



## The Hon Dan Tehan MP

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Senator the Hon Stephen Parry  
President of the Senate  
Parliament House  
CANBERRA ACT 2600

Dear Mr President

I am pleased to present to you the Australian Government Response to the Foreign Affairs, Defence and Trade Committee Report on Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill [Provisions]. This is pursuant to standing order 166, relating to the presentation of documents when the Senate is not sitting.

Yours sincerely

**DAN TEHAN**  
Encl



## Australian Government

# Australian Government response to the Foreign Affairs, Defence and Trade Legislation Committee report:

## Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016 [Provisions]

March 2017



**PREFACE**

The Government welcomes the opportunity to provide a response to the Foreign Affairs, Defence and Trade Legislation Committee inquiry into the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016 [Provisions].

The report made two recommendations with additional recommendations from the Labor members and from Senator Lambie.

The Government Response to those recommendations is set out on the following pages.

On 20 March 2017 the Senate Foreign Affairs, Defence and Trade Committee released its report into the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016 [provisions]

The Committee made the following recommendations:

#### **Recommendation 1**

**The Committee recommends that the Department of Veterans' Affairs conduct a review of its consultation and engagement practices in order to:**

- **receive informed critical feedback on proposed legislative amendments;**
- **rapidly respond to concerns raised in the veteran community; and**
- **increase the understanding of proposed legislation changes in the veteran community.**

The Government agrees with this recommendation. The Department of Veterans' Affairs (Department) will undertake a review of its consultation processes.

The review will ensure more effective consultation with the general defence and the veteran community in addition to the Department's regular consultation with the ex-service organisation round table (ESORT).

While I will await the full review, one of the refinements that the Department has already agreed to, is to post notices on the DVA website of details about all new legislation that is introduced and include a short summary of the measures. This will allow the broader defence and veteran community to better understand the impact of proposed changes and provide meaningful input during the consultation phase of any legislation.

#### **Recommendation 2**

**The Committee recommends the Senate pass the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016.**

The Government welcomes this recommendation.

The Labor members of the Committee made an additional recommendation:

### **Recommendation 1**

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

The Government does not accept this recommendation.

The amendment proposed by the Labor members would hinder the benefit intended to be conferred by the Henry VIII clause.

The evidence and submissions to the Senate inquiry from some of the ex-service organisations highlighted the limited resources available to these organisations to assess legislative proposals and provide informed feedback.

If the Minister is required to consult extensively on proposed regulations under the Henry VIII clause, it would only delay the provision of relief to a person who has suffered a detriment. Given that the Henry VIII clause can never be used to benefit the Commonwealth, consultation would only delay the benefit provided by the regulation. This would be contrary to the purpose of the inclusion of the Henry VIII clause and be contrary to the assumed intent of the recommendation.

The Government proposes an alternative to this recommendation. In the event that the Minister intends to instruct the Governor General to make regulations to overcome the adverse impact on a person(s), the Department will undertake to determine if there is evidence of other people in a similar circumstance that the regulations should cover.

The Department will then post a notice on the DVA website of the intention to make regulations, outlining the types of cases impacted by the regulations and encourage anyone who considers they are impacted by the same circumstances to contact the Department.

This process of notification will ensure that there is no delay in implementing the regulations and correcting the detriment in the person's circumstances.

Senator Lambie made a number of recommendations:

### Recommendation 1

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

The Government does not accept this recommendation. This change is not required.

In 2004, section 69 of the SRCA was duplicated with suitable amendments in section 142 of the SRCA when the Military Rehabilitation and Compensation Commission was created and became responsible for military compensation claims under the SRCA. Section 142 of SRCA has been replicated as section 142 of the DRCA.

To confirm that section 69 is not required in the DRCA, the following table compares the existing section 69 of the SRCA with section 142 of the SRCA/DRCA.

<b>Section 69 of SRCA:</b> <i>Subject to this Act, Comcare has the following functions, in addition to its other functions under this Act</i>	<b>Section 142 of SRCA/DRCA:</b> <i>(1) The functions of the MRCC include:</i>
(a) to make determinations accurately and quickly in relation to claims and requests made to Comcare under this Act	(a) determining defence-related claims under this Act accurately and quickly;
(b) to minimise the duration and severity of injuries to its employees and employees of exempt authorities by arranging quickly for the rehabilitation of those employees under this Act;  [this provision only relates to the Minister for Employment declaring an entity or a Commonwealth authority as an “exempt authority” under section 35 of the SRCA]	No equivalent in section 142.  Under the DRCA, the Chief of the Defence Force or the MRCC is the relevant rehabilitation authority (depending on whether the person is a current member of the defence force or is discharged). Section 148 refers.  [The Rehabilitation Guidelines, which are made by Comcare and will be used under the DRCA provide: 7.3 The aim of rehabilitation is to restore, as speedily and as far as is reasonably practicable, an injured employee to the same: (a) physical and psychological state; and (b) social and vocational status as the injured employee had before suffering the injury.]
Paragraphs (c) to (e) concern the Comcare functions related to the <i>Work Health and Safety Act 2011</i> and associated Acts in its regulator role. Comcare will continue these functions under the SRCA. Regulatory contributions for these functions will be collected from Defence under new sections 97DAA and 97DAB of the SRCA.]	Not applicable. No equivalent for DVA – these are Comcare-only functions.

Paragraph (ea) in respect of actions for non economic loss—to take over the conduct of such actions under section 52A on behalf of the Commonwealth, Commonwealth authorities or employees against whom such actions were taken;	Not applicable. Under subsection 147(2) of both the SRCA and the DRCA, section 52A does not apply to defence-related claims.
Paragraphs (eb) to (g) are Comcare functions that concern the administration of other entities and licensees, regulatory contributions and the administration of rehabilitation authorities.	Not applicable. The paragraphs refer to specific Comcare functions which are not relevant for the purposes of the MRCC in administering defence related claims.

## Recommendation 2

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

The Government does not accept this recommendation.

One of the major reasons for the enactment of the DRCA was to provide the Minister for Veterans' Affairs with the clear authority to determine the operation and future direction of the legislation that provides Defence Force members with access to a "military specific" compensation and rehabilitation scheme.

To ensure separation of the DRCA scheme from the SRCA scheme the enactment legislation removes the regulatory and governance roles of the Safety, Rehabilitation and Compensation Commission (the SRCC) and Comcare with respect to the MRCC.

Subsection 142(5) refers to this governance role in requiring the SRCC to ensure that both the MRCC and Comcare produce equitable outcomes for claimants by being consistent in their administrative practices and procedures.

One of the primary reasons for this distinction was to prevent adverse impact of "military specific" compensation and rehabilitation schemes from being impacted by changes to civilian schemes. This was recognised when Defence Force members were exempted from some of the proposed amendments to the SRCA that came from the recommendations of the SRCA Review.

The MRCC has also assured the Committee that, while the DRCA and SRCA remain closely aligned, all of the relevant case law developed with respect to the SRCA will continue to apply to the equivalent provisions of the DRCA if and until a body of DRCA specific case law is developed.



### **Recommendation 3**

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

The Government does not accept this recommendation.

The omission of the Henry VIII clause and the reliance on the general regulation making power, such as section 440 of the MRCA, will not allow a remedy of the type that can be made under the Henry VIII clause.

Section 440 of the MRCA provides for the general regulation making power found in many Acts. The equivalent of section 440 of the MRCA has been retained in section 122 of the DRCA. Neither of these powers would satisfy the aim of no client being worse-off under DRCA than under SRCA.

Proposed section 121B (the Henry VIII clause) of the DRCA operates very differently to section 440 of the MRCA. This section can only apply in the circumstances where the retrospective application of an earlier version of the DRCA has resulted in unforeseen and adverse consequences. A Henry VIII clause would provide an effective and efficient remedy in such circumstances, leaving no veteran worse-off and providing a solution without excessive regulatory burdens.

### **Recommendation 4**

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

The Government does not accept this recommendation.

As outlined in the Government response to Recommendation 1, the Department will consider options to ensure that the veteran community is informed and comprehends proposed legislative amendments.