

# Decision to find complainant ineligible under the Veterans' Support Act 2014

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<b>Legislation</b>	Ombudsmen Act 1975, ss 13(7)(a), 22(1)(b), 22(3)(e); Veterans' Support Act 2014, ss 7, 215, 228
<b>Agency</b>	New Zealand Defence Force
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	000421
<b>Date</b>	December 2024

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*Chief Ombudsman received complaint from a journalist who believed he should be recognised by the New Zealand Defence Force as a 'veteran' eligible for entitlements under the Veterans' Support Act 2014 – Defence Force did not act unreasonably in determining the complainant was not a 'veteran' – decision not made in accordance with a law which is unreasonable, unjust, oppressive, or improperly discriminatory – there was no basis for Ombudsman to recommend that the Defence Force should reconsider its decision.*

## Background

The complainant was involved in various military conflicts in his role as a journalist working for the New Zealand Press Association in the 1960s and 1970s.

The Chief Ombudsman received a complaint from him concerning his efforts to be recognised by the New Zealand Defence Force (Defence Force) as a 'veteran'. As a veteran, the complainant would be eligible for entitlements under the Veterans' Support Act 2014 (VSA).

## Pre-investigation

### Potential exclusion from the Ombudsman's jurisdiction

Before commencing the investigation, the Ombudsman first needed to consider whether he was precluded from investigating the complaint under section 13(7)(a) of the Ombudsmen Act 1975 (OA).

Under this section, an Ombudsman has no jurisdiction to investigate if there is a *'right of appeal or objection'* on the merits of the case available against an agency's decision to a court or tribunal, unless there are special circumstances that make it unreasonable to expect the complainant to have resorted to that step.

Part 7, subpart 2 of the VSA includes a statutory right to review a decision made by Veterans' Affairs New Zealand relating to a person's entitlement and, from there, a right to appeal to the 'appeal board', and then the High Court on points of law.

In the absence of special circumstances, the inclusion of a statutory review and appeal process in the VSA appeared to preclude the Ombudsman from investigating the complaint.

However, the Defence Force were of the view that no rights of review or appeal were available to the complainant (as it considered they were only available to a 'veteran' or 'other claimant' as defined in section 7 of the VSA).

As a result, the Ombudsman's investigation proceeded on the basis that it was justified by 'special circumstances'. These included:

- the Defence Force's position on this issue;
- the complainant's advancing age;
- the protracted nature of this dispute; and
- the fact the complaint also concerned the reasonableness of the underlying policy settings which a review to the 'appeal board' would have been unable to address.

## Investigation

The investigation focused on whether the Defence Force's decision to find the complainant ineligible as a veteran under the VSA:

- was contrary to law or unreasonable; or
- was made in accordance with a law which is unreasonable, unjust, oppressive, or improperly discriminatory.

### Was the decision contrary to law or unreasonable?

Section 7 of the VSA defines a 'veteran', in essence, as a member of the armed forces who served, an employee of the Defence Force, or someone who was seconded to the Defence Force. The complainant was never a member of the armed services, he was not an *'employee'* of the Defence Force (he was employed by the New Zealand Press Association at all times) and he was not paid by the Government to undertake his role. As a result, he did not satisfy the main criteria to meet the definition of a veteran.

The Ombudsman's analysis therefore focused on whether the complainant could be considered to have been *'seconded to the Defence Force'*.

The Ombudsman considered that the complainant's role was not consistent with the ordinary meaning of the word 'secondment' (an undefined term in the VSA). Typically, a secondment comes about because an organisation has a particular skill shortage it is looking for a secondee to fill. For the Defence Force, secondees are sometimes brought into the military from other Government departments to provide specific skills, expertise or services (for example, in health, IT, policy, legal or intelligence).

At all relevant times, the complainant was working and reporting for the New Zealand Press Association. He was never called a secondee, no secondment agreement was put in place outlining his role, nor was he paid by the Defence Force. Although the complainant was integrated with the armed forces, his role was not to support their military objectives through the provision of skills, expertise or intelligence services, as a secondee would have been. Rather, he was there as an independent media representative to report on the conflict zones for the benefit of the New Zealand public. Significantly, the work he produced was at all times the responsibility of, and paid for by, the complainant's employer, the New Zealand Press Agency.

Ultimately, the Ombudsman found no evidence the complainant was ever 'seconded' to the Defence Force during his deployments to conflict zones.

### Was the decision made in accordance with a law which is unreasonable?

Under section 22(1)(b) of the OA, the Ombudsman can investigate whether a decision was made *'in accordance with a rule of law or any legislation or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory'*. If the Ombudsman was to form such an opinion, he can recommend that the *'law on which the decision, recommendation, act, or omission was based should be reconsidered'* (section 22(3)(e) of the OA).

In order to determine whether the decision was made in accordance with a law that is unreasonable, the Ombudsman began by considering the VSA's meaning and purpose, including why it was introduced.

### Purpose of the VSA

In 2007, the Law Commission was tasked with reviewing the War Pensions Act 1954, and tabled a report in the House in June 2010: ['A New Support Scheme for Veterans: A Report on the Review of the War Pensions Act 1954'](#)<sup>1</sup>. It proposed replacing the War Pensions Act with new legislation, and as a result, the VSA was enacted.

### Who was the VSA intended to provide coverage for?

The VSA contains two schemes applying to different veterans depending on their date of service. The Law Commission Report 'recommendations 6 and 7' (page 24) stated that both schemes should cover *'civilians employed by the Government to serve overseas in connection with qualifying operational service'* (provided they were New Zealand residents). It would appear that this is reflected in subsection (b) of the current definition of a veteran as covering those 'persons' who are not members of the armed forces, but are employed by, or seconded to, the Defence Force.

The Law Commission did not specifically explain why it proposed that civilians should be included in the VSA.<sup>1</sup> The Select Committee report on the Veterans' Support Bill and the Hansard Reports on the various versions of the bills also do not explain why. The Ombudsman's view was that civilians were included in the VSA to make sure there was continuation of the coverage available under the War Pensions Act, and uniformity between the VSA's two schemes, especially when it came to who was eligible for cover.<sup>2</sup> The inclusion of 'seconded' and 'employees' appears to reflect modern employment language.

Service eligibility was acknowledged by the Law Commission Report as a significant topic of debate. The Law Commission 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'*.<sup>3</sup>

In another section it describes the veterans' scheme as:

*...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.*<sup>4</sup>

The Ombudsman identified that the Law Commission considered the Government had a responsibility to those who, in the service of the State, were placed in harm's way by it. This requires a higher degree of risk than is normal to an employment setting. Further, to be eligible under the VSA, personnel need to be specifically **sent** into harm's way by the Government. This may have explained the inclusion of the wording referring to those armed forces serving *'at the direction of the New Zealand Government'* in the legislation, which implies an element of lacking choice or control over the decision to be placed in harm's way. This would also accord with the Law Commission's principles, and the overarching purpose section of the VSA, which talks of providing support for those who become injured or ill as a result of *'being placed in harm's way'*.

The necessity to demonstrate being employed by (or seconded to) the Defence Force, suggests it was considered the Government only has a moral obligation to provide support (beyond the universal entitlements all New Zealanders can access) to those employed by (or who are seconded to) the Defence Force. The mutual obligations inherent to an employment (and secondment) relationship are consistent with the principle that the State should be responsible for **only** those specifically employed (or seconded) to work alongside armed forces. For

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<sup>1</sup> See para's 3.15-3.17 of the Law Commission's report.

<sup>2</sup> The War Pensions Act covered members of the Defence Force through the definition of "member of the forces". Members of the Defence Force include civil staff employed as members of the Defence Force under section 61A of the Defence Act 1990. The Law Commission appears to be ensuring this was clear in the new legislation.

<sup>3</sup> See para 3.1 –*emphasis added*.

<sup>4</sup> Para's 4.16 –*emphasis added*.

example, employees have responsibilities to be present, act in accordance with their employer's instructions, and exercise reasonable skill and care in their work. By contrast, those who do not work for the Government are more at liberty to come and go as they please and do not have the same contractual obligations (to take directions).

### **Applying the Law Commission's rationale to the complainant**

The Ombudsman then assessed the complainant's situation in light of the Law Commission's rationale. He found there was no question the complainant was placed in harm's way. The conflicts the complainant was involved in were all listed as '[qualifying operational service](#)' on the Defence Force's website.<sup>5</sup>

However, the Ombudsman could not see any evidence that the complainant was **sent** by the Government into a conflict zone – ultimately it was his decision to go, and if anyone sent him, it was his employer, the New Zealand Press Association. He was at all times employed (and paid) by the NZPA, and therefore ultimately it was the NZPA that was responsible for his wellbeing, not the State vis-à-vis the Defence Force.

### **Are the legal settings fair and reasonable?**

The Ombudsman went on to consider whether the settings in the VSA were fair and reasonable. The Ombudsman acknowledged that the interpretation outlined above **could** allow the Government to abdicate responsibility for personnel by electing not to enter into a formal employment or secondment relationship, notwithstanding the relationship may bear all the hallmarks of one.<sup>6</sup>

The Defence Force was asked to provide examples of civilians who have not undertaken the oath of allegiance to serve in the armed forces, but who may have been employed or seconded by the Defence Force, and therefore eligible for a veteran's entitlement under the VSA. The Defence Force advised that people are seconded from other government agencies, for example to provide intelligence, health or IT services. In addition, there are many 'military adjacent' civilians working alongside the Defence Force in conflict zones who would **not** be entitled to coverage under the VSA. For example, the Red Cross, Police, diplomats, interpreters and entertainers.

The Ombudsman noted he was not the first to consider whether the current settings are right or whether there is a moral obligation to provide coverage to an additional subset of people. The question of veteran eligibility remains a vexed one within the veteran community, with many calling for an expansion to the current definition. The VSA has been subject to review, with Professor Ron Paterson releasing a report in March 2018 titled: [Warrant of fitness – An independent review of the Veterans' Support Act 2014](#). Although veteran eligibility was outside the scope of the review, Professor Paterson suggested a range of eligibility options, and

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<sup>5</sup> The Indonesian confrontation from 17 August 1964 to 11 August 1966; service in Vietnam from 29 May 1964 – 31 Dec 1972; observed French nuclear tests at Mururoa Atoll on 22 and 28 July 1973.

<sup>6</sup> The Ombudsman found no evidence such a responsibility has been abdicated.

approaches, and recommended the Government undertake further work on who is a veteran and how New Zealand wants to recognise their service.

As a result, in 2019 the Minister for Veterans Ron Mark requested the Veterans' Advisory Board (VAB) provide advice on who should be considered a veteran. In 2019 it presented its interim report, entitled '[What constitutes a veteran and how should their service in the armed forces be recognised](#)', to the Minister. In essence, it recommended removing references to both 'qualifying operational service' and 'at risk of significant harm' in the definition of veteran and replacing it with a simpler definition which links veteran status solely to attestation.<sup>7</sup> To adopt the VAB's recommended definition, it was estimated the number of veterans would rise from 35,000-40,000 to 120,000 which of course would have fiscal implications. However, the VAB suggested eligibility for services and support should be considered separately on the basis of demonstrated need (rather than being tied to qualifying operational service).<sup>8</sup>

The Ombudsman noted that ultimately a line does have to be drawn somewhere and he considered some State employees providing services to Defence, such as Police, could be distinguished from privately employed civilians, not seconded to the Defence Force, or employed by the Government, such as journalists. In his opinion, the Government should bear **less** responsibility towards privately employed civilians. Such personnel also have more element of 'choice' as to whether to be placed in harm's way such that the State cannot be said to be at fault for any harm they suffer.

For these reasons, the Ombudsman considered there to be less justification for broadening the definition of 'veteran' to cover journalists, such as the complainant, than there would be for extending coverage to others employed by the State, such as Police, but who might not have been formally seconded to work with the Defence Force. While where to draw the line is ultimately a political decision, if those employed by the State such as Police are not covered by the VSA, there is even less justification for journalists to be covered.

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<sup>7</sup> The VAB's rationale for linking the definition of veteran to attestation was due to the special and unique nature of the relationship between attested service members and the State, in that from the point in time a service member becomes attested, they relinquish many of their individual rights and freedoms enshrined in the New Zealand Bill of Rights Act 1990, and become subject to military law. The VAB's view was that non-attested members and civilians, who are not subject to the same loss of freedoms and individual rights, should not be conferred the title of 'veteran', but their service should be recognised through other means such as medallic recognition, letters of appreciation for service etc. It also considered civilian employees of the Defence Force and seconded personnel ought to be entitled to 'access to high quality services and support', provided they can establish they suffered harm through their service to New Zealand.

<sup>8</sup> In a statement released on 10 December 2019, accompanying the VAB's interim report, the Minister for Veterans noted that the VAB's recommendations in terms of who should be considered a veteran '*would be a substantial change to the current situation.... [and] there are a number of implications to be worked through*' and they '*do not represent Government policy*'.

## Outcome

The Ombudsman formed the opinion that the Defence Force's decision to find the complainant ineligible as a veteran under the VSA did not appear to be contrary to law or unreasonable. The complainant did not meet the definition of 'veteran' under the VSA, and therefore was not eligible for any entitlements covered by the VSA.

The Ombudsman also formed the opinion that the decision was not made in accordance with a law that was unreasonable, and therefore there was no basis for him to recommend that the Defence Force should reconsider its decision.<sup>9</sup>

*This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*

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<sup>9</sup> Following this investigation, the Minister of Veterans announced on 11 April 2025 that a [Veterans Recognition Bill](#) is to be introduced to recognise more former defence personnel as 'veterans'. The proposed Bill will stand alone from the VSA and will not expand the group of personnel eligible for support entitlements.