Presumption
The Bridge Across and Between Understandings and Misunderstanding

The Simple Explanation of Presumption

Were you exposed in Vietnam to Agent Orange and its dioxin contaminant? No you weren't.

If you were exposed, which you weren't, would the dioxin have caused any of the diseases, disorders, disabilities, defects and deaths that have been claimed in veterans and their children and grandchildren? No, there is no scientific or medical proof that dioxin has caused any condition in Vietnam veterans and their children and grandchildren.

Then why do Vietnam veterans get benefits and treatment for those conditions? Because in veterans' legislation, in the absence of scientific and medical proof, we are given the benefit of the doubt. That's presumption.

And why do the children get compensated for the five accepted conditions? Because, even though there is absolutely no scientific and medical proof that any conditions in the children and grandchildren were caused by the veterans' war service, the government agreed to those five conditions. That's presumption.

Conclusions of this Paper

After an analysis of presumption and its application in New Zealand and by the end of this rather long paper I come to four conclusions:

- Firstly, that we Vietnam veterans should have known a lot more about presumption a lot earlier, and we didn't.
- Secondly, that we should have directly challenged the administration and implementation of the war pensions legislation instead of wasting time and energy, and causing considerable pyschological trauma (*Mamae*) in our own community, fighting an unwinnable battle against the science of Agent Orange;
- Thirdly, that in fighting the wrong battle we Vietnam veterans were as much at fault as the politicians and bureaucrats for not using to our own advantage the benevolence of presumption, and the benefit of the doubt, already existing in the War Pensions Act 1954;
- Instead, we focused on a single alleged cause of health disorders in Agent Orange, and needlessly looked for non-existent scientific proof, when we didn't need to; and

- Fourthly, that a contributing factor to that is that we Vietnam veterans, as a community, have had a lack of knowledgeable and effective leadership over a long period of time. As I wrote in my last paper, the blind leading the blind.

That in some ways we are the authors of our own misfortune. Not entirely of course, for we had at various times an intractable foe administering the war pensions law. But we should have beaten them, a lot earlier.

I will show how and why the War Pensions Act 1954 could and should have been used to our collective advantage, and wasn't.

Apart from a greater knowledge and understanding of the science, the scientific method, and the scientific process (see earlier paper), we needed as a community to be a lot more knowledgeable about presumption, and the presumptive provisions of the War Pensions Act 1954.

The Concept of Presumption

In my first posting in this series in the NZ Vietnam Veterans & Families Facebook group I introduced the concept of presumption in veterans' affairs. I did so because it is a key concept that seems not to have featured in the Agent Orange debate in New Zealand.

For Vietnam veterans, presumptive recommendations and decisions in the USA and Australia were implemented by 1994, The acceptance of those presumptive conditions in the USA and Australia was often mistaken by New Zealand Agent Orange claim makers as scientific and medical proof, which it was not. Those who did try to introduce the concept of presumption into the debate were sometimes labelled as untruthful by the other side. The two sides were talking past each other. That rendered the Agent Orange debate somewhat meaningless, although it has persisted for decades into the present time, generating more heat than light.

For veterans' legislation in the USA, Australia and New Zealand has long allowed for veterans to be given the benefit of the doubt in the absence of scientific, medical and legal proof. The decades long battle in New Zealand against the science, in order to indict Agent Orange, was totally unnecessary. As we will see the solution lay instead in the legislation, and in presumption, not in fighting an unwinnable battle against the science. The solution lay in enforcing the existing already adequate legislation.

But that required an understanding of the legislation and its presumptive standard of proof; an understanding that seems to have been missing in action for several decades.

In this paper I explore presumption in much greater detail, and at length, for it is an important concept in veterans' affairs and ought to be much

better understood. I also point out where we (New Zealand's Vietnam veterans) went wrong.

A Policy Response to Uncertainty

What follows is a lay interpretation and simplification of relaxed evidentiary rules in veterans' legislation. It may not seem simple. Nevertheless it is important. Bear with me.

A full examination by Bruce Topperwien explains the detail and history in great legal detail. His paper examines the evolution of those evidentiary rules in Australia with comparative reference to the USA, UK, Canada and New Zealand. It is recommended reading.

"A presumption is a rule of law for the handling of evidence. It gives the person for whom the benefit of the presumption was intended, the advantage of not having to produce specific evidence to establish the point at issue. A presumption can be rebutted by evidence, and the law can provide that a particular standard of proof is to apply in order to rebut a particular presumption. Similarly, the law can provide that particular evidence is required to raise the presumption in the first place".[1]

It is not a simple subject and has not always, or not often, been understood by scientists, policy makers and veterans' claim makers, leading to much confusion. Nevertheless the intent of presumption is crystal clear and central to the administration of veterans' affairs:

> *"It gives the person for whom the benefit of the presumption was intended, the advantage of not having to produce specific evidence to establish the point at issue".*

The phenomenon of competing understandings and resultant misunderstanding is not new in veterans' affairs. After World War 1 the legislatures in the USA, Australia and New Zealand all created various levels of presumption as the bridge between scientific and medical uncertainty, and the concerns of the veteran applicant for war service entitlements.

A cause of aggravation between New Zealand policy makers and the New Zealand Vietnam veteran claim makers from about 1982 until recent times was a lack of knowledge and understanding of presumption by the veterans and their claim makers. Equally, it was caused by a failure of policy makers in government to credibly explain the benevolent nature of the existing legislation[2] to the whole Vietnam veteran community, and

[1] Topperwien, B., Relaxed evidentiary rules in veterans' legislation: a comparative and empirical analysis, Southern Cross University Law Review, Vol. 7, 2003, pp 259-307. Bruce Topperwien is a former senior lawyer and director of litigation at the Australian Department of Veterans Affairs, and former Executive Officer at the Australian Veterans Review Board.

[2] War Pensions Act 1954.

more importantly, to ensure that the legislation was applied as intended by the Parliament that passed it into law in 1954.

Under that law the veteran had only to prove:

- that he had the disease or condition he claimed, and
- that he had served in a qualifying theatre of war.

The third required element was that the disease or condition **could** be attributed to his war service. To climb that third hurdle was often too difficult for the veteran based on the available historical and scientific evidence. Presumption granted him the benefit of the doubt.

Some legislation, or parts of the legislation, required the government to prove otherwise if it could. This was known as the reverse onus of proof. In some cases specific conditions could be incorporated into legislation and regulation as presumptive conditions for which no further proof was required.

Presumption is therefore the bridge built by policy makers across and between the competing understandings of the scientist and the veteran. It is the bridge between scientific and medical uncertainty and the claims of the veteran. It eliminates the need to fight the science.

Part of the justification for presumption is an acknowledgement of the duty of care owed to the war veteran by the policy makers in government.

Presumption is defined in a US Congressional Research Service paper:[3]

"In the context of VA [Veterans' Affairs] *claims adjudication, a presumption relieves veterans of the burden to prove that a disability or illness was caused by a specific exposure that occurred during service in the Armed Forces. When a disease is designated as presumptively service-connected, the individual veteran does not need to prove that the disease was incurred during service. In other words, a presumption shifts the burden of proof concerning whether a disease or disability was caused or aggravated due to service from the veteran to the VA. The VA would have to demonstrate that some other intervening event caused the disability in order to rebut the presumption".*

In the New Zealand context Hon Robert Fisher QC provided this expert explanation:[4]

"The War Pensions Act uses different standards of proof in different places. A standard of proof is the level of probability to which the law

[3] Panangala et al, Veterans Affairs: Presumptive Service Connection and Disability Compensation, US Congressional Research Service, 18 November 2014.

[4] Fisher, R., Evidential Requirements under the War Pensions Act 19534, Opinion for Munro-Law and RNZRSA, concerning presumption in New Zealand law, 2 June 2010.

requires a factual proposition to be proved. Four relevant levels of probability in ascending order are:

a. *Mere possibility (cf "possibly" in s 17(3))*
b. *Evidence sufficient to at least raise a doubt, i.e. evidence sufficient to make something a live issue by raising at least a doubt on the subject (impliedly the threshold required of claimants arguing attribution under ss 17(3) and 18(2)(c).*
c. *Proof on the balance of probability, i.e. evidence showing that something is more probable than not (impliedly the requirement under s 19 to show that the veteran served in the armed forces and suffered a disablement).*
d. *Proof beyond reasonable doubt (impliedly the requirement from the Crown to disprove attribution for the purpose of s 18(2)(c).*

Presumption

"A presumption is a factual conclusion ("the presumed fact") which the law requires a decision maker to draw if and when certain threshold facts ("the basic facts") have been established to the required degree of certainty. The proponent must still establish the basis facts to whatever level of certainty the statute requires (see the four levels of probability referred to above). But once the proponent has established the basic facts to that level (e.g. that the veteran has been on war service overseas and that he had suffered the disablement while there) the law steps in and takes the proponent the rest of the journey by stating that the presumed fact (e.g. that the disablement was attributable to the service) is to be adopted. The law adopts that conclusion whether or not there is any evidence to support it.

"A presumption is rebuttable if the law allows the other party (in this case the Crown) to produce or point to evidence showing that such a presumption would be factually incorrect. In creating a rebuttable presumption the law will state the level of probability which the opponent must attain in order to rebut the presumed fact (see the four levels of probability referred to above).

"A presumption is irrebuttable if the law does not permit the other party (in this case the Crown) to adduce evidence to rebut the presumed fact, no matter how compelling the evidence as to the actual facts may be. An example of an irrebuttable presumption is the presumption on initial fitness created by s 17(1)".

The First Presumption: All Vietnam veterans were exposed to Agent Orange

Throughout the Agent Orange debate, claim makers have consistently and persistently assumed and asserted that Vietnam veterans were exposed to Agent Orange (and other toxic disease-causing chemicals). They

universally asserted that the alleged exposure was sufficient to cause a multitude of diseases, disorders, disabilities, defects and death in the veterans, and in their children and grandchildren. They disregarded scientific debate over whether the alleged exposure, if any, was in sufficient dosage (dose-response) over sufficient time (time-exposure) to have any effect. They cherry picked studies that they agreed with, and ignored or repudiated the rest.

Victor Johnson of the Vietnam Veterans Association of New Zealand (VVANZ) was an early claim maker alleging exposure:

"Research conducted in New Zealand during 1984 and 1985 determined New Zealand troops operated in defoliated areas within Phuoc Tuy Province. The information is in the document titled as, 'New Zealand Military Forces Likely to Have Been Exposed to Chemicals in South Vietnam', authored by Victor R Johnson, was lodged with the Alexander Turnbull Library, New Zealand Pacific Region, since 1985". [5]

"Approximately 3400 New Zealanders served in Vietnam and my research establishes that about 2400 personnel would most likely have been the most heavily exposed to defoliants". [6]

Unfortunately Johnson's "*most likely*" and "*heavily exposed*" conclusions from his research, conclusions that have influenced belief in the New Zealand Vietnam veteran community for decades, are based entirely on speculation rather than specific evidence of exposure.

For claim makers have consistently and persistently cited the amount of Agent Orange and its dioxin contaminant sprayed over Vietnam (nearly 19.5 million gallons of Agent Orange[7]), the locations it was sprayed, and our patrolling in and through defoliated areas, as evidence that veterans were exposed. Veterans have anecdotally claimed direct exposure to sprayed herbicides. Others have claimed anecdotally indirect exposure through drinking contaminated ground water, eating contaminated food, or absorbing the toxin from soil and dust.

Controversially some researchers, including those employed by the US Government, have refuted those claims and produced evidence to show why almost all veterans were not directly sprayed or otherwise exposed.

[5] Johnson, V., Agent Orange Inquiry New Zealand Health Select Committee, Submission of Victor Johnson, Vietnam war veteran, 25 November 2003, Part 5.2.

[6] Johnson, V., Full Text of International Independent Agent Orange Network (New Zealand) Document, Submission to New Zealand Government Foreign Affairs and Defence Select Committee Hearing on the Vietnam Veterans Health Inquiry Bill 1990, 4 august 1990, Part 1.0.

[7] Stellman, S., Stellman, J., Exposure opportunity models for Agent Orange, dioxin and other military herbicides used in Vietnam, 1961-1971, in Journal of Exposure Analysis and Environmental Epidemiology, 2004, 14, 354-362.

They have produced evidence to show that insufficient TCDD/Dioxin contaminant could have remained in the environment to cause indirect exposure. And that any exposure would not have been raised above the dose-response and time-exposure thresholds to cause the claimed diseases, disorders, disabilities, defects and deaths.

Between 1982 and 1985 the US Government's Center for Disease Control (CDC), mandated by the US Congress, unsuccessfully attempted to conduct research to build a model that would enable it to determine whether or not veterans were exposed, individually or collectively. It then conducted a "Vietnam Experience" study to determine exposure, without result. CDC then imported technology from Sweden to determine dioxin levels in the blood of 600 veterans chosen from those who were known to have been involved in spraying over a protracted period, compared with other veterans who had not served in Vietnam. That attempt failed to indicate any excess exposure in the 600.

In 1982 the US Air Force established a 40-year longitudinal study of its "Ranch Hand" veterans who sprayed the herbicides, and its early results also failed to produce evidence of exposure in sufficient dosage to cause the claimed effects.

The attempt to determine exposure levels was abandoned amid accusations of fraud, incompetence and cover-up by some veterans, by veterans' advocates in the US Congress, and in the media. VVANZ claim makers joined in that condemnation of the US Government research.[8] Notwithstanding that, as at 2018 no direct evidence of exposure has yet been produced, and the debate over whether or not an accurate exposure model is possible has continued into the 2000's.

In a previous paper I explained why New Zealand Vietnam veterans were not exposed.

In 1988 advocates in Congress, led by then Representative (later Senator) Tom Daschle, were faced with a dilemma. The CDC and Ranch Hand studies had failed to produce evidence of exposure and there was no expectation a study could be designed to produce different results. Rather than directly legislate a presumption of exposure, Congress passed the (USA) Agent Orange Act (P.L. 102-4) (1991). As a result of that Act decisions about Agent Orange have been taken as though the CDC and Ranch Hand studies had never been done.[9]

[8] Johnson, V., Submission to the New Zealand Government Foreign Affairs and Defence Select Committee Hearing on the Vietnam Veterans Health Inquiry Bill 1990, para 5.2.1, 4 August 1990.

[9] That process was duplicated in New Zealand thirty years later with the official dismissal of the Reeves and McLeod Reports.

Public Law 102-4, the Agent Orange Act of 1991, established in law the requirement for US Veterans Affairs to presumptively recognise certain conditions in Vietnam veterans as being connected to their service.

In doing so it effectively established the first presumption – that all those who served in Vietnam were individually and collectively exposed to sufficient dosage over sufficient time to cause diseases, disorders, disabilities, defects and deaths associated with Agent Orange. Those conditions were to be identified by the National Academy of Sciences (NAS). It is the primary presumption underlying presumptive conditions in veterans' legislation and regulation in the USA (1991 onwards), and set the precedent for the adoption of the same presumption in Australia (1994), and New Zealand (2006-2014).

In New Zealand the Parliamentary Health Select Committee moved towards establishing that presumption in 2004 by declaring;

"Evidence received by us demonstrates, beyond doubt, that New Zealand defence personnel were exposed to Agent Orange and other herbicides during their service in Vietnam. We consider that the photographic evidence and the map documentation confirm that New Zealand defence personnel served in defoliated areas.

"We note the evidence of direct exposure provided by many submitters to our inquiry who witnessed aerial and ground herbicide spraying during their service in Vietnam. We note indirect exposure through residue remaining in the soil or entering water sources or the food chain is inevitable given that 76 million litres of herbicides were sprayed in Vietnam.

"Submitters told us of their living conditions during the war: they wore the same clothing day after day, inhaled dust particles, and slept and worked in defoliated areas.

"In line with the Australian and the United States Governments, we accept that service in Vietnam is evidence of likely exposure to defoliants and other, possibly toxic, chemicals". [10]

In making that declaration the Health Select Committee mistakenly interpreted US and Australian presumption as evidence, in addition to accepting anecdotal accounts as evidence. The accounts of exposure quoted in the Select Committee Report are easily disproved. It was however a political rather than a scientific inquiry.

[10] Chadwick, S., Chairperson, Inquiry into the exposure of New Zealand Defence personnel to Agent Orange and other defoliant chemicals during the Vietnam War and any health effects of that exposure, and transcripts of evidence, Report of the Health Committee, Forty-seventh Parliament, October 2004, p 20.

Based on the Health Select Committee Report, and on further investigation and consultation by a Joint Working Group, the 2006 Memorandum of Understanding (MOU) negotiated by the New Zealand Government, and the RNZRSA and EVSA representing veterans, embedded the presumption of exposure.[11] Contrary to widespread belief in the veteran community The Health Select Committee, the Joint Working Group, and the MOU negotiation process did not prove anything. It merely embedded presumption of specified conditions (in the absence of scientific and medical proof).

For as part of the MOU the Government accepted a list of presumptive conditions established by the US National Academy of Sciences (NAS), thereby establishing in New Zealand both the presumption of exposure and specific presumptive conditions.

The late Colonel John Campbell (RNZRSA negotiator) is quoted as saying that there was:

"*… a reluctance to accept that any conditions had sufficient scientific evidence to establish a definite causative link*".[12]

It would appear from that remark that the Government was holding to the scientific standard of proof, and that the veterans' negotiators were asking for conditions based on the US adoption of a presumptive standard. From the quoted comment it seems that the veterans' negotiators themselves might not have understood the difference between causation, and correlation leading to presumption. In the event the "*causative link*" was not established despite what many still think.

For the NAS list of conditions was based on statistical associations (correlation) rather than proof of cause and effect (causation), and those statistical associations (regardless of significance) provide the justification for presumptive conditions.

Exposure is the first presumption, bridging the gap from the claims of veterans and their advocates, often based on anecdotal accounts, and despite the lack of empirical evidence to substantiate those claims. It is the presumption that bridges the gap between disparate understandings between scientists and veterans. It paves the way for further benevolent presumption.

Many claim makers do not acknowledge that the primary presumption of exposure has been established as presumption, and continue to assume and assert exposure. Some New Zealand claim makers, including veterans and their lawyers, mistakenly cite presumption of exposure as evidence of

[11] Memorandum of Understanding, The Ex-Vietnam Services Association AND The Royal New Zealand Returned and Services Association AND Her Majesty The Queen in Right of New Zealand, 6 November 2006.
[12] Campbell, J., consulted by Challinor by email 30 October 2008, quoted in Challinor, D., Grey Ghosts, New Zealand Vietnam Vets talk about their war, Harper Collins, 2009 Edition (first published in 1998), p 238.

exposure. For example counsel for the WAI 1401 claim at the Waitangi Tribunal asserts:

"… there was exposure to the chemical defoliant commonly referred to as Agent Orange, which contained the most poisionous [sic] *contaminants known commonly as dioxin".* [13]

Unable to determine through research whether Vietnam veterans were individually or collectively exposed to defoliants in sufficient dosage over sufficient time to cause diseases, disorders, disabilities, defects, and death, every Vietnam veteran, regardless of occupation or trade, combat role or support role, field soldier or office worker, rifleman or cook, and regardless of time in theatre, twelve months or twelve days, is now presumptively deemed to have been exposed.

In the case of the New Zealand and Australian veteran the presumption of exposure applies both to those who served in the 1st Australian Task Force operational base at Nui Dat, and to those who served in the 1st Australian Logistic Support Group base at Vung Tau, and elsewhere.

The Second Presumption: Based on the first presumption of exposure to Agent Orange, the second presumption asserts that the statistical associations between TCDD/Dioxin and certain health effects, established by systematic review and meta-analysis of toxicological and epidemiological research not specifically related to service in Vietnam, are sufficient to establish several presumptive conditions for Vietnam veterans

A US Veterans Affairs Department publication explains the Agent Orange Act and presumption:

"Public Law 102-4, the Agent Orange Act of 1991, established in law a mechanism whereby VA presumptively recognized certain illnesses in Vietnam veterans for service connection. That legislation required VA to enter into an agreement with the National Academy of Sciences (NAS) for a comprehensive review and analysis of scientific literature on Agent Orange at least every two years. Under this legislation, the Secretary of Veterans Affairs must take into account the reports received from the Academy and all other available sound medical and scientific information in determining whether a "positive association" exists between exposure of humans to an herbicide agent and the occurrence of a disease in humans. The legal definition of a "positive association" is met when the evidence for an association equals or outweighs the evidence against an association. If such an association is determined to exist, the

[13] Harman, P., Waitangi Tribunal, Synopsis of Opening Submissions of WAI 1401 / 2381 Claimants, Wai 2500, #3.3.20, 4 April 2016 para 7.

Secretary must prescribe regulations providing that a presumption of service connection is warranted for that disease. In practice, VA compensation policy has closely followed findings from the NAS". [14]

In practice also, the US Congress had already established a presumption of exposure, the first presumption.

The NAS meta-analysis reports from 1994 to 2014 consistently acknowledged that there was no evidence to establish that Vietnam veterans were exposed to the herbicides, individually or collectively, except for those who mixed, stored and sprayed the chemicals. The reports also acknowledge that the NAS and most of the research it reviewed, had not and could not take into account confounding factors (other causes), other than herbicides, that might have contributed to the conditions in Vietnam veterans, and that might have resulted in different conclusions.

The statistical or "positive" associations published in the NAS studies are based firstly on the broad and benevolent first presumption of exposure, and secondly, are mostly based on epidemiological studies of populations other than Vietnam veterans, whether exposed by occupation or accident. They are also based on the extrapolation of toxicological research on laboratory animals to humans. The associations are not based on any direct evidence.

Public Law 102-4 established the categories of statistical associations that were used by the NAS in its 1994 report and its ten two-yearly updates to 2014:

- Cat. 1: Sufficient Evidence of an Association;
- Cat. 2: Limited/Suggestive Evidence of an Association;
- Cat. 3: Inadequate/Insufficient Evidence to Determine Whether an Association Exists;
- Cat. 4: Limited/Suggestive Evidence of No Association

Conditions in Categories 1 and 2 reach the requirement for the declaration of presumption by the Secretary of the US DVA.

The initial 1994 NAS report established lists of conditions that were accepted in the USA as presumptive conditions, and were accepted as precedent by the Australian Government in 1994 to establish its own procedure for prescribing presumptive and other accepted conditions

[14] Veterans Affairs, Department of, 21st Century VA Independent Study Course: Vietnam Veterans and Agent Orange Exposure - Symptoms, Diagnosis, Medical Care for Wartime Dioxin Herbicide Exposure (Veterans Health Issues Series) (Kindle Locations 296-304). Progressive Management. Kindle Edition.

They are the Statements of Principles (SOPs) published by the Australian Repatriation Medical Authority.

In 2006 the NAS lists were accepted by the New Zealand Government, until the Australian SOPs were adopted and incorporated into legislation and regulation in 2014.

The whole edifice of Agent Orange attributed disease, disorder, disability, defect and death is therefore built upon presumption rather than legal or scientific evidence.

Presumption in New Zealand Law

Presumption has long been an accepted part of New Zealand war pension law.

The Legislation

The NZ Military Pensions Act (1866) provided entitlements for colonial forces. Pro-government Maori veterans were also eligible, at a lower rate than Pakeha. This legislation was also used after the South African (Boer) War.

The NZ War Pensions Act (1915)[15] set up a network of war pensions boards to decide whether a veteran's death or disability was due to their military service. The requirement for veterans to be "*deserving*" was dropped, and Māori veterans received the same pension as Pākehā veterans. Maximum rates were established and partial rates left to the discretion of the war pensions boards.

The New Zealand War Pensions Act (1943)[16] provided improved pension rates and made it easier for war veterans and their families to receive compensation for death, disability or financial disadvantage. It established the benevolent presumptive and evidential standards carried forward into the 1954 legislation.

Section 17 (3) of the legislation that was in force from 1954 to 2014, the New Zealand War Pensions Act 1954 (and regulations and amendments),[17] provided for presumption (see also Fisher (2010)):

"In any case in which the foregoing presumption[18] in favour of the claimant does not for any reason apply or is not sufficient to establish his claim, the claimant shall be entitled to produce to the Secretary or an Appeal Board, as the case may be, any evidence (whether strictly legal evidence or not) to show that the condition that resulted in the disablement or death of the member was possibly or probably

[15] http://www.nzlii.org/nz/legis/hist_act/wpa19156gv1915n16235/
[16] http://nzlii.org/nz/legis/hist_act/wpa19437gv1943n22243/
[17] http://www.legislation.govt.nz/act/public/1954/0054/latest/whole.html#DLM284755
[18] That by being accepted as medically fit for war service the member is conclusively presumed to have been medically fit unless contradicted by his medical record.

attributable to or aggravated by his service with the forces in connection with any war or emergency, and if any reasonable evidence to that effect is produced there shall thereby be established a presumption that that condition was in fact attributable to or aggravated by the service of the member, and that presumption may be rebutted only by evidence that satisfies the Secretary or Appeal Board that the condition was not so attributable or aggravated but was due entirely to other causes".

Section 18 (1) elaborated:

"In determining, in relation to any claim for a pension under this Act made by a member of the forces in respect of his disablement or made by any other person in respect of the disablement or death of a member, whether the disablement or death of the member was attributable to his service as a member or whether the condition that resulted in his disablement or death was aggravated by that service, the Secretary or an Appeal Board, as the case may be, shall decide in accordance with substantial justice and the merits of the case, and shall not be bound by any technicalities or legal forms or rules of evidence".

Section 18 (2);

"In the application of the general rule formulated in subsection (1) the following particular rules shall apply—

(a) in no case shall there be on the claimant any onus of proving that the disablement or death on which the claim is based was in fact attributable to the service of the member or that the condition that resulted in the disablement or death of the member was aggravated by his service:

(b) the claimant shall be given the full benefit of the presumptions in his favour provided for in section 17:

(c) the Secretary or an Appeal Board, as the case may be, shall be entitled to draw and shall draw from all the circumstances of the case, from evidence furnished, and from medical opinions submitted to the Secretary or Appeal Board, ***all reasonable inferences in favour of the claimant, and the claimant shall, in every case, be given the benefit of any doubt as to the existence of any fact, matter, cause, or circumstance that would be favourable to him****".* [Emphasis added].

The higher scientific, medical or legal standard of proof was specifically waived in favour of the member or claimant.

Nevertheless New Zealand Vietnam veteran claim makers, from the late 1970's onwards, persisted in their efforts to have their concerns accepted at the higher standard of legal or scientific proof. That claim postulated that New Zealand Vietnam veterans had been exposed to a sufficient dosage of Agent Orange and that was the cause of multiple diseases,

disorders, disabilities, defects and deaths suffered by the veteran and his progeny; and that that had been scientifically proven.

However the legislated general presumption in WPA54 mandating the lower benevolent standard of proof, and negating the need for scientific proof, was in force throughout the whole of the post-Vietnam period until replaced by more specific presumptions in the Veterans Support Act 2014 and Regulations.

War Pensions Appeal Board (WPAB) Decisions

From at least 1980 presumption was applied, at least at the level of appeal. In 1980 it was reported that the WPAB determined in favour of a Vietnam veteran who had applied for compensation due to chemical exposure. He suffered from a severe skin rash:

"In its summary the Board made it clear that the decision did not imply that exposure to herbicide was harmful or that the case should be seen as a precedent."[19]

Even so the veteran's appeal was granted and he received compensation.

Several WPAB decisions in the early 1990's affirmed the benevolent nature of the legislation, the benevolent interpretation of the Act by the WPAB, and the Board's clear understanding of the difference between proof and presumption.

The following are just a selection of WPAB decisions over a limited time period. They relate to WW2 and Vietnam veterans. Further research is needed to establish a record of decisions from 1972 to the present day.

In 1990 an appeal for entitlements for ischemic heart disease was not accepted but the Board on its own initiative, and applying a benevolent standard, substituted deafness and anxiety neurosis, and granted entitlements.[20]

A few days later another appeal for olivio-poutine-cerebral degeneration was not accepted, but the Board benevolently substituted anxiety neurosis and approved a 70% backdated disability pension.[21]

In an appeal for chronic obstructive airways disease attributable to smoking in Egypt the Board decided, "*Applying the presumptions, and the inferences we are required to apply by S17 and S18C of the Act leads us to a conclusion that his present condition is attributable to his war service*", and a 50% disability pension was approved.[22]

[19] NZ Herald, 16 May 1980, quoted in McCulloch, J., The Politics of Agent Orange: The Australian Experience, Heinemann, 1984.
[20] Trapski, P., WPAB, Brisbane, 18 June 1990, appellant Graham.
[21] Trapski, P., WPAB, Sydney, 22 June 1990.
[22] Trapski, P., WPAB, Sydney, 22 June 1990, appellant Shore.

A 1991 decision of the War Pensions Appeal Board in favour of a Vietnam era appellant clearly accepted American and Australian presumption as precedent in finding for the appellant:

"We have no trouble in accepting the American and Australian findings of a statistical link[23] between non-Hodgkin's lymphoma and service in Vietnam. The evidence is certainly reasonable and ***establishes the link as at least possible****. There is no evidence to find that Mr Cameron's condition was not attributable but was due entirely to other causes."*[24] [emphasis added]

Note that the WPAB accepted a "statistical link" (i.e. correlation rather than causation or actual scientific and medical proof). The reverse onus of proof was also applied.

Given that in the Cameron case in 1991 the WPAB used American and Australian precedent, it was especially significant that the Board observed that previous applicants in Australia, who had wrongly had their cases dismissed on the basis of the findings of the Evatt Royal Commission at a legal standard of proof, had been invited to resubmit their claims on the basis of USA precedent [relating to presumptive conditions established by the US administration].

This 1991 case was introduced into evidence at the Waitangi Tribunal WAI 2500 hearings by Gavin Nicol[25]. It is not known whether Nicol took the case to appeal in 1991, or whether he knew about the WPAB decision at that time.

This important WPAB decision was not widely known in the Vietnam veteran community, and had it been known, and used as precedent for more applications for entitlements, reviews and appeals, it might have prevented much of the anger and outrage that developed in the years from 1998 to 2008. Gavin Nicol was an early member or associate of the main claim making group, Vietnam Veterans Association New Zealand (VVANZ).

[See later Hank Emery's successful use of Australian and American precedent].

In another case in 1993 the WPAB demonstrated a benevolent approach in dismissing an appeal for mercury poisoning from fillings, but increasing the appellant's pension for anxiety hysteria from 25% to 40%, on the basis that it may have been the cause of his fixation on mercury poisoning.[26]

On the same day the Board declined an appeal (appellant Grayling) for high blood pressure and hypertension but increased the appellant's

[23] The "statistical link" in epidemiology does not establish causality, or cause and effect, in a scientific, medical or legal sense, but it does provide a justification for presumption.
[24] Trapski, P., WPAB, Wellington, 4 June 1991, appellant Cameron.
[25] Nicol, G., Waitangi Tribunal, WAI 2500, #A230 p5 and WAI 2500, #A130(a), 14 March 2016, pp 1-8
[26] Trapski, P., WPAB, Auckland, 26 January 1993, appellant Franklin.

pension for stress disorder from 40% to 45%.[27] Importantly, the late Allan Grayling was a welfare officer with the VVANZ, the organisation that was the leading claim maker for Vietnam veterans in New Zealand for about 25 years from 1982.

"*Allan Grayling, a veterans' advocate who has had many years' experience assisting veterans to obtain pensions, and a veteran himself, notes that while many applications are declined in the initial stages, they are often accepted at appeal.*"[28]

The Cameron and Grayling appeals demonstrate that leading members of the claim makers group (VVANZ) were aware, or should have been aware, of the benevolent intent of the legislation and its application by the WPAB.

A VVANZ Perspective

Leading claim maker, VVANZ president Vic Johnson, did not seem to agree that the war pensions system was benevolent or favourable to the Vietnam war veteran.[29] He wrote expressing that view to the Minister and received the following reply:

"The reply from the Hon Warren Cooper, Minister in Charge of War Pensions was that:

> *" ...the New Zealand war pensions legislation covering awards of disablement pensions to members of the Forces who served overseas in a war or emergency is considered liberal, in that it is merely necessary to establish that the disablement occurred or arose whilst the serviceman was overseas, and not that it was directly attributable to service."*

"The reply also referred:

> *"...The Government does not formally acknowledge, therefore, that service in Vietnam is the only qualification needed to sustain an application for war disablement pension in respect of any form of cancer or for any other disability. The law requires that each application be decided on the individual circumstances of the case.*
>
> *"The Australian Government has recently announced that a link between Agent Orange and 10 types of cancer has been accepted. However New Zealand War pensions have already been granted for many of those cancers. Entitlement is decided on the basis of medical reports and opinions from specialist medical examiners who are kept up to date with the current worldwide research and conclusions. The fact is that a Vietnam veteran is at liberty to apply for a pension for*

[27] Trapski, P., WPAB, Auckland, 26 January 1993, appellant Grayling.
[28] Challinor, D., and Lancaster, D., 2000, Who'll Stop The Rain?, Harper Collins, p 72.
[29] Johnson, V.J., Report to the Vietnam Veterans Association of New Zealand, 3 December 1994, Vietnam Veterans and Non-conventional War Injuries, http://nzvietnamvets.freeservers.com/vietvet2.html

any form of disablement, and if it can be established that the disablement occurred or arose during service overseas then it acceptable as pensionable. It is not, nor has it ever been, necessary to issue a general determination in respect of certain types of disablement, nor to await such a determination from an overseas authority".

The minister was correct in describing the legislation and its intent, albeit in a roundabout way.

However Johnson cited the two cases below to support his contention that the Minister's reply was not correct. The cases he cited did not actually contradict the minister because they concerned the administration of the legislation rather than the legislation itself.

"Documentation of war pension application proceedings show categorically that weight has been, and is still given, to determination of overseas authorities. It only takes two examples to demonstrate the Minister Cooper's reply is not in accordance with facts.

"Example 1 [Circa 1990]:

"The following text is in relation to a war pension applicants appeal against declines of a claim. Each of the decisions declined the claims on the grounds that there appeared ***no causal link accepted by research****. One statement follows in relation to an appeal: ... in offering a second opinion, commented [inter alia]:*

"I enclose Abstracts from this research, you will see that this question was looked at by the Evatt Royal Commission in Australia. Although ***not everyone agreed*** *with the findings of the Royal Commission, my understanding, reading these Abstracts, is that the Commission did not feel that veterans were at an increased risk of malignancy as a result of being exposed to Agent Orange. It is possible that further data will come to hand in the future, but I believe that at the present time there is insufficient evidence to support an association between Agent Orange and malignancy".*

"Example 2 [Circa 1991]:

"This example relates to an appeal against a War Pension Claims Panel decision in respect of lymphocyte cancer, usually incurable and as proved to be in this particular case:

"...It was said that this disability could have had its primary cause in service in Vietnam, but the Claims Panel determined that the condition could not be accepted as due to service. It noted that specialist evidence indicated that the condition was possibly due to late effect of defoliants but decided that this cause had not yet been proved or accepted..."

It is not clear from the available context whether the first example relates to the Claim Panel, NRO or WPAB level of consideration. However it does state that it concerns an "appeal".

The second example definitely relates to a first level (Claims Panel) decision. Without knowing whether that claim was taken to review by the NRO, or to appeal at the WPAB, and the results of any review and/or appeal, it is not possible to determine the relevance of the case.

Without more detail it is not possible to analyse or comment on those two cases. However, the minister was essentially correct, regardless of the whether or not the veteran bureaucracy properly administered the legislation.

The 1990 -1991 period to which they relate is the same period during which the War Pensions Appeal Board was delivering favourable decisions according to the presumptive intent of the legislation. It is also about the same time (June 1991) that the Board had used American and Australian precedent to grant a pension to a Vietnam veteran for cancer.[30] That successful (Cameron) appeal was known (at some stage) to VVANZ member or associate Gavin Nicol.[31]

VVANZ president Vic Johnson wrote the above comments about three years later in 1994 by which time VVANZ ought to have been aware of the successful Cameron appeal decision granting entitlements for *non-Hodgkin's lymphoma* based on presumption, and American and Australian precedent. In hindsight New Zealand claim makers ought to have used by then the accumulation of WPAB decisions to establish through their activism and advocacy some commonality across the regional claims panels.

<u>After Evatt in Australia</u>

After the Evatt Royal Commission in Australia in 1985 controversially declared Agent Orange "not guilty", but also declared the repatriation (or war pensions) system guilty for not properly and lawfully applying existing repatriation law, Vietnam Veterans Association Australia (VVAA) did set about establishing legal precedent. They supported a number of successful appeals against DVA decisions and those favourable decisions did help to change the system.

<u>Nehmer in the USA</u>

In 1989 in the USA a legal ruling in *Nehmer v US Veterans Administration* had far reaching effects in the USA and Australia, and eventually in New Zealand.

[30] Trapski, P., WPAB, Wellington, 4 June 1991, appellant Cameron.
[31] Nicol, G., Waitangi Tribunal, WAI 2500, #A230 p5 and WAI 2500, #A130(a), 14 March 2016, pp 1-8

This legal case and rulings flowing from it provide the legal precedent for the acceptance of presumptive conditions to this day. *Nehmer v US Veterans Administration* started in 1986 as another class action, during the $US180m settlement process following the 1979 – 1984 mass class action against the chemical companies.[32]

Veterans claim makers frequently attribute the acceptance of conditions related to Vietnam service to their own claim making, or to the advocacy of their preferred claim makers. However this legal challenge became the main impetus for the acceptance of presumptive conditions in the USA, and in Australia following the US lead.

The importance of *Nehmer* is that it challenged policy rather than the science. It challenged the DVA requirement for scientific proof instead of the legislated benefit of the doubt standard.

The suit was brought by Vietnam Veterans of America (VVA) and the National Veterans Law Center (NVLC) challenging the standards of proof required by the Department of Veterans Affairs (DVA) regarding Agent Orange (cause and effect). In 1989, the United States District Court for the Northern District of California (Judge Henderson) ruled VA's regulation was invalid because the causation standard it used was inconsistent with the intent of Congress. On 3 May 1989 the Court invalidated VA's regulation and voided all benefit denials made under it.

Following that decision, eight days later on 11 May 1989 Secretary Derwinsky reversed DVA policy and accepted the ruling.

That momentous *Nehmer* ruling started the move to presumptive conditions related to Agent Orange in the USA and seems to have been missed entirely by VVANZ and presumably by the International Independent Agent Orange Network (IIAON) of which VVANZ was a member.

"The veterans refused to accept the impossibility of conducting a true Agent Orange study and kept pushing the government to do more. ***Actually, a definitive exposure study shouldn't have been necessary****. The VA's past disability rulings had never required such strict proof. The agency had always relied upon a looser "statistical association" standard, a showing that the evidence connecting a disease and its presumed cause probably wasn't the result of chance. Also, the agency was supposed to give veterans the benefit of the doubt when determining which illnesses were compensable. The VA had followed these guidelines when it established presumptions for cases of diabetes and multiple sclerosis showing up within seven years after service in*

[32] In which 502 New Zealanders participated as plaintiffs.

Vietnam. The Agency assumed neither disease had anything to do with herbicide exposure. A connection between dioxin and diabetes was identified years later. But the VA insisted on a tighter "cause and effect" standard for any health problem potentially related to herbicides. This would require both a strong, consistent level of association and a plausible description of the responsible biological mechanism. Neither seemed attainable after the failure of the government's research, with one exception, chloracne.

"In 1989, the National Veterans Legal Services Project (NVLSP), representing Vietnam veterans and their survivors, filed a federal class action, Nehmer v. U.S. Veterans Administration, demanding that the VA apply its usual standards to disability claims related to herbicide exposure …. The court sided with the veterans:

> *"The Administrator both imposed an impermissibly demanding test for granting service connection for various diseases and refused to give veterans the benefit of the doubt in meeting that demanding standard. These errors compounded one another, as they increased both the type and the level of proof needed for veterans to prevail during the rule making proceedings. We find that these errors sharply tipped the scales against veteran claimants."*[33]

Nehmer has continued to influence US veterans' policy since the 1989 judgement, through to the present day.

The 1989 *Nehmer* ruling in the USA would have provided the perfect model and precedent to legally challenge the administration of war pension law in New Zealand, instead of continuing to challenge the science. When *Nehmer* was in progress, or shortly thereafter, Vic Johnson of VVANZ was present in the USA as a guest of US Vietnam veterans but seems not to have been aware of that crucially important court case. Or at least he did not mention it in any of his published reports. It was ultimately more important than all of the other activities and events he reported on his return.

<u>Presumption and Benevolence Reaffirmed by the NZ High Court 1993</u>

The presumptive and benevolent intent of the New Zealand War Pensions Act 1954 was reaffirmed in 1993 in an important High Court judgement by Justice McGechan in a case in which the Secretary for War Pensions (Nixon) unsuccessfully sought the reversal of a favourable War Pensions Appeal Board decision.

"I consider 'service' should not be approached in any narrow way, isolated from textual and social context. It should be approached in a broad and common sense way, sympathetic towards the spirit and the

[33] Sills, P., Toxic War: The Story of Agent Orange, Vanderbilt University Press. 2014, Kindle Edition, pp 216-217.

benevolent purposes of the legislation. The Act was passed in 1954, at a time when society was still acutely conscious of the problems and needs of returning servicemen. With the Korean War boom, there were funds available for social purposes. The legislature meant to assist. It did not mean to be niggardly."[34]

This decision could have had a significant influence on the strategy of the claim makers but it does not appear to have been known to them, or at least used by them to influence policy.

Margaret Faulkner on Presumption

Margaret Faulkner was well aware of Justice McGechan's finding. She worked in the War Pensions Services for 14 years and for several of those years was the National Review Officer, responsible for reviewing Claims Panels pension decisions.[35] In her oral evidence to the Parliamentary Health Select Committee Margaret Faulkner indicated that she was well aware of the presumptive provisions and applied them in her role as National Review Officer:

":…this country has had war disabilities pensions, allowances, and related treatment costs for service people who have suffered a disability of any kind as a result of their service in a war or an emergency since the enactment of the Military Pensions Act in 1886. It is not a new system that we have by any manner of means. The current law, the War Pensions Act 1954 and the War Pensions Regulations 1956, contains a provision referred to as a reverse onus of proof and presumption. That is where the deciding body, like Veterans Affairs or anybody else, cannot actually make the person, the applicant, prove their case beyond reasonable doubt. Any decision has got to lean in the applicant's favour. This presumption was reinforced in the High Court in 1993 when Justice McGechan, in considering a war pension case called Nixon v Auld, noted that the War Pensions Act was a very beneficial act, and the current decision-making process must reflect that notion".

"The New Zealand system allows quicker recognition of new medical evidence and new medical conditions than other countries. If a medical examiner notes that there is a doubt in the case as to cause, then the war pension applicant gets the benefit of that doubt immediately without complex legal argument. For example, the New Zealand war pension system relating to myeloma was awarded at least 3 years before anything in Australia was awarded, and longer there. But, of course, if

[34] McGechan, J., Nixon v War Pensions Appeal Board and Auld, March 1993, Wellington.

[35] Faulkner, M., in NZ Health Select Committee report (below), "The position of National Review Officer was created by the 1989 law changes, and the role of this officer was to hear cases that had been considered by the claims panel but did not meet the approval of the war pension applicant; to adjudicate on cases where the claims panel did not agree; and to reopen cases that had been previously declined, where there was new evidence or where there was injustice. I filled that role for several years".

we had the combination of some of the already accepted cases from overseas and the New Zealand system we would have a faster award system, which would be a great win-win for all veterans".[36]

The first level in the veterans' claims structure consisted of claims panels. Their decisions could be reviewed by the NRO and that officer's decisions could be appealed at the WPAB. The High Court was the next level of appeal.

In her role as NRO Margaret Faulkner clearly understood the presumptive intent of the legislation, as did the WPAB. It is not clear whether the claims panels were as well informed. Anecdotal accounts suggest that many were not, and that on some of them were a few World War II RSA members who were unsympathetic towards Vietnam veterans.

Despite that, review and appeal were always available. New Zealand claim makers (specifically VVANZ) do not appear to have made the most of available evidence and process.

The Health Select Committee also seems to have ignored Margaret Faulkner's important contribution.

Hank Emery on Presumption and the Claims Panels

As a volunteer advocate Hank Emery was successfully using the Australian SOPs for at least 15 years before they came into force in VSA 2014. He also was the first, or one of the first, to successfully use Australian and US precedent. Welfare Officer Margaret Snow of RNZRSA also used those precedents after Hank paved the way.

Emery took his own case for his feet to the War Pensions Appeal Board (Judge Trapski presiding). In this email he explains some of the problems at the claims panel level:

"My goal was to get it before the War Pensions Appeals Board where the debate would not be about my feet specifically, but how the War Pensions Act 1954 was brought into being with the aim of providing benefits to Veterans who needed it, and how it was worded in a legal sense when it came to Decisions made by both the Claims Panel and the National Review Officer.

"After that in order to help other Veterans I found it much easier to look at overseas legal cases with positive decisions ***especially those made by Judges*** *that affected Viet Nam Veterans. That narrowed the field down to Australia and the United States given that their legal system is in the main based on English Law as ours is.*

[36] Faulkner, M., oral evidence in NZ Parliament Health Select Committee, Report of the Health Committee Presented to the House of Representatives, Inquiry into the Exposure of New Defence Personnel to Agent Orange and Other Defoliant Chemicals During the Vietnam War and any Health Effects of That Exposure, and transcripts of evidence, pp 199-208.

"It is also a mind game with the Claims Panel. Being the snobs they are, they do a double take when Case Law decisions are submitted by me in the Supporting Notes to support a claim for a New Zealand Veteran living here in Waitaha or up north or in Australia.

"That also included using the Statement of Principles (SOPs) at least 15 years before they became part of the Veterans Support Act 2014. Even now with the SOPs in force the Decision Officers still stuff up as they did in Willy's case.

"One of the first things I look for when I read the letter to one of our mates declining his claim are the words "… in the opinion of the Medical Expert…"; or "…insufficient evidence…" or similar phrases. An opinion in a legal sense is just that, an opinion only made by someone with supposedly expert knowledge and has no place in the legal decision making process unless that opinion is backed up by scientific medical research data. That can be challenged straight away as it is not considered as a scientific medical fact even if the Medical Expert is renowned worldwide in his field of study.

"If one has to challenge it in the fullest sense then all one has to do is get a second medical opinion to cast doubt on the first. And that is how a majority of decisions are made in the US Court of Appeals – Veterans when they remand cases back to the Federal Court Judges to come up with a decision that is fair and just as it applies to the Veteran or the Widow or the Family Member. Inevitably the Federal Court Judges will follow the US Court of Appeals ruling and do just that.

"Likewise the same applies to "… insufficient evidence…" all that means is that the Claims Panel is too bloody lazy to look for it. And that contravenes their legal responsibility and duty of care to the Veteran under the Act. A claim can only be declined if the Claims Panel actually states in writing all the evidence that they are viewing that irrefutably rebuts the evidence provided by the Veteran to support his/her claim. To date they have not done that in any case that I have been aware of. So, naturally they leave themselves wide open and continually waste taxpayers' money fighting it at the Appeals Board Level or equivalent."

Hank Emery was and is an expert advocate who has long understood the legislation and the claims process, and how to tilt the process in favour of the veteran. He demonstrates that the claims process could be somewhat amateurish and, as he and Wayne Lindsay showed with their expert advocacy, that unfavourable decisions would invariably be overturned on appeal. They also show that under the 1954 legislation the process, properly and professionally managed, could and should have been made to work for all Vietnam veterans.

<u>Colonel Jesse Gunn on Presumption</u>

In her oral evidence at the Health Select Committee the then Head of Veterans Affairs also spoke on presumption:

"Under the New Zealand war disablement pension systems, veterans can make a claim for any, and I repeat, any, disability that they believe to be attributable to, or aggravated by, their service. There are no restrictions on what can be claimed. There are no restrictions on how many disabilities can be claimed, and there are no restrictions provided in terms of the level of percentage awarded for a disability. Rather, a war disablement pension is a tax-free entitlement that is paid for life.

The decision-making process for the grant of a war pension is based on the reverse onus of proof. That is to say, if a link between the disability and the service cannot be disproved, then a pension must be paid. The percentage awarded can be reviewed at any time, and that means upwards only, and that is when and if the veteran feels that his or her disability has deteriorated. The process of awarding a war disablement pension is individualised, and decisions are made about the specific impact that a specific disability has on an individual veteran's quality of life. The decisions are made by panels that include a veteran representative. Currently, 35 percent of all the war veteran claims panel that makes decisions on war pension entitlements include a Vietnam veteran.

As at 30 June 2003, 1,191 [about 36%] *of New Zealand's Vietnam veterans were in receipt of a war disablement pension. Vietnam veterans have made a total of 5,407 claims for war disablement pensions, of which 81.1 percent have been accepted as being either attributed to, or aggravated by, service in Vietnam. The largest numbers of claims that are being considered are for hearing-related disabilities, followed by orthopaedic conditions, followed next by psychiatric conditions."*[37]

At 30 June 2003 at total of 5,407 claims for war disablement pensions had been lodged by Vietnam veterans with 81.1 percent accepted. That is a lot more than popular history would have us believe.

Colonel Gunn's important evidence was also ignored by the Health Select Committee, and by most Vietnam veterans.

<u>Brigadier McMahon & Major Daniel on WPA54 & Presumption</u>

In a phone interview in 2017[38] Fred Daniel (V1 Coy) related conversations he and Brian McMahon had with John Campbell during RNZRSA and EVSA negotiations with Government in 2006.

Brigadier (Retd) Brian McMahon and Major (Retd) Fred Daniel[39] had two or three heated encounters with the late Colonel (Retd) John Campbell

[37] Gunn, J., Oral Evidence to the NZ Parliamentary Health Select Committee Inquiry into the Health Effects of Agent Orange, HSC Report, Appendix G Transcript, 3 December 2003, p 222.
[38] Daniel, F., phone interview, 5 February 2017.

about the RNZRSA/EVSA strategy to have the War Pensions Act (1954) rewritten. Campbell criticised and "*slagged off*" WPA54 and McMahon forcefully told him he was wrong and should not change WPA54.

Brian McMahon is not just a military doctor. He was a tropical medicine specialist who became Director General of Medical Services (DGMS) of the NZ Defence Force. He was also for a time a member of the War Pensions Appeal Board. Fred Daniel was the long serving CEO of Montecillo Veterans Home and Hospital in Dunedin. McMahon also served on the Montecillo board. Both had vast practical hands-on experience with veterans' welfare and with WPA54.

They were both of the opinion that Campbell did not understand WPA54. McMahon tried to tell him that what was required was to "*enlarge the experience and understanding of WPA54 in the veteran community*". Daniel was of the opinion that veterans themselves were causing problems with WPA54.

Through their political contacts they were aware that long delays in rewriting the Act would be caused by "*bureaucratic obstruction from Treasury, SSC, Internal Affairs, Health and ACC*". According to their information the bureaucrats were apparently opposed to the continuation of the legislated independence of the Secretary for War Pensions, as well as the financial implications of greater access to entitlements.

They believed that amendment and improvement of WPA54, the process that was already under way prior to 2003, would have been much quicker.

<u>Government Ministers on Presumption</u>

Throughout Agent Orange claim making in New Zealand successive governments were consistent in their responses, asserting the benevolent intent of the legislation.

In March 1982 in a letter to KSAFA (Secretary, Vic Johnson) David Thomson, Minister in Charge of War Pensions, indicated the benevolent and presumptive intent of WPA54:

"*As the Vietnam War was declared an 'emergency' for purposes of the War Pensions Act the Board is not required to establish the attributability of the disability to service. All it has to be* [is] *satisfied … that the disablement occurred during service. The question of whether chemical sprays have caused the disability does not arise*".[40]

In 1994 Vic Johnson reported this similar response he received from Warren Cooper, Minister in Charge of War Pensions:

[39] Disclosure: The writer has known both officers for over 50 years, and served with Fred Daniel as friend and colleague in V1 Company in 1967.
[40] Thomson, D., in Challinor (2006), p 66.

" ...the New Zealand war pensions legislation covering awards of disablement pensions to members of the Forces who served overseas in a war or emergency is considered liberal, in that it is merely necessary to establish that the disablement occurred or arose whilst the serviceman was overseas, and not that it was directly attributable to service."

"...The Government does not formally acknowledge, therefore, that service in Vietnam is the only qualification needed to sustain an application for war disablement pension in respect of any form of cancer or for any other disability. The law requires that each application be decided on the individual circumstances of the case.

"The Australian Government has recently announced that a link between Agent Orange and 10 types of cancer has been accepted. However New Zealand War pensions have already been granted for many of those cancers. Entitlement is decided on the basis of medical reports and opinions from specialist medical examiners who are kept up to date with the current worldwide research and conclusions.

"The fact is that a Vietnam veteran is at liberty to apply for a pension for any form of disablement, and if it can be established that the disablement occurred or arose during service overseas then it acceptable as pensionable. It is not, nor has it ever been, necessary to issue a general determination in respect of certain types of disablement, nor to await such a determination from an overseas authority".[41]

In June 1999 in a speech to the RNZRSA National Council Don McKinnon said:

"The nature of military service places a special reciprocal obligation on Governments to safeguard the wellbeing of the Service personnel who act in their interests and those of the citizens they represent.

The Government's responsibility in this regard is embodied in the War Pensions Act 1954. A basic principle of the Act is to give the veteran the benefit of the doubt in terms of demonstrating the attribution of a condition to his or her military service."[42]

On 14 December 2004 Minister for Veterans Affairs George Hawkins responded publicly to the HSC report.

"In light of the information made available resulting from the detailed research undertaken by the NZ Defence Force the government offers a formal apology to Vietnam veterans for the failure of governments in the past to recognise that the veterans were exposed to a toxic environment during their service in Vietnam.

[41] Johnson, V., 1994.

[42] McKinnon, D., Speech to the Returned Services Association of New Zealand National Council, 15 June 1999. Accessed at: https://www.beehive.govt.nz/speech/speechreturnedservicemen039sassociationnewzealandnationalcouncil

"We already have support in place for Vietnam veterans and their families. Vietnam veterans who have disabilities which may be attributable to their service in Vietnam can make application for a war pension. In fact, New Zealand's war pension system is unique in that it is based on a reverse onus of proof where the presumption is that the disability arises from military service, unless it can be proven otherwise.

"Changes are being planned to streamline the war pensions process including a review of the process of referral to medical specialists. Any veterans who consider that their claims were not fairly considered in the past are able to request that their claims be reviewed.

"The children of New Zealand's Vietnam veterans who suffer from spina bifida, cleft lip/palate, acute myeloid leukaemia or adrenal gland cancer are able to access fully funded care for those conditions. The children are also able to access genetic counselling and support for any mental health issues they might have. This package of support for the children maintains parity with that offered to the children of Vietnam veterans in Australia.

Additionally, the government has reaffirmed its commitment to monitor international research and the programmes of entitlements that are made available by other governments to the children and grandchildren of Vietnam veterans."[43]

Hawkins reaffirmed the presumptive provisions of the existing legislation, including reverse onus of proof. He also reaffirmed presumptive provision for the children. As a result of subsequent claim making the presumptive intent of the legislation has moved from the general to the specific, and the presumptive provision for children has not since changed.

The Application of Presumption 2000 – 2017

Anecdotal accounts provided by three of the most successful veterans' advocates[44] indicate that from 2000, when Colonel Gunn headed Veterans Affairs, about 95% of applications prepared by them were successful at the first level of consideration, and that almost all of the remaining 5% were successful at review or appeal. That is a greater percentage than cited by Colonel Gunn (95% vs. 81.1%) but as expert advocates they prepared expert applications. They also declined to act on behalf of those claims for which there was no evidence to present, or which they knew to be invented.

[43] Hawkins, G., Minister for Veterans Affairs, Government Responds to Select Committee Agent Orange Inquiry, 14 December 2004.

[44] Vietnam veterans Kevin Bovill (V1 & Australian SASR), Hank Emery (V1 & V6) and Wayne Lindsay (W1). These were the three voluntary advocates consulted by the RNZRSA and EVSA during the rewrite of the legislation leading to the Veterans Support Act 2014.

They advise that from late 2008 onwards the situation was reversed with 95% of their applications going to review or appeal, and that almost all of those were eventually successful. They believe that situation has begun to change from late 2016.

That would indicate that legislation and policy was not uniformly applied by the veterans' welfare bureaucracy over the years, and that if there was fault in the system, it was the fault of the political class and the bureaucracy rather than the legislation and policy itself. Some blame could also be attributed to the WW2 generation who dominated the claims review panels for most of the period up to about 2000.

RNZRSA was also the primary source of advice to the Ministers of Defence and Veterans Affairs and that organisation was dominated by an often unsympathetic WW2 generation until the election of the first Vietnam veteran as president in 2004. For at least one decade after the Vietnam War the ministers were also WW2 veterans with close links to the RNZRSA leadership.

In any event, in 2007 the claim makers insisted that the legislation be rewritten and over seven years later the Veterans Support Act 2014 came into force.

VSA 2014 probably limits the ability of the political class and the bureaucracy to stray from policy and to impose their own understandings[45], but in regards to presumption and benevolence the general intent of policy has not changed.

Battle Lines in New Zealand

Throughout the whole period of Agent Orange claim making in New Zealand, Government ministers and agencies consistently pointed to the presumptive intent of the War Pensions Act 1954, and to the "*benefit of the doubt*" and "*reverse onus of proof*" provisions in the legislation.

Evidence from veterans' advocates who used those provisions to advantage would seem to support the position that WPA54 was capable of delivering benevolent and favourable decisions for Vietnam veterans regardless of causation. War Pensions Appeal Board and High Court decisions confirm that view. There is evidence that some of those benevolent decisions were based on presumptive conditions set by US and Australian precedent.

The battle fought by Agent Orange claim makers, led by VVANZ, consistently aimed to prove and have accepted the proposition that Agent Orange (and other chemicals) caused disease, disorder, disability, defect and death in Vietnam veterans and their progeny. Successive governments consistently defended WPA54 and claimed that the existing legislation

[45] Through the adoption of the Australian Repatriation Medical Authority (RMA) prescriptive Statements of Principles (SOP's).

was able to meet the needs of the veteran community without specifically identifying cause and effect (which in any case was not possible).

Other actors, their voices not heard above the clamour of the battle, seemed to get on with using the existing legislation to the benefit of Vietnam veterans.

The real causes of any inefficiency and mismanagement in the existing system might have been:

(1) At the first level of application the claims panels, or some claims panels, were unsympathetic and unprofessional (but they could be taken to review and appeal).

(2) The Vietnam veteran community needed to become better informed about WPA54, and about presumption.

(3) Through a lack of detailed knowledge about the legislation and about presumption, and a reliance on word of mouth propaganda about the science of Agent Orange, veterans themselves were causing problems with WPA54.

(4) The battle could and should have been about the implementation of war pensions' law (as in *Nehmer v USVA*), rather than a needless battle to prove the scientifically unprovable.

The first points to a failure of Government to ensure that the legislation was managed and administered as intended. The second indicates a failure of both Government and Vietnam veteran claim makers to inform and educate the veteran community in the use and application of the existing legislation. Government didn't, and the claim makers couldn't, due to their unnecessary fixation on the science and on causation. The third proposition points to the culpability of the Agent Orange claim makers themselves.

The fourth reinforces the first three and points to a lack of knowledgeable and effective leadership in our New Zealand Vietnam veteran community over a long period of time.