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Senate Foreign Affairs, Defence and Trade Legislation Committee
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Canberra ACT 2600
14 September 2015

Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

Thank you for your correspondence of 08 September 2015 drawing the attention of AFOM to and inviting AFOM to make written submissions to the FADT Legislation Committee's inquiry into Schedule 2 of the reference Bill.

Please find attached our written response to your kind invitation to address the significant issues detailed in Schedule 2 concerning "Reconsideration and review of determinations" under the *Military Rehabilitation and Compensation Act 2004*.

In the event it is required, we are available to appear before or speak with the Committee via telephone or email as detailed above. Further written information will be provided if requested by the Committee.

Yours faithfully

F H Benfield OAM
AFOM Ambassador
Level 3 Advocate
VEA, SRCA and MRCA

Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

Background

1. The Australian Families of the Military Research Foundation (AFOM) was set up by current and former ADF Members and their Families. AFOM aims to provide funds for research which are unencumbered by political and/or Departmental imperatives. While not usually engaged within the military rehabilitation and compensation space, AFOM is well aware of the necessity for fair and equitable review and consideration processes under the *Military Rehabilitation and Compensation Act 2004* (the MRCA) and therefore AFOM is grateful for the opportunity to make this submission.
2. This submission's author, Frank Benfield OAM, a Vietnam veteran, is also a veteran of working with all forms of military compensation, including the MRCA, the *Veterans' Entitlements Act 1986* (the VEA) and the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA). Within the ex-service community, Frank has practised in the areas of pensions, welfare and advocacy since 1982. He was a Services Member of the Veterans' Review Board (VRB) from 1999 to 2012. He was an inaugural Member of the Prime Ministerial Council on Ex-Service Matters (PMAC) from 2008 to 2011 and on secondment from PMAC, he participated in every aspect of the Review of Military Compensation Arrangements from 2009 to 2011 (the Review). He has trained and mentored pension officers and advocates across all aspects of military rehabilitation and compensation including reviews and consideration processes both as a member of the VRB and as a TIP trainer. Frank Benfield is recognised within the ex-service community as possessed of considerable subject matter expertise and with respect, the Committee is requested to attach considerable weight to this AFOM submission.
3. While the subject Bill comprises three schedules, it is only schedule 2 that has been referred to the Committee's attention for inquiry. AFOM has no dispute with Schedules 1, Veterans' Vocational Rehabilitation Scheme; or 3, Graves of dependents of members of the Defence Force. Rather this submission addresses only Schedule 2, Reconsideration and review of determinations and as AFOM understands, this concerns the Review chapter 17 recommendations, which are set out in the following table:

Chapter 17 recommendations: Reconsideration and Review		
1	The MRCA determining system be refined to a single appeal path to the Veterans' Review Board (VRB) and then the Administrative Appeals Tribunal (AAT), as a means of a more timely review that is less complex and less costly.	The Government accepts this recommendation in principle but defers its response (along with a response to Recommendation 17.2) pending the outcome of consultation with stakeholders and full consideration of the detail and implications of this complex change. The planned implementation date is 1 July 2014, subject to consultation with stakeholders, further decision by Government in the 2014 Budget, and legislative change.
2	Internal reconsideration by the MRCC be the first step in the review process, and the process for section 31 reviews under the VEA be adopted, to help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs.	The Government accepts this recommendation in principle but defers its response (along with its response to Recommendation 17.1) pending the outcome of consultation with stakeholders, consideration of resource and other implications and a further decision in the 2014 Budget.

3	There be access to a case conference process by the VRB so that, wherever possible, the key questions and relevant evidence are established as early as possible and the hearings can proceed without any unnecessary delay.	The Government accepts this recommendation. Case conferencing is part of the Alternative Dispute Resolution (ADR) process, increasingly used in the broader legal community. The VRB issued a General Practice Direction (GPD) in January 2011 allowing the VRB to refer a case to an ADR process, including conferencing or neutral evaluation.
4	In advance of the adoption of a single path, a formal service level agreement between the MRCC and the VRB be negotiated to define a comprehensive case conference process within current legislation.	The Government accepts this recommendation with the modification that the VRB and the MRCC should establish agreed national administrative and procedural arrangements, including case conferencing and other alternative dispute mechanisms, designed to improve timeliness. To respect the independence of the VRB, this recommendation will be achieved by mechanisms other than a formal service level agreement. The arrangements are to be in place before 1 July 2014.
5	The MRCA be amended to provide the VRB with explicit powers to remit a matter to the MRCC for needs assessment and compensation.	The Government accepts this recommendation. This will overcome the current situation where the VRB has to adjourn a case to ask a delegate of the MRCC to conduct investigations and relay the evidence to the VRB. The implementation date is 1 July 2013, subject to legislation being passed.

Progress

4. Previous amendments to the VEA and the MRCA were passed by the Parliament with bi-partisan support in the *Veterans' Affairs Legislation Amendment (Mental Health and other Measures) Bill 2014*. The changes permit the VRB to use modern, effective alternative dispute resolution processes and improved case management powers including the power to hold directions hearings, administrative and business procedures.

5. The remaining recommendations, 17-1 – 17.4 are inextricably linked and DVA's website reports "... consultation with stakeholders on moving to a single appeal pathway for MRCA claims has been undertaken. Implementation issues that would arise if the proposal were to be implemented are now being examined in detail."

The VRB

6. The VRB is an independent statutory body whose role is to provide merits review. It is not a court, but a specialist high volume tribunal providing timely, cost-effective decisions and veterans the opportunity to discuss their application on a face to face basis with VRB members, many of whom are former ADF members and have an understanding of all types of service under all three Acts regulating the military compensation space. Merits review means the VRB makes a fresh decision it considers is the correct or preferable decision in all the circumstances. In doing so, the VRB exercises the same statutory powers and is subject to the same limitations as the decision-maker whose decision it is reviewing. Neither the Minister nor DVA and its delegates have any statutory power of direction over the VRB.

7. The VRB began operations during January 1985 and since 22 May 1986 has been governed by the VEA. In conferring additional jurisdiction on the VRB, the MRCA applies provisions of the VEA with some modifications. This means the VRB operates under the VEA, as modified, when deciding matters under the MRCA or *the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*.

8. As explained above, the VEA and the MRCA have now been amended by the *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014* which received Royal Assent on 30 June 2014. The amendments allow for a full suite of Alternative Dispute Resolution powers as well as improved case management, administrative and business procedures. A twelve month trial of case-conferencing commenced in NSW and the ACT on 01 January 2015.

9. The VRB is an independent statutory body whose role is to provide merits review. It is not a court, but a specialist high volume tribunal providing timely, cost-effective decisions and veterans the opportunity to discuss their application on a face to face basis with VRB members, many of whom are former ADF members and have an understanding of all types of service under all three Acts regulating the military compensation space. The principal components of the system are the:

- Department of Veterans' Affairs (DVA);
- Repatriation Commission (RC);
- Military Rehabilitation and Compensation Commission (MRCC);
- Veterans' Review Board (VRB): and
- Administrative Appeals Tribunal (AAT).

10. The VRB does not have a general power to review decisions made under the VEA or MRCA. As a statutory tribunal it has only those powers given to it by legislation. The VRB must be able to identify a specific provision that authorises it to make a particular decision or take a particular action. Each decision must relate to a prior decision – the decision under review. The VRB substitutes its own decision for the decision it is reviewing if it thinks the decision should be changed. It makes a new decision in place of the previous decision. In substituting that for the original decision, the VRB may exercise all the powers and discretion that are conferred on the RC, the MRCC or a service chief. The legislative provisions concerning decisions or determinations that the VRB has jurisdiction to review under both the VEA and the MRCA are set out in the VRB's *Annual Report 2013-14* (pages 7-10)¹.

Current arrangements

VEA

11. Under the VEA, a veteran makes a claim which, following investigation, prompts a primary decision by the RC. In the event the veteran is dissatisfied with the primary decision of the RC then the veteran may first seek internal review by the RC. If the veteran remains dissatisfied after internal review, an application for review by the VRB may be made. Throughout this process, the veteran may choose to seek the assistance of a representative from an ex-service organisation (ESO). Lawyers are unable to appear before the VRB however, it is not uncommon for lawyers to prepare submissions.

¹ <http://www.vrb.gov.au/pubs/vrbannrep2013-14.pdf>

12. Veterans may in turn appeal VRB decisions to the AAT. At this level of review, veterans may choose to be represented by either an advocate from an ESO or a legally trained representative from a legal company. AFOM wishes to inform the Committee that there are many highly skilled, experienced pension officers, welfare officers and advocates around Australia who voluntarily provide their services to veterans on a pro bono basis.

13. The author of this submission recently participated in a review of the training regime in place for such representatives, which examined in detail the wide-ranging ESO representation available. This was a joint venture between DVA and the ex-service community's peak body, the ESO Round Table and the review's finding reinforced the value of these representatives. While a diagram of the MRCA process is provided below para 19, a similar figure for the relatively simple VEA process is not considered necessary here.

The MRCA

14. The current MRCA determining system is shown in the figure below, which details the two pathways (either of sections 349 or 352 of the MRCA) that are being considered by this Committee's inquiry. A member's claim provokes an original determination by the MRCC. If the member is dissatisfied with this original determination then the member must make an election as to which path is preferred. That choice is irreversible.

15. Upon receipt of a request for reconsideration, the MRCC can reconsider any original determination under section 347 under its 'own motion'. This becomes an original determination in itself and is, therefore, appealable under either path.

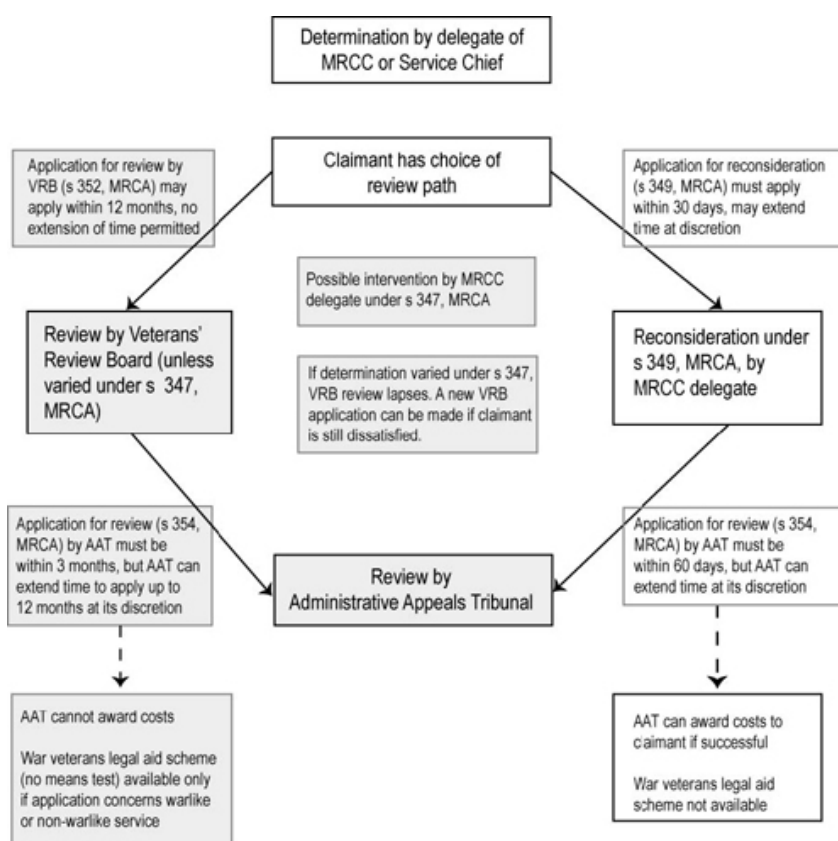
16. Under section 352 of the MRCA, the member may appeal to the VRB. This path leads to the AAT with legal aid, subject to a merits' test, to members with warlike or non-warlike service. Costs cannot be awarded under this path. The MRCC must provide a written report to the VRB within six weeks of an application for review by the VRB being received, as required by section 353 of the MRCA which adopts section 137 of the VEA.

17. Legal representation is not permitted at the VRB, although the member may be accompanied by a nominated advocate from an ESO. While those with legal qualifications are prohibited from appearing at VRB hearings, members may consult lawyers prior to a hearing and paralegals employed by a law firm can appear. Written submissions prepared by a legal practitioner will be accepted by the VRB. However, legal aid funding is not available for legal work on VRB applications.

18. Consistent with the practice under the VEA, the MRCC reconsidered all VRB appeals by another delegate under section 347 before allowing the matter to proceed to the VRB. This practice was soon discontinued in response to ESO requests for a more prompt referral to the VRB.

19. Under section 349 of the MRCA, the member may seek reconsideration by another delegate of the MRCC. This path leads to further review by the AAT with possible awarding of costs where the member is successful (no costs' awards can be made against the member). The section 349 path offers internal reconsideration, as well as review by application to the AAT. Once a request for reconsideration is lodged under section 349 of the MRCA, a member cannot then proceed to the VRB. Under both paths general, means-tested legal aid may be made available in accordance with State-based criteria.

Current complex MRCA determining system



Discussion

20. For the reasons set out below, AFOM strongly opposes the Schedule 2 changes that seek to:

- (i) remove the option for internal reconsideration by the MRCC, of original determinations by the MRCC under the MRCA; and
- (ii) allow for the single pathway of review of that decision by the VRB only.

21. It is considered that the proposed change is overtly contrary to the Review's recommendation, in which this writer participated and understands intimately, that the single pathway appeal should involve (i) internal reconsideration by the MRCC; (ii) then the VRB; and (iii) then the AAT as necessary. After almost two years of careful consideration, the Review decided that this pathway would provide a more efficient, faster and cost effective process.

22. The Review also decided that such internal reconsideration by the MRCC would help ensure high quality original determinations by the MRCC thus reducing the number of VRB hearings and costs and would also align with the VEA review process.

23. Further, AFOM disputes the claim that the proposed changes are consistent with the Review recommendations, because demonstrably they are inconsistent, not least because recommendations 17.1 to 17.4 are inextricably interconnected. For example, while accepting recommendation 17.1 (the single pathway), the Bill's amendments ignore recommendation 17.2 as the first step (internal MRCC reconsideration).

24. This means the proposal in the reference Bill will remove internal reconsideration altogether, leaving the VRB review as the first tier of the single appeal pathway. It is instructive at this stage to note the Review's findings at para 17.68, which are in the following terms:

The Committee believes that arrangements in this area should be simplified and that, given the history of achieving change in administrative law, the changes should be incremental. The Committee believes that, in time, there should be one pathway for reconsideration and review applying to all claimants, regardless of the type of service from which the claim arises. The single path must include active case management at all stages.

25. Unfortunately, no justification is given for failing to adopt all the chapter 17 recommendations in full. And an absence of such justification only invites speculation. For example, is the government concerned about costs of hearings at the AAT? Or is it the hope that a more complex process will deter members from seeking review because "it is all too hard"? In either case, AFOM considers this submission addresses such speculative concerns by arguing for VRB hearings which are cheaper, more efficient, timely and cost-effective and less complex than appearing before the AAT.

26. It is plain within the community of current and former ADF members and their dependants, and not just among those with MRCA service, that there is a lot of anger and dismay with respect to the changes integral to the reference Bill. What was previously seen on both sides of politics as an acceptable suite of chapter 17 recommendations made by the Review is now being reviewed. That is, the Review is being reviewed with totally insufficient justification. These recommendations were first considered and accepted by the government during 2011. Why is it that significant matters affecting current and former ADF members and their dependants are yet again being delayed by political gainsaying?

Conclusion

27. AFOM strongly believes these schedule 2 changes will remove the right to apply for a reconsideration under the MRCA. If this legislative amendment is enabled, then it will discriminate against current and former ADF members with MRCA eligibility who will not have the same rights as those with VEA service. It was never intended that the MRCA would create such disadvantage and inequality.

28. Therefore AFOM strongly believes that the amendment to Schedule 2 of the reference Bill should provide for:

- (i) Internal review by the MRCC;
- (ii) An external review before the VRB;
- (iii) Further review before the AAT;
- (iv) Access to legal aid at the AAT in the same manner as it is accessible under the VEA.

29. For the sake of consistency and equity, AFOM submits that the VRB should be given jurisdiction to hear appeals of primary decisions concerning veterans made under the SRCA and that reviews of VRB decisions under the SRCA be allowed at the AAT.

30. Such three-tiered MRCA and SRCA systems will replicate the current VEA system and is the preferred outcome among those members of the ex-service community with whom AFOM interacts on a regular basis. Equally importantly, this three-tiered system will also ensure equity and efficiency for all concerned.

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