Slater Gordon Lawyers

Inquiry into the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016

Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade by Slater and Gordon Lawyers

24th February 2017

Submitted on behalf of Slater and Gordon Lawyers

Brian Briggs, National Military Compensation Expert

24 February 2017

Committee Secretary
Foreign Affairs, Defence and Trade Committee Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Re: *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016*

Thank you for your letter dated 9th February 2017 and the invitation to provide a written submission addressing the *Safety, Rehabilitation and Compensation Amendment (Defence Force) Bill 2016*, hereafter referred to as the DRCA. Please find enclosed a submission prepared by Slater and Gordon Lawyers.

I am available to speak with the Committee at short notice.

Should you require any further information, please do not hesitate to contact me.

Yours faithfully,

Brian Briggs
Practice Group Leader
Military Compensation
SLATER AND GORDON

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Introduction

Relevant Legal Background

Slater and Gordon is a national consumer law firm and is recognised as a leading provider of legal advice and representation to injured Australian Defence Force ('ADF') personnel, military veterans and their dependants in every State and Territory. We have a dedicated military compensation team that has assisted thousands of ADF personnel, veterans and their families.

Slater and Gordon have had a longstanding commitment to working with this Committee, the Department of Veterans' Affairs ('DVA') and the ADF on the administration and improvement of military and veterans' compensation schemes.

Personally, I am a legal practitioner admitted in 1987 and a Queensland Law Society Accredited Specialist in Personal Injury Law. I have specialised exclusively in Military Compensation claims under the three compensation schemes, including the *Veterans' Entitlements Act 1986* (Cth) ('VEA'), the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRCA'), and the *Military Rehabilitation and Compensation Act 2004* (Cth) ('MRCA') since 2008.

I refer the Committee to my previous submissions outlining my position as the Practice Group Leader heading the Military Compensation Group at Slater and Gordon and the vital role our firm plays by acting on behalf of ADF personnel and veterans. I do not believe it necessary to revisit this information which is readily available to the Committee.

I would however respectfully suggest that I am in a position to comment on the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* ('DRCA' or 'the Bill'), and welcome the opportunity to present a submission on the DRCA and elucidate what I consider to be some serious concerns I have with this piece of legislation now before the Parliament. From discussions with various other advocates who also represent claimants, my concerns are not unique. There is a groundswell of discontent which needs to be acknowledged.

The Need for the DRCA

It is my view, which is also widely accepted, that the SRCA is the best functioning Act currently available for the compensation of veterans and ADF personnel. It is also uncontested that the SRCA is easier to navigate and gives better compensation for veterans as a whole, as will be demonstrated later in this submission. Hence the question arises – why the need for the DRCA?

The Honourable Mr Tehan MP asserts that the DRCA "will simply replicate" the SRCA with "appropriate amendments to give full control of the Act to the Minister for Veterans' Affairs".[1] On the face of Mr Tehan's statements, it would seem that the operational effect of the DRCA is primarily to put more control into the hands of his own portfolio. This action is not in itself unwise, as having a centralised scheme may allow for better management. However, the additional changes to the DRCA, as well as the subsequent changes to the general administration of ex-service personnel

[1] Commonwealth, *Parliamentary Debates*, Senate, 9 November 2016, 3279 (Dan Tehan).

compensation schemes, indicate that the DRCA is not all that it seems, as this submission will examine.

The Rushed Timing of the Bill

The first and most notable anomaly with the present Bill is its timing. The very pace at which this legislation is being rushed into enactment is in itself a concern, and is raising valid fears and alarm within the Defence community. In particular, the Bill has an abnormally limited time period for submissions, being a mere two weeks; as well as a similarly narrow period for a report by the Committee, being a little over a month.

This apparent urgency surrounding the enactment of the DRCA appears ill advised and erring on the side of recklessness. There is little reason for legislation such as the DRCA to be of an urgent nature. On the contrary, due to its far reaching effects and the nature of the communities affected by its enactment, any attempts at varying legislation dealing with military compensation and the operation of the scheme should be approached with caution and care.

Furthermore, such changes should only be made subsequent to comprehensive consultations with the Defence community and advocates. Previous submissions from veterans and ex-service personnel on a recent related inquiry into suicide by veterans and ex-service personnel highlight an inherent disconnect between Parliament and the involved community.[2] The Honourable Mr Tehan MP claims that:

> The development of a standalone SRCA for ADF members and veterans was announced by government nearly two years ago, during which time DVA has been consulting with Defence and ex-service representatives (both of which have been supportive of a standalone act). [3]

Thus he would seem to have addressed this disconnect. However, with all due respect I query the existence of any announcement made regarding reforms to the SRCA in that time period, and invite Mr Tehan to provide evidence of such announcements, as well as the consultations between DVA and the Defence and ex-service representatives. To my knowledge, the first notice my colleagues and I received of these reforms was late last year when the Bill was first announced. Whilst there may have been discussions about a standalone bill, the DRCA is not a standalone duplication of the SRCA, as it gives the power to revoke, vary or amend legislation as the Government and the Department sees fit to enact at a later date. This will with respect be the beginning of the sting in the tail.

Further, I query the amount of support received for these reforms as well as the extent to which the DVA and Mr Tehan have sought consultation in the Defence community. I also note that the National and State Secretariats of the Returned and Services League ('RSL') seem to be experiencing their own internal issues and I query if their leaders have been able to properly review the legislation in an environment of turmoil at the moment. To my knowledge, neither Slater and Gordon, other lawyers representing veterans or our colleagues and contacts in the Defence community have been

[2] Mr A.R. Browning, Submission No. 101 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Suicide by Veterans and Ex-Service Personnel*, 2016.
[3] Commonwealth, *Parliamentary Debates*, Senate, 9 November 2016, 3279 (Dan Tehan).

consulted about these reforms. This restricting of consultation to organisations that are higher up in the chain of command such as ESORT and Defence does not paint a holistic picture of the effects of these reforms. It excludes the opinions of those who are at the heart of the system and those who will be most deeply affected.

On another related point, I would question whether the government has briefed external lawyers to draft this Bill. In the event that lawyers have been briefed, my concern is whether these lawyers have the necessary impartiality required to do so. In my experience, the DVA are known to employ both internal and external counsel for various reasons. However, the obvious caveats with using the same counsel for the drafting of such a crucial bill are the impartial and one sided views that counsel and DVA panel lawyers are likely to have.

Hence, it is my view that the Parliament should seek to cure the apparent disconnect with the Defence community through a more comprehensive consultation, comprising of the branch officers and sub-branch officers of the RSLs, advocates and legal firms who assist the veterans and ex-service personnel in administering claims on a day to day basis.

Moreover, the report from the Suicide Inquiry into the DVA, which was referred on 1 September 2016, is due on 30 March 2017. This is on a date later than the due date for this committee to report, being 20 March 2017. This not only highlights the abnormal pace with which the current legislation is being dealt, but also the apparent contempt of Parliament in attempting to enact new legislation before the more comprehensive study and report on the operation of the DVA has been finalised. Additionally, the short time period for consultation and submissions raises concerns for the comprehensiveness of the reviews undertaken by the organisations consulted, and I would again invite the Honourable Mr Tehan to provide the details and results of the "consultation" for public scrutiny.

It is conceded that if the DRCA was the simple duplication of the SRCA in order to separate Australian Defence Force members from other Commonwealth employees, as the Honourable Mr Tehan MP so avidly claims, such a rushed pace with enacting the legislation would not be out of place. However, despite Mr Tehan's claims, there are differences between the SRCA and the DRCA, and furthermore major changes in its application and administration, which will be discussed further in this submission.

Therefore, the expeditious manner with which the DRCA is being dealt with raises concerns and some suspicion.

We have recently witnessed legislation detrimental to veterans and ex-service personnel being passed through Parliament in a discreet and underhanded manner in the guise of the *Budget Savings (Omnibus) Act 2016*, notwithstanding the fact that the provisions in that legislation were highly contested and repeatedly argued down. It is my hope that such an incident does not occur again with this current Bill.

Hence, it would be my recommendation for Parliament to make the process more open and transparent and extend the time limit for the giving of submissions and thus the report to the Senate. This would serve two purposes – to allow the relevant communities to be aware of the

possible and inbound changes, and to allow Parliament to listen and gain a better understanding of the issues pervading the community.

Issues with the DVA

As it stands, the Bill confers unfettered power onto the Department of Veterans' Affairs and the Military Rehabilitation and Compensation Commission ('MRCC'). This is a problem because the DVA has shown in the past to be an inefficient, unhelpful and adversarial service provider to veterans. In the previous Senate Inquiry into veteran suicide, many submissions noted the defective administrative process in claiming entitlements.[5] I do not consider that allowing the DVA to have complete and total control of military compensation to be a wise move.

Medical claims have been challenged by the DVA in many cases, and with the monopoly the Department has over veterans' health this creates a power imbalance.[6] I refer to any number of the hundreds of submissions currently before the Senate.

Further, the DVA is known to dispute the accounts of events provided by veterans and is seen as an impediment by veterans, ADF members and treatment providers.[7] Dr Nick Ford's submission provides one such example. Due to an initial unit reporting error a young veteran was told that he did not partake in numerous actions as an ASLAV commander that he did participate in. Despite this discrepancy being resolved within a month the DVA contested this matter for more than 12 months.[9] In another submission a Vietnam veteran stated:

> I know of another fellow sailor was told by member at DVA Brisbane when he submitted a claim that he would not have seen anything when the ship was hit by shells fired by the Viet Cong as he was an Engineering Mechanic and would have been down in the engine or boiler rooms, which proves DVA staff have no idea about the workings of the Defence Forces.[10]

Further, I note that in a Senate Estimates Committee meeting in October 2015 the issue of overpayments made by the Department was raised by Senator Lambie. The Senator stated that nearly 25% of DVA clients had overpayments made to them.[11] It is a further failing on the part of the DVA that there are serious faults in the accounting systems being utilised.

Another example of the problems of the DVA is evidenced by the Department giving figures regarding the amount of claims rejected under its 'Compensation for Detriment caused by Defective

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[5] Mr Ashley Smith, Submission No 26 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Suicide by Veterans and Ex-Service Personnel*, 2016, 2.
[6] Name Withheld, Submission No 3 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Suicide by Veterans and Ex-Service Personnel*, 2016, 1-3.
[7] Dr Nick Ford, Submission No 44 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Suicide by Veterans and Ex-Service Personnel*, 26 September 2016, 3.
[9] Ibid.
[10] Name Withheld, Submission No 31 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Suicide by Veterans and Ex-Service Personnel*, 2016, 1.
[11] Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Supplementary Budget Estimates 2015-16; Answers to questions on notice from the Veterans' Affairs portfolio* (2015) 4.

Administration' (CDDA) scheme, with a substantial number being rejected or not even processed each financial year.[12]

Staff have not been disciplined for these matters in the last 5 years.[13] I have noticed an alarming trend of DVA staff turnover in the past year. I also query the Department's approach it now takes to external communication, where its delegates identify themselves by their first name and/or ID number via emails. Such a policy is deeply impersonal and psychologically distressing for claimants who are dealing with only an ID number in some instances. It further underscores the disconnect between the DVA and veterans and ex-members.

I have experienced a recurring issue in Slater and Gordon's dealings with the DVA whereby the Department sends important materials to the client directly, despite the fact that we have been acting on behalf of the client for months or even years. Please find attached my letter to DVA dated 8 December 2016 regarding this issue and its distressing effects on my clients (see Appendix 1). The DVA responded with the attached letter dated 1 February 2017 (see Appendix 2). The DVA response acknowledged the issue but unsatisfactorily addressed the problem. In the time since receiving the DVA's response, this issue has continued to occur. This incompetence is evidence of the disarray inherent in the DVA and continues to cause untold grief and confusion for our clients.

All this information appears to paint a picture of a department that does not look after its clients and is in a chaotic state. Whilst the Minister may have good intentions it does not appear the DVA staff are on the same page. My observations are not confined to claims presently being conducted by Slater and Gordon alone. Many of my contacts mirror the same issues.

Coupled with these problems is the DVA's adversarial approach to claims which is compounded by the amount of money the Department has been spending on its legal services. Over the past 5 years, external legal expenditure has been steadily increasing, while the money spent on internal legal expenditure has been steadily declining (see Figure 1). This appears to indicate that the department is spending its resources on external litigation, possibly against veterans, instead of using that money on internal services to assist veterans.

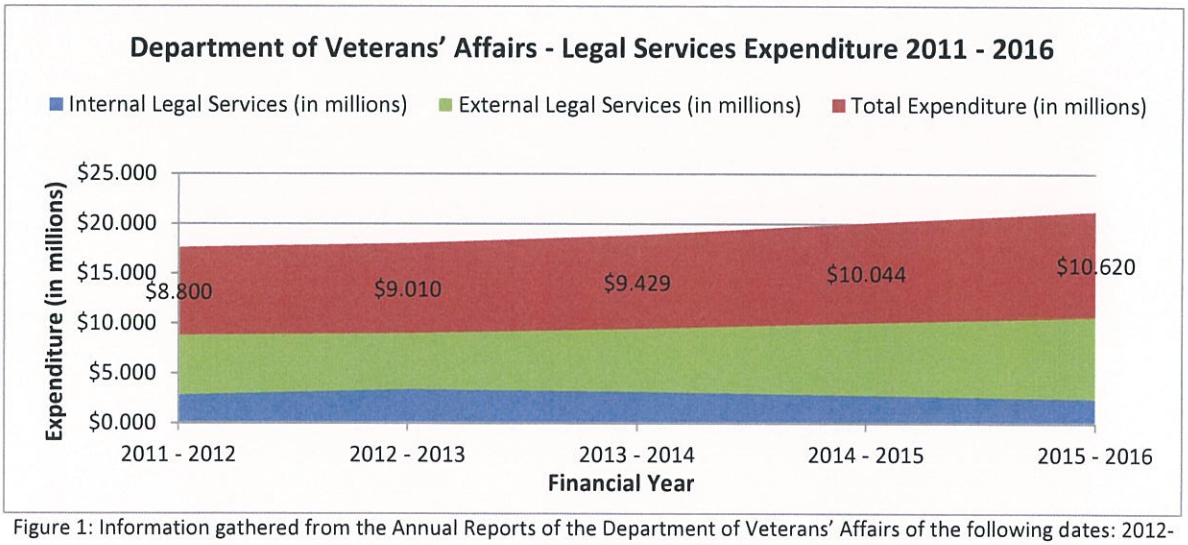

Figure 1: Information gathered from the Annual Reports of the Department of Veterans' Affairs of the following dates: 2012-2013, 2013-2014, 2014-2015, 2015-2016.

[12] Ibid, 5.
[13] Ibid 6.

Department of Veterans' Affairs - Legal Services Expenditure 2011 – 2016			
Year	Internal Legal Services (in millions)	External Legal Services (in millions)	Total Expenditure (in millions)
2011 - 2012	$2.800	$6.000	$8.800
2012 - 2013	$3.400	$5.600	$9.010
2013 - 2014	$3.180	$6.244	$9.429
2014 - 2015	$2.820	$7.225	$10.044
2015 - 2016	$2.460	$8.160	$10.620

Figure 2: A table representing the information gathered from Figure 1.

Furthermore, I direct attention to the table provided in the Administrative Appeals Tribunal's ('AAT') submission to the Suicide Inquiry (see Figure 3). This table directly correlates with the increasing amounts of money the DVA is spending on external legal advice, with external representatives being used 111 times in the 2015-2016 financial year. I query why private solicitors and firms are being employed by the DVA when the AAT is reporting a higher amount of self-representation in appeals during the period of 2015-2016. This trend in spending appears to run directly counter to the stated aims and goals of the DVA, which was founded to help returned service personnel.

Role	Party Type	Representative Type	Total
APPLICANT	Individual	Representation type not known	3
APPLICANT	Individual	Private Solicitor/Legal Firm	192
APPLICANT	Individual	Community Legal Centre	1
APPLICANT	Individual	Self-Representative	62
APPLICANT	Individual	Legal Aid	5
APPLICANT	Individual	Barrister	1
APPLICANT	Individual	Friend/Relative	6
APPLICANT	Individual	Other non-legal advocate/organisation	62
OTHER	Agency	Private Solicitor/Legal Firm	1
RESPONDENT	Agency	Self-Representative	233
RESPONDENT	Agency	Private Solicitor/Legal Firm	111
RESPONDENT	Agency	Representation by other agency (e.g. Centrelink)	1

Figure 3: Types of representatives appearing in AAT veterans' appeals in 2015-16[14]

The evidence of spending and outsourcing suggests that the DVA is not able to handle, within its current resources, the current case load on an adequate turnaround timeframe.

Further to this issue, the latest DVA Annual Report shows that out of the 307 cases that were decided by the AAT, only 84 of them affirmed decisions by the DVA, being 27.4% of the cases decided.[15] This signifies that a staggering 72.6% of the decisions by the DVA were incorrect not only

[14] Administrative Appeals Tribunal, Submission No 127 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Suicide by Veterans and Ex-Service Personnel*, 14 October 2016, 3.

[15] Department of Veterans' Affairs Annual Report 2015-2016 p 117. Note that these numbers are low as they do not include matters that were withdrawn, dismissed or settled by consent.

at the first instance, but unable to be corrected through the pathways of appeal through the Veterans' Review Board ('VRB') or the internal reconsideration by the MRCC. This glaring inability of the DVA in deciding its cases necessitates a veteran to endure two stages of appeal in order to be properly compensated, a process that is rarely followed due to the fragility and financial position of many of those aggrieved. Hence, while the statistics by themselves are shocking, the reality is that many incorrectly decided cases simply remain as they are, and thus will not be represented in these numbers. This display of incompetence by the DVA in my opinion makes it difficult to see why the DVA should be given more power and responsibility through these reforms.

Moving the SRCA completely under their power through the DRCA will only compound the problem. The DVA is currently benefitted by the oversight and assistance of Comcare when dealing with the SRCA. The removal of this oversight will further undermine the Department's ability to efficiently and effectively serve veterans. Bringing the administration of all of veteran's entitlements under the DVA removes any possibility of oversight mechanisms, essentially bypassing the principles that are the cornerstone of administrative law in Australia: accountability and transparency.

The MRCC and the Problems of Self-regulated Power

The absolute power that the MRCC have in military compensation will only be more entrenched with the passing of this Bill. With no safeguards in place there will be nothing to stop the MRCC from preparing, amending, varying or revoking the Guide to the Assessment of the Degree of Permanent Impairment ('the Comcare Guide') and thereafter riding roughshod over entitlements. Simply, this will mean a worse deal for ex-service members and veterans.

The Henry VIII Clause and the Problems of Executive Legislative Power

The unfettered power that the Bill confers is encapsulated in the Henry VIII clause mentioned in the Explanatory Memorandum (s121B). A Henry VIII clause delegates legislative power to a person who makes regulations, effectively permitting them to modify the application of a primary statute.[16] As long as Parliament is to retain the right to repeal or amend the primary statute, this will not be held to be unconstitutional.[17] Section 121B will be unconstitutional if the new regulation making power abrogates Parliament's ability to amend the DRCA itself. If the DRCA is meant to be a simple duplication of the SRCA it begs the question as to why this specific clause, which is not present in the SRCA, was inserted into this Bill. This clause does not make the Bill a duplication, rather it is a substantive alteration to existing law. The granting of legislative power to the Minister to modify the operation of the Act is an unacceptable instance of unrestrained power being placed in the hands of a single department or individual.

[16] Rule of Law Institute of Australia, *Draft: Henry VIII clauses and the rule of law,* Rule of Law Institute of Australia <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf>.

[17] *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248, 265, per Mason CJ, Dawson and McHugh JJ.

Computerised Decision-Making and the DVA

To compound the dangers of the DRCA is to consider the introduction of the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016* ('Digital Readiness Bill'). If passed, the Digital Readiness Bill will see the DVA's decision-making process go digital. That is to say, the bill will authorise the DVA to use a computer program or system to make decisions under the SRCA, VEA and MRCA. With the state of the DVA, this in my view will result in terrible outcomes for veterans and ADF members. I do not agree that suggested reforms will fix the problems by 2018. This timeline is wildly ambitious.

As Jennifer Jacomb from the Association of the Victims of Abuse in the ADF has pointed out, these computerised decisions will lack the nuance of Federal Court decisions.[18] This may give the DVA the ability to ignore the Court's decisions as these precedents and information will be unavailable in the system.[19] It has been proposed that the DVA will adopt the same system recently used by Centrelink. With the recent debacle of errors from Centrelink's electronic claims process, it is clear that the removal of human oversight from the process of the final decision will be catastrophic when assessing veterans' claims.[20]

Transfer of Information to Defence

The Bill will also permit the Secretary of the DVA to provide information of cases or a single case to the Department of Defence. This will have the effect of discouraging ADF members from speaking freely and frankly with the DVA and their doctors, and this may result in claims being rejected due to claims not meeting the strict time restrictions contained in Statements of Principles.[21] Reporting by members of injuries, conditions and diseases will further compound the existing inaccuracies that are already a major problem within the services.

This move overturns effective public policy and replaces it with a computerised program lacking in compassion or beneficial consideration.

A further provision allows the Secretary to publicly release individual cases to correct public "misinformation".

In the second reading speech for the Bill the Minister stated there were five safeguards to ensure appropriate implementation, including giving the Minister delegated legislative power to set the rules for the Secretary (a Henry VIII clause that has no oversight).[22] There are no safeguards to this provision, as the Secretary is not bound to respect any objections by affected persons.[23] The Secretary is only obliged to "consider" the comments made by the person whose records may be

[18] Victims Of Abuse In The Australian Defence Force Association, Submission No 1 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the provisions of the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*, 2016, 4 [3.1].
[19] Ibid.
[20] Ibid, 4 [3.4].
[21] Ibid, 7 [4.2]-[4.4].
[22] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2016, 4317 (Dan Tehan).
[23] Above n14, 9 [5.1].

released.[24] This will enable the Secretary to disregard an objection as there is no obligation for the Secretary to act beneficially in the interests of the person's privacy.

This will allow the Secretary to be able to divulge records of the person's military service, Medicare, Centrelink, Comcare, ComSuper and current medical records.[25] The prospect of disclosure of this information puts ex-members and veterans at considerable risk. The fine of 60 penalty units looks unlikely to prevent an abuse of power by the Secretary.[26] If the Secretary ignores a person's objection, there is also no right to appeal such a decision.[27] Again, this provision will discourage applicants to speak openly to their doctors and the DVA.[28] With no definition of misinformation, the provision could also be used to discredit legitimate complainants, particularly those with a history of mental health issues.[29] This provision of the proposed *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016* directly and arbitrarily violates an individual's right to privacy guaranteed by Article 12 of the Universal Declaration of Human Rights (UDHR) due to the Secretary not being bound by an individual's objections.[30]

Article 12 of the UDHR states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".[31] This Bill circumvents this right with its disclosure method, effectively taking the DVA out of the *Privacy Act 1988* (Cth) and the established case law.[32] Caesar will judge Caesar.

With the DVA's poor track record of assisting veterans in mind, as evidenced by the increase in complaints and the hundreds of submissions highlighting the problems and failures of the DVA, the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016* will only further empower the DVA to mistreat those whose rights it is meant to be protecting. With respect to the Minister, his assessment of the department undertaking a "significant transformation"[33] is inaccurate. My experience in recent months suggests that the Department's management of claims is deteriorating, not improving.

The Dangers of Aligning the DRCA with the MRCA

This Bill purports to re-enact SRCA with no changes to or impacts on veteran's entitlements. However, by excising veterans' SRCA coverage from Comcare and repackaging it as a military-specific compensation scheme, the DRCA sets a dangerous precedent.

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[24] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2016, 4317 (Dan Tehan).
[25] Victims Of Abuse In The Australian Defence Force Association, Supplementary to Submission No 1 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the provisions of the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016*, 2016, 7 [3.2].
[26] Above n14, 9 [5.1].
[27] Ibid, [5.4].
[28] Ibid, 10 [5.6].
[29] Ibid, [5.7].
[30] Ibid.
[31] *Universal Declaration of Human Rights*, (entered into force 10 December 1948), art 12.
[32] Above n21, 7 [3.2].
[33] Rory Callinan, 'Veterans' office 'feudal, chaotic'', *The Australian* (Australia), 20 February 2017, 2.

The SRCA as it currently exists covers both defence members and all Commonwealth public servants. The tests for liability are the same for each group and the impairment provisions determining the level of compensation for injuries, diseases and conditions are more favourable to defence members.

The Minister for Veterans' Affairs has confirmed that an eventual goal of the Bill is to align this new defence-specific DRCA with the MRCA. The MRCA is roundly regarded as a poorly crafted piece of legislation that fails to protect the rights and entitlements of veterans. There have been widespread calls in the Defence community to repeal the MRCA. Accordingly, it is my view along with many others who represent our military that to replace the SRCA will lead to military complainants being significantly disadvantaged.

The MRCA currently provides rehabilitation and compensation coverage to defence personnel who served on or after 1 July 2004. It differs from the SRCA in that both the statutory tests for liability (*Statements of Principles* or 'SoPs') and its metric to determine payable compensation (*Guide to the Assessment of Rates of Pensions* or 'GARP M') are far more onerous for veterans.

Statements of Principles: Liability Tests for Lower Limbs

Under the MRCA, the SoPs determining liability for impairment are more restrictive and unnecessarily technical than the SRCA provisions. Claims can be rejected on the basis that the factors in the relevant condition's SoP are not met, even where the claimant has provided medical evidence proving that their condition is linked to their military service.

To give an example of the limitations imposed by SoPs, I refer to the recognised condition of shin splints which is common amongst my clients. In order to prove on the balance of probabilities that a typical clinical onset of shin splints is connected with their peacetime service, a veteran under the MRCA must prove one of the following factors:

a) Running or jogging an average of at least 60 kilometres per week for the one month before the clinical onset of shin splints; or

b) Undertaking weight bearing exercise involving repeated activity of the lower leg on the affected side, at a minimum intensity of five METs, for at least six hours per week for the one month before the clinical onset of shin splints; or

c) Increasing the frequency, duration or intensity of weight bearing activity involving the lower leg on the affected side by at least 100 percent, to a minimum intensity of five METs for at least four hours per day, within the seven days before the clinical onset of shin splints.[34]

The quantification and qualification required to prove the above factors is onerous on the veteran and serves to lengthen the claims process and restrict Commonwealth liability. If a claimant cannot immediately report the onset of symptoms or if their experience does not otherwise meet these strict parameters, their claim can be denied.

[34] Repatriation Medical Authority, *Statement of Principles concerning shin splints No. 10 of 2015*, 27 January 2015.

In comparison, a Commonwealth public servant covered by the existing SRCA must only demonstrate that on the balance of probabilities their injury arose out of or was aggravated in the course of their employment. In my experience, this test is less restrictive and contains fewer arbitrary technicalities that seem designed to block claims by veterans.

Statements of Principles: Clinical Onset of Conditions

The MRCA allows delegates to deny legitimate claims from veterans on the basis of mere technicalities contained in the SoPs.

To provide an example for the Committee, one of my clients was formally diagnosed with a psychiatric condition. This condition was accepted by the DVA. Our client then claimed for the condition of bruxism (grinding of the teeth), secondary to the psychiatric condition. The relevant SoP for bruxism states that the relevant factor to be met is 'having a clinically significant disorder of mental health as specified at the time of the clinical onset of bruxism'.[35]

The MRCC found evidence in our client's dental file that he had tooth damage recorded two months prior to his clinical diagnosis with the psychiatric condition. The MRCC therefore denied the client's claim on the basis that the client technically did not have the psychiatric condition at the time of the clinical onset of bruxism. The delegate was able to make this decision because the starting date of the psychiatric condition was formally considered to be the date of diagnosis.

The formal diagnosis clearly occurred at a point in time after the bruxism first manifested. Common sense would therefore dictate that the client's psychiatric condition and his bruxism commenced around the same time. However, the technical wording of the SoPs allowed the delegate to deny the claim.

These kinds of illogical decisions often result from the restrictive and narrow tests for liability under the MRCA. The SRCA alternatively allows the delegate more flexibility and does not force them to consider the 'date of clinical onset' as a determining factor.

Restrictive Timeframes: Suicide and Attempted Suicide

Furthermore, the strict time limits outlined in many SoPs constitute an unnecessary and irresponsibly implemented barrier in the compensation process. To provide an example of these arbitrary timeframes, the SoP governing Suicide and Attempted Suicide requires that the claimant who attempts suicide after experiencing a category 1A or 1B stressor during their wartime service must experience this stressor within five years before the attempted suicide.[36] If the claimant experienced the same stressor during peacetime service, the stressor must have been experienced within two years of a suicide attempt.[37] If a veteran's suicide attempt occurs outside of this five or two year window, it cannot be relied upon as a factor and they will either have to prove some other factor or fail to establish liability altogether.

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[35] Repatriation Medical Authority, *Statement of Principles concerning bruxism No. 91 of 2016*, 28 October 2016.

[36] Repatriation Medical Authority, *Statement of Principles concerning suicide and attempted suicide No. 65 of 2016*, 24 June 2016.

[37] Repatriation Medical Authority, *Statement of Principles concerning suicide and attempted suicide No. 66 of 2016*, 24 June 2016.

To give context, category 1A and 1B stressors include traumatic events such as experiencing a life-threatening event, being subject to a serious physical attack including rape, being an eyewitness to killings or atrocities on other persons, and viewing and handling corpses. Medical specialists acknowledge that delayed onset of symptoms can be common following trauma. Nevertheless, the SoP is formulated to prevent claims by a veteran or that veteran's estate if these narrow timeframes are not met.

These SoPs are currently being investigated by the Repatriation Medical Authority but have nonetheless been in place for years and are representative of the kind of limitations imposed under the MRCA. Again, a Commonwealth public servant covered by the SRCA can more easily prove liability for the same condition using the more lenient tests under the SRCA.

In light of these strict liability tests required by the MRCA, I query why the future alignment of this proposed defence-specific SRCA with the MRCA is considered a desirable goal by the Minister for Veterans' Affairs.

The Disadvantages of GARP M: Lower Limbs

If the DVA intends to use the DRCA to issue a new permanent impairment guide that is more in line with the GARP M than the preferable Comcare guide, this constitutes a direct attack on the existing entitlements of Australian veterans. In my experience the use of the GARP M has consistently led to lower lump sum compensation payments for veterans with multiple injuries, diseases and conditions.

The GARP M uses a points-based system to measure functional impairment that results in lower measures of compensation for veterans with multiple impairments. Under the SRCA's Comcare Permanent Impairment Guide 2 ('the Comcare guide'), compensation is not payable where it is determined that the degree of permanent impairment of a claimant is less than 10%. Similarly, there is a minimum impairment threshold of 10 impairment points under the MRCA. However, these respective thresholds under the Comcare guide and GARP M differ in their requirements.

SRCA – Comcare Permanent Impairment Guide		**MRCA – GARP M**	
Impairment %	**Table 9.5[38] Limb Function – Lower Limb**	**Impairment Rating**	**Functional Loss Table 3.2.2[39] Lower Limbs (Both Together)**
10	Can rise to standing position and walk but has difficulty with grades and steps.	TEN	Walks at normal pace on level ground, but has constant difficulty up and down steps and over uneven ground. Need for a walking stick may be manifested: - Pain and/or slowness; or - constant pain from weight-bearing. Pain restricts walking to 500 m or less, at a slow to moderate pace (4 km/h). Can walk further after resting. Sciatic pain daily — present most of the time during walking.

Figure 4: Comparing Table 9.5 in Pt 2 Div 1 of Comcare PIG 2 with Functional Loss Table 3.2.2 in GARP M.

Much like the SoPs when compared to the SRCA provisions, the GARP M requirements are more technical and onerous than that of the Comcare guide. For an example, please see Figure 4 above for a comparison of the Comcare and GARP M minimum impairment thresholds that must be met by veterans with lower limb conditions.

For veterans with multiple lower limb impairments, the GARP M system is extremely disadvantageous. According to the guide, the two lower limbs constitute a single functional unit and therefore the functional impairment rating is calculated for both legs together. The effect of this rule is that the MRCA does not allow separate payments for separate lower limb injuries, with the result that ex-service personnel with multiple lower limb injuries receive far less lump sum compensation than Commonwealth public servants under Comcare.

The High Court decision in *Fellowes*[42] is beneficial to veterans as it allowed compensation payments for multiple separate lower limb injuries, which reflects the common law standard that permits multiple payments for multiple injuries. The ruling in *Fellowes* continues to benefit Commonwealth employees under the SRCA. Despite the fact that this case and others like it were won by injured veterans, their beneficial effects are enjoyed only by those covered by the SRCA, meaning that veterans under the MRCA are disadvantaged compared to Commonwealth public servants. I believe the DRCA has been designed to ultimately achieve this result.

The requirements of the Statements of Principles and GARP M under the MRCA necessitate excessive proof from veterans and have complicated and lengthened the claims process. To ignore the many submissions by veterans who have been negatively impacted by the restrictiveness of these guidelines is to ignore the values stated in DVA's own Service Charter.

Application of the DRCA and Moving Coverage to the MRCA

I am highly suspicious of the provisions repealing and substituting s 4AA within Item 23 of the Bill. In both the SRCA and the DRCA, s 4AA defines the persons to which the Act applies. Upon a reading of the provision, it appears that the DRCA may only apply if the claimant has not served at all on or after 1 July 2004.

To be clear, the SRCA s 4AA in its existing form currently states that it applies to veterans who suffered their injury during service prior to the MRCA's commencement on 1 July 2004, even if their period of service continued after the MRCA came into effect on that date.

In contrast, the proposed s 4AA of the DRCA removes any reference to the DRCA's application on the basis of the date of the injury. It states only that the DRCA will apply if the injury arises out of the veteran's employment where that employment occurred before 1 July 2004. Furthermore, the proposed DRCA s 4AA clearly states that the DRCA will not apply where the veteran's employment occurred both before and after 1 July 2004.

I can only interpret this to mean that the DRCA will not apply where an injured veteran's employment either spanned 1 July 2004 or occurred during separate periods before and after 1 July

[42] *Fellowes v Military Rehabilitation and Compensation Commission* [2009] HCA 39.

2004. If the DRCA does not apply to veterans who served at any time following 1 July 2004, this can only mean that the MRCA will cover those veterans instead.

Hypothetically, if the Bill is not passed, a veteran whose service spanned 2001-2006 (before and after the MRCA) and who recorded multiple knee injuries in 2002 would be covered under the SRCA if they were to initiate their claim for compensation. This means that they would find it easier to prove liability and will receive compensation for each knee injury, due to the jurisprudence of *Fellowes*.

However, if this Bill succeeds and the DRCA is introduced, it would be irrelevant that this hypothetical veteran's injuries occurred in 2002. Because his employment continued on and after 1 July 2004, he could not be covered by the DRCA. Instead the same veteran would be covered under the MRCA, meaning that he would have to meet the strict factors of the SoPs and ultimately would receive a lower lump sum of compensation for his multiple lower limb injuries.

In light of this analysis, I am extremely doubtful of the Minister's claims that the DRCA will not affect any existing entitlements of veterans.

This problem only worsens when the technicalities of the MRCA's SoPs are considered.

In November 2016 when this Bill was first introduced, we foreshadowed a potential issue whereby a hypothetical claimant who served from 1990 – 2006 might be diagnosed with lumbar spondylosis in 2005 via an MRI. MRCC policy is to determine the date of clinical onset as the date of diagnosis.

The hypothetical claimant's lumbar spondylosis was caused by the large amount of lifting and carrying he was required to do during his peacetime service. Since the DRCA cannot apply as the veteran served after 1 July 2004, the veteran would be covered by the MRCA.

As such, the veteran would have to prove liability according to the factors required by the relevant SoP governing lumbar spondylosis. According to the SoP, the relevant factors that must exist in order to prove liability for lumbar spondylosis include:

(i) lifting loads of at least 35 kilograms while bearing weight through the lumbar spine to a cumulative total of at least 168 000 kilograms within any ten year period before the clinical onset of lumbar spondylosis, and where the clinical onset of lumbar spondylosis occurs within the 25 years following that period; or

(j) carrying loads of at least 35 kilograms while bearing weight through the lumbar spine to a cumulative total of at least 3 800 hours within any ten year period before the clinical onset of lumbar spondylosis, and where the clinical onset of lumbar spondylosis occurs within the 25 years following that period.[43]

On occasions, the MRCC delegates have refused to include lifting and carrying activities in their assessment if those activities occurred prior to the commencement of the MRCA. As a result, only a single year of lifting and carrying activities would be assessed in the calculations of the totals. As a

[43] Repatriation Medical Authority, *Statement of Principles concerning lumbar spondylosis No. 63 of 2014*, 20 June 2014.

result, the hypothetical veteran would not be able to meet the factors in the SoP and Commonwealth liability for the claim would be denied.

We proposed this hypothetical as a demonstration of the artificial restrictions of the MRCA and the poor treatment of veterans attempting to access compensation to which they are rightfully entitled.

In early 2017 one of our clients experienced this appalling example firsthand when their lumbar spondylosis claim was rejected on this very basis. As none of our client's lifting and carrying activities prior to the MRCA commencement date on 1 July 2004 were assessed by the delegate, he was deemed to have failed in satisfying the relevant SoP factors.

This seemingly wilful lack of logical decision-making is a disgrace to the sacrifices that veterans have made in their service to this country. Considering the above, I anticipate that this trend will only continue if the DRCA is implemented.

The Minister for Veterans' Affairs will have sole and complete responsibility for all compensation acts covering ex-service personnel. In light of this responsibility, I seek a guarantee from the Minister that a veteran who has served under both the SRCA and MRCA regimes will not at any stage be assessed solely under the MRCA regime if the DRCA is successfully introduced.

The Threat to Existing SRCA Case Law

A number of helpful cases have been fought and won in favour of veterans' rights and entitlements under the SRCA. Several of these precedents have rectified unfair and unfavourable DVA decisions regarding veterans' entitlements. As a result, the ability to refer to these important decisions by the courts has given greater certainty to veterans and has improved their access to justice.

The High Court decisions of *Canute*[44] and *Fellowes*[45] prevented the DVA from considering multiple injuries together as part of the 'whole person' approach and thereby avoiding payment of compensation for each separate impairment. This has meant that our veterans are not prejudiced compared to workers under the common law and state based compensation schemes.

Fellowes particularly was a landmark decision in securing fairer and more common-sense outcomes for veterans with lower limb injuries. In *Fellowes*, the MRCC initially determined that it was not liable to pay a Defence member compensation for permanent impairment to her right knee because it had already paid compensation for a previous and separate injury resulting in impairment to her left knee. The High Court rejected this logic and ruled that separate injuries must be assessed separately, meaning that compensation is currently payable for each separate lower limb injury under the existing SRCA. The significant Full Federal Court cases of *Irwin*[46] and *Robson*[47] and the Administrative Appeals Tribunal decision in *Dean*[48] have followed the rulings in *Fellowes* and *Canute*, resulting in fairer outcomes for veterans.

[44] *Canute v Comcare* (2006) HCA 47.
[45] *Fellowes v Military Rehabilitation and Compensation Commission* [2009] HCA 39.
[46] *Irwin v Military Rehabilitation and Compensation Commission* [2009] FCAFC 33.
[47] *Robson v Military Rehabilitation and Compensation Commission* [2013] FCAFC 101.
[48] *Re Dean and Military Rehabilitation and Compensation Commission* [2010] AATA 388.

This reasonable and beneficial approach is not taken under the MRCA. Instead, the GARP M guidelines use a points-based system that expressly avoids the need to pay full compensation for each separate injury resulting in permanent impairment. This is yet another of the potential dangers of the anticipated future 'alignment' to the MRCA that will have a detrimental impact on veterans currently covered by the SRCA.

The Jurisdictional Policy Advices[49] resulting from these cases have provided invaluable assistance in preventing further unnecessary delays and expensive litigation for veterans accessing their entitlements.

I am somewhat sceptical of the intentions of DVA where this Bill creates the opportunity to circumvent the High Court's rulings in *Fellowes* and *Canute* in addition to other important decisions including *Irwin*, *Re Dean* and *Robson*. DVA has previously attempted to circumvent the rulings of the courts through policy, which has failed given the authoritative nature of these decisions.

The threat posed by the DRCA is that these authoritative rulings may no longer apply, especially if the existing SRCA guidelines and policy advices are repealed, amended or revoked as is made possible by the proposed Henry VIII clause in Item 45 of the Bill. This would result in a situation whereby Commonwealth public servants continue to enjoy the effects of these beneficial rulings while veterans do not. We should be safeguarding veterans' entitlements, not attacking them as this piece of legislation will do.

If the operation of the DRCA differs significantly from the current operation of the SRCA, this may lead to further unnecessary litigation regarding the changes to the status quo. The existing and extensive precedents under the SRCA will be difficult to replicate under the DRCA, even if regulations are not explicitly enacted to negate the application of the case law entirely. Veterans generally do not have the resources and funds to challenge decisions. The DVA, however, devotes a significant proportion of its funding to internal and external legal costs and is therefore better equipped to deal with litigation than the average veteran. This creates further inequity for veterans in navigating the DRCA.

There is no doubt that veterans are far more likely to be injured and suffer resulting permanent impairments in the course of their service to this country than Commonwealth public servants. Most Australians would agree that veterans should have injury compensation coverage that is equal or superior to that enjoyed by Commonwealth public servants. The prospect that the new defence-specific DRCA created by the Bill will be aligned with the MRCA is counter-intuitive to the principle that veterans deserve the best standard of access to rehabilitation and compensation the Commonwealth can offer.

The Bill opens a pathway to a statutory scheme whereby a veteran will face a longer and more onerous process of proving liability and will ultimately receive less compensation than a Commonwealth public servant with the exact same injuries.

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[49] Comcare, *Canute decision—implications for consequential injuries*, Jurisdictional Policy Advice 2007/05, 8 May 2007; Comcare, *High Court decisions in Fellowes v MRCC—implications for determining permanent impairment*, Jurisdictional Policy Advice 2010/02, 12 March 2010.

Allowing DVA to have unfettered power to use the MRCA will no doubt have serious consequences for the Defence community. DVA is already considered to be a department in turmoil. Every day I see decisions that are quite frankly atrocious and embarrassing. Some delegates do not understand the law and yet have the power to make decisions with far-reaching consequences. It has become a lottery for claimants as to whether their claims will be dealt with correctly.

Recent Case Study: Breaches of Lawfully Mandated Policy

As an example, a client's claim was recently handled by a highly incompetent or inexperienced delegate which has now necessitated a reconsideration request being prepared under the SRCA meaning further delays in the claim. This client attended both an orthopaedic and psychiatric appointment for DVA. We were then advised that the delegate had forgotten to ask each doctor to assess other conditions under review, so the client had to attend a further orthopaedic and psychiatric appointment. This caused my client severe distress. This failure by the DVA delegate cost our client in terms of an unnecessary delay and the taxpayer unnecessary costs for the extra appointments.

When the decision was then issued, one of our client's permanent impairment claims was rejected in clear breach of the authoritative High Court decision of *Fellowes*.

In making this decision the delegate did not seem to know or understand the law, despite the fact that the DVA has issued a clear policy regarding the *Fellowes* ruling. The delegate has either been negligent, deliberately ignored this policy, or has knowledge of some potential new policy coming into operation with the introduction of the DRCA. I query if DVA intends to use the DRCA and a policy of which I am not aware to circumvent the *Fellowes* decision. The alternative thought is that the relevant delegate has been insufficiently trained for the most basic assessment where DVA's own doctor has found in my client's favour.

As should be apparent to the committee from hundreds of the submissions to the ongoing inquiry into suicide amongst veterans and ex-service personnel, the veteran community cannot afford to deal with the constant difficulties caused by this kind of incompetence. The DVA's ongoing delays, failures and the frequency of decisions that are wrong in law all compound to have a profound negative effect on veterans' mental health. It is not an exaggeration to say that these failings are dangerous to the lives and livelihoods of Australian veterans and their families. Promises of transformation occurring are out of touch with reality.

The MRCA and Veterans' Common Law Rights

In recent days I have seen a further detrimental operation of the MRCA when compared to the SRCA which is impacting on a claimant's common law rights.

I would bring to the committee's attention that under the existing SRCA legislation, the claimant does not need to respond to an offer of compensation and will not suffer adverse consequences if no election to accept or decline the offer is made.

However, under the MRCA, DVA have taken the view that, in the absence of a response from the claimant within 21 days, weekly statutory payments will commence, irrevocably removing a claimant's common law rights to commence court proceedings.

In this regard, please refer to the attached letter from the DVA to a veteran (see Appendix 3). The DVA's own boilerplate letter states:

> It is important to note that if you do not advise us by [date at 21 days from date of letter] that you wish to commence common law action by returning this form, the permanent impairment periodic payments noted above will be automatically paid to you and this will remove your right to take any common law action for those conditions.

This approach or new policy will have serious repercussions for claimants and could result in a loss of common law rights through simple miscommunication (i.e. mail being sent to an incorrect address, a claimant being unwell, hospitalised, overseas, not having a fixed address or lacking capacity).

Veterans, who may otherwise have a strong and substantial claim in common law negligence, can effectively be denied the ability to pursue the level of compensation they are rightfully owed due to a bureaucratic error. This is an abhorrent act on the part of DVA.

DVA are unilaterally removing a claimant's common law rights in contravention of the basic principle that a person should have access to justice. It is inequitable compared to the rights of Commonwealth public servants and the general population. I query the motivations of the author of this latest policy development which means the Department can strip away a person's rights by imposing a 21 day time period. This is another disgraceful example of DVA's actions which will no doubt be amplified by the DRCA after the ultimate alignment to the MRCA.

In light of these numerous ongoing issues, the Minister's statement in his Second Reading Speech regarding the anticipated "areas of potential alignment with the *Military Rehabilitation and Compensation Act 2004* once the standalone Act commences" is highly concerning to the Defence community. Further alignment with the MRCA will result in more onerous procedures for veterans with less compensation payable at the end of their battle with the DVA. In comparison to the SRCA as it currently exists, the MRCA overwhelmingly functions to restrict veteran's entitlements and their ability to access those entitlements.

The issue with the Single Pathway of Appeals

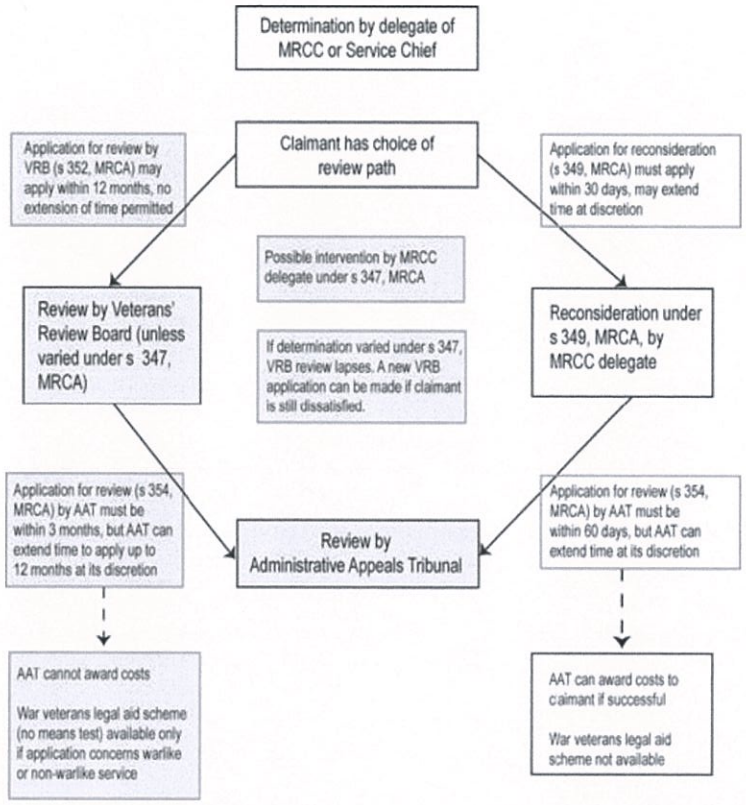
The enactment of the DRCA further raises concerns for the ability of veterans or defence force personnel to appeal determinations made by the DVA where they are unsatisfied as to the outcome. These concerns arise as the system of review through the MRCA have recently been altered through the *Budget Savings (Omnibus) Act 2016* ('*Omnibus Act*'), and the present Bill is anticipated to modify the SRCA's review system to match that of the MRCA.[50]

[50] *Budget Savings (Omnibus) Act 2016* Schedule 24.

Background

By way of explanation, the amendments made by the recent *Omnibus Act*, which were highly contested in the defence community in the months prior to the change, effectively eliminated a vital pathway for compensation claimants to seek appeals of their respective determinations.[51]

Figure 5: Structure of former MRCA review system.[52]



In order to grasp the detrimental effect of these changes on military compensation claimants, it is necessary to first understand the dual methods of appeal that were available to DVA applicants prior to the amendments. Figure 5 above illustrates this former system.

As shown in Figure 5, the two pathways of appeal available to DVA applicants were either an application of review to the Veterans Review Board ('VRB') or an application for internal reconsideration by a MRCC delegate. If a claimant remained unsatisfied after the review or reconsideration, they could then approach the Administrative Appeals Tribunal ('AAT') for a final review of their case. However, there are notable differences between the two methods, which led to the internal reconsideration method being given preference by applicants and professionals alike.[53]

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[51] Slater and Gordon Lawyers, Submission No 8 to Foreign Affairs, Defence and Trade Legislation Committee, *Inquiry into Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015—Schedule 2,* 11 September 2015.

[52] Department of Veterans' Affairs, *MRCA Report Reconsideration and Review*, Vol 2, Ch 17.

[53] Greg Isolani, *Reviewing Adverse MRCA Decisions*, 15 June 2012.

Differences between the Two Appeal Methods

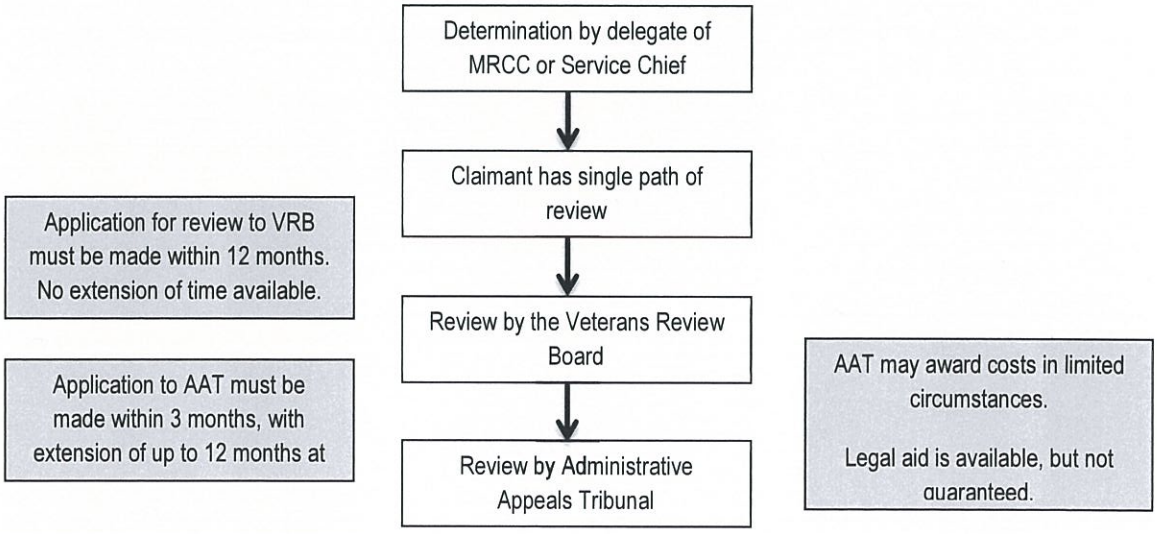
Perhaps the most crucial difference between the two methods is the applicant's entitlement to legal representation and the subsequent legal costs. As mentioned in Slater and Gordon's previous submissions, where a claimant applies for a review process under the VRB, they are not only disallowed legal representation at the VRB review hearing but further denied legal costs and disbursements should they choose to appeal the decision by the VRB to the AAT with legal representation.[54] In comparison, the DVA is allowed to procure as many in-house or external lawyers as they deem necessary, and indeed they do, as demonstrated by the $10.62 million spent on legal services in the past year. This creates an imbalance in resources which is counterintuitive to the very mission of the DVA – "to support those who serve or have served in the defence of our nation and commemorate their service and sacrifice."[55]

Further, the VRB hearing is tape-recorded and thus may lead to evidence gathered against an applicant and later used in a subsequent appeal to the AAT. The MRCC reconsideration method on the other hand has proven itself to being a faster appeal method without the requirement for an applicant's case to be restated due to its internal nature. This results in the latter method being unquestionably be more cost efficient, less time consuming and less stressful for an applicant.

Changes to the MRCA Review Pathway

As mentioned above, the amendments of the *Omnibus Act* resulted in the abolishing of the internal reconsideration pathway, leading to the current review system illustrated in Figure 6 below. At first glance, this new 'single pathway' seems to be simpler, easier to understand, and perhaps more efficiently structured. However, the reality of this system in practice is, as referred to above, the elimination of a fairer, quicker and more efficient system in favour of a review system that is both prejudicial and biased against veterans.

Figure 6: Current 'single pathway' MRCA review system



[54] Slater and Gordon Lawyers, Submission No 8 to Foreign Affairs, Defence and Trade Committee Department of the Senate, *Inquiry into Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015*, 11 September 2015.
[55] Department of Veterans' Affairs (DVA) Service Charter 2014.

Granted, the new single pathway through the VRB and AAT now allows for costs to be paid, as opposed to the prior situation where costs were not available at all. However, the AAT is precluded from making such costs where:[56]

a) The claimant has provided to the Tribunal a document relevant to the review, and the VRB did not have the document prior to the review and the claimant could have provided the document to the VRB without unreasonable expense or inconvenience and the VRB would have made a determination more favourable to the claimant than the reviewable determination;
b) The claimant was previously granted legal aid;
c) The claimant failed, without reasonable excuse, to appear at the hearing of the review by the Board;
d) The Tribunal remits a decision for the Commission to make a new decision.

These exclusions in effect result in a total restriction on the AAT to award costs save for the most limited of circumstances. This disparity and bias in favour of the DVA is especially prominent when considering the effect of restriction (a), which discourages the claimant from obtaining or submitting any updated or recent documents such as updated medical reports. In contrast, no such restriction applies on the DVA in presenting its case to the AAT. This restriction, while seemingly innocuous, is disastrous for any claimant appealing their case. In practical terms, this limitation allows the DVA to bring in any number of updated medical reports and documentation with near unlimited resources to prove their case, while the claimant would be punished or completely disallowed from countering those documents depending on their financial situation. As many veteran claimants are by their nature unable to work, their financial situation alongside this restriction effectively disables them from defending themselves appropriately. In comparison, Commonwealth public servants under the SRCA have no such restrictions. This represents an abrogation of the Commonwealth's obligations as a model litigant – to not take advantage of a claimant who lacks the resources to litigate a legitimate claim.[57] This doctrine of unfairness and inequality, while already abhorrent and in place for the MRCA, cannot be allowed to prevail through the DRCA.

One redeeming factor in favour of the single pathway being proposed by DVA is the suggestion that Legal Aid that would purportedly be available through the new pathway. However, the reality of Legal Aid, as others have pointed out, is very different from the all-encompassing coverage that the DVA usually ascribes to it.[58] The first caveat of Legal Aid is that it is only available where a veteran has been injured under operational service – essentially overseas service. The second is that the DVA cannot guarantee Legal Aid for anyone. Legal Aid is a wholly separate system that encompasses more than just the compensation of veterans, and is basically a creature of each respective State and Territory. In effect, this means that a veteran's right or even ability to receive Legal Aid is not enshrined, as illustrated by the brief withdrawal of NSW Legal Aid from the funding of veterans even with operational service in 2014. Further, it is well known that Legal Aid is extremely difficult to

[56] *Budget Savings (Omnibus) Act 2016* Schedule 24 s 11; *Military Rehabilitation and Compensation Act 2004* s 357 (6A-6C).
[57] Legal Services Directions 2005 Appendix B s 2(f).
[58] Greg Isolani, *Letter to the Editor "Labor Snubs Veteran Community and Supports Lawyers over Veterans"*, 8 September 2015.

obtain and most States have reduced the amounts available, causing Legal Aid to be an unreliable source of funds and thus relief for claimants.

Admittedly, the amendments to the MRCA do not totally remove the MRCC reconsideration process. The process may still be enlivened through a request by the Chief of the Defence Force to the MRCC, which is not available to a veteran claimant.[59] However, it is argued that this internal review does not provide for a proper reconsideration and is fundamentally dissimilar to the path previously available to claimants, being obscured by the layers of governance and creating a system with less apparent accountability and oversight.

As a final practical matter on this change, the move to the single pathway appeal is understandably anticipated to substantially increase the workload of the VRB. I question the VRB's capacity to handle this greater workload. There is insufficient data to adequately answer this concern at the present time, the reforms having only taken place recently. However, it is noted that the average application times from lodgement to finalisation at the VRB in the past three financial years have been 363.1, 362.4 and 376.6 days respectively (See Figures 7 and 8 below) – an entire year for a claimant to appeal their case.[60] Figure 7 below also shows no apparent improvement in the efficiency of the VRB in recent years, and I would argue that these numbers do not bode well for the high influx of cases that are currently directed to the VRB through the MRCA amendments. To further shift the veterans under the SRCA to this same single pathway system would only cause undue delays and distress.

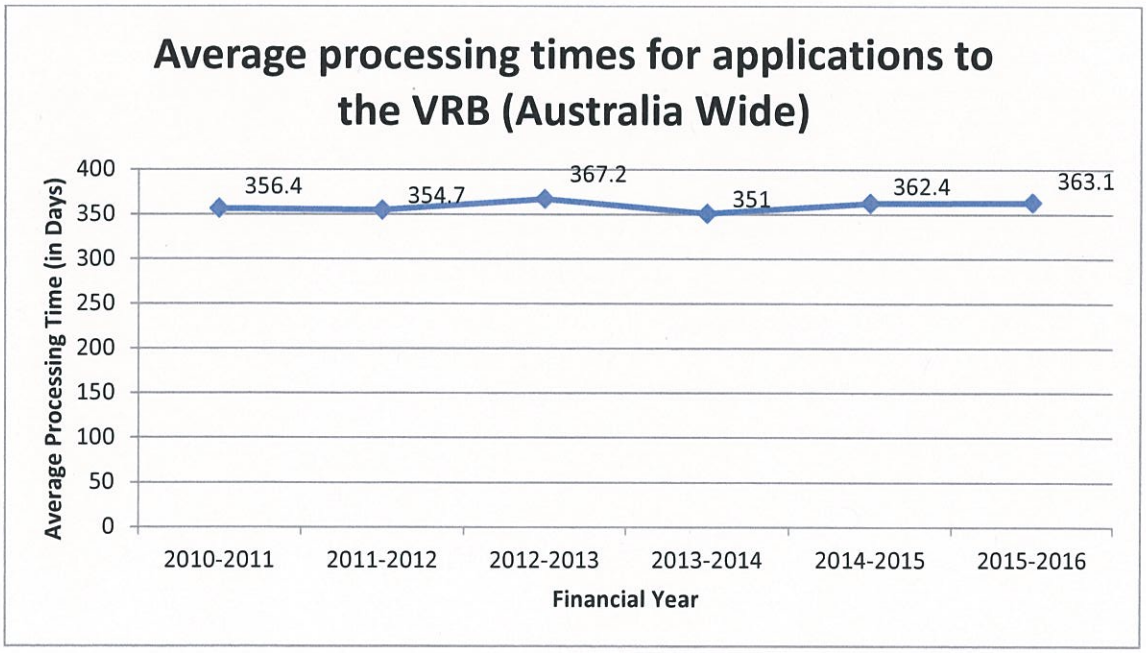


Figure 7: Graph of average processing times for the VRB in Days (Australia-wide). See Figure 8 below.

[59] *Military Rehabilitation and Compensation Act 2004* s 349.
[60] Veterans' Review Board Annual Reports 2015-2016, 2014-2015 and 2013-2014.

Financial Year	Average Processing Times in Days (Australia-Wide)
2010-2011	356.4
2011-2012	354.7
2012-2013	367.2
2013-2014	351
2014-2015	362.4
2015-2016	363.1

Figure 8: Table of Average Processing Times for the VRB in Days (Australia-wide). Data extracted from Veterans' Review Board Annual Reports 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, and 2015-2016.

I foreshadow that if these reforms were to happen, there will be problems in practice and confusion within the AAT as to how appeals will proceed or be directed back to the MRCC. I question the need for such reforms when the existing method of reconsideration has been in place for many years, and has proven itself to be more advantageous in terms of costs and efficiency. It is my opinion that to move the SRCA to this single pathway system is not only an unwise decision in terms of practicability, but also runs utterly contrary to the aforementioned mission of the DVA.

Effect on ComSuper

The present Bill would require ComSuper to seek the view of the MRCC regarding retirement and incapacity payments.[61] This does not seem to be a mere formality or procedural change. In my experience, ComSuper is often far more favourable and efficient in determining eligibility to these claims than MRCC, as they are not bound with as many restrictions and thresholds, and further its decisions may give a result adverse to the MRCC and the DVA.

This change would put ComSuper under the gaze of MRCC, thus limiting the decisions ComSuper may make and further eroding the facets of accountability and safeguards within the current scheme. I invite Parliament to elaborate on the purpose of these changes in an alleged duplication bill and remain wary of the possible ramifications of these slight yet weighty amendments.

Why is ComSuper seen mentioned in a bill that duplicates the SRCA? I suspect there are ulterior motives involved to impact on ComSuper's ability to make decisions involving payment of retirement benefits.

The DRCA's Effect on Pensions

In this Bill's second reading speech the Minister for Veterans' Affairs mentioned that there are no changes to benefits or entitlements other than the dubious 'duplication' of existing entitlements under the SRCA.[62] In actual fact this is changing the precedents, as these are not the same entitlements that the Minister claims.

It remains unclear what is happening with the "dual eligibility" if a member falls under an earlier pension and the DRCA. Subsection 5(6) restricts the operation of the DRCA to an ADF member if a

[61] Explanatory Memorandum, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill* 2016 (Cth) 36; *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* ss 47-53.
[62] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 November 2016, 3279 (Dan Tehan).

disability pension is payable under the VEA.[63] It appears that the object of the Bill is to remove this eligibility,[64] stranding people who have claimed under the dual system in a pension purgatory. I question whether the pension will exclude entitlements to lump-sum compensation and other entitlements. It appears that under s30C they will not be entitled to dual compensation by receiving compensation from Part II of the VEA and a lump sum from another source or under section 30 or section 137 of the DRCA.[65] Taking into account the amount of compensation determined under subsections 30C(8), (9) or (10), the pension amount payable under Part II of the VEA is reduced accordingly.[66]

The Explanatory Memorandum is also unclear as to whether sections 14, 15, 16 and 17 of the DRCA will affect offsetting for dual compensation.[67] It does appear (cryptically) that the practice may be discontinued. This leaves the future of many "dual eligibility" recipients in doubt.

All of this suggests the opposite of a 'duplication' of the SRCA. The Government is rewriting the law with a new set of provisions with restrictions. I invite the Minister to address the purpose of these changes and what they might cover.

Conclusion

In conclusion, it is my submission that the DRCA Bill in its current form should not be passed by the Senate. As the arguments in the above submission demonstrate, the DRCA reforms are neither wanted nor needed in the Defence community. In truth, they represent a further abrogation of the scarce rights and privileges currently provided to Australian veterans and ex-service personnel. The DRCA should not be presented under the guise of a mere crossover provision when it contains changes to the existing regime that will leave veterans vulnerable to the deprivation of more entitlements through the overreaching power of the Minister of Veterans' Affairs and the DVA.

With the greatest respect to Parliament, I suggest that a better path towards recognising the service of our veterans and ex-service personnel is to amend the MRCA legislation to have it better reflect the advantages and simplicity of the SRCA.

Further, it is my opinion that Parliament should exercise special caution and care where purporting to enact legislation which affects military compensation and the operation of the schemes through a longer and more extensive consultation period with a more diverse range of parties involved.

I apologise to the committee if the technical nature of parts of this submission is not within the scope of the committee's request. However, it is vital that it is understood by the committee and the Defence community at large that this Bill is not a simple duplication of the SRCA.

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[63] Explanatory Memorandum, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* (Cth) 11.
[64] Explanatory Memorandum, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* (Cth) 12.
[65] Explanatory Memorandum, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* (Cth) 36.
[66] Explanatory Memorandum, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* (Cth) 37.
[67] Explanatory Memorandum, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* (Cth) 33-34.

Taking into consideration the arguments, examples and evidence that have been included in this submission, I cannot in good conscience agree with the Minister's assurances that the DRCA will be beneficial for veterans and ex-service members. I see the DRCA as an attack on veterans' entitlements. The DVA will be empowered by this legislation to be the perpetrator, the defence counsel, the judge and the jury when assessing claims.

It is my strong recommendation that the Senate vote against the Bill.

Acknowledgements

I would like to acknowledge the valuable assistance that I have received from Ms Jennifer Gibbons, Senior Administration Officer, as well as Otis Platt, Julia Scott and Dylan Tang from the University of Queensland Pro Bono Centre.

I thank you for this opportunity to comment.

Brian Briggs
Practice Group Leader
Military Compensation
SLATER AND GORDON

8/12/16

Appendix 1

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Correspondence to:

Brian Briggs
GPO Box 2478
BRISBANE QLD 4001

DX 213 BRISBANE QLD

Dear Sir/Madam

I am writing to raise with you an ongoing issue that we continually face in our dealings with your Department and a more recent problem that has arisen due to a "new system" being trialled by DVA.

Permanent impairment matters – DVA directly contacting clients

I note that we have attempted to resolve this issue on numerous occasions through various manners of communication.

Unfortunately, despite our repeated efforts, staff within your office continue to directly contact our clients, instead of us, as their nominated representatives. This causes many of our clients great distress.

Most recently, in an email dated 14 October 2016 these issues and examples of the difficulties were again outlined to Alison (Acting Team Leader) of the Brisbane Permanent Impairment team.

Disappointingly, our attempts to stop the practice have been in vain. No satisfactory resolution has been reached nor any satisfactory explanation provided. I query if DVA has introduced a new policy to deliberately do this or whether we are simply dealing with an age old problem continually resurfacing.

I further note that your Department's insistence on contacting our clients results in permanent impairment determinations or medical appointment details frequently being forwarded to clients without reference to us. In some cases, we are fortunate to receive copies of these letters, in others, we are not. In either case, it is entirely inappropriate for your Department to make any direct contact with our clients. We firmly reiterate our request that any and all correspondence be sent to our office when dealing with the liability and permanent impairment claims under SRCA and MRCA.

The ongoing nature of this problem has caused and continues to cause confusion, frustration, anger and worry for many of our clients – many of whom are very vulnerable. It also leads to unnecessary duplication of documentation and significant time spent on administrative follow ups. It further renders us unable to properly monitor the progress of our clients' claims leading to delays in the finalisation of same.

On numerous occasions we have been advised by your Department that you did not have us listed as the client's representative, despite the fact that we had been acting and in contact with the Department since the first stage of the claim, being its initial filing. In most cases we have also submitted the Needs Assessment document, which initiates the permanent impairment assessment. For reasons unknown, your systems appear to be unable to recognise our involvement in the claim process.

The correspondence of 14 October 2016 identified several examples of these problems. Unfortunately, since that time we have noted a further **NINE** instances of direct contact being made with our clients in relation to permanent impairment medical appointments. Further, one of our clients received a permanent impairment determination direct from your Department. With respect, this is unprofessional conduct on the part of the Department and its delegates.

Initial liability matters – Recent change in "systems"

Of concern is that it has now come to my attention that a similar situation may be developing in relation to initial liability matters.

On 30 November 2016, we submitted an initial liability claim for a client, by post and facsimile to your Melbourne office.

This claim was accompanied by our submissions on letterhead, and we were identified in the claim form as the acting representative.

Evidently, this was not clear enough to alert your staff to the fact that we were the nominated representatives, as on 1 December 2016 our client received the initial acknowledgement letter direct from your Department. Naturally, our client contacted us duly concerned why letters were being sent to him.

A member of my team contacted your Department to query why the letter was sent to our client, rather than coming via our office after we submitted the claim.

We were informed that a "new system" is currently being trialled, whereby the initial liability letters are automatically generated and populated. We were advised that the letter automatically generates the contact details, and the Delegates/DVA staff are not permitted to amend them. It appears that contact details or addresses cannot be altered, which in my opinion is bizarre. What if a client has changed address after he submitted a claim without notifying DVA? This new practice does not permit a delegate to enter correct information on your records.

We were further advised that if the client had previously claimed, and their details were in the DVA system, the initial liability letter would populate with their details and the letter would go straight to the client. DVA staff will be unable to override this so that we, the representatives, would receive the letter or would at least be copied into the correspondence.

The DVA staff member stated during the conversation that the Department has a lot of "new staff", and that on occasion delegates are unaware that they should correspond with us, instead of the claimant. This suggests, with the greatest respect, that very little training of new staff is occurring.

This response was concerning on a number of levels. First, it highlighted that despite us raising the issue of communicating directly with clients on multiple occasions, the practice is well and truly embedded. Secondly, the "new system" provides no mechanism by which staff can correct automated errors. This is perplexing and surely cannot be considered acceptable. Given that this is a trial, we would like to lodge our strongest objection to its operation in this current form. I would recommend that your IT team review its operation as a priority.

Finally, and perhaps most worrying, is the suggestion that staff are not adequately trained so as to appropriately process and handle claims, the very basis of their work. This would, however, explain the persistence of this problem despite our numerous complaints.

Regardless of whether this issue is as a result of administrative or technical error, substandard training or yet something else, the one thing that is clear is that these issues reflect poorly on your Department. The persistence of such problems is damaging your Department's reputation and creating significant doubts as to its capacity for efficient service delivery. This is not only in our eyes, but in those of many of our clients – the very people the DVA is supposed to be assisting.

We note that issues such as this do not appear to be isolated, given the numerous submissions and reports lamenting DVA's institutional capacity and practices, and the resulting lack of claimant satisfaction evident from the submissions to the current Senate Inquiry.

Failing a satisfactory response and steps towards a resolution to these issues in a timely manner, I will not hesitate to pursue the matter further with the Minister. I also reserve our clients' rights in all respects including highlighting the problem to the Senate Committee, to the wider Australian public, and to the Defence community.

We trust that you will take steps to rectify the problems on a priority basis.

I await your reply.

Brian Briggs
National Military Compensation Expert
SLATER AND GORDON

Appendix 2

Australian Government
Department of Veterans' Affairs

Mr Brian Briggs
National Military Compensation Expert
Slater and Gordon
GPO Box 2478
BRISBANE QLD 4001

Dear Mr Briggs

Thank you for your letter of 8 December 2016 about the way in which the Department of Veterans' Affairs (DVA) handles cases in which Slater and Gordon has been nominated to act on a client's behalf.

In those cases in which a legal firm is appointed to act on behalf of a client it is DVA's long-standing policy, particularly in relation to claims under the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) or the *Military Rehabilitation and Compensation Act 2004* (MRCA) that all correspondence will generally be sent to the firm. An exception is made for correspondence concerning medical appointments which is, so as to avoid delays, sent directly to the client. In such instances the firm should nevertheless be provided with a copy of the letter.

There have been no changes to DVA's policy in this regard. I am sorry that there have nevertheless been instances of non-compliance on DVA's part.

The arrangements for representation in a SRCA or MRCA initial liability case do not automatically apply to subsequent claims for rehabilitation or benefits under those acts. In such cases, it is incumbent upon either the client or the representative to advise DVA of any continuing arrangements for representation. If a representative is appointed the new case will generally be handled in the same way as the initial liability claim.

As a part of DVA's efforts to become a more client-focused organisation, work is underway to improve DVA's rehabilitation and compensation (R&C) systems and processes. The first major processing system change, made in November 2016, encompassed registration, incapacity and non-liability health care. Further changes will be made at six-month intervals over a two-year period.

I assure you that the November 2016 processing system changes provide for letters to nominated representatives. However, prior to the completion of the program in November 2018 there will be some need for manual action by staff. All DVA R&C staff have recently been reminded of the importance of this.

As with any change process there will be challenges along the way, and DVA asks for your patience and cooperation. Should any further matters of concern arise, please contact either Sandro Cardinali on or Stuart Bagnall on Mr Cardinali can assist you in relation to claims under the *Veterans' Entitlements Act 1986* and initial liability claims under the SRCA and MRCA. Mr Bagnall can assist with claims under the SRCA and the MRCA for incapacity payments and permanent impairment compensation.

Thank you for bringing your concerns to DVA's attention. I trust that your future dealings with DVA will be more satisfactory.

Yours sincerely

John Sadeik
Assistant Secretary
Programme Support Branch

1 February 2017

Appendix 3

Your options for payment
Based on the above information you are entitled to a lifetime tax free weekly amount of **$15.11**. You have six months from **10 February 2017** to decide if you would like to convert this weekly amount into a tax free lump sum payment of **$15,400.11.**

The weekly amount is tax free and indexed annually. It is paid to you on a fortnightly basis for life. The lump sum is also tax free.

Alternatively you may decide to pursue legal action, by seeking compensation under common law. Please see 'Your right to take legal action' below for more detail on this option.

Choice to take lump sum
You have six months from the date of this letter to advise DVA if you wish to convert your weekly amount into a lump sum payment. You should note that this is a one-time choice and is irrevocable. Once you have made a decision please complete the enclosed *Choice to take lump sum* form and return it in the reply paid envelope.

If you do not advise us of a decision to convert your weekly amount into a lump sum payment within six months this choice will no longer be available to you and you will only be entitled to receive compensation as tax free weekly amount (paid fortnightly). Please contact me on the number listed on this letter if you are unable to respond within six months.

Please read the enclosed Factsheet MRC07 *Permanent Impairment Compensation Payments* for more detailed information.

Your right to institute action for damages against the Commonwealth
Under section 389 of the MRCA you may at any time before an amount of compensation is paid in respect of an injury, elect in writing to institute an action or preceding against the Commonwealth, a Commonwealth authority or another Commonwealth employee for damages (for non-economic loss) at common law if you believe that your permanent impairment resulted from their negligence.

If you choose to take legal action against the Commonwealth:

- any legal costs incurred in pursuing this option would be your responsibility; and
- the maximum amount you would receive if you were successful is $110,000.00 for each condition, as specified in the MRCA; and
- the choice is irrevocable once you elect to commence common law action; and
- you will no longer be entitled to receive permanent impairment compensation for the condition regardless of the outcome.

The receipt of common law damages will not affect your entitlement to other compensation under the MRCA such as treatment, rehabilitation and incapacity payments.

If you wish to pursue this option please complete and return the attached *Election to take legal action* form in the enclosed reply paid envelope within 21 days, advising whether or not you wish to receive the compensation or institute proceedings at common law. **It is important to note that if you do not advise us by 3 March 2017 that you wish to commence common law action by retuning this form, the permanent impairment periodic payments noted above will be automatically paid to you and this will remove your right to take any common law action for those conditions.**

If you are unsure about any aspect of this option, DVA recommends that you consult a solicitor before proceeding.

Saluting Their Service

GPO BOX 9998
IN YOUR CAPITAL CITY Telephone: 133 254 Country Residents: 1800 555 254 Internet: http://www.dva.gov.au