve this new desired level of accountability. It is clear that in order to achieve the productivity gains it so desperately needs to achieve, DVA will need to invest heavily in training and provide enough budgetary support for ESOs to pay their advocates adequately.

26. What the Commission Final Report does not appear to touch upon, is that so many of the current advocates are themselves beneficiaries of the DVA claims system and many are indeed restricted legislatively to only working 8-10 hours week in paid employment.

DVA Productivity Gain Set-Off

27. I submit that the Senior Executives of DVA need to ask themselves the following overarching questions before they progress with this proposal:

    a. What budget does the proposed system require to support it?

    b. What additional investment be required, in terms of money, to provide the training and ongoing support to advocates as well as how it will resource complaints and feedback processes as part of its enforcement activities? and

    c. Will the potential productivity gains outweigh the budgetary burdens enough to justify the proposal?

**Legal Fee-For-Service Commercial Operators**

**Solicitors v Lawyers**

28. It is noted that the term ‘lawyer’ and not ‘solicitor’ is used in the Consultation Paper. By way of clarification: a lawyer is generally a person who is admitted to the roll of a

[16] Royal Commission into Defence and Veteran Suicide. (2024). *Final Report* (Vol. 5, p. 210, para. 112). Australian Government Publishing Service.

Supreme Court of a state/territory but has no right to practice. A solicitor is both admitted to the roll of a state/territory Supreme Court and is registered, appropriately insured and holds a current practising certificate from their relevant state/territory law society. The key difference is that a lawyer is not permitted to engage in the practice of law whereas a solicitor and barrister may.

**Specialist Accreditation**

29. The process involved in submitting DVA claims is akin to the area of practice in law referred to in the profession of solicitors as Personal Injury Law. The various law societies throughout Australia run specialist accreditation schemes in which solicitors can choose to seek specialist accreditation with their law society in respect to a specific area of practice, such as Personal Injury Law. In Queensland for example, the Queensland Law Society describes its Specialist Accreditation Scheme as a rigorous, practical and peer-reviewed competency-based accreditation program, which is intended to promote the professional advancement of solicitors in Queensland. It is designed for solicitors who are full members of the Society and engage in legal practice in a particular area of accreditation. Solicitors who are accredited as specialists are recognised as having enhanced skills, superior knowledge, significant experience and a high proficiency in established legal speciality areas. The high standard of the Scheme ensures that recognition is meaningful and reliable and represents a mark of excellence for those who are Accredited Specialists. To maintain their specialist accreditation a solicitor must undertake further continuing professional development each year related to the area of accreditation.

30. Specialist accreditation is not a path that all solicitors choose to take. One should note that not having a specialist accreditation is not a bar to practising in a particular area of law. It is often a personal professional choice made by the individual practitioner.

**Generally**

31. Solicitors have long been engaged in assisting veterans lodge claims with DVA in the personal injury space. It is true that they are fee-for-service commercial operators;

but not in the sense of the non-legal fee-for-service commercial operators. Solicitors are subject to specific governance and regulatory requirements as detailed below.

**Australian Solicitor Conduct Rules**

32. It is well known that solicitors are governed by a code of conduct. This code of conduct is known as the *Australian Solicitors Conduct Rules* (ASCR) which are a set of professional and ethical guidelines that govern the conduct of solicitors in Australia. Unlike many professional codes of conduct, these rules have the force of law because they are adopted and enforced by the various legal professional bodies and regulatory authorities across the different states and territories in Australia.

**Fees**

33. Solicitors have the option to charge either fixed fees for work performed in a matter or an hourly rate and either of those can be calculated on a 'speculative' or 'no-win-no-fee' basis. In matters such as those that would involve claims made by clients to DVA for injuries sustained in service, some jurisdictions permit a solicitor to charge an 'uplift fee' which is often expressed as a percentage of the fee charged. There are also caps on such uplift fees and in Queensland this is 25%.

34. By way of example of regulation in this area of legal practice, in Queensland the *Legal Profession Act 2007* requires a solicitor to enter into a Costs Agreement together with a Disclosure Statement with a client. The law requires that the solicitor must disclose certain information regarding costs[17]. A solicitor must also notify a client of their rights in the event of a dispute about the solicitor's costs.[18] The notification may be made by using a prescribed form.[19]

35. The following avenues are available to a client of a solicitor in Queensland if they are aggrieved by their solicitor's fees:
    a. requesting an itemised bill.
    b. discussing their concerns with the solicitor.
    c. having their costs assessed.

[17] *Legal Profession Act 2007*, s 308.
[18] Ibid s 331.
[19] Ibid s 331(3), Form 2.

d. applying to set aside the costs agreement.

36. There are currently no such restrictions or oversight on non-legal fee-for-service commercial operators operating in this space. It also follows that a client aggrieved by a non-legal commercial operator's fees does not have recourse to the same regime to review the invoice charged.

**Study & Training Requirements**

37. The legal profession is one of the most highly regulated professional industries in Australia and existing legal profession regulation is generally consistent across all states and territories.

38. In addition to requiring what is generally a four-year university degree for legal practice and a further 12-month graduate diploma in legal practice, the regulatory regime for legal practitioners in all Australian jurisdictions includes:

a. personal suitability requirements for admission to the profession;
b. a mandatory 18-month to 2-year period of supervised practice (followed, in a number of jurisdictions, by practical examinations) before permitting any legal practitioner to practise unsupervised so, for example, that they may establish their own practice or act as a principal in any firm;
c. personal suitability requirements for the granting and annual renewal of practicing certificates;
d. the ability of the legal regulators in each state and territory to immediately cancel, suspend or vary practicing entitlements or conditions in response to instances of misconduct, bankruptcy, or commission of certain offences;
e. mandatory continuing professional development;
f. mandatory professional indemnity insurance;
g. ethical and other professional responsibilities;
h. trust money and trust accounting regulation, including provision for external intervention;
i. fidelity cover;

j. complaint mechanisms for consumer and disciplinary matters, and a range of consumer remedies – including, in some cases, formal disciplinary proceedings before judicial officers;
k. legal practitioners remain at all times officers of the court and are thereby subject to the inherent supervisory and disciplinary powers of the court; and
l. rules of professional conduct that are nationally consistent.

39. By way of example of the commitment involved, I undertook seven (7) years of work and study to be permitted by the Queensland Law Society to practice as an unrestricted solicitor and run my own law practice.

**The 'Institute' Regulating Solicitors**

40. The proposed Institute's initiative to regulate solicitors representing DVA clients by introducing a separate registration requirement, in addition to their existing professional solicitor registration, may give rise to a number of issues which I have articulated seriatim below.

Potential Issues

***Conflict with Professional Regulation***

41. **Overlap and Confusion**: The introduction of a separate registration requirement can create confusion about which body governs the solicitor's conduct in these matters. It may lead to conflicting rules and standards between the professional regulatory body and the government department.

42. **Erosion of Professional Independence**: Solicitors are regulated by professional bodies, such as law societies or bar associations, to maintain independence and avoid external influence. The proposed regulation could undermine this independence, particularly if the government body has a vested interest in the outcome of the claims.

***Access to Justice***

43. **Barrier to Representation**: Additional registration requirements could limit the number of solicitors willing or able to represent clients in these matters, particularly if the registration process is onerous, costly, or overly restrictive.

44. **Potential for Bias**: If the government department has control over who can represent claimants, there is a risk that only those perceived as sympathetic or compliant may be registered, potentially biasing the claims process.

***Administrative Burden***

45. **Increased Costs and Complexity**: Solicitors will face additional administrative burdens and costs associated with maintaining multiple registrations, which could be passed on to clients, potentially making legal representation more expensive.

46. **Duplication of Effort**: Having to comply with two separate sets of regulations, such as one from the professional body and one from the government department, could lead to duplicated efforts, inefficiencies and the possibility of oversight to fall between the cracks thereby diminishing consumer protections.

***Potential for Overreach***

47. **Government Influence on Legal Strategy**: If the government body overseeing the registration is also the one against whom claims are made, there's a potential for overreach, where the government might impose regulations that subtly influence how solicitors can represent their clients, thereby impacting the fairness of the process.

***Impact on Legal Ethics***

48. **Conflicting Ethical Obligations**: Solicitors might face situations where their ethical obligations to their client under their professional registration conflict with the requirements imposed by the government body. This could create ethical dilemmas, particularly in cases where the government's interests are at odds with those of the client.

***Constitutional Issues***

49. When considering the restriction upon lawyers to communicate with potential clients that wish to make claims with DVA, it is my submission that such a restriction would require legislative change. Section 51 in the Commonwealth Constitution may well provide a head of power to support such proposed legislation.[20] However, any proposed legislation purported to regulate the provision of advice to DVA clients for the purpose of their protection may still fall foul of the implied freedom of political communication necessary to sustain representative government.[21]

***Generally***

50. By virtue of their admission as lawyers together with possessing the requisite practising certificate, solicitors are recognised as qualified to practise, interpret and apply the law. Assisting clients to prepare documentation that complies with prescribed legal regulations is a core legal task which no practising solicitor should be restricted from providing. The proposed Institute together with its restrictions, would prevent a non-registered solicitor from assisting a client in preparing an application for submission to DVA, for example, checking to ensure that an application complies with DVA legislation and regulations. I submit that this is an untenable restriction on the practise of solicitors. In effect the proposed Institute's regulatory provisions would operate to prevent a solicitor not registered with the Institute from assisting clients to ensure compliance with a relevant law.

51. I further submit that the imposition of an additional regulatory regime on top of the system already imposed on solicitors produces a number of complexities, uncertainties, duplications, costs and undesirable outcomes for solicitors and their clients.

***Appeal Mechanism***

52. It is noted in the Consultation Paper that the Institute Board can revoke or suspend membership of a member with the Institute after 'due process'.[22] The proposal does

[20] *Cunliffe v the Commonwealth* (1994) 124 ALR 120.
[21] Ibid 143 per Brennan J, see footnotes 81 and 82 therein.
[22] See: 'A new Institute of Veterans' Advocates' paper under heading 'Ethical and service and standards' p 3.

not touch upon an appeal mechanism for members who feel their membership was unjustly revoked or suspended. This could lead to perceptions of injustice or bias in the disciplinary process.

***Continuing Professional Development***

53. The Consultation Paper states that '[A]ll members would also be required to satisfy minimum training requirements and undertake continuing professional development'.[23] However, as outlined in this paper, solicitors are already mandated to fulfill Continuing Professional Development (CPD) obligations as part of their registration. Solicitors with specialist accreditations face even more stringent CPD requirements. Therefore, imposing an additional layer of continuing professional development would be both unnecessary and redundant.

***Double Jeopardy***

54. The common law has created the principle of 'Double Jeopardy'. It is commonly referred to as 'the rule against double jeopardy'. The principle finds expression in pleas from the bar of *autrefois acquit* and *autrefois convict*. The rationale for the principle is that multiple prosecutions and punishments for the same conduct/offence is intrinsically unlawful.[24]

55. The Institute proposal will result in solicitors being subject to two codes of conduct, being the ASCR in each jurisdiction and the Code of Ethics for Veterans' Advocates together with the Institute service standards – which have as yet not been particularised. It is noted that it is proposed that the Institute would:

> monitor members' compliance with these standards and requirements and would also administer a complaints and feedback process for issues raised about the performance or conduct of an Institute member where they are not subject to another equivalent professional discipline process.

[23] Ibid.
[24] Hurd, H.M. & M.S. Moore (2021). 'The ethical implications of proportioning punishment to deontological desert' in *Criminal Law and Philosophy* 15:495-514.

> Membership and access to the associated benefits would be able to be revoked or suspended by the Board in instances where, after due process, it is satisfied the member has been in breach of their membership requirements.
>
> Members who are already subject to professional oversight and ethical standards through their paid employment (e.g. lawyers) would be exempt from similar standards set by the Institute[25]

56. The above statement raises more questions than it provides answers. For example, how will the Institute determine if a member is already subject to equivalent professional oversight and ethical standards? Should it transpire that the Board determines to unilaterally suspend or revoke a solicitor's membership and has also made a referral to the solicitor's state regulatory authority then it follows that the solicitor may well be subject to two separate investigations into the same conduct, two separate disciplinary proceedings and two punishments. For example, if a client complains to the Institute about certain conduct by a solicitor, which is duly investigated and results in that solicitor's revocation of membership to the Institute, the client is also free to lodge a complaint with the relevant Law Society or Legal Services Commissioner, quite possibly prompting a secondary investigation into the same conduct.

57. In order to discharge its statutory functions, a legal services regulator may investigate the conduct and take appropriate action, notwithstanding the fact that disciplinary action has already been taken by the Board (the revocation of membership from the Institute), as the sanction has had no impact on the solicitor's right to practice law – It is my submission that in these circumstances the subsequent result would likely be viewed as a prosecution of the same conduct twice and therefore be in breach of the principle of Double Jeopardy.

58. These factors serve to highlight a fundamental problem with dual regulation: those subject to two schemes of regulation covering the same conduct can be investigated

[25] 'A new Institute of Veterans' Advocates' paper under heading 'Ethical and service and standards' p 3.

and punished twice for the same 'offence' or might avoid professional consequences altogether.

***Legal Professional Privilege***

59. It is noted that the proposal provides that

> The Code and standards would define the behaviour and service delivery expectations for all members including in relation to acting with integrity and respect, and the requirement to ***keep appropriate records*** and ensure advocates are responsive and accessible.[26]

60. The reference to 'keeping appropriate records' presupposes a notion that the Institute would at some stage presumably seek to access those records; be that for audit or disciplinary investigation purposes.

61. I am sure it will come as no surprise that communications between a solicitor and their client can be subject to Legal Professional Privilege (LPP). LPP exists to protect confidential communications and confidential documents between a solicitor and a client made for the dominant purpose of the solicitor providing legal advice or professional legal services to the client, or for use in current or anticipated litigation.[27] The privilege belongs to the client, not the Solicitor.[28]

62. LPP serves the public interest in the administration of justice by facilitating freedom of consultation between a client and their solicitor.[29] By enabling persons to conduct their affairs with the benefit of legal advice, LPP conforms to and underpins the rule of law.[30]

63. LPP won't always apply, but when it does it will prevent the ability by the Institute to access documents.

---

[26] Ibid (emphasis added).
[27] *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 64-65 [35]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552-3 [9]-[11].
[28] *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 570.
[29] *Waterford v Commonwealth* (1986) 163 CLR 54, 62.
[30] *Kennedy v Wallace* (2004) 142 FCR 185, [201].

**Non Legal Fee-For-Service Commercial Operators**

64. A quick internet search will reveal that many individuals accredited through the ATDP program have been increasingly leaving ESOs to either start their own commercial ventures or work for such organisations. They continue performing the same advocacy work but with broader scope, including lodging claims against superannuation funds such as CSC for claimants with Total and Permanent Disability (TPD).

65. These organisations have created retainers or contracts and offer their services to veterans on a no-win-no-fee basis. Some request upfront payments as part of the service. If a claim is lodged on behalf of a veteran is successful, their retainers often involve taking a percentage of that payout which can be a not inconsiderable amount of money.

66. This practice of taking a percentage of a claimant's payout is not permitted in the legal profession for it quite often does not reflect the amount of work performed on the file. It has long been removed from conveyancing and more recently Personal Injury matters. Furthermore, through legislation, various law societies have placed severe restrictions on advertising for prospective clients by solicitors working in the personal injury space.

67. It seems to me that a core issue concerning ESORT, is the emergence and involvement of non-legal fee-for-service commercial operators providing claims-related advocacy services to DVA clients. What isn't discernible is whether it is because the resultant applications lodged by such operators are of poor quality and/or concerns that the veteran claimants are paying too much for the service. In any event, given the current ATDP framework, ESOs are unable to sanction or discipline these operators.

**Recent Federal Court Action**

The Case

68. It is interesting to note that one non-legal fee-for-service commercial operator, Veteran Benefits Australia (the Applicant), made a claim against DVA through a

representative action on behalf of a number of clients.[31] The matter related to alleged breaches of privacy by DVA against the veterans. The Applicant was represented by the Director of itself, who it seems was not legally qualified. The application was ultimately summarily dismissed on the basis that the Applicant lacked standing and a costs order was handed down against it. It is not known if the Applicant has passed that cost order onto to the claimants.

69. In that matter Her Honour Meagher J opined that a multifactorial approach to determine the Applicant's standing was appropriate. One of those approaches was to determine if the Applicant been on the DVA Advocacy Register. It transpires that the Applicant wasn't, and this was one of the reasons for the Applicant's failure to establish standing.[32] The case was then summarily dismissed.

Key Takeaway

70. The main takeaway from this case is that if the ESORT proposal for the Institute had been or is established, and such an Applicant was a member and listed on the Roll of Advocates, they would likely have had standing; notwithstanding the other multifactorial elements.

71. If this conduct by a non-legal fee-for-service commercial operator concerns DVA and/or ESORT, as I believe it should, then including such operators on the Roll of Advocates may allow them to continue providing sub-standard legal services to veterans and open the door further. Consequently, veterans would bear the fiscal and emotional burden of these inevitable failures. It is not far-fetched to suggest that such operators could take legal action against DVA for failed claims.

**Concerns**

Unconscionable Conduct

72. As has been alluded to above, in providing services, the non-legal fee-for-service commercial operators invariably enter into a private contractual relationship with the

[31] *Veteran Advocacy Australia v Secretary, Department of Veterans' Affairs* [2024] FCA 895 (https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0895).
[32] Ibid para 33.

veteran. Those contracts typically involve the payment of a percentage of a veteran's claim should the veteran be successful. Many also seek an upfront payment to cover some initial costs.

73. In addition to statutory Unconscionable Conduct,[33] there exists the equitable doctrine of unconscionable conduct. It is a principle in the unwritten law of equity that prevents one party from taking unfair advantage of another in circumstances where it would be unjust or morally wrong to allow the conduct to stand. This doctrine applies when one party to a transaction has a significant power imbalance over the other, and they exploit this imbalance in a way that is unconscionable.

74. The key elements of the equitable doctrine include:

    a. Special Disadvantage: The weaker party must be under some form of special disadvantage, which could be due to factors like age, illness, poverty, lack of education, or emotional dependency. This disadvantage makes them vulnerable to exploitation.

    b. Knowledge and Exploitation: The stronger party must be aware of the special disadvantage or ought to have known about it, and they exploit this vulnerability to obtain a benefit or impose an unfair condition.

    c. Unconscionability: The conduct of the stronger party must be so unfair or morally wrong that it offends the conscience of the court. This goes beyond mere unfairness or inequality in bargaining power—it requires a level of moral wrongdoing.

75. It is not an unreasonable proposition to suggest that many veterans seeking to make claims against DVA and/or TPD claims against CSC will have some form of special disadvantage; be that a mental illness, poverty or something else recognised by the law from time to time.

[33] Australian Consumer Law Part 2-2—Unconscionable conduct.

76. There is little doubt that some non-legal fee-for-service commercial operators may well have some exposure to unconscionability claims in their contracts with their clients and the resulting contract would likely be held unenforceable.

Australian Consumer Law

***Misleading & Deceptive Conduct***

77. The non-legal fee-for-service commercial operators, by their nature, are in trade and commerce and would doubtless be subject to the Australian Consumer Law (ACL). There are various provisions within the ACL which deal with misleading and deceptive conduct.[34]

78. The Australian Competition and Consumer Commission (ACCC) is not solely responsible for enforcement of ACL; a right of private action also exists. In my view, should such conduct come to the attention of DVA, it would be prudent for DVA to either report the conduct to the ACCC or, if the ACCC chooses not to take an action, take its own private action against such operators to protect the vulnerable members of the veteran community. The fact that it has not done so to date is concerning for it would also go some way to regulating the conduct of these non-legal fee-for-service commercial operators.

***Unfair Contract Terms***

79. The ACL also provides for Unfair Contract Terms in consumer contracts.[35] It may well be that some contracts that veterans are entering into with these non-legal fee-for-service commercial operators may be affected by these provisions. Through my dealings with veterans I can say generally that they are not aware of these provisions and they could greatly benefit from some education on this area of law which may assist them and prevent them from entering into such contracts in future.

***Provision of Legal Services***

[34] ACL ss 18, 151 etc.
[35] ACL Part 2-3—Unfair contract terms.

80. All stakeholders should be concerned about non-legal fee-for-service commercial operators potentially providing legal services that they are not authorised to provide. I have already provided an example above in terms of the alleged breach of privacy by DVA against veterans.

81. Despite many non-legal commercial operators openly stating that they do not provide legal advice, I am concerned that, at least in Queensland, many of their activities would be at risk of breaching the *Legal Profession Act 2008* (LPA)[36] by operating within the realms of 'legal practice' and/or the 'practice of law'.[37]

82. Section 24 provides, inter alia, that '*A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.*' and prescribes a maximum penalty of 300 penalty units or 2 years imprisonment.[38] Other states have analogous legislation prohibiting the conduct.

83. The meaning of 'to engage in legal practice' has been addressed in a number of cases in various jurisdictions throughout Australia.[39] Some further reading can be found in the paper of Professor G.E. Dal Pont.[40]

84. When the conduct of non-legal fee-for-service commercial operators is viewed in light of the meaning of 'legal practice' and/or the 'practice of law', I am of the view that their conduct may well be at risk of breaching the analogous various provisions which prohibit this conduct throughout Australia.

85. In those circumstances, I submit that a proper course of action would be for DVA and/or CSC to refer instances of the conduct that it is aware of to the relevant state based regulatory body with a view to having them take enforcement action. The fact that neither DVA or CSC have not yet made such referrals is concerning as, again, it

[36] S 24.
[37] Other state jurisdictions have analogous law.
[38] Penalty Units in Queensland from 1 July 2024 are currently set at $161.30 which brings the maximum fine to $48,390.
[39] *Legal Services Commissioner v Raghoobar* [2023] QSC 41; *Legal Services Commissioner v Walter* [2011] QSC 132 & *Reichman v Legal Services Commissioner*; *Legal Services Commissioner v Reichman* [2017] QDC 158; *Re Sanderson; ex parte the Law Institute of Victoria* [1927] VLR 394.
[40] Dal Pont 'Unauthorised practice of law' (2018) 45(3) *Australian Bar Review* 224.

would go a long way to regulating the conduct of these non-legal fee-for-service commercial operators.

**Competition Law: DVA & The Institute**

**Introduction**

86. Competition laws in Australia are, by-and-large, regulated by the ACCC. Despite their regulator role however, the part IV provisions of the *Competition and Consumer Act 2010* (Cth) (CCA) are largely such that it also provides a platform from which private litigation can take place in which the conduct of an aggrieved party through marketplace conduct of another party can prosecute conduct without the intervention of the ACCC. Indeed, the Hilmer Committee considered that Part IV of the *Trade Practices Act 1974* (Cth) [41] should be enforced via private actions 'in most cases'. More recently the Harper Panel prefaced its discussion on private actions with the recognition that '[p]rivate enforcement of competition laws is an important right'.[42]

**Exclusive Dealing: Third Line Forcing**

87. On its face, the proposed conduct of DVA requiring all advocates lodging claims to also be a member of the Institute would ordinarily raise red flags. In the context of the cut and thrust of the commercial world this conduct is typically referred to as 'third line forcing'.[43] Prior to 2017 it was a '*per se*' offence in the CCA – that is to say, it was subject to no other test. Post 2017, for a third line forcing arrangement to contravene the CCA it must now have the effect of Substantially Lessening Competition (SLC) in the relevant market. Notably, there is also a requirement that DVA would be 'in trade or commerce'. In the circumstances of what has been proposed, I am of the view that it is unlikely that DVA would be seen as being in 'trade or commerce', a term that is defined further in the CCA.[44] Further guidance on interpretation of that provision can be found in the extensive body of case law.

[41] Now the CCA.
[42] Competition Policy Review Panel, *Competition Policy Review: Final Report* (March 2015) 416.
[43] S 47(6)&(7) CCA.
[44] CCA s 4.

88. I merely raise third line forcing for consideration on the basis that the proposed conduct, in the context of world of private enterprise, can have profound consequences for market participants – hence the existence of the third line forcing provisions and extensive penalties.

**Exclusive Dealing: Full Line Forcing**

89. Full Line Forcing is another form of exclusive dealing in the CCA.[45]

90. It is noted in the Consultation Paper that it is intended that '…Institute members would have access to a range of tools and benefits (some of which may necessitate regulatory and/or legislative change and consideration by Government) including:'

> enhanced MyService functionality including being able to lodge claims on behalf of their clients, and access to a dashboard showing the status of claims for all their clients

91. The above statement infers that the enhanced MyService functionality will not be available to non-Institute members.

92. It is noted that the Consultation Paper indicates that the Institute would be a Commonwealth company limited by guarantee or similar. In those circumstances, and the anticipated nature of the Institute, it is my view that any conduct by the Institute may well be in 'trade or commerce' and depending upon the nature of its business, therefore be subject to the provisions of the CCA.

93. It would seem that the intention will be that the Institute will only supply the enhanced MyService functionality on the condition that a person acquires membership of the Institute. This CCA provision is also subject to an SLC test which will assess the effect of the conduct on the market in an economic sense by reference to a well-established body of law. If a court were to determine the market narrowly, for example, that the relevant market is the market for the provision of advocacy claims to DVA for veterans in Australia, then in my view that restrictive conduct may well place the Institute at risk of breach of the CCA exclusive dealing provisions.

[45] S 47.

94. It would be prudent to note that the maximum pecuniary penalties for breaches of Part IV of the CCA, in which the exclusive dealing provisions are contained, are the greater of:
    a. $50,000,000;
    b. if the Court can determine the value of the 'reasonably attributable' benefit obtained, 3 times that value, or
    c. if the Court cannot determine the value of the 'reasonably attributable' benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the contravention.

**The Board**

95. Given the above issues, the Institute would need to ensure that it takes steps to ensure it operates within the confines of the CCA and the proposed make-up of the board I note does not include a person with a legal background, let alone someone with knowledge of CCA.

**Conclusion**

96. DVA will be the ultimate beneficiary of an efficient and effective regulatory regime for advocates. A successful regulatory regime will provide DVA with greatly enhanced productivity gains ultimately resulting in the requirement for less Full Time Equivalent Australian Public Service staff. The real question is will those gains outweigh the budget required to achieve it?

97. The benefits to be derived from the system however, are purely illusory to veterans using the service as while it may result in reduced DVA processing of claims, the burden of delays are instead shifted onto the veterans and their advocates while at the same time making advocates more accountable.

98. While the proposed creation of the Institute of Veterans' Advocates aims to improve the quality, regulation, and accessibility of advocacy services for veterans; the introduction of a separate regulatory framework raises several concerns, particularly regarding solicitors.

99. The dual regulation of solicitors through both the Institute and existing legal professional bodies presents potential conflicts in ethical obligations, administrative burdens, and LPP. Solicitors are already subject to stringent regulation, continuing professional development requirements, and ethical standards governed by their respective legal professional bodies, ensuring accountability and competence. Adding another layer of regulation risks duplicating efforts, creating confusion, and potentially undermining professional independence.

100. Moreover, the potential for solicitors to face double jeopardy, where they could be penalised twice for the same conduct under two different regimes, is particularly troubling. This situation may lead to unfair outcomes for solicitors and their clients. The proposed framework must ensure that any additional regulation does not erode the rights of solicitors or the legal protections afforded to their clients, such as LPP. Ultimately, while enhancing advocacy services is a noble goal, any regulatory changes must avoid unnecessary overlap and ensure that access to justice remains paramount.

101. Some conduct of non-legal fee-for-service commercial operators may well be in breach of ACL provisions as well as various state legal regulators laws. Instances of such conduct, when it comes to the attention of DVA should be, where appropriate, prosecuted by DVA and/or reported to the relevant regulatory authorities. The combined effect of these actions may well curtail the very reasons for the proposal of the Institute.

102. The establishment of the proposed Institute of Veterans' Advocates presents significant implications for the regulation and support of veterans' advocacy. While the intent behind the Institute—to enhance the quality and availability of advocacy services and address concerns about the conduct of individual advocates—is commendable, the proposal also raises several critical issues, particularly concerning the potential overlap and conflict with the existing regulatory framework governing solicitors not to mention possible CCA breaches.

103. The issues serve to highlight the potential risks of fragmenting the regulatory framework governing solicitors, particularly when it involves government oversight in a context where the government is also a party to the disputes in question. As a result, any proposed Institute should strongly consider exempting solicitors from that framework.

Ralph Lake JD, MA, GradDipLegPrac
Principal Solicitor

11 September 2024

## Glossary

| | |
|---|---|
| ACCC | Australian Competition & Consumer Commission |
| ACL | Australian Consumer Law |
| ASCR | Australian Solicitors Conduct Rules |
| ATDP | Advocacy Training and Development Program |
| BEST | Building Excellence in Support and Training |
| CCA | *Competition and Consumer Act 2010* (Cth) |
| CPD | Continuing Professional Development |
| CSC | Commonwealth Superannuation Corporation |
| DRCA | *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) |
| DVA | Department of Veteran's Affairs |
| ESO | Ex-Service Organisation |
| ESORT | Ex-Service Organisations Round Table |
| LPA | *Legal Profession Act 2008* (Qld) |
| LPP | Legal Professional Privilege |
| MRCA | *Military Rehabilitation and Compensation Act 2004* (Cth) |
| RTO | Registered Training Organisation |
| SLC | Substantial Lessening of Competition |
| TIP | Training and Information Program |
| TPD | Total and Permanent Disability |
| UNSW | University of New South Wales |
| VEA | *Veterans' Entitlements Act 1986* (Cth) |