



The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel

MB20-000084

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Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Thank you for your invitation to the Secretary of the Department of Veterans' Affairs (DVA) to make a submission to the 'Inquiry into the exemption of delegated legislation from parliamentary oversight'. I note that the basis for establishing the Inquiry is the Committee's concern about an increase in delegated legislation which has been exempted from parliamentary oversight.

The Inquiry is to *'inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to.....the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight'*.

The Secretary has sought the views of the relevant sections of DVA and these have been provided as set out below under headings based on the Terms of Reference.

At the outset, it is important to note that there have been no changes to the disallowance regime for instruments made within the DVA portfolio during the COVID-19 pandemic.

Although Schedule 6 (Additional Support for Veterans) to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* provides two additional powers for me, as Minister for Veterans' Affairs, to make legislative instruments, these instruments are disallowable instruments and therefore would be subject to parliamentary scrutiny. Neither of these powers has been used to date. Their purpose was to ensure that parity could be maintained between veterans' law and social security law. As such, they would only be used if changes to the social security law were made that necessitated similar changes to the veterans' law.

Veterans' Affairs delegated legislation currently exempt from parliamentary oversight

DVA has almost 900 legislative instruments in force. Of those, only a very small number are not subject to disallowance. There are currently six legislative instruments not subject to disallowance under the provisions of the *Legislation Act 2003*.

The exemptions apply to the 'warlike' or 'non-warlike' service determinations made under both subsection 5C(1) of the *Veterans' Entitlements Act 1986* (VEA) and subsection 6(1) of the *Military Rehabilitation and Compensation Act 2004* (MRCA).

The determination that military service is 'warlike' or 'non-warlike' will establish the compensation and benefits that a veteran or service member will be eligible for under the VEA or the MRCA.

Although made under Veterans' Affairs portfolio legislation, the 'warlike' and 'non-warlike' service instruments are made by the Minister for Defence. These determinations relate to the nature of the military service provided by veterans. They may involve considerations of aspects of the military service that are subject to the highest level of secrecy and national security considerations. As a consequence, these have historically been exempt from parliamentary scrutiny. Again, I reiterate that there has been no change in the level of parliamentary scrutiny for these legislative instruments.

The other form of delegated legislation that by their nature is exempt from disallowance are notifiable instruments. Notifiable instruments concern matters of detail and are made by a person or body authorised to do so by enabling legislation. Under the *Legislation Act 2003*, all notifiable instruments and their compilations must be registered on the Legislation Register. Notifiable instruments are not subject to disallowance and do not automatically sunset 10 years after commencement.

DVA has two current notifiable instruments which concern factors and conditions relevant to the valuation of certain asset-tested income streams (lifetime) under section 52BAB of the VEA. The two instruments mirror those made under section 1120AB of the *Social Security Act 1991* as notifiable instruments.

Grounds upon which Veterans' Affairs delegated legislation currently exempt from parliamentary oversight

As previously discussed, the only legislative instruments made under Veterans' Affairs portfolio legislation which are exempt from disallowance are the 'warlike' and non-warlike' service determinations made under the VEA and the MRCA.

The provisions under which 'warlike' and 'non-warlike' service determinations were first made were under subsection 5C(1) of the VEA which was inserted in amendments made by the *Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Act 1997*.

The Explanatory Memorandum stated in relation to the amendments "*that reference to the Defence classification system of warlike and non-warlike service be inserted into the VE Act so that a determination by the Minister for Defence will flow on to Repatriation benefits without the need for further amendment of the Act*". It is not clear if the instruments made under subsection 5C(1) at that time were exempt from disallowance.

The 'warlike' and 'non-warlike' service determinations made under subsection 6(1) of the MRCA were exempted from disallowance in amendments to the *Legislative Instruments Regulations 2004* (the predecessor to the *Legislation (Exemptions and Other Matters) Regulation 2015*) made by the *Legislative Instruments Amendment Regulations 2005 (No. 2)*.

The rationale for exempting the determinations made under subsection 6(1) of the MRCA was outlined in the Explanatory Statement which stated that:

Subsection 6(1) enables the Minister for Defence to determine in writing that particular defence service is 'warlike' or 'non-warlike' service.

These determinations have implications for the allowances and benefits of members of the Australian Defence Force on deployments. They are made by the Minister for Defence on the advice from the Chief of the Defence Force, who relies on material that is always sensitive and frequently classified.

The determinations are not currently disallowable. The Senate Scrutiny of Bills Committee, when considering the then Military Rehabilitation and Compensation Bill 2004, accepted that these determinations should not be subject to disallowance.

The new item exempts determinations made under subsection 6(1) from the disallowance provisions. This preserves the current arrangements.

Manner in which Veterans' Affairs delegated legislation is made exempt from parliamentary oversight

The current exemption from disallowance for the 'warlike' and non-warlike' service determinations is provided for by the listing of the instruments in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

As previously stated the two notifiable instruments are exempt from disallowance due to their status.

The appropriateness of exempting delegated legislation in times of emergency from parliamentary oversight

The invitation also noted the concerns of the Committee in regard to the exemption of delegated legislation made in response to the COVID-19 pandemic.

While both the Repatriation Commission and the Military Rehabilitation and Compensation Commission have made legislative instruments that were directly related to the COVID-19 pandemic, none of the instruments were made under provisions that exempted them from disallowance.

Whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended

While acknowledging that the Veterans' Affairs portfolio only has a very small number of instruments which relate to military service which are exempt from disallowance, the view of DVA is that the existing framework should be maintained.

DVA does not have a view on the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation made in a time of emergency.

For any further advice concerning this submission the contact officer in DVA is:

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Yours sincerely


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