

Labor senators' additional comments

Introduction

1.1 Labor senators continue to hold concerns regarding the bill. The main intention of the bill appears to be to change current arrangements for veterans' compensation and rehabilitation to enable future reform to occur. However, the shape of this reform has not been explained. The scope of potential change to veterans' entitlements is highlighted by proposed new section 121B which will give the Minister the capacity to change the DRCA through regulation. The consultation practices undertaken by DVA in relation to the bill do not indicate that the views of veterans, ex-service organisations and others will be adequately taken into account when major legislative reforms to this area are considered.

Lacking detail

1.2 It is not clear the extent to which the creation of the DRCA will change the consideration of claims for veterans over time. In particular, excluding the influence of decisions made under SRCA in the future and the assessment guides prepared by Comcare for claims could potentially disadvantage veterans. From the evidence received, it did not appear that DVA had conducted an assessment of this specific issue. DVA officers appeared to indicate that, at the present time, no reform options are being excluded.¹ No assurance has been provided that reforms to align the DRCA and the MCRA will not produce worse outcomes for veterans. Labor senators urge the Minister to clarify the detail of proposed reforms to provide certainty to ADF members and veterans.

Proposed new section 121B

1.3 The regulations made under proposed new section 121B will be disallowable legislative instruments and considered by the Senate Regulations and Ordinances Committee. Nonetheless, long-standing concerns regarding the overuse of Henry VIII clauses are still relevant. Future changes to the DRCA through this process will be subject to less parliamentary oversight and fewer checks and balances. In particular, the process and the criteria the Minister will use to be 'satisfied' that it is 'necessary or desirable' the operation of the DRCA be modified are unclear.

1.4 While the Senate Scrutiny of Bills Committee (Scrutiny Committee) did not comment on the bill, it has recently raised issues with a similar remedial power provision granted to the Tax Commissioner which was enacted in the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017*. This provision allows the Tax Commissioner, by legislative instrument, to modify the operation of a taxation law provided he/she has met certain conditions.

1.5 The Scrutiny Committee raised several concerns including the delegation of legislative power, consultation requirements, retrospective application and a

1 *Committee Hansard*, 15 March 2017, p. 28.

discretionary review of the new power. Despite receiving responses from the relevant Minister, the Scrutiny Committee remained concerned about these matters.² Labor senators consider that many of these issues also apply in relation to proposed new section 121B and do not appear to be addressed in the explanatory memorandum. In particular, there is no scheduled review of the new power granted to the Minister mandated in the bill to assess whether it is functioning as intended.

1.6 While section 17 of the *Legislation Act 2003* provides that rule-makers 'should consult' before making legislative instruments, the form and scope of this consultation is largely at their discretion. Failure to consult does not affect validity or enforceability of a legislative instrument. To address this, Labor senators consider that proposed new section 121B should be amended to insert an obligation on the Minister to consult with ex-service organisations and the veteran community before the power granted in section is used. This amendment could be expressed as follows:

121B Regulations modifying the operation of this Act

- (1) The regulations may modify the operation of this Act.
- (2) Before the Governor-General makes regulations under subsection 1:
 - (a) the Minister must be satisfied that it is necessary or desirable to make the regulations to ensure that no person (except the Commonwealth) is disadvantaged by the enactment of this Act; and
 - (b) the Minister must conduct appropriate consultation with relevant ex-service organisations and the veteran community, including the public release of the full text of proposed regulations.

Consultation

1.7 Labor senators welcome the committee's recommendation that DVA review its consultation and engagement practices. It is concerning that it appears that the first opportunity that ex-service organisations had to view the actual text of the bill was on the same day it was introduced into the Parliament. Given the complexity of the legislative schemes involved and the limited resources of ex-service organisations to undertake legislative analysis, it would have been more appropriate for an exposure draft of the proposed legislation to be made available for a period of public consultation. In the future, Labor senators urge the Minister to use the release of exposure drafts of proposed legislation to enable informed consultation to occur.

2 Senate Standing Committee for the Scrutiny of Bills, *Eighth report of 2016*, 9 November 2016, pp 504-516.

Recommendation 1

1.8 Labor senators recommend the Senate amend proposed new section 121B to include an obligation on the Minister for Veterans' Affairs to conduct consultation with ex-service organisations and the veteran community before regulations modifying the operation of the Act are made.

**Senator Alex Gallacher
Deputy Chair**

Senator Claire Moore

