



Australian Government
Attorney-General's Department

**Senate Foreign Affairs, Defence and Trade
Legislation Committee**

**Inquiry into the 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 submission

9 October 2020

Introduction

The Attorney-General's Department (the department) welcomes the opportunity to provide the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee) with this submission as part of the Committee's inquiry into the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 (the Bill) and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020 (the Consequential Amendments Bill) (together, the Bills).

The Attorney-General, the Hon Christian Porter MP, assisted by the department, has portfolio oversight of the establishment of the National Commissioner for Defence and Veteran Suicide Prevention (the National Commissioner), including the Bills. Subject to the passage of the Bills by the Parliament, the National Commissioner will be established as a new independent statutory office holder within the Attorney-General's portfolio.

This submission outlines key aspects of the National Commissioner's role and inquiry powers as provided in the Bills.

Context of the reforms

On 5 February 2020, the Prime Minister, the Hon Scott Morrison MP, announced the Australian Government will establish a new permanent National Commissioner to inquire into, and support the prevention of, deaths by suicide of serving Australian Defence Force (ADF) members and veterans. The Prime Minister announced that as part of this work the National Commissioner will conduct a one-off independent review of past ADF and veteran deaths by suicide.

The death by suicide of any ADF member or veteran is tragic for the family, and felt by the entire community. Preventing these deaths is a key priority for the Government.

The Australian Institute of Health and Welfare has reported that between 2001 and 2018, there were 465 certified deaths by suicide among ADF members and veterans.¹ Ex-serving men and women are particularly at risk, with the age-adjusted rate of suicide over the period 2002-2018 being 21% higher for ex-serving men and 127% (or 2.27 times) higher for ex-serving women when compared to the broader Australian population.

An enduring National Commissioner

The National Commissioner will be a full-time, independent statutory officer appointed by the Governor-General (clause 16). The National Commissioner will be appointed for a period of up to five years (clause 17). Consistent with other statutory appointments, for example Tribunal members under the *Administrative Appeals Tribunal Act 1975* and members appointed under the *Australian Law Reform Commission Act 1996*, a National Commissioner appointment can only be terminated by the Governor-General in a limited range of prescribed circumstances (clause 22).

¹ Australian Institute of Health and Welfare, *National suicide monitoring of serving and ex-serving Australian Defence Force personnel report: 2020 update* (9 October 2020), <https://www.aihw.gov.au/reports/veterans/national-suicide-monitoring-adf-2020/contents/about-this-report>.

Broad functions to consider past and future ADF member and veteran deaths by suicide

The Bill provides the National Commissioner with a broad suite of functions to ensure they can comprehensively consider past and future ADF member or veteran deaths by suicide or suspected suicide. The National Commissioner's functions include (clause 11):

- inquiring into the circumstances of relevant suicides
- making findings and recommendations following such inquiries, addressing defence and veteran suicide prevention and wellbeing strategies, and any policy, administrative or structural reforms that may be required
- working collaboratively with state and territory Coroners to understand issues contributing to defence and veteran deaths by suicide
- reviewing action taken in response to any findings or recommendations the Commissioner has already made, and
- promoting understanding of suicide risks for members and veterans, and factors that can improve the wellbeing of members and veterans.

The National Commissioner will have broad discretion when inquiring into the circumstances of particular deaths or systemic issues, including considering (clause 26):

- the person's service in the ADF, including training, the manner or time in which they were recruited, and, for veterans, the person's transition from the ADF
- the availability of health, wellbeing and counselling support services to the deceased person in their capacity as an ADF member or veteran, and the effectiveness of any such services
- the quality and effectiveness of responses to any complaints made by the person or the person's family, friends or associates in relation to the person's health and wellbeing, or access to relevant services
- the extent to which the circumstances of a particular suicide death reflects broader or systemic issues, and
- any other matter the National Commissioner considers relevant and reasonably incidental to defence and veteran deaths by suicide.

The Bill provides that the National Commissioner has discretion to undertake inquiries at their own initiative at any time, and that they may inquire into a relevant death by suicide that occurred prior to the establishment of the National Commissioner function (subclauses 27(2) and (3)). As an independent statutory office holder, the National Commissioner cannot be instructed what to investigate by, for example, the Departments of Defence or Veterans' Affairs.

Royal Commission-like inquiry powers

Consistent with the Prime Minister's announcement on 5 February 2020, the Bill provides that the National Commissioner will have inquiry powers broadly equivalent to a Royal Commission. Like a Royal Commission, the National Commissioner will have the power to:

- summon witnesses and hold public hearings (clauses 27 and 30)
- take evidence on oath or affirmation (clause 31)
- compel the production of documents, witness statements or things (clause 32)
- receive information and evidence in private (clause 28)
- protect evidence from publication by issuing a non-publication direction (clause 53)
- compel information despite legal professional privilege and, in a qualified way, despite the privilege against self-incrimination (clauses 48 – 50)

- protect witnesses to guard against adverse action by an employer or others (clause 51), and
- refer potential breaches of the law to enforcement bodies (clauses 56 and 57).

A detailed comparison between the inquiry powers of the National Commissioner and a Royal Commission is at **Attachment A**.

The Bill also provides a range of enhancements compared to the framework in the Royal Commissions Act, to ensure the National Commissioner has powers which are tailored to its specific functions. As outlined further in the following parts, the Bill provides:

- A pathway for Commonwealth, state and territory bodies to voluntarily disclose information to the National Commissioner to assist its work, despite legislative prohibitions that might have otherwise prevented this information sharing (clauses 40, 41). This is intended to encourage proactive information sharing.
- A person who is complying with a compulsory request, or who was authorised to voluntarily provide information to the National Commissioner, is shielded from liability under secrecy provisions in Commonwealth, state and territory legislation, and from actions arising under common law, for assisting the National Commissioner (clauses 45(5) and 58).
- The National Commissioner has broad powers to on-share information it has received, which is intended to assist the National Commissioner working collaboratively with other bodies engaged in suicide prevention efforts, as well as for law enforcement purposes (clauses 56 and 57).

Greater accountability than from a Royal Commission

The National Commissioner has the discretion to make findings and recommendations following any inquiries (clause 11). The Bill requires the National Commissioner to provide an annual report as soon as practicable after the end of each financial year, to be tabled in Parliament by the Attorney-General (clause 60). The National Commissioner could draw on any aspect of its broad functions or powers in preparing the annual report. In addition to the annual report, the National Commissioner will be able to provide reports on any matter relevant to its functions, which will also be required to be tabled in Parliament (subclause 60(2)). To ensure ongoing accountability, the Bill requires the Australian Government to respond in writing to all reports to Government by the National Commissioner, and for those responses to be tabled in Parliament (clause 61).

While a Royal Commission is time limited and has no ability to monitor how their final recommendations are responded to, the Bill provides that the National Commissioner will be an enduring function. As such, the National Commissioner will have an important role in monitoring the implementation of its recommendations over time, to ensure accountability and build on prevention and defence and veteran wellbeing strategies into the future. This could include holding hearings into how particular recommendations have been implemented or are progressing. The Bill specifically provides for the National Commissioner to provide a report to the Prime Minister and the Minister if the National Commissioner is of the opinion that appropriate action has not been taken by the Government following an earlier report. That report must be tabled in Parliament (clause 62).

The National Commissioner could release additional discussion papers or research reports as they consider appropriate, which may not be formal reports intended for tabling in Parliament (just as Royal Commissions frequently release discussion papers and research, in addition to producing final reports that are tabled in Parliament).

Recognition families and others affected have a unique contribution to make

The Bill recognises that families and others affected by a suicide death have a unique contribution to make to the National Commissioner's work, and may wish to be consulted (clause 12). In practice, families and others affected will have the opportunity to engage with the National Commissioner in a variety of ways. This could be, for example, through making a submission on a matter relevant to the National Commissioner's work or meeting with the National Commissioner or their staff. More formally, families and others affected may provide evidence to the National Commissioner through a witness statement or by participating in a hearing.

The Bill provides that, as a guiding principle, the National Commissioner should take a trauma-informed and restorative approach in exercising their functions (clause 12). In practice, this means that the principles of safety, confidentiality, consultation and informed participation, for example, will underpin the way the National Commissioner and their Office operates.

Ability to hold private hearings to protect personal and private information

The National Commissioner will have discretion to hold private hearings (including making any part of a public hearing closed) where personal and private information relating to a deceased person, or their family, friends or associates may arise (clause 28). Consistent with the National Commissioner needing to take a restorative and trauma-informed approach, it is intended that the Commissioner will take into account the wishes of family members or close associates of the deceased in choosing the most appropriate approach to a hearing.

Consistent with the approach to conducting private sessions in a Royal Commission, the National Commissioner will have flexibility about the procedures for a private hearing, so the wishes and interests of affected parties can be accommodated where appropriate (clause 27). The preferences of the witness will be an important factor guiding how a private hearing will operate.

The National Commissioner must consider consulting the witness and any other person whose interests are affected by evidence given in a private hearing, before using or disclosing that evidence (clause 29). The National Commissioner must also consider:

- any potential risk of prejudice to a person if the person is not consulted before using or disclosing information given at, or in relation to, a private hearing, and
- any preference the witness communicates (whether before, during or after a private hearing) about future consultation (subclause 29(2)).

Placing a requirement on the National Commissioner to consider consulting witnesses and affected persons leaves appropriate discretion for the National Commissioner to determine the extent of consultation required in each case. This also ensures the National Commissioner can address any procedural fairness issues for third parties who may not otherwise be aware they have been referenced in a private hearing.

Collaborative interaction with state and territory Coroners, and other bodies

The National Commissioner's role will be complementary to the role of state and territory Coroners. The Bill requires that the National Commissioner (clause 11):

- work collaboratively with state and territory Coroners to understand issues contributing to defence and veteran deaths by suicide
- cannot make findings on the cause of death in relation to a defence and veteran death by suicide, recognising this is a core coronial function, and
- is required to have regard to the need to avoid prejudicing current or future criminal or civil proceedings, or other contemporaneous inquiries, which will include avoiding prejudice to coronial processes.

On 27 July 2020, the Council of Attorneys-General agreed to work together, in consultation with the Council of Chief Coroners, to establish a new National Coronial Centre for Defence and Veteran Suicides to assist Coroners to develop a common understanding of the issues for consideration in individual ADF member and veteran deaths by suicide, and to support the National Commissioner in identifying broader systemic issues for inquiry. This work has commenced, with the intention of agreeing arrangements as soon as practicable.

The National Commissioner's role will complement the role of other Commonwealth bodies which may inquire into circumstances relevant to member and veteran suicide, such as the Inspector-General of the Australian Defence Force (IGADF), Comcare and the Commonwealth Ombudsman.

Power to scrutinise operationally sensitive and intelligence information

The Bill provides the National Commissioner with strong powers to require the production of all information necessary to undertake its work, including operationally sensitive and intelligence information, as defined in the Bill (clause 5). This reflects the standing of the National Commissioner as a genuine accountability function, modelled on Commonwealth Royal Commissions.

The Bill accounts for the possibility that the National Commissioner may acquire sensitive information, including operationally sensitive and intelligence information. The Bill contains provisions which outline processes for how such information should be handled, or factors the National Commissioner is to consider in exercising their discretion handling such information. These requirements ensure that the National Commissioner can obtain and scrutinise all material relevant to ADF and veterans death by suicide (for example, clause 29 in relation to operationally sensitive information, clause 42 for intelligence information). The inclusion of these legislative provisions address matters which a Royal Commission would in practice handle administratively, if they were in the position of receiving security sensitive information.

The Bill incorporates a requirement for a person to provide notice in advance of disclosing operationally sensitive or intelligence information to the National Commissioner, to ensure that the National Commissioner is aware of the potential sensitivity of the material, and that relevant affected persons and entities can be given notice or consulted, as appropriate in each case (clauses 33 and 34).

Operationally sensitive information

Operationally sensitive information includes information about ADF and certain other agencies' information sources, methods and past or future operations. It also extends to information provided by a foreign government, where that government does not consent to the public disclosure of the information (clause 5).

The Bill provides the National Commissioner with broad discretion to make any hearing or part of a hearing private if satisfied that operationally sensitive information may be disclosed (subclause 28(3)). When considering doing this, the National Commissioner must contemplate, among other things, the potential risk of prejudice to national security or to law enforcement and security agencies, and the safety and security of any person. The National Commissioner may also call for submissions from a range of parties on the extent to which such a hearing should be held in private (subclause 28(3), 33(3)).

Allowing the National Commissioner to weigh different considerations in deciding the approach to a hearing, rather than the Bill mandating private hearings, preserves the transparency of the National Commissioner's work and recognises the importance that families are not isolated from the evidence taking process.

Once a witness has given evidence at a private hearing because of operationally sensitive information, the National Commissioner must consult any law enforcement or security agency to which the evidence relates before disclosing or using any evidence taken in the hearing (clause 29). The National Commissioner must also consider any potential risk of prejudice to national security, and the safety and security of any person, at this point.

Intelligence information

The Bill incorporates protections for intelligence information, which is defined to include information acquired or prepared by, or on behalf of, an Australian intelligence entity in connection with its functions, or that relates to the performance of these entities' functions (clause 5).

The National Commissioner will be required to take all reasonable steps to establish an arrangement with the head of each of the intelligence entities governing the processes for obtaining, storing, accessing, using and disclosing intelligence information relating to that entity (clause 42).

Enabling voluntary disclosures to the National Commissioner

The Bill includes a mechanism enabling Commonwealth, state and territory bodies to volunteer information to the National Commissioner to assist its functions (clauses 40 and 41). This will encourage government entities to proactively disclose information they may hold about a particular member or veteran suicide, or other matter the National Commissioner is considering.

The proposed pathway for voluntary and proactive information sharing in the Bill will support the efficiency of the National Commissioner's processes, and reduce the need for recourse to compulsory powers or adversarial discovery, where it is clear a government entity can assist the National Commissioner. The pathway includes a requirement that such disclosures are properly authorised within the volunteering entity, and enables disclosures to occur despite legislative barriers that would have otherwise prevented information sharing.

Information sharing with other entities and referral to law enforcement bodies

The Bill provides that the National Commissioner may personally disclose information to a range of Commonwealth, state and territory bodies, and to particular office holders, such as Attorneys-General in each jurisdiction (clauses 56 and 57). This information sharing mechanism is modelled on the Royal Commissions Act and the Terms of Reference in recent Royal Commissions, which enable information to be provided to law enforcement bodies

where evidence of a criminal or civil wrongdoing may have come to light in the course of the Royal Commission's work.

Given the National Commissioner is not permitted to make findings of civil or criminal wrongdoing, it is appropriate that the National Commissioner be able to refer material raising potential wrongdoing of this kind to the appropriate authorities. The National Commissioner will have the capacity to refer both operationally sensitive and intelligence information to relevant law enforcement and integrity bodies (noting consultation requirements accompany a referral of intelligence information under clause 57).

The information sharing mechanism for the National Commissioner in relation to non-intelligence information will extend to a broad range of other agencies or bodies. This could include, but is not limited to, the Inspector-General of the Australian Defence Force, the Commonwealth Ombudsman and Comcare, as well as bodies with a research focus, such as the Australian Institute of Health and Welfare. This information sharing power will assist the National Commissioner working collaboratively with other bodies engaged in suicide prevention efforts.

Freedom of information and privacy

The Consequential Amendments Bill provides that the National Commissioner, and the department to the extent that it is assisting the National Commissioner performing its core functions and powers, will be exempt from the operation of the *Freedom of Information Act 1982* (FOI Act). The proposed exemption leaves scope for the FOI Act to operate with respect to requests on administrative or corporate related matters. This approach aligns with the exemption of active Royal Commissions from the operation of the FOI Act.

Due to the operation of the FOI Act, this amendment will also exempt the Commissioner, and the department, from the *Privacy Act 1988* (Privacy Act) to the same extent of the exemption under the FOI Act. This is appropriate, on the basis that Royal Commissions are similarly exempt from the Privacy Act, and the Bill protects against any use or disclosure of information if it is not related to the National Commissioner's functions or powers (clause 55). If a person wished to access or correct their own personal information held by the National Commissioner or the department, for example, this could be facilitated administratively, despite the Privacy Act process for this to occur not strictly applying.

Administrative arrangements for the Office of the National Commissioner

The National Commissioner will be administratively housed within the department, while remaining independent in the exercise of their statutory functions. Staff will be made available to the National Commissioner by the Secretary of the department (clause 14). Staff assisting the National Commissioner will be administratively separate from other departmental functions. The department will provide support to the National Commissioner in areas such as human resources, property, facilities, information technology and security.

The Office of the National Commissioner will be led by an Official Secretary and is currently being established. The Office will comprise staff with multi-disciplinary skillsets as required, including expertise in areas of legal inquiries, counsel assisting, policy, mental health and suicide prevention, counselling, community engagement, facilitation, communications, logistics and administration. On 2 July 2020, the department advertised a public merit-based recruitment round to fill a number of ongoing and non-ongoing positions within the Office of the National Commissioner. Applications for this process closed on 19 July 2020 and the process is now in its final stages with outcomes to be settled in the near future.

Funding of \$42.7million over five years from 2019-20 to 2023-24 has been announced to establish the National Commissioner. This includes funding of the Review of past cases, and a legal financial assistance scheme.

The legal financial assistance scheme will be available to individuals, including families, and entities, to assist in meeting the costs of legal representation and disbursements associated with engaging with the National Commissioner's formal evidentiary processes. The scheme will be administered in accordance with the *Commonwealth Guidelines for Legal Financial Assistance 2012* and the Addendum which sets out eligibility criteria and scope of assistance. Entities other than individuals will be subject to an assessment of whether they can meet the cost of its legal representation without incurring serious financial difficulty.

Feedback received during public consultation

A four week period of public and stakeholder consultation was conducted on the Bills from 27 August to 24 September 2020. Almost 100 submissions have been received to date and the department met with a range of key stakeholders to discuss the Bills, including defence and veteran stakeholder organisations such as the Ex-Service Organisations Roundtable, the Younger Veterans Forum – Contemporary Needs Forum, the Operational Working Party, the Council for Women and Families United by Defence Services and the Council of Chief Coroners.

Submissions received have been published on the department's website,² except where the author declined publication, the submission was unrelated to the Bill or work of the National Commissioner, or the content of the submission was otherwise not suitable due to the inclusion of personal information or offensive material or language.

Conclusion

The department thanks the Committee for considering this submission. The department will provide any further information to the Committee as required.

² <https://www.ag.gov.au/about-us/publications/submissions-received-ncdvsp-legislation>

Comparison of key inquiry powers

National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 and the *Royal Commissions Act 1902* (Cth)

| National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 | | Royal Commissions under the <i>Royal Commissions Act 1902</i> (Cth) |
|---|---|---|
| Scope and outcomes of inquiry | | |
| Scope of inquiry | The functions of the National Commissioner and the scope of matters it can inquire into are provided in the Bill (clause 11, clause 26) | Any matter specified in the Letters Patent, which relates to the peace, order and good government of the Commonwealth or any public purpose or any power of the Commonwealth (section 1A) |
| Make findings | Yes – The Bill provides the National Commissioner can make findings and recommendations following inquiries (clause 11(1)(b)) | Yes – Not specified in Act but a Royal Commission can make findings |
| Make recommendations | Yes (clause 11(1)(b)) | Yes |
| Communicate information to law enforcement entities relating to a potential contravention of a law | Yes – the National Commissioner may disclose information to law enforcement and integrity entities, in addition to other bodies that may have a suicide prevention related role (for example, Coroners, the Australian Institute of Health and Welfare, the Inspector-General Australian Defence Force) (clause 56) | Yes (section 6P) |
| Powers | | |
| Commissioner, legal practitioners and witnesses have | Yes (clause 64) | Yes (section 7) |

| National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 | | Royal Commissions under the Royal Commissions Act 1902 (Cth) |
|---|--|---|
| immunity from legal action | | |
| Compel production of documents or things, compel a witness statement | Yes (clause 32) | Yes (section 2) |
| Summon witnesses to give evidence | Yes (clause 30) | Yes (sections 2, 6FA) |
| Take evidence on oath or affirmation | Yes (clause 31) | Yes (section 2) |
| Arrest witness failing to appear | No – Not considered necessary to confer an arrest related power given the National Commissioner’s role. Not complying with a summons is an offence (clause 45), which is considered sufficient | Yes (section 6B) |
| Prevent publication of evidence | Yes (clause 53) | Yes (section 6D) |
| Hold private sessions enabling individuals to share personal stories | Analogous arrangement in place – Bill provides for private hearings (clause 28) | Yes (Part 4) |
| Inspect, retain and copy documents or things | Yes (clause 35) | Yes (section 6F) |
| Search warrants | Yes – the National Commissioner may apply for a search warrant (clause 36) | Yes – Commission may apply for a search warrant (sections 4 and 5) |
| Take evidence and make inquiries overseas | Yes (clause 8) | Yes (sections 7A and 7B) |

| National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 | | Royal Commissions under the Royal Commissions Act 1902 (Cth) |
|--|---|---|
| Abrogate client legal privilege | Yes (clauses 48 and 49) | Yes (subsection 2(5) and section 6AA) |
| Abrogate privilege against self-incrimination | Yes – except if charge is current (clause 50) | Yes – except if charge is current (section 6A) |
| Use immunity applies | Yes in relation to criminal proceedings (clause 50). This operates alongside subclause 64(4), enabling a defence of absolute privilege in civil proceedings. | Yes (section 6DD) |
| Be authorised to receive intercepted information under the <i>Telecommunications (Interception and Access) Act 1979</i> | No – the National Commissioner is not intended to inquire into matters that may involve the commission of an offence. The National Commissioner may apply for issue of search warrant in exceptional circumstances (clause 36). | If the relevant Minister is satisfied that the Royal Commission is likely to inquire into matters that may involve the commission of a prescribed offence |
| Requirements for the handling of security sensitive information | Yes – the Bill provides for the handling of operationally sensitive and intelligence information, given the potential relevance of such information to the National Commissioner’s work | No – the Royal Commissions Act does not address the process to manage the risk of security sensitive information being disclosed in a hearing, report or otherwise. In some cases the Terms of Reference for a Royal Commission has included directions as to the handling of sensitive information |
| The Inspector-General of Intelligence and Security may volunteer information | Yes, if the National Commissioner is prescribed under regulations to the <i>Inspector-General of Intelligence and Security Act 1986</i> (clause 43) | Yes, if the Royal Commission is prescribed under regulations to the <i>Inspector-General of Intelligence and Security Act 1986</i> (section 34A IGIS Act) |
| Key offences | | |
| False or misleading evidence | Yes – via application of sections 35 and 36 of the <i>Crimes Act 1914</i> (see Note 2 to clause 31) | Yes (section 6H) |

| National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 | | Royal Commissions under the <i>Royal Commissions Act 1902 (Cth)</i> |
|--|---|--|
| Bribery, corruption, fraud, deceiving in relation to witnesses | Yes – via application of sections 37 and 38 of the <i>Crimes Act 1914</i> (see Note 2 to clause 31) | Yes (sections 6I and 6J) |
| Preventing witness from attending | Yes – via application of section 40 of the <i>Crimes Act 1914</i> (see Note 2 to clause 31) | Yes (section 6L) |
| Failure to attend hearing, produce documents or give information etc. | Yes (clause 45) | Yes (section 3) |
| Refusal to swear an oath, make an affirmation or answer a question | Yes (clause 46) | Yes (section 6) |
| Dismissal of witness by employers | Yes (clause 51) | Yes (section 6N) |
| Hold a person in contempt | Yes (clause 52) | Yes (section 6O) |