



Australian Government
Department of Veterans' Affairs
OFFICE OF THE SECRETARY

Mr David Sullivan
Committee Secretary
Foreign Affairs, Defence and Trade Committee
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CANBERRA ACT 2600

Dear Mr Sullivan *David.*

I refer to your 6 April 2017 letter to me, enclosing a copy of the letter from Senator Back, Chair of the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee), in which he invited the Minister, Department of Veterans' Affairs or relevant agencies to make a written submission in relation to the Committee's inquiry into the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017* (Omnibus Bill.)

I would like to thank the Committee for the opportunity to make a written submission and I am pleased to provide the Committee with general information about the Omnibus Bill. Should issues about aspects of the Omnibus Bill be raised that the Committee does not consider are covered in the submission that follows, I would be very happy to provide the Committee with further information.

Yours sincerely

fw S. Lewis PSM
Secretary *AOD*

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Senate Foreign Affairs, Defence and Trade Committee inquiry into the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017*

Submission provided by the Department of Veterans' Affairs

Executive Summary

The Bill comprises eight Schedules that would implement several small, but necessary amendments to veterans' legislation to clarify, improve or streamline the operation of the law. While each of the sets of amendments is relatively modest, they would enhance the operation of the Department of Veterans' Affairs (DVA) and will deliver better outcomes for veterans.

Schedule 1 – Veteran's Review Board

The Veterans' Review Board (VRB) plays a very important role in the determination review process for veterans. It is critical that the VRB continues to be viewed as a modern merits review tribunal and maintains the confidence of appellants in relation to the VRB's ability to effectively and efficiently carry out its functions.

The *Tribunals Amalgamation Act 2015* merged a number of Commonwealth merits review tribunals into the Administrative Appeals Tribunal (AAT). In doing so, it made certain amendments to the powers of the AAT. To ensure that the improvements to the AAT's operations also apply to the VRB and that there is uniformity between the VRB and the AAT, there is now a need to make similar amendments to the *Veterans' Entitlements Act 1986* (VEA) in relation to the powers of the VRB, to ensure that the operations of the VRB remain aligned with the AAT.

The proposed amendments are as follows:

Changes to the VRB's objective clause

The proposed change will expand on the current provision that: "*In carrying out its functions, the Board must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick*"; and include reference to being accessible, proportionate and promoting public trust. This will help better define the role of the VRB and provide a framework to guide future decisions around the operations of the Board.

Parties must assist the VRB

This is a new provision that would require a party to a proceeding, and any person representing such a party, to use their best endeavours to assist the VRB to fulfil its objectives.

The Repatriation Commission (RC) and the Military Rehabilitation and Compensation Commission (MRCC) (the Commissions) are not normally represented at VRB hearings. However, they are still a party to the proceedings and may be involved in alternative dispute resolution (ADR). For the Commissions, this provision will not require anything more than the current legislative commitments to provide reports and carry out investigations as requested by the VRB under the relative VEA provisions and participate in ADR.

In practice, this provision would ensure that all parties have an obligation assist the VRB to meet its objectives. At present this obligation exists for the Commissions under subsection 148(9), but not for other parties.

Variation or revocation of decision reached through alternate dispute resolution

This proposed amendment relates to decisions reached by agreement of the parties through an alternate dispute resolution (ADR) process. Currently, where the parties agree to an outcome through the ADR process, and then wish to vary or amend that outcome, the only recourse is to appeal to the AAT. This is an unnecessary impost on the veteran, the Department and the AAT. This amendment would give the VRB the power to also vary or revoke the decision in accordance with the parties' wishes.

Ongoing requirement for lodging material documents with the VRB

This new provision would impose an ongoing obligation on the parties to a review to lodge with the VRB a copy of any document that comes into its possession that is relevant to the review and has not been lodged previously, until such time as the Board determines the review. Having all relevant information will assist the VRB in the decision making process. To ensure that this provision is not unduly burdensome on the Department and applicants, the Principal Member will issue practice directions to define the scope of the continuous disclosure obligation.

VRB power to dismiss if a proceeding is frivolous or vexatious

The proposed new provision would give the VRB the power to dismiss claims that are frivolous, vexatious, have no reasonable prospect of success or are an abuse of process. It is expected that such a provision would be used rarely. However, it is important that the VRB have a mechanism to efficiently deal with such cases should they arise.

To provide assurance and prevent abuse of such a provision, there would be a right of appeal to the AAT for this type of dismissal.

Schedule 2 – Specialist Medical Review Council

The SMRC is a statutory body which, on request, reviews decisions made by the Repatriation Medical Authority (RMA) on Statements of Principles (SoPs).

The proposed amendments seek to modernise relevant sections of the VEA to simplify processes for applicants and stakeholders, improve the operations of the SMRC and allow the SMRC to use new digital technology. Specifically, amendments are proposed for the nomination and appointment process for councillors, online applications for review, and the payment for travel by applicants to bring the administrative practices of the SMRC into line with those of the RMA.

The legislation currently requires that councillors must be selected from lists provided by medical colleges. In practice, the colleges advertise vacancies, and once advertised, individual members submit their availability and interest for the position. The colleges do not endorse candidates or provide any assessment regarding their suitability for the vacancies. On that basis, there is limited merit in continuing with this approach. The proposed changes will enable the SMRC to advertise directly online, removing the requirement to involve medical colleges. This practice is consistent

with similar agencies that also have medical specialists appointed by the relevant Minister. For example, appointments to the RMA under the VEA require that members are appointed by the Minister for Veterans' Affairs. There is no requirement for the RMA to seek nominations through medical colleges. This amendment would align the RMA and SMRC appointment processes. The applicants will still be required to have the necessary qualifications and clinical experience to be considered as SMRC members.

Consistent with the Government's digital transformation agenda, a number of amendments contained in the Bill would empower the Convener of the SMRC to give written directions about the manner for lodging requests or applications. This would allow the SMRC to adopt electronic lodgement of requests for reviews. Currently, the legislation requires applications for review to be lodged in a manner approved by the Repatriation Commission and to be lodged at a DVA Office in a hard copy form. However, for requests made to the RMA, the Chairperson has the authority to give directions about the manner of lodging requests for investigations, which includes the use of electronic requests. The proposed amendment will bring the SMRC processes into line with the RMA.

Section 196ZB of the VEA contains a number of requirements regarding new investigations being carried out by the SMRC. Specifically, subsection 196ZB(1) requires the Review Council to publish a Gazette notice advising that the Council intends to carry out a review of some or all of the contents of a Statement of Principles for a particular kind of injury, disease or death. Subsection 196ZB(2) requires that the notice specify: the date on which the Council will hold its first meeting for the purposes of the review; and the date by which all submissions must have been received by the Council. On the basis that the SMRC will often Gazette a notice prior to convening a Council to conduct the review (in order to expedite the review process), the requirement to specify the first meeting date of the Review Council is impractical. Accordingly, the Bill contains a technical amendment to remove the requirement to notify when the first meeting of the Review Council will be held. The requirement to specify the date by which submissions to the review are to be received will remain.

When a written submission has been made to the SMRC, the VEA allows the author of the submission to appear before the Review Council to make an oral submission. Amendments proposed in the Bill would ensure that individuals who make an oral submission and, where reasonable, their attendants (if any), can apply to have prescribed travel costs to attend an oral hearing reimbursed.

Schedule 3 – International Agreements

The power of the Minister for Veterans' Affairs to enter into an agreement with the government of another country is currently provided under section 203 of the VEA. That section provides that the Minister is able to enter into arrangements with the governments of countries that are or have been Dominions of the Crown, to act as an agent of that country to pay pensions and provide assistance and benefits in Australia to eligible veterans or dependents from those countries who are resident in Australia.

Formal agreements have been made under the equivalent provisions of the redundant *Repatriation Act 1920* with the United Kingdom and New Zealand. Those agreements continue to operate under

the provisions of section 56 of the *Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986*.

The need for the proposed amendments has arisen because, under the terms of section 203, the arrangements that can be entered into can only include benefits and treatment (including rehabilitation) comparable to that provided under the VEA. Agreements made under the current provision for benefits and treatment are therefore restricted to veterans with service of a type that is the equivalent to that covered by the VEA.

The proposed amendments to section 203 would enable agreements to be made to cover allied veterans and defence force members with service of the type for which benefits and payments (including rehabilitation) can be provided by the Commissions under the VEA, *Military Rehabilitation and Compensation Act 2004* (MRCA), the proposed *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) or the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

Schedule 4 – Employer Incentive Scheme payments

The purpose of Schedule 4 is to amend the VEA, the MRCA and the DRCA (if enacted) to strengthen the legislative foundation for providing certain rehabilitation assistance to eligible serving and former Defence Force members, reservists and cadets.

The assistance involves payments to employers under the Employer Incentive Scheme in the form of incentive payments to encourage them to engage injured veterans who have found it difficult to compete in a tight labour market.

The proposed amendments are as follows:

Changes to the VEA objective clause

Section 115B of the VEA provides the RC with the power to make a rehabilitation scheme by way of a legislative instrument. This scheme is known as the Veterans' Vocational Rehabilitation Scheme (VVRS) and has been in operation since December 1997. The proposed amendments to this section of the VEA are intended to clarify that vocational rehabilitation assistance under an Employer Incentive Scheme, in the form of incentive payments, is within the scope of the VVRS.

Changes to the MRCA

The purpose of the amendments to the MRCA is to provide the MRCC with the power to determine a scheme for rehabilitation under this Act, by way of Ministerial approval and a legislative instrument. The amendments specify that the MRCC will be empowered to incorporate incentive payments to employers under such a scheme.

Changes to the DRCA

These amendments are contingent upon the enactment of the DRCA.

As per the proposed changes to the MRCA, the proposed amendments to the DRCA would provide the MRCC with the power to determine a scheme for rehabilitation under this Act, also by way of Ministerial approval and a legislative instrument. The scheme under the DRCA would also

incorporate incentive payments to employers for providing suitable civilian work to eligible serving and former Defence Force members, reservists and cadets.

Schedule 5 – Disclosure of information

Schedule 5 of the Bill contains legislative amendments which would introduce formal mechanisms to allow the Commonwealth Superannuation Corporation (CSC) to request information regarding DVA claims from the MRCC for purposes allowed under the CSC's legislation.

This change implements issues considered in the 2011 report from the Review of Military Compensation Arrangements and subsequent recommendations made by the Military Superannuation-Compensation Scoping Working Group (comprising representatives from DVA, CSC, the Department of Defence and the Department of Finance) in its 2014 report.

Requests by CSC for DVA claims information are becoming increasingly common for the purpose of conducting CSC superannuation assessments. CSC advises that this is due to the completeness and reliability of DVA records and the quality of medical reports used in assessing claims under DVA legislation.

While the information gathering powers under DVA legislation clearly allow DVA to request information from CSC, there are no provisions which allow CSC to request information from DVA to assist with the assessment of superannuation benefits. At present, all requests for DVA claims information from CSC are made in accordance with the *Privacy Act 1988*.

Schedule 5 of this Bill proposes amendments to the table contained in subsection 409(2) of the MRCA to add CSC as a person or agency to whom the MRCC may provide information. Such information may be used to assist in conducting superannuation assessments under military superannuation legislation.

Section 151A of the DRCA (if enacted) will also be amended to enable the MRCC, or a staff member assisting the MRCC, to provide information obtained in the performance of duties under the DRCA, to CSC for the purpose of assisting in conducting superannuation assessments.

These amendments would not only improve the time taken by CSC to determine claims, they may also reduce the frequency that individuals are required to attend medical assessments connected with their respective claims with multiple agencies. This will particularly benefit those with mental health conditions.

Schedule 6 – Delegation

The proposed amendments to the MRCA would allow the Minister to delegate his or her functions under that Act.

Under section 384 of the MRCA, the powers and functions of the MRCC can be delegated to an individual commissioner, persons who assist the MRCC, persons in the Department of Veterans' Affairs appointed or engaged under the *Public Service Act 1999* or a member of the Defence Force.

Unlike section 212 of the VEA, the MRCA does not allow the Minister's powers and functions to be delegated. That omission has prevented some administrative reforms from being implemented to achieve efficiencies across the Department of Veterans' Affairs as part of the Government's commitment to reduce red tape. While the Department's Chief Operating Officer (COO) was delegated some of the RC and the MRCC's powers and functions, further efficiencies could be achieved, were some of the Minister's powers able to be delegated.

For example, it is proposed that the Minister could delegate his or her power to approve minor variations to the MRCA Education and Training Scheme, Treatment Principles and the MRCA Pharmaceutical Benefits Scheme to the Department's COO. The powers and functions of the Minister to approve those variations under the VEA was delegated to the COO in 2014.

It is also envisaged some of the powers and functions of the Minister that concern relatively minor matters would be delegated to a person appointed or engaged under the *Public Service Act 1999* at a lower level than the COO. Examples of these sorts of delegations include determining the interest rate payable on lump sum payments of permanent impairment compensation and minor determinations concerning reimbursement of travel expenses, requirements for medical examinations and the type of payments that may be deducted from payments of weekly compensation.

Schedule 7 – Legislative instruments

The proposed amendments would exempt certain legislative instruments made under the VEA and the MRCA from subsection 14(2) of the *Legislation Act 2003* (the Legislation Act). Subsection 14(2) of the Legislation Act prevents, unless specifically authorised by the enabling legislation, legislative instruments from incorporating non-disallowable legislative instruments or other non-legislative writings as in force from time to time.

Many of the Department's legislative instruments incorporate non-legislative written documents. For example, the two sets of Treatment Principles incorporate by reference approximately thirty non-legislative documents and the Repatriation Pharmaceutical Benefits Scheme and the MRCA Pharmaceutical Benefits Scheme each incorporate by reference eleven non-legislative documents.

Currently, each time there is a change in policy and one of the non-legislative documents is updated, eg a new rehabilitation appliance becomes available and is added to the Rehabilitation Appliance Program National Schedule of Equipment which is incorporated into the Treatment Principles, the legislative instrument must also be amended and updated.

This is because subsection 14(2) of the Legislation Act prevents legislative instruments from incorporating non-legislative documents as in force *from time to time*. The non-legislative documents can only be incorporated as in force at the time the legislative instrument is *enacted* (ie, a fixed point in time.) This causes delays in new products being made available to clients because of the need to amend the legislative instrument, as it can only recognise the version of the non-legislative document at the time the instrument was made.

Given the number of legislative instruments and their incorporated documents that the Department administers, the requirement to amend the legislative instruments each time a change in policy

results in amendment to the non-legislative documents that are incorporated within the legislative instruments, causes significant administrative issues for the Department.

Most of the non-legislative documents are prepared by the Department such as the various Fee Schedules and the Rehabilitation Appliance Program National Schedule of Equipment that apply to treatment provided under the Treatment Principles. Included in the other documents that are incorporated are documents prepared by the Department of Health. All of the incorporated documents that are prepared by the Department and the Department of Health can be easily accessed on-line via the Department's website or via links on the Department's website.

The remaining documents that are incorporated in the legislative instruments are well known publications such as the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)* made by the American Psychiatric Association and the Pharmacopoeia published by the UK and US governments and the European Union. Those documents while not publicly available are available to the administrators and practitioners.

The effect of the amendments would be that certain VEA and MRCA legislative instruments would automatically update and incorporate the latest version of non-legislative documents when those documents are changed. The benefit to DVA clients is that, as new aids and appliances are added to the RAP Schedule or new medications are added to the Pharmaceutical Benefits Schemes for example, they will be available to clients straight away. Currently, because of the need to amend the legislative instruments to take account of changes to incorporated documents, there can be a delay of 3 – 6 months before new aids, appliances or medications are available to DVA clients.

Schedule 8 – Minor amendments

This Schedule would repeal redundant and spent provisions administered in the Veterans' Affairs portfolio concerning benefits that are no longer payable under the portfolio Acts, and make amendments consequential to those repeals. The Schedule will also make some minor corrections to clarify existing provisions of the VEA. The Schedule also includes consequential amendments to other Acts which result from the amendments that repeal the redundant and spent provisions of the VEA and the MRCA.

Examples of the sorts of provisions repealed by these amendments include the definitions of "clean energy advance" and "clean energy bonus," as well as the Parts that provided for the payment of the 2006, 2007 and 2008 one-off payments to older Australians, the economic security strategy payment and the Educational Tax Refund payment.

Removing these redundant provisions and clarifying other provisions will simplify veterans' affairs legislation and make it more accessible for individuals wishing to interpret the current provisions. The amendments made by Schedule 8 were originally included in the *Omnibus Repeal Day (Spring 2015) Bill 2015*. That Bill lapsed with the prorogation of the Parliament on 17 April 2016.

The Department would be pleased to answer any specific questions the Committee may have about the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017*.