



ADSO ALLIANCE OF DEFENCE SERVICE ORGANISATIONS

**PO Box 4166
KINGSTON ACT 2604**

5 May 2017

**The Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
PO Box 6100
Parliament House
CANBERRA ACT 2601**

SUBMISSION TO SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE INQUIRY INTO DRAFT VETERANS' AFFAIRS LEGISLATION AMENDMENT (OMNIBUS) BILL 2017

INTRODUCTION

The Alliance of Defence Service Organisations (ADSO) welcomes the opportunity to make a submission to the Senate Committee's Inquiry into **the Draft Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017**. The Alliance comprises the organisations listed¹ below with a combined membership of approximately 90,000.

ISSUES

General

The issues in this submission attempt to address the following eight points that deal with Schedules 1 to 8 in both the draft Bill and the Explanatory Memorandum (EM). The Senate FDAT Standing Committee Secretariat advised that, for the purposes of this submission, these Schedules should be treated as the Terms of Reference.

¹ **ADSO Comprises:** The Defence Force Welfare Association (DFWA), Naval Association of Australia (NAA), RAAF Association (RAAFA), Royal Australian Regiment Corporation (RARC), Australian Special Air Service Association (ASASA), Vietnam Veterans Association of Australia (VVAA), the Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women, the Fleet Air Arm Association of Australia, Partners of Veterans Association of Australia, Royal Australian Armoured Corps Corporation (RAACC), the National Malaya & Borneo Veterans Association Australia (NMBVAA), Defence Reserves Association (DRA), Australian Gulf War Veterans Association, Australian Commando Association, the War Widows Guild of Australia, Military Police Association Australia (MPAA), and the Australian Army Apprentices Association

TERMS OF REFERENCE 1 - SCHEDULE 1

Veterans' Review Board: The proposed harmonising of the Veterans' Review Board (VRB) provisions in the VEA with provisions in the *Administrative Appeals Tribunal Act 1975* (Cth)

1.1 Enhance consistency between the objectives of the VRA and AAT

The *Veterans Entitlement Act 1986* (Cth) (VEA) specifies the Board's objectives vide s.133A thus:

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.

The *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) specifies the Tribunal's objectives thus:

In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

- (a) is accessible; and*
- (b) is fair, just, economical, informal and quick; and*
- (c) is proportionate to the importance and complexity of the matter; and*
- (d) promotes public trust and confidence in the decision-making of the Tribunal.*

The Draft Bill proposes repealing the current proviso of s.133A and substituting it with:

133A Board's objective

In carrying out its functions, the Board must pursue the objective of providing a mechanism of review that:

- (a) is accessible; and*
- (b) is fair, just, economical, informal and quick; and*
- (c) is proportionate to the importance and complexity of the matter; and*
- (d) promotes public trust and confidence in the decision-making of the Board.*

The amendment to the VEA which mirrors the AAT Act is seen to be on any view, a reasonable proposal and one which will enable each appeal jurisdiction to mirror each other's approach to discharging its functions according to law.

Similarly, the harmonising of statutory objectives also operates to remove any jurisdictional issues that may impede the appeals process on a point of law being argued over roles and objectives. The concurrent operation of both Acts along similar lines better serves the administration of natural justice, than not.

1.2 Strengthen the obligations of parties to a VRB appeal to lodge documents in their possession not previously tendered as evidence.

Section 37(2) of the AAT Act authorises the Tribunal to seek further and better in respect of additional documentation, to enable the Tribunal to make a decision based on all the material facts, according to law; viz

Tribunal may require other documents to be lodged

(2) Where the Tribunal is of the opinion that particular other documents or that other documents included in a particular class of documents may be relevant to the review of the decision by the Tribunal, the Tribunal may cause to be given to the person a notice in writing stating that the Tribunal is of that opinion and requiring the person to lodge with the Tribunal, within a time specified in the notice, the specified number of copies of each of those other documents that is in his or her possession or under his or her control, and a person to whom such a notice is given shall comply with the notice

The VEA is silent on mirrored provisions and it follows that, the proposal to cure this procedural gap is considered necessary to harmonise the document-producing requirements with the addition of a new clause to s.137, making it compulsory to produce further and better as soon as practicable. The requirement to comply with this statutory obligation is welcomed and, when considered in conjunction with the proposed addition of a new s.142(2)(h), will greatly enhance the smoother and speedier process of merits reviews undertaken by the Board; viz

137A On-going requirement for lodging material documents with Board

If:

- (a) an application for a review is made under section 135; and*
- (b) before the Board determines the review:*

- (i) a party to the review obtains possession of a document;*
- (ii) the document is relevant to the review; and*
- (iii) a copy of the document has not already been lodged with the Board;*

the party must, subject to any directions given under subsection 142(2), lodge a copy of the document with the Board as soon as practicable after obtaining possession.

Significantly, ADSO notes the proposed amendment does not operate to affect or diminish, the beneficial substantial justice provisions under which the Board operates, vide s.138.

1.3 Power to issue written directions (s.142(2)(h)).

The addition of s.142(2)(h) to empower the Principal Member to issue written directions and seek further and better or not, is supported. ADSO contends that any unnecessary or unreasonable delay in the production of documents to prosecute an appeal by any party, operates to prejudice the administration of natural justice.

The increase in applications for merits review appeals arising from the extension of the single-path (VRB) appeals processes to veterans subject to MRCA, justifies a mandatory requirement to ensure access to natural justice through merits review, is not fettered by unnecessary delays by parties providing any and all material relevant to an appeal.

The requirement to tender supporting evidence and other documentation, is a necessary feature of the merits review process and, consistent with current disclosure practices in other courts and tribunals, is designed to ensure parties to an appeal are not subject to trial by ambush.

The phrase “*justice delayed is justice denied,*” is highly relevant.

1.4 Enable the VRB with the consent of the parties to vary or revoke a decision under review made vide the Alternative Dispute Resolution (ADR) process.

The powers and functions of the Board in respect of Alternative Dispute Resolution (ADR) are enshrined in Division 4 of the VEA². They are completely silent on exercising power and functions by the Board to vary or revoke a decision with the consent of the parties to the matter before the Board. There is no reference to the term “*vary*” or “*revoke*” in Division 4.

Similarly, ADSO notes the lack of any steps in the Board’s General Practice Direction³ permitting revocation or varying a primary decision, in respect of consent between parties to an ADR.

Therefore, no authority exists to enable the Board to make a joint (consenting party) decision, as is the case with the AAT Act vide s.34D (4).

² ss.145A to 145G inclusive.

³ http://www.vrb.gov.au/pubs/practice_dir_guide/general-practice-direction.pdf [accessed 11/4/2017].

The lack of such a provision is considered by ADSO to impede the administration of natural justice by the lack of an effective statutory tool designed to operate to the satisfaction of the parties to a matter before the Board.

ADSO contends the addition of a new s.145C VEA mirroring the provisions available to the AAT of s.34D(4), will remove that impediment and will also enable the Board to incorporate this provision in its General Practice Direction.

1.5 Require the Repatriation Commission to use their best endeavours to assist the VRB fulfil its legislated objectives.

The current provisions of s.148 of the VEA (Procedure of Board) specify at s.148(9):

In a review of a decision of the Commission, the Commission must use its best endeavours to assist the Board to make a decision in relation to the review.

In order to further harmonise procedural matters, section 148(9) will be replaced by a new sub-section, viz

(9) A party to a review of a decision of the Commission, and any person representing such a party, must use their best endeavours to assist the Board to fulfil the objective in section 133A.

The requirement to act reasonably accords with the Test of Reasonableness established by the decision of the Federal Court in the *Australian Doctors* case⁴ in which the Court per Beazely J, held that the term “reasonable” to be construed as defined in the Concise Oxford Dictionary, that is; “Agreeable to reason, not irrational, absurd or ridiculous”.

Nothing in any subsequent decision by a Court of superior jurisdiction has detracted from this analysis.

ADSO contends the addition of a new sub-section 148(9) is considered a necessary enhancement of the **function** of the Board to comply with the **objectives** set out in s.133A.

1.6 Give the Principal Member the power to dismiss an application if he or she is satisfied that the application is frivolous, vexatious, misconceived in substance, has no reasonable prospect of success or is otherwise an abuse of power. The power to dismiss will be subject to appeal to the AAT.

ADSO fully supports any changes that will remove vexations, frivolous and hopeless appeals - all of which come at a cost to the Australian taxpayer and to the detriment of veteran applicants through costly, time-consuming and corrosive appeals of this nature.

The addition of a new s.155(8) to the VEA will mirror the same provisions in s.42B of the AAT Act and are considered to be consistent with the Common Law decision of the Court in *Wentworth's* case⁵ in which Roden J established the following tests to be met in assessing the frivolous or vexatious nature in proceedings; viz

1. *Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
2. *They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
3. *They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

⁴ ” (*Australian Doctors' Fund v Commonwealth* (1994) 34 ALD 459, per Beazely J; *Department of Industrial Relations v Burchill* (1991) 33 FCR 122; 105 ALR 327, considered).

⁵ *Attorney General v Wentworth* (1988) 14NSWLR 481 at 491.

ADSO contends that proposed changes to the VEA 1986 are considered to be necessary improvements to the operation of the Board and thereby enhance the process of natural justice for veterans and widows.

With the extension of the single-path appeals process to the VRB now in place for contemporary veterans, it follows that appeals flowing from an adverse decision made under MRCA will result in a consequential increase in applications for review to the VRB.

It is worth noting that in order to ensure the natural justice process is as seamless and as smooth as possible, a need now exists to have in place a process that enhances equitable merits review through a merits review process that:

1. Attempts to resolve matters prior to appeal through ADR;
2. Is able to revoke or vary a reviewable decision, subject to the consent of all parties; and
3. Gives the Principal Member of the Board powers to dismiss vexatious and frivolous appeals under s.155(8),

These three limbs are considered to be fundamental to an equitable merits review process applied to all matters before the Board.

The dismissal powers are in and of themselves a welcome addition due to frustrations experienced by Advocates whose clients insist on their day in Court, regardless of the unsustainability of their case, resulting in valuable ADR and Board hearing time being taken up.

ADSO cautions against extending the harmonising of the VRB to the AAT processes to resemble a second mini-AAT which may potentially change the focus of VRB appeal at Tier 1 level from inquisitorial *de novo* review to that of the AAT which is adversarial in nature and focuses on points of law and not on the merits of the matter before it.

ADSO will vigorously oppose any attempt to remove the merits review focus from the VRB through any harmonising process.

Whilst ADSO notes the amalgamation of three major tribunals under the *Tribunals Amalgamation Act 2015 (Cth)* (the Amalgamation Act), the primary consideration in ADSO's view, that no contemplation of having the Board subsumed by the AAT to create a super-veterans' jurisdiction should ever be considered by Parliament. The special status of veterans and veterans' widows demands they are able to access an independent merits review body that recognises and works within that special status.

TERMS OF REFERENCE 2 - SCHEDULE 2

Specialist Medical Review Council: The Specialist Medical Review Council (SMRC) provisions would be amended to streamline the nomination and appointment process for councillors, enable online lodgement of claims, streamline the notice of investigation requirements and give the SMRC an ability to pay the travel costs of applicants who appear before an oral hearing of the SMRC.

The mooted changes to sections 196v(1) to new section 196ZR VEA 1986, do not on their face affect the matters related to veterans' rights and entitlements, but focus more specifically on the governance provisions that apply to the SMRC.

Item 28 of the Draft Bill relating to the addition of s.196ZQ, relates to the reimbursement of expenses reasonably incurred through interested parties appearing before the SMRC, to make oral submissions. The addition of this section is intended to reflect the entitlement to health as enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights; as specified in the Explanatory Memorandum at p.xii; viz

...as it provides financial assistance for individuals, representatives of organisations and any necessary attendants accompanying those individuals or representatives of organisations, to travel and attend a SMRC hearing to make an oral submission.

TERMS OF REFERENCE 3 - SCHEDULE 3

International agreements: The proposed amendments would enable international agreements to be made that would cover allied veterans and defence force members with service of the type for which benefits and payments including rehabilitation can be provided by the Repatriation Commission or the Military Rehabilitation and Compensation Commission under the VEA, MRCA, DRCA or the Australian Participants in British Nuclear Tests (Treatment) Act 2006. Currently, the Minister can only enter into arrangements with the governments of countries that are or have been Dominions of the Crown. These amendments would enable the Minister for Veterans' Affairs to enter into arrangements with a broader range of countries.

ADSO supports any initiative that enhances access by Atomic veterans to treatment.

It is well settled that issues surrounding entitlements and access to Repatriation support for this class of veterans has been contentious to say the least. The current provisions of s.203 state:

203 Arrangements with Governments of other countries

The Minister may enter into arrangements with the Government of a country that is, or has at any time been, a part of the Dominions of the Crown:

(a) by which assistance and benefits (not being pensions) may be granted in the Commonwealth to, or in relation to, persons who are, or have been, members of the naval, military or air forces of that country and have been employed on active service during a war to which this Act applies or in warlike operations in an area described in Schedule 2 during a period during which that area was an operational area; and

(b) the Commission may act as the agent of the Government of that country in the granting of assistance, benefits and pensions to, or in relation to, persons who are, or have been, members of the naval, military or air forces of that country.

The repealing of this section and replacing it with a new s.203 will enshrine coverage and entitlement to “*service of the type for which benefits and payments including rehabilitation*”⁶ available under the relevant veterans’ legislation, namely VEA 1986, MRCA 2004, the proposed DRCA 1988, or the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

ADSO supports the coverage of all defence members, current and serving and Atomic veterans, across all three sets of veterans’ legislation and the retention of payment of and treatment as entered into with other Nation States who are a party to treatment of their veterans as a result of “*the agreement with service of the type for which benefits and payments including rehabilitation can be provided by the Repatriation Commission or the MRCC*”⁷ by the Australian Government vide the following Statutes:

- *Veterans’ Entitlements Act (1986);*
- *Military Rehabilitation and Compensation Act (2004); and*
- *Proposed Safety, Rehabilitation and Compensation (Defence-related Claims) Act; or*
- *Australian Participants in British Nuclear Tests (Treatment) Act (2006).*

⁶ Explanatory Memorandum at p. viii

⁷ Above, n.6, at p.13.

The current provisions of s.203 VEA are silent on the matter of reciprocity between the relevant countries.

The repeal of that section and substitution of a new s.203 that will redress that omission, in particular those matters relating to payments, treatment and rehabilitation are supported.

ADSO also supports the savings provisions of new s.203(2) in relation to retaining the effect of any previous agreements entered into by the Government.

Significantly, the provisions of new s.203 (3) do not operate to diminish or disturb any previous agreement entered into by the Commonwealth in respect of treatment of Atomic veterans.

TERMS OF REFERENCE 4 - SCHEDULE 4

4.1 Employer Incentive Scheme

The proposal to provide incentives to employers to employ veterans who have incurred an injury, illness or disease as a result of their eligible defence and/or operational service, is very welcome. The introduction of such a scheme for veterans under MRCA is considered essential to assist veterans who have taken discharge or are medically discharged, to re-enter the civilian workforce to the extent they are able, and continue to be a valuable contributing member of society.

Equally critically is the beneficial effect of employment to assist veterans retain and enhance their sense of dignity and self-esteem. These are considered by ADSO to be two critical points that go to the heart of veterans going into crisis and attempting self-harm or worse.

Any initiative that enhances a veteran's chances in a post-military life is strongly supported.

4.2 Broaden the power to provide vocational rehabilitation assistance under the VEA

The provisions of s.62 MRCA 2004 are silent on any incentive scheme for employers to employ veterans. The provisions of s.62 clearly indicates that it falls to a veteran's rehabilitation authority to reasonable attempts to find "*suitable civilian work*" for the member concerned (s.62(3)). This is not always successful and places a rehabilitation authority in the invidious position of being unable to offer any potential employer any form of incentive to employ an injured veteran.

ADSO contends the addition of a new s.62A will substantially redress this imbalance and, in conjunction with the various initiatives to hire a veteran, will be hopefully successful. It acknowledges that the success of employing an injured veteran is a two-way street, predicated on the injured veteran endeavouring to participate in the scheme to the best of their ability.

The amendments to the VEA 1986 vide additions to ss.115B (5) - new paragraph (h) and an the insertion of a new s.199(d)(a) will also in ADSO's view, act to enhance participation in the scheme, by VEA-coverage veterans. The joining of the Consolidated Revenue Fund (CRF) for appropriation by the insertion of s.199(d)(a) is considered to be a very positive step and puts in place, a significant revenue source to fund any incentive payments to potential civilian employers.

4.3 Create a legislative instrument making power so that the MRCC could create vocational rehabilitation schemes under the MRCA and DRCA, similar to the one under the VEA.

The enactment three separate limbs of veterans' legislation must on any analysis contain mirrored reciprocal beneficial entitlements in each Act.

The proposal to enshrine the same rehabilitation provisions, including access by civilian employers to incentives, is strongly supported.

Notwithstanding the cross vesting of multiple beneficial provisions for veterans' rehabilitation and employer incentives, a difficulty still arises with veterans being forced to live under a three-Act regime. ADSO continues to maintain that this is a wholly unacceptable, unreasonable and overly bureaucratic veterans' support regime and has argued for more efficient and beneficial compensation system for veterans at the Senate Inquiry into Suicides on 18 November 2016; viz

Col. Jamison: They have to be dealt with at the root cause, and the root cause is the three compensation systems and the complexity that is there. We desperately need a simple, singular, easy-to-claim-for, and beneficial, fair compensation system for our ADF personnel.

Senator BACK: I honestly think that we are capable of achieving it. In the civilian space we have been capable of achieving it in other fora. Quite frankly, I think the sort of evidence you are giving us, the evidence of others and our own observations are pointing in that direction. I think there is an enthusiasm across the board to have this happen.

Col. Jamison: And I will say that I cannot see that it would be anything less than much more efficient to administer and to staff. It would potentially be more beneficial to the members of the ADF. (Fol 29:30-38)⁸.

ADSO remains strongly of the view that the current exercise in cross-vesting relevant provisions in the draft Bill and Explanatory Memorandum, further reinforces its stated position that it is time for the Government to look at drafting omnibus legislation incorporating all beneficial features of the three Acts into one Act, and repealing the three current Acts in order to eliminate their current complexities.

TERMS OF REFERENCE 5 - SCHEDULE 5

Disclosure of Information: The proposed amendments would amend section 409(2) of the MRCA and 151A(1) of the DRCA to add the CSC as a person to whom DVA may provide information, for purposes allowed under CSC's legislation. The Military Superannuation-Compensation Scoping Working Group recommended that options to improve information sharing processes for incapacity and superannuation benefits between DVA and CSC should be explored. These amendments respond to that recommendation.

ADSO believes that 'information sharing' is an unresolved issue between ESOs and Government.

The recent Centrelink *robo-debt* debacle and regular media coverage of accidental releases of private and sensitive confidential information affecting thousands of people held on government databases, including health databases, created a perfect storm of significant distrust and suspicion of any Government initiatives involving information-sharing between Government agencies.

ADSO's concerns and the declining level of trust in secure electronic storage is supported by a continuing litany of media reports surrounding this contentious issue. These reports included but were not limited to the assertion by Senator Katy Gallagher (Lab ACT) at a recent Senate inquiry into the *robo-debt* debacle, that the *robo-debt* system "*was a disaster*". Senator Gallagher's comments resonate with the general electorate, including among ESO and Defence community members, thereby increasing to a significant degree, the distrust quotient.

The Centrelink situation has become so serious that DHS engaged a leading firm, Price Waterhouse Coopers, to comprehensively review the Department's data-matching program.

⁸ **Official Committee Hansard**, Senate Foreign Affairs, Defence And Trade References Committee Inquiry into **Suicide by veterans and ex-service personnel**, 18 November 2016, 67pp, by authority of the Senate [accessed 13/4/2017].

This followed an independent review that reported the system was “*riddled with usability and transparency issues.*”⁹

In his report to the Department, the Acting Ombudsman stated *inter alia*:

*Many problems could have been reduced through better project planning, system testing and risk management,*¹⁰

This concern finds further support in a media report describing the challenges to the ATO following a series of mishaps in which their systems “*crashed disastrously in December and again in January.*”¹¹

That such a catastrophe should befall the ATO’s systems does no augur well for any other Government-managed database and given the nature of the ATO’s remit, as well as that of DVA and Defence, the potential for a crash and loss of vital personal and medical data or accidental release of that data, remains ever-present.

The preceding comments by the Acting Ombudsman are in ADSO’s view, extraordinarily prescient given the very recent catastrophic leak of 18,977 email addresses and associated government loan statuses of Defence members, is on any level, an incomprehensible bungle.

Notwithstanding Defence’s attempt to “*identify any corrective or preventative step required concerning individuals and Defence practices and procedures,*”¹² ADSO is yet to be convinced that sufficient checks and balances are in place to be fully confident that the integrity of the electronic data stored on Government servers, in particular those of DVA and Defence, is immune from this type of debacle.

The release of this information, while related to financial matters affecting Defence members, is in ADSO’s view the potential thin edge of the wedge on possible future and more serious leaks of current and former Defence members’ information of a more sensitive nature.

Equally seriously is the report by Towell (2017)¹³ regarding the ATO seeking to assure all “*its 19,000 public servants that their sensitive employment data will no longer be shared with private-sector polling companies*” and did so covertly “*without their knowledge or consent.*”

Such breaches of privacy go to the heart of ESO and Defence community confidence in the Government being able to maintain and manage the safe and secure storage of confidential and sensitive personal information. In ADSO’s view, the trust in Government continues to be continually eroded by such revelations.

ADSO’s strong conviction is that the identities and personal/medical information of current and former ADF members who have protected ID status such as Special Forces and other protected members remains inviolate from any leak, be it human error or electronic failure. That conviction should be one sacrosanct to the Government as well.

Similarly, the fact that information is stored on third-party servers offshore, only adds to the level of suspicion. ADSO contends that all electronically stored information for current and former Defence members must be held in secure electronic storage in Australia.

⁹ Lewis, R., 2017, ‘DHS calls in experts to audit welfare muddle’ *The Australian* April 11, p.6.

¹⁰ Lewis, R., above, n. 10.

¹¹ Towell, N., 2017, ‘ATO to test efficiency of new systems’ *The Canberra Times*, April 13, p.2.

¹² Callinan, R., 2017, ‘Defence bungles expose emails,’ *The Australian*, April 13, p.8.

¹³ Towell, N., 2017, ‘ATO commits to stop sating its workers’ data’ *The Canberra Times*, April 18, p.7.

ADSO notes that the Explanatory Memorandum is silent on whether a Privacy Information Impact Assessment (PIIA) has been conducted. The only conclusion that can be reached is that nothing has been done in that regard. The Memorandum is silent also on the need to information-share in respect of Superannuation. The rationale that it is to expedite claims is difficult to understand.

There are no further and better in the Explanatory Memorandum to clarify whether or not the proposed amendments to the legislation to assist with expediting claims is a general requirement for access to superannuation, or whether it is specific to veterans who are medically discharged and have an entitlement to access Superannuation on the grounds of disability.

ADSO also notes the evidence tendered to the Senate Inquiry into the proposed DRCA on 15 March 2017 in which DVA's Principal Legal Adviser Ms Carolyn Spiers stated:

The minister has not been shy in saying in the Explanatory Memorandum and in the second reading speech that the benefit of this is that once the minister has policy control of the three compensation pieces of legislation—because SRCA will no longer apply; it will be DRCA, VA and MRCA in the new regime—that will give him opportunities to start examining streamlining, simplification and alignment of legislation. (Fol 25:51-52; Fol 26: 01-03).¹⁴

It is the opportunities available to the Minister to undertake the “*examining streamlining, simplification and alignment of legislation,*” in this particular instance, in circumstances related to information sharing, which is of particular concern to ADSO.

It is not an exaggeration to contend that on any analysis, this is a matter that will continue to create considerable dissent in the ESO and Defence communities with a resultant deterioration in trust from those communities

Similarly, it is noted that no cross-vesting sanctions for an unauthorised release of information by the Secretary DVA, has occurred to align the criminal sanctions inherent in the Digital Measures Bill with an unauthorised disclosure of information under the measures being considered in this Draft Bill, at Schedule 5.

While ADSO supports the amendment in principle, it is nonetheless concerned that unresolved issues remain. Conducting a full PIIA would mitigate those concerns. Interested parties must then be given an opportunity to see the results and make comment as necessary upon them

TERMS OF REFERENCE 6 – SCHEDULE 6

MRCA delegation power: The Minister is able to delegate some of his or her powers to DVA staff under the VEA, but is unable to do so under the MRCA, as a delegation power was not included in the MRCA when it was enacted in 2004. Seemingly, the incorporation of the delegation power was overlooked at that time. The proposed amendments would enable the appropriate delegation of the Minister's powers and functions under the MRCA.

The proposed amendment to MRCA will enable the Minister to delegate the exercise of a power or function to a member of the MRCC or a public employee appointed or engaged under the *Public Service Act 1999* (Cth).

The delegation of Ministerial powers is will be exempted from the provisions of the Legislation Act 2006 (Cth) vide s.14(2) will according to the Explanatory Memorandum (at p.iii) enable the Minister “*to incorporate material contained in another non disallowable legislative instrument or other non-legislative writings as in force from time to time.*”

¹⁴ **Official Committee Hansard**, Senate Foreign Affairs, Defence And Trade References Committee Inquiry into *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016*, 15 March 2017, 36pp, by authority of the Senate [accessed 13/4/2017].

The MRCA is silent on Ministerial delegation of a power and function such as that contained in the VEA (s.212). The amendments 437 MRCA – **Amounts of compensation**, by inserting a new s.437A will give statutory effect to the Minister delegating the exercise of a power and function.

ADSO notes the Minister occupies the following portfolios:

1. Minister for Veterans' Affairs
2. Minister for Defence Personnel
3. Minister Assisting the Prime Minister for the Centenary of ANZAC
4. Minister Assisting the Prime Minister for Cyber Security

It follows that a requirement exists for the Minister to adequately prosecute all portfolio responsibilities to the extent that delegating some Ministerial powers is necessary.

ADSO notes the comment by DVA's Senior Legal Advisor¹⁵ that the Minister is intent on streamlining, simplifying and aligning legislation. The suite of Bills currently before the Parliament and which have been the subjects of recent Senate Standing Committee hearings are of such import that significant delegation of authority is required.

ADSO acknowledges the requirement of the Minister to delegate but is cognisant of the fact that Ministerial delegation does not abrogate nor extinguish in any way ultimate Ministerial responsibility for any acts or omissions by those with delegated powers and functions.

Such delegation must, in ADSO's view, be consistent with the Carltona Principle¹⁶ related to delegation of Ministerial powers and functions¹⁷ in which the English Court of Appeal held that regardless of the delegation of a power and function, the Minister remains ultimately responsible.¹⁸

The leading judicial opinion regarding Ministerial responsibility is found in *Dooney*¹⁹, where the High Court Per Callinan J, citing from *Carltona*²⁰ noted the comments of Lord Green Master of the Roll, in which His lordship held:

'It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible.'

The comments by Green LJ MR, were agreed with by Denning J in the *Metropolitan Borough*²¹ case; viz

Now I take it to be quite plain that when a minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorized official of his department. The minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government...²²

¹⁵ Spiers, C., above, n.15.

¹⁶ *Carltona Ltd v Commissioners of Works*, [1943]2 All ER 560. This case has been followed with approval in a number of decisions by the High Court of Australia.

¹⁷ Blight, J., and Lahy, P., Counsel and Senior Counsel, *Delegations, authorisations and the Carltona Principle*, Legal Briefing, No 74, 14 December 2004, Australian Government Solicitor's Office, 12pp. Online at <http://ags.gov.au/publications/legal-briefing/br74.pdf> [accessed 13/4/17].

¹⁸ *Dooney v Henry* [2000] HCA 44; (2000) 174 ALR 41; (2000) 74 ALJR 1289 (24 August 2000), per Callinan J at [13], online at <http://www.austlii.edu.au/au/cases/cth/HCA/> [accessed 13/4/17].

¹⁹ Above, n.19.

²⁰ Above n. 17.

²¹ *Metropolitan Borough and Town Clerk of Lewisham v Roberts*, 1949] 2 KB 608 at 621, cited in *Dooney v Henry* (*supra*), at [13].

²² Above, n.22 at [13].

The degree of Ministerial delegation is, in ADSO's view, one which must at all times be exercised judiciously and in such a manner that an abuse of process or power does not present itself.

The trust of the ESO and Defence communities in the exercise of a delegated power and function by an authorised Delegate of the Minister is predicated on the indisputable contention that any such exercise of a power and function must be of the highest order.

The implications of *Carltona* makes it clear that in circumstances where something goes wrong from a legislative policy perspective, there is no defence of plausible deniability by a Minister hiding behind delegated authority of a power and function. The liability of the Minister is thus consistent with *Carltona* and the Westminster tradition of Ministerial accountability.

Whilst the exercise of a delegated power and function is considered to be an administrative necessity in order to reduce chaos in Government decision-making, in this instance by agents of the Government as represented by DVA, the power of delegation exercised by the Minister must be exercised in such a manner that the ESO and Defence communities do not suffer unnecessary and unreasonable detriment.

ADSO also believes the multiple portfolio responsibilities exercised by the Minister are of themselves sufficient to detract from a whole of portfolio focus that the Veterans Affairs portfolio demands and questions the efficacy of placing so many portfolios with one elected individual.

In conclusion, it follows that the ultimate responsibility which rests with the Minister and which is consistent with the Westminster Principle of Ministerial accountability, is of comfort to ADSO in ensuring the application of the proposed amendment to MRCA will not be abused by either the Minister or the person exercising a power and function on behalf of the Minister. It enhances accountability to Parliament and the ESO and Defence communities.

TERMS OF REFERENCE 7 – SCHEDULE 7

Incorporation by reference/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. Section 14 prevents, unless specifically authorised by the enabling legislation, legislative instruments from incorporating the provisions of non-disallowable legislative instruments or other non-legislative writings as in force from time to time. This requirement causes significant administrative issues for the Department as these DVA instruments can only include updated references to the referred documents at the time DVA remakes the instruments.

The proposed changes to the *Australian Participants in British Nuclear Tests 26 (Treatment) Act 2006* (Cth) are cosmetic in nature and as such no major issues appear to flow from these amendments. ADSO further notes that a significant amount of amendments to the relevant provisions of MRCA 2004 and VEA 1986, is also required as part of the harmonising process.

TERMS OF REFERENCE 8 – SCHEDULE 8

Minor and technical amendments: These amendments were included as part of the lapsed Repeal Day (Spring 2015) Bill 2015. They repeal redundant and spent provisions concerning benefits that are no longer payable, and make amendments consequential to those repeals. For example, definitions of 'clean energy advance and clean energy bonus' would be repealed, as would 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.

ADSO further notes the amendments to the relevant legislation is also required as part of the harmonising process.

CONCLUSION

Whilst in the main supporting the proposed legislative amendments, ADSO remains firmly of the view that such support for the implementation of information-sharing as discussed in Term of Reference 5 cannot be fulsome until the Government can give an assurance not only that the sharing of information will not prejudice any entitlement to Superannuation payments but that all risks to the safe and secure storage of all information relating to a veteran's pension and health status have been minimized .

Similarly, notwithstanding the necessity of a multi-portfolio Minister to delegate the exercise of powers and functions to Departmental delegates must be undertaken by the Minister in the full knowledge that responsibility for any act or omission by a Delegate rests at all material times, with the Minister.

ADSO continues to express concerns as to the efficacy of data storage and its propensity to be compromised by either human error, system failure or both. It is unconvinced that sufficient checks and balances are in place to alleviate this occurring with veterans' personal information, including the protection of current and former ADF members who require protected identities.

OFFER TO GIVE EVIDENCE IN PERSON

On behalf of all members of ADSO, I commend this submission to the Inquiry.

At the discretion of the members of the Senate Committee's Inquiry into the '**Draft Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017**', I offer myself to appear personally before the Inquiry at any time and answer any direct questions about the issues contained in this Submission, or other questions the Committee deems appropriate to its inquiry deliberations.

ACKNOWLEDGEMENT

The Alliance acknowledges with gratitude, the preparation and drafting of this submission by the Chairman of the Royal Australian Armoured Corps Corporation, Mr Noel Mc Laughlin OAM, MBA, contained in this submission.

Yours Sincerely

Colonel David Jamison AM (Ret'd)
National Spokesman
Alliance of Defence Service Organisations