

## **Senator Jacqui Lambie's additional comments concurring in part and dissenting in part from the committee's report**

1.1 Senator Jacqui Lambie, of the State of Tasmania, for the most part agrees with the Department of Defence, in its submission, that the present legislative arrangements for current and former ADF members is 'complex' and that 'creating a standalone version of the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) for Australian Defence Force members, and the Safety Rehabilitation and Compensation (Defence-related Claims) [Bill 2016] (DRCA) is seen as a positive step in reducing this complexity...'.<sup>1</sup>

1.2 During the hearing the Department of Veterans' Affairs (DVA) conceded that the ex-service organisation round table (ESORT) members<sup>2</sup> did not have access to the provisions of the bill until 9 November 2016, the day it was introduced into Parliament.<sup>3</sup> Senator Lambie concurs with the committee's report on Recommendation 1, that DVA conduct a review of its consultation and engagement practices.<sup>4</sup>

1.3 DRCA has its shortcomings in that the same functions used by Comcare, that were binding upon the Military Rehabilitation and Compensation Commission (MRCC) have been repealed and not been replicated in their entirety within DRCA despite assertions made at the hearing by DVA.<sup>5</sup>

1.4 For example, subsection 69(b) of SRCA, which is 'to minimise the duration and severity of injuries to its employees and employees of exempt authorities by arranging quickly for the rehabilitation of those employees under this Act' is missing in DRCA. Subsection 69(b) of SRCA is contained in Part VII and as such would, on its face, not be applicable to Defence claims per operation of subsection 147(1)(c) of SRCA. Still, the section dealing with the functions of the MRCC found in subsection 142(1)(d) of SRCA notes that the functions of MRCC include 'doing anything the doing of which', under subsection 142(1)(d)(ii) 'would be required of Comcare if

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1 *Submission 6*, p. 1.

2 It should be noted, that the Returned & Services League of Australia (RSL), with a membership of over 240,000 is the largest service and ex-service organisation, and is a member of ESORT, did not make any public submission in reference to the inquiry nor did it appear as a witness at the committee hearing. (See <http://rslnational.org/>) The RSL weighing in on future inquiries such as this may serve to assist lawmakers in understanding important issues and draft legislation affecting the Defence and Veterans communities.

3 Ms Carolyn Spiers, DVA, *Committee Hansard*, 15 March 2017, p. 25

4 It is suggested that the review be independent in nature due to the noted 'perception that DVA has an adversarial relationship with some veterans' advocates groups and lawyers acting on behalf of veterans' noted in the committee's report.

5 Explanatory memorandum (EM), p. 15.

Comcare had responsibility for the performance of that function'. Despite the operation of subsection 147(1)(c) of SRCA which does not apply Part VII to Defence related claims, subsection 142(1)(d)(ii) of SRCA is contrary to subsection 147(1)(c) and does in fact require MRCC to carry out functions as Comcare would such as those that are found in subsection 69(b). However, subsection 142(1)(d)(ii) and the entirety of section 69 are repealed in the DRCA bill.<sup>6</sup>

1.5 The committee report fails to squarely address the real possibility of future inequities of outcomes raised at the hearing concerning the repeal of section 89B, in DRCA, which is also codified in subsection 142(5) of SRCA – and is also being repealed. Rather, the committee report relies upon the Principal Legal Advisor to DVA conclusory statement that 'the reason why we are looking at excising the military from SRCA is that we did not actually want the then Comcare bill that was being proposed to apply to the military...the MRCC is to be responsible for the administration purely of the DRCA'. The statement by the DVA Principal Legal Advisor, at the hearing, fails to address the core issue – that being the likely result that future claimants under DRCA will not be able to rely upon past function practices afforded to veterans presently under SRCA with respect of the equity of outcomes.

1.6 During the committee hearing it was noted, with respect to decades of case law, that the 'threat posed by DRCA is that these authoritative rulings may no longer apply, especially if the existing SRCA guidelines and policy advices are repealed, amended or revoked...'.<sup>7</sup> Conversely, the DVA through its Principal Legal Advisor, opined that 'all the case law and precedents that currently applies to the consideration of claim under the SRCA will continue to apply to DRCA if it comes into force'.<sup>8</sup> This opinion by a DVA's Principal Legal Advisor, given to the committee, is a straw man fallacy for the reasons outlined in paragraphs 1.4 and 1.5 above.

1.7 The committee report fails to address issues germane to MRCC functions as if it were Comcare outlined in paragraphs 1.4, 1.5 and 1.6 above and instead relies upon the straw man fallacy provided by the DVA Principal Legal Advisor, as noted in paragraph 1.6, as a reason to recommend the Senate pass DRCA.

1.8 It is for the reasons contained in paragraphs 1.4, 1.5 and 1.6 above, Senator Lambie dissents in part as SRCA is not being fully replicated into DRCA. The consequence of which will be that claimants with Defence related injuries or diseases will be disadvantaged as they will no longer be able to rely upon past functional practices and precedence under SRCA, if and when DRCA comes into force. In the committee's haste to report out the DRCA bill it fails in exercising due diligence in examining the underlying issues of the MRCC functions, as it exists today in SRCA, not being fully carried over to DRCA. The committee's reliance upon the DVA's straw man fallacy in which purportedly all case law will continue to apply to DRCA is erroneous as demonstrated above.

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6 EM, p. 15.

7 Mr Brian Briggs, Slater and Gordon Lawyers, *Submission 4*, p. 17.

8 Ms Carolyn Spiers, DVA, *Committee Hansard*, 15 March 2017, p. 30.

1.9 The new section in DRCA, aptly named the Henry VIII clause, confers unfettered power upon the Executive Branch of Government, through DVA, in regulation making which permits modifications to the operation of the act itself. This is unprecedented in the history of Australian veterans' entitlement law. A regulation or any amendment thereto would only be 'disallowable and must be brought before both houses of parliament and sit for 15 sitting days of parliament before they come into operation'.<sup>9</sup> Such a short period of time, 15 days, is insufficient for any key stakeholders or members of the public to raise any initial concerns, to lawmakers for a disallowance motion, in future changes to veterans' entitlements through by regulation.

### **Recommendation 1**

**1.10 That the functions of Comcare noted in section 69 of SRCA be inserted into DRCA, to require MRCC and DVA to carry out such functions which would be consistent with 'doing anything the doing of which', under subsection 142(1)(d)(ii) of SRCA 'would be required of Comcare if Comcare had responsibility for the performance of that function'.**

### **Recommendation 2**

**1.11 Preserve well settled equity of outcomes as recognised by decades of functional practices and precedence presently codified in section 89B of SRCA, which is found in subsection 142(5) of SRCA, by codifying it within DRCA.**

### **Recommendation 3**

**1.12 Delete the Henry VIII clause in DRCA subsection 121B(1); and instead adopt similar language found within section 440 of the *Military Rehabilitation and Compensation Act 2004* concerning regulation creation into DRCA.**

### **Recommendation 4**

**1.13 That the review of the DVA consultation and engagement practices be of an independent nature due to the reasons outlined in the committee report.**

**Senator Jacqui Lambie  
Senator for Tasmania**

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9 Ms Carolyn Spiers, DVA, *Committee Hansard*, 15 March 2017, p. 22.

