

Senate Standing Committees on Foreign Affairs, Defence and Trade
National Commissioner for Defence and Veteran Suicide Prevention Bill
2020 and the National Commissioner for Defence and Veteran Suicide
Prevention (Consequential Amendments) Bill 2020

Attorney-General's Department

Hearing date: 17 November 2020

Hansard page: 57

Question type: Spoken

Kimberley Kitching asked the following question:

Senator KITCHING: Thank you. I now go to Attorney-General's. There are discrepancies in the funding amounts for the national commissioner across different documents. The explanatory memorandum to the bill refers to funding of \$42 million. The budget papers refer to \$31 million. Which is the correct amount? I also ask: did the government undertake any costings for a royal commission?

Ms Harvey: Just in terms of the budget, were you referring the July economy statement? I understand there's an error in it between the number and the text.

Senator KITCHING: I'd have to go to the PBS, but I think it was the budget papers. If you can take it on notice, if that's possible, that would be good.

Ms Harvey: We'd be happy to do that.

Senator KITCHING: Thank you.

The response to the Senator's question is as follows:

The correct figure of \$42.7 million is set out in the Explanatory Memorandum to the National Commissioner for Defence and Veteran Suicide Prevention Bill. The figure of \$42.7 million is also set out in the table in the July Economic Fiscal update.

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Scope of Commissioner powers and functions

1. The Defence Force Welfare Association (DFWA) Queensland Branch raised concerns in its submission about potential ambiguity in the Commissioner's ability to compel evidence from state and territory bodies, and recommended several amendments to specifically ensure that the Commissioner can compel evidence from state and territory bodies, and can consider the provision of any relevant services by state and territory bodies to veterans.

a) Will the Commissioner have the power to compel evidence from state and territory bodies under the bill as it is currently drafted?

Yes. Clauses 30 and 32 enable the National Commissioner to compel the provision of evidence, information, documents or other things, including from state and territory bodies and officer holders.

It would be possible for a state or territory body to seek to resist being compelled to provide evidence in a particular matter, for example if it believed that there were grounds to make a public interest immunity claim, and if such a claim was made and persisted with then ultimately that would be a matter for a court to determine. Public interest immunity claims are relatively rare, with respect to the exercise of coercive powers, unless what is being sought to be compelled to be provided is something like Cabinet documents. It is commonly the case with the exercise of the same coercive powers by Royal Commissions that there is a discussion with government entities about what and how documents can be provided, after the Royal Commission issues a coercive notice to the entity.

The Bill also provides that one of the functions of the National Commissioner is to work collaboratively with state and territory Coroners to understand issues contributing to defence and veteran deaths by suicide (paragraph 11(1)(d)). For that reason, in addition to the coercive power, the Bill also provides a pathway for state and territory bodies and office holders to volunteer information to the National Commissioner to assist in the performance or exercise of the National Commissioner's functions or powers (clause 41). The Bill expressly provides that such voluntary disclosures under clause 41 are permitted 'despite anything in a law of a state or territory, or the general law, that restricts or prohibits disclosure of information' (subclause 41(4)). Coroners, and other state and territory bodies, may prefer to use the voluntary pathway, or may prefer to only provide information to the National Commissioner on receipt of a compulsory notice.

b) What is the department's response to the proposals raised by the DFWA Qld?

The Bill gives effect to the Government's commitment that the National Commissioner will have inquiry powers broadly equivalent to a Royal Commission, as well as providing a clear basis for state and territory bodies and office holders to provide evidence to the National Commissioner on a voluntary or compulsory basis. Noting their comments about how Royal Commissions are set up, it is not the case that every Royal Commission that is likely to need to seek information from state or territory government entities is set up as both a Commonwealth and a state/territory Royal Commission.

2. The Law Council of Australia raised a number of concerns (*Submission 25*, pp. 64-69) about the inclusion of warrant-based search and seizure powers under clauses 36 and 37 of the bill, noting that other Commonwealth oversight bodies with existing responsibilities relevant to defence and veteran suicide do not hold these powers.

a) What is the justification for including these powers in the bill?

The Bill implements the Government's commitment that the National Commissioner will have inquiry powers broadly equivalent to a Royal Commission. The search warrant provisions in clauses 36 and 37 of the Bill align with sections 4 and 5 of the Royal Commissions Act, and are considered a necessary and appropriate part of ensuring the National Commissioner has inquiry powers aligned with a Royal Commission.

b) What is the department's response to the Law Council's concerns in this area?

Safeguards relevant to applying for, and the issuing of, a search warrant

As outlined above, the search warrant provisions in clauses 36 and 37 of the Bill align with sections 4 and 5 of the Royal Commissions Act, including the following safeguards:

- subclause 36(3) requires the National Commissioner, or an authorised member, to have 'reasonable grounds for suspecting that there may be, at that time or within the next following 24 hours...a thing or things of a particular kind connected with a matter into which the Commissioner is inquiring', and
- the Commissioner or authorised member 'believes on reasonable grounds that, if a summons were issued...the things might be concealed, lost, mutilated or destroyed'.

Clause 36 provides a very limited set of circumstances for the National Commissioner or an authorised member to apply for the issuing of a search warrant.

The criteria in clause 36 operate alongside the fact that the decision to issue a search warrant is made by an 'eligible judge', being an independent judicial officer acting in their personal capacity, appointed by the Attorney-General (clause 63). If an application is made to an eligible judge, the judge 'may, if satisfied that there are reasonable grounds for issuing the warrant', proceed to do so. Determination by an independent judicial officer whether to issue a search warrant, on application and in accordance clause 36, provides a further strong safeguard.

The National Commissioner would have discretion about the information they provided in their reports to the Parliament, or other reports they release from time to time, about any applications for a search warrant that may have been made.

General principles for the National Commissioner and opportunities for the voluntary production of information

The search warrant provisions in the Bill should also be understood within the context of the ways in which the Bill promotes the National Commissioner obtaining information in a non-adversarial way, including providing opportunities for information to be shared outside of responses to formal notices and hearings. It is a guiding principle for the National Commissioner's functions that they take a restorative and trauma-informed approach (clause 12).

As outlined in response to question 1, the Bill also includes mechanisms enabling Commonwealth, state and territory officials to volunteer information to the National Commissioner (clauses 40 and 41), which will reduce the need for recourse to compulsory powers.

Independence and resourcing of the Commissioner role

3. The Law Council of Australia raised a range of concerns in its submission relating to the independence of the Commissioner under the bill, including issues related to the appointment process and staffing arrangements (see *Submission 25*, pp. 39-59). What is the department's response to the Law Council's concerns and recommendations in these areas?

Appointment of the National Commissioner

The Bill provides that the National Commissioner will be an independent statutory office holder, appointed by the Governor-General on a full-time basis (clause 16). To be appointed as the National Commissioner, a person must be, in the Governor-General's opinion, suitable for appointment because of their 'qualifications, training or experience' (clause 16).

Similar arrangements apply to Royal Commissions, where the Governor-General, on the recommendation of the Government, may issue Letters Patent appointing 'such person or persons, as he or she thinks fit' (section 1A Royal Commissions Act).

Arrangements for the Office of the National Commissioner

As we said in evidence at the hearing on 17 November 2020, arrangements around the National Commissioner such as staffing and financial administration are the same arrangements that apply to Royal Commissions. Like a Royal Commission, the National Commissioner will be supported by a dedicated Office of the National Commissioner, which will comprise an Official Secretary and staff made available by the Secretary of the Attorney-General's Department (the department) (clause 14). Office of the National Commissioner staff will be administratively separated within the department to confirm their independence from other departmental functions.

The Secretary of the department will be the accountable authority and employing authority for the Office of the National Commissioner for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Public Service Act 1999* (Public Service Act), which is the same as for a Royal Commission. The Official Secretary will be the Secretary's delegate for the purposes of these Acts and will oversee the administrative activities of the Office of the National Commissioner, just as the Official Secretary of a Royal Commission is and does. Staff of the Office of the National Commissioner will report to the Official Secretary, as the Secretary's delegate.

The department will provide support to the National Commissioner in areas such as human resources, property, facilities, information technology and security. This arrangement also aligns with the way Royal Commissions are supported by the department.

There is no inherent conflict between the National Commissioner being an official of the department for the purposes of the PGPA Act (clause 13) and the National Commissioner

being independent in the exercise of their functions and powers. The approach provided in the Bill is appropriate to ensure the proper use of Commonwealth resources entrusted to the National Commissioner (for example, the use of a departmental credit card on official travel). It will provide certainty about the relevant requirements for the National Commissioner's use of any Commonwealth resources.

4. A number of submitters and witnesses argued that the Commissioner role and its office should be completely independent from the ADF, the Department of Defence and DVA, to avoid perceptions of 'Defence investigating itself' or any unintended bias in the Commissioner's role. Some of these have criticised the fact that the interim Commissioner has a record of ADF involvement, notwithstanding her other qualifications. What is the department's response to these concerns?

The National Commissioner will be an independent statutory office holder within the Attorney-General's portfolio. This reflects that the National Commissioner and their Office will have clear independence from the Departments of Defence and Veterans' Affairs.

The Bill requires the National Commissioner to disclose personal interests to the Attorney-General (clause 23), and the National Commissioner will be required to manage any potential conflicts, like Commissioners of a Royal Commission. If the National Commissioner 'fails, without reasonable excuse' to comply with the disclosure requirement in clause 23, the Governor-General 'must terminate the appointment of the Commissioner' (clause 22). The Bill reflects similar provisions to those that are in place for other independent statutory office holders, such as non-judicial tribunal members under the *Administrative Appeals Tribunal Act 1975*.

The selection of the interim National Commissioner is a matter for Government.

5. The Law Council of Australia raised several issues relating to resourcing of the Commissioner's role under the bill (*Submission 25*, pp. 59-60), citing a lack of financial independence for the Commissioner and lack of public transparency in resource allocation, and proposed two potential reforms to address these issues. What is the department's response to the Law Council's proposals?

The Bill provides a framework for the National Commissioner to be supported by a dedicated Office of the National Commissioner, which will comprise an Official Secretary and staff made available by the Secretary (clause 14). This arrangement aligns with the way Royal Commissions are supported by the department, and how staff are engaged by the department to support Royal Commission inquiries. While the Law Council has suggested that the Office of the National Commissioner could be established as a 'listed entity' under the PGPA Act, it should be noted that Royal Commissions are not listed entities, neither is the Independent National Security Legislation Monitor (a statutory officer supported by the Attorney-General's Department), and neither was the Defence Abuse Response Taskforce (which was established as part of the Attorney-General's Department but operated independently).

A decision to amend the Bill and adopt a different approach to the current arrangements would be a matter for Government.

The Law Council has proposed in the alternative that the department's annual reports include a breakdown of the National Commissioner's annual operating budget from within the department's general operating budget. The department will consider the most appropriate approach to future reporting about the National Commissioner's functions (noting the department publishes annual expenses of Royal Commissions as a separate note to the

department's published financial statements in the department's Annual Report).

Advisory input for the Commissioner

6. A number of submitters have called for some form of independent advisory panel or advisory body to guide the Commissioner's work. What is the department's view on this proposal?

The establishment of an independent advisory panel or body is a matter for the National Commissioner to determine.

Reporting timeframes

7. Some submitters argued that there need to be clearly defined timeframes for the government to provide formal responses to the Commissioner's reports (rather than the unspecified 'as soon as is reasonably practicable' in clause 61), and defined timeframes for relevant agencies (e.g. DVA and the Department of Defence) to consider and implement the Commissioner's recommendations.

a) What is the department's response to these concerns?

The Bill provides that 'the Commonwealth must respond to the report in writing and cause the response to be laid before each House of the Parliament as soon as is reasonably practicable after the report is tabled' (clause 61). The Royal Commissions Act does not include a requirement for the Commonwealth to respond to reports – responses occur as a matter of practice and the timing of such responses are a matter for Government.

An express function of the National Commissioner in the Bill is to 'review action taken in response to any findings or recommendations made by the Commissioner' (paragraph 11(1)(c)). The National Commissioner could do this in a variety of ways, including compelling information from relevant entities about steps taken to act on past findings or to implement recommendations. The National Commissioner may provide a further report, which is to be tabled in Parliament, if the Commissioner considers that adequate and appropriate action has not been taken on the matters addressed in the Commissioner's reports (subclause 62(1)).

It would be a matter for the Government to determine whether it is necessary and appropriate to provide a specific timeframe for Commonwealth responses in the Bill.

Privacy and confidentiality issues

8. Dr Bruce Baer Arnold, Ms Deborah Morris and the Law Council of Australia raised a range of concerns in their submissions about the bill's exclusion of protections available under the *Privacy Act 1998*, as well as the exclusion of the bill from the Freedom of Information Act and associated issues.

a) What is the rationale for excluding the bill from the operation of the Privacy Act and the FOI Act?

b) What is the department's response to these concerns raised by these submitters?

Royal Commissions are exempt from the Freedom of Information Act and Privacy Act to the same extent as is proposed for the National Commissioner. As outlined in the Explanatory Memorandum to the Consequential Amendments Bill, the National Commissioner, and the department to the extent that it is assisting the National Commissioner in performing their core functions and powers, are proposed to be exempt from the operation

of the *Freedom of Information Act 1982* (FOI Act). The proposed exemption is targeted to the National Commissioner's core inquiry powers, and leaves scope for the FOI Act to continue to apply to the department with respect to requests on administrative or corporate related matters.

The FOI Act exclusion reflects the importance of effectively protecting documents which are internal to the operation of the National Commissioner's role, including documents which have been obtained as evidence by the National Commissioner via the use of a compulsory power.

The Consequential Amendments Bill provides that the National Commissioner, and the department to the extent that it assists with the National Commissioner's core functions and powers, will also be exempt from the Privacy Act. Section 7 of the Privacy Act also exempts a range of other inquiry related bodies, including Royal Commissions, as well as a 'Commission of inquiry' (as defined under the Privacy Act), the Integrity Commissioner, and certain other agencies specified in Schedules 1 and 2 of the FOI Act.

The Bills provides a framework for privacy which is tailored to the National Commissioner's functions, and the types of information the National Commissioner will hold. For example, the Bills goes further than the Privacy Act by including an offence for unauthorised use or disclosure of information (clause 55). The inclusion of this offence reflects the importance of personal and other information being properly used and handled. In contrast, the general position is that an interference with privacy under the Privacy Act may result in civil penalties for entities.

The National Commissioner also has a broad and flexible power to issue a non-publication direction over information given to the National Commissioner, modelled on a similar power for a Royal Commission (clause 53), which is a further privacy safeguard. A non-publication direction may specify that material (including personal information) must not be published, produced or disclosed (or except in the manner or to the persons the National Commissioner specifies). Breaching a direction is a criminal offence under clause 54.

The approach a number Royal Commissions and other inquiry bodies that are exempt from the Privacy Act take is to make information publicly available about the approach they will take to privacy. For example, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability website provides that 'although the Royal Commission is not bound by Australian privacy laws, the protection of your privacy is important to us. Accordingly, the handling, security and disclosure of any personal information you provide to the Royal Commission will be guided by the *Privacy Act 1988*'.¹ It would be open to the National Commissioner to take the same approach.

Under the approach in the Consequential Amendments Bill, the department remains subject to the Privacy Act in relation to administrative and corporate matters outside of the specific exemption. This means the department will be required to comply with the Privacy Act and the notifiable data breaches scheme in relation to matters outside of the exemption.

9. Ms Deborah Morris raised concerns that the non-publication directions available to the Commissioner under clause 53 of the bill could be used as a 'gag order' to prevent veterans' families from speaking out publicly.

a) What is the department's response to this concern? Are amendments required to ensure that this clause cannot be used in this way?

Clause 53 of the Bill is modelled on section 6D of the Royal Commissions Act and provides a

¹ <https://disability.royalcommission.gov.au/privacy> (accessed 19 November 2020).

flexible mechanism for the National Commissioner to guard against the risk of sensitive information being inappropriately published or disclosed in certain other ways.

A non-publication direction is used to protect against the public disclosure of sensitive information, including information subject to legal professional privilege or information that may identify a witness, where the witness is giving highly personally sensitive evidence. For example, non-publication orders were made by the Royal Commission into Institutional Responses to Child Sexual Abuse with respect to case studies that were the subject of pending criminal proceedings, in order not to prejudice those criminal proceedings, and at the same time that Royal Commission made other orders to permit the publication of those case studies after the criminal proceedings were concluded.

Non-publication directions are only made where necessary, given the general public interest in transparent proceedings. Non-publication orders protect the interests of people providing information to the National Commissioner, especially where the information has been sought on a compulsory basis. This is a well-established power for bodies with the power to compel the provision of information and it operates as a safeguard, not as a gag.

Clause 53 provides that the National Commissioner ‘may, in writing, vary or revoke a direction’, which provides flexibility to the National Commissioner to account for any change of circumstances that may arise following a direction being issued, including a need that may arise for a direction to be revoked.

Implementation

10. How many people will the Office of the Commissioner employ from the Department? What is the expected workforce model for the Commissioner's office through its initial 18 month review period, and following this initial review?

As outlined in response to question 3 above, the National Commissioner will be supported by a dedicated Office of the National Commissioner, which will comprise an Official Secretary and staff made available by the Secretary (clause 14). Staff within the Office of the National Commissioner will report to the Official Secretary, who with the National Commissioner will determine the staffing arrangements for the Office. Some staff will be current departmental staff that transition into the Office of the National Commissioner, and others will be separately recruited through a recent recruitment process, or engaged as contractors.

The staffing complement for the Office of the National Commissioner will be determined in line with the resourcing allocation provided by the Government and necessarily have some flexibility to account for operational changes. The Office expects to have approximately 20 staff for the initial period, in addition to being able to engage contractors as it sees fit within its budgetary envelope.

The Office of the National Commissioner will comprise staff with multi-disciplinary skillsets as required, including expertise in areas such as legal inquiries, policy, mental health and suicide prevention, counselling, community engagement, communications, logistics and administration.

11. Concern has been raised in relation to the work load and timeframe set out in the Interim National Commissioner's Terms of Reference. Does the Department believe that 18 months is sufficient time to investigate and reach conclusions on more than 400 cases of veterans suicide that have occurred over the past two decades?

The Terms of Reference for the Review provide that the objectives of the Review are to:

- identify and understand the risk and protective factors relevant to past deaths by suicide among ADF members and veterans
- provide affected families the opportunity to share their stories, provide insights, and speak to the impact of the loss of their loved ones
- make recommendations to Government to inform more tailored and effective strategies for suicide prevention among ADF members and veterans and
- provide a foundation for the future work of the National Commissioner.

The Terms of Reference further provide that the Review will analyse available data and information to identify trends, systemic issues, and common risk and protective factors, including consideration of social and cultural factors, and examine available research and data relating to suicidal ideation and incidence of suicide attempts and self-harm among ADF members and veterans.

The Australian Institute of Health and Welfare and the Australian Commission on Safety and Quality in Health Care are providing technical expertise to support the Independent Review, including by linking and analysing available data, and considering existing research and policy approaches, and this work is already underway.

How the Review is conducted over the 18 months will be a matter for the National Commissioner, but if the legislation is passed then the Commissioner will be able to use their powers to also advance the Review.

12. Why was the AGD's public consultation process run after the introduction of the bill to parliament, rather than through an Exposure Draft process?

Decisions about the approach to consulting on the Bills are matters for the Government.

13. What were the key issues raised from the consultation process?

The department received 94 public submissions during the consultation period held over 27 August to 24 September 2020. A broad range of views were put forward during the consultation process, with certain stakeholders presenting alternative approaches to addressing similar issues. The key issues arising in consultation process were:

- highlighting the importance of the National Commissioner having scope to consider attempted suicides and the lived experience of current serving members and veterans
- clarifying the circumstances when the National Commissioner may inquire into a 'suspected suicide'
- seeking a stronger obligation on the National Commissioner to engage with families and other people affected by a death by suicide, while also recognising that some families may not wish to engage with the National Commissioner
- emphasising the importance of the National Commissioner being independent from Government, and the Departments of Defence and Veterans' Affairs, and
- suggesting that the National Commissioner should have discretion to consider the *availability* of support services for members and veterans, in addition to the quality of such services.