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## Govt faces \$3.2 billion bill as court slams Veterans' Affairs for rejecting Agent Orange link to brain tumour



**David Fisher**

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The Government has been left with a \$3.2 billion bill for military veteran welfare, after the High Court sharply criticised Veterans' Affairs over its cost-driven response to Tā Wira Gardiner's claim that his fatal brain tumour was caused by Agent Orange in the Vietnam War.

Veterans' Affairs Minister Chris Penk said the Government was reflecting on possible changes to the law after the High Court ruled that Veterans' Affairs had been getting it wrong over Agent Orange and other veteran welfare claims since it came into force in 2014.

The new ruling was heavily critical of Veterans' Affairs, saying it created an unnecessary "emotional toll" on Gardiner's whānau for going back to the High Court, which had already ruled on key areas around Gardiner's case in 2023.

Gardiner's widow and former National Cabinet minister Hekia Parata - Lady Gardiner - told the *Herald* the case by Veterans' Affairs was a "waste of taxpayers - and veterans - monies at best, and government bullying at worst".

Gardiner made the claim before his death from a brain tumour in the hope it would improve access for fellow Vietnam veterans and others. The claim asserted the brain tumour was a likely result of the defoliant Agent Orange being sprayed in the jungle where he and others served.

Gardiner served 20 years in the Army, including as an infantry platoon commander in Vietnam, before holding a number of senior public service roles.

The judgment makes it easier for veterans to receive state support for issues relating to their military service. In doing so, it is projected that the cost of veteran welfare will rise sharply.

The Government's books carry a \$2.9b liability for veterans' welfare over their lifetimes. [The Gardiner case increases that liability](#) by \$3.2b to \$6.1b.

OIA papers show the actual liability could be another \$1b either way.

It is the [seventh decision in Gardiner's case](#) and effectively replicated a decision made by the High Court two years ago. The only decisions supporting Veterans' Affairs were its own - its rejection of Gardiner's was twice overturned by an appeal body and then twice by the High Court.

### The \$3.2b judgment

Justice Karen Grau heard the case and in its judgment said:

- Veterans' Affairs should decide cases with benevolence and on their merits, rather than rejecting cases on technicalities;
- Veterans' Affairs can't narrow the rights of veterans out of concern over the cost of their support through a successful claim;
- Cases that are alike with similar facts should be treated in the same way, meaning modern veterans making claims under new legislation should get the same recognition as cases heard under an older law.
- Claims don't always fit into the law's strict pathways for support but there are alternate pathways for individuals cases available.

For veterans seeking support, the New Zealand system lines up a claimant's illness with a list of illnesses known to be service conditions. When they match, the claim is approved.

In Gardiner's case, a brain tumour was listed but not in connection with Agent Orange and Vietnam service and so his claim was denied.

The court ruled the law meant that Veterans' Affairs was then obliged to consider whether a "reasonable hypothesis" as to the root of the illness had been made, and, if so, accept the claim.

The court ruled that the approach taken by Veterans' Affairs to Gardiner's case "appears to be the very opposite of benevolence and instead appears to be about resources".

## **Minister - no issues with agency**

Despite that criticism, Penk says there are no issues with the agency as it has been operating "in good faith" since the law came into effect in 2014.

He said it was likely some who had sought support from Veterans' Affairs had been wrongly denied their claim but no work would be done to identify those people.

Penk also said there would be no review or oversight of Veterans' Affairs even though the High Court had been highly critical of its approach and handling of claims.

And he wouldn't rule out a law change that had the potential to unseat Gardiner's claim, narrowing the ways in which veterans could qualify for support.

"We will consider if the law needs to be clarified," Penk said.

He said he "absolutely" held faith with veterans but there was a need to reach a "reasonable interpretation" of the law "and the fiscal implications will follow from there".

Asked about the judge's comments on Veterans' Affairs, Penk said it would be "constitutionally unattractive" for a minister to disagree with a judge but considered his agency had acted with benevolence deciding cases over the last decade.

Parata told the *Herald* she was "really pleased with the judgment and exasperated with VANZ" after having to take yet another appeal.

"This is looking like a waste of taxpayers (and veterans) monies at best and government bullying at worst."

She said it followed four years of "wrangling with bureaucracy and taking time from the pressured justice system".

Parata said the objective was to get effective and fast support for veterans "and the gratitude of a nation for their service". In doing so, Gardiner had given his "last koha to veterans, their families and whānau".

"Wira was a public servant to the day he died. Duty to our country and to the men and women he served with, and those before and after, were always a priority for him. He wanted his diagnosis, his death, to serve in some way to improve health access and delivery for veterans."

## **Act is 'inherently benevolent'**

A Veterans' Affairs spokeswoman said Gardiner's claim had been accepted before the High Court case and that no appeal would be lodged. She said the case was taken to get clarification and certainty about how the law should be interpreted.

The agency did not appear to accept criticisms in the judgment, saying "it was administering the legislation in line with the purpose of Parliament when the Act was passed".

The spokeswoman said the process of decision making under the 2014 law was "inherently benevolent" as it was geared towards paying out when medical conditions suggested - rather than proved - a link.

In many cases, this meant less evidence needed to be produced. "Some research has estimated that 95% of claims accepted under (Statement of Principles rules) may not actually have been caused or contributed to by the claimant's service."

Veterans' Affairs said about 1000 cases a year were not accepted but it wasn't possible to track down people over the 10-year period it had operated on a different understanding of the law.

The spokeswoman said veterans who believed the new way of deciding claims would change their position were welcome to apply.

## Veterans' groups sound warning

The Royal NZ Returned and Service Association general manager of support services Andrew Brown said the judgment came after years of the organisation saying Veterans' Affairs wasn't living up to the law.

As a result, he said claims for support were regularly declined because Veterans' Affairs was making decisions based on an incorrect use of the law.

Brown said the NZRSA's hope was that the judgment was "accepted by Veterans' Affairs and provides a new, clear pathway to support for our veterans".

In a letter from No Duff veteran support group calling for wholesale reform, MPs were told Veterans' Affairs had been working "as an insurer fighting claims, not a support agency".

Co-founder Aaron Duff told MPs they needed to vote against any proposed law change that would "override court decisions" and eliminate the increased spending of \$3.2b. He said they should also push for a select committee inquiry into Veterans' Affairs "culture and systemic failures".

Duff said evidence to the High Court reinforced the state's contract with its military personnel - that there was an "enduring obligation ... (to) look after veterans and their families if they are injured or killed".

He said fewer than 10% of contemporary veterans engaged with the agency despite some of those who had served in Afghanistan, Iraq, the Solomon Islands and Timor Leste having PTSD, physical injuries, and service-related conditions at rates comparable to earlier conflicts.

**David Fisher is based in Northland and has worked as a journalist for more than 30 years, winning multiple journalism awards including being twice named Reporter of the Year and being selected as one of a small number of Wolfson Press Fellows to Wolfson College, Cambridge. He first joined the Herald in 2004.**

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