



Australian Government
Department of Veterans' Affairs

Sent by email: fadt.sen@aph.gov.au

Chair
Foreign Affairs, Defence & Trade Committee
Department of the Senate
Parliament House
CANBERRA ACT 2606

Dear Senator Back

I am writing to correct an aspect of my evidence before the Senate Foreign Affairs, Defence & Trade Committee on Friday 26 May 2017 concerning the Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017.

During the hearing, I was asked whether the proposed frivolous and vexatious power for the Veterans' Review Board contained in Schedule 5 of the Bill was in addition to or replacing the 2 year dismissal power (see extract from Hansard at Attachment A). My evidence outlined how the two year statutory dismissal power operates and that it is an additional power to the proposed frivolous and vexatious power. I am writing to clarify this issue.

Sections 155AA-155AC of the *Veterans' Entitlements Act 1986* (VEA) were the legislative authority for the Veterans' Review Board to consider and strike out a VRB application if it had been inactive for two years. Attachment B is an extract of these provisions.

In 2014, the VEA was amended to incorporate new alternative dispute resolution powers for the VRB. As part of the amendments, sections 155AA – 155AC were repealed and replaced, in part, by more general discretions for the Principal Member of the VRB to dismiss an application.

Item 24 of Schedule 4 to the *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014* inserted new section 155 regarding dismissal. While some of these provisions relates to mutual consent to dismiss, new subsection 155(4) and (8) provided the Principal Member of the VRB with dismissal powers for failure to appear (subsection 155(4) and failure to proceed with an application or comply with a direction (subsection 155(8)). These specific provisions have been

extracted below with a full extract of s.155 at Attachment C to provide context as to when these dismissal powers can be exercised.

(4) If the applicant for the review of a decision fails to appear in person, or to appear by a representative, at a directions hearing, or an alternative dispute resolution process under Division 4A, held in relation to the application or at the hearing of the review:

(a) the Principal Member may dismiss the application without proceeding to review the decision; and

(b) if he or she does so, he or she must notify each party to the review of the dismissal.

8) If the applicant for the review of a decision fails within a reasonable time:

(a) to proceed with the application; or

(b) to comply with a direction given to the applicant under this Part in relation to the application;

then:

(c) the Principal Member may dismiss the application without proceeding to review the decision; and

(d) if he or she does so, he or she must notify each party to the review of the dismissal.

So in terms of my evidence before the Committee, the frivolous and vexatious power of the Omnibus Bill is in addition to the existing powers and functions of the VRB but noting that now the 2 year dismissal power has been replaced by more general discretions for the Principal Member of the VRB to exercise.

In all other respects my evidence before the Committee stands. I trust this clarifies the issue to your satisfaction and assists the Committee in its consideration of the Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017. If you have any queries regarding this letter, please contact me on 02 6289 6003.

Yours sincerely

Carolyn Spiers
Principal Legal Advisor
Department of Veterans' Affairs

9 June 2017

Extract Hansard – Senate Committee Foreign Affairs, Defence & Trade 26 May 2017

CHAIR: The only question I have on schedule 5—and it has probably been covered, but I just need clarification—relates to this closure. Mention has been made of a two-year time frame.

Senator MOORE: I think it is one.

CHAIR: Is it one?

Senator MOORE: The point made by one of the people applying was about the period during which you could bring cases—the two-year process. His recommendation, although not part of this bill, was that that was one element that needed to be taken into account. If the department were to review this area, that was the one issue he was concerned about. That is right, is it not?

CHAIR: Yes.

Ms Spiers : There is a separate power of the Veterans' Review Board—a strike-out power. That is when there is inactivity on the appeal for over two years. I think that is what is being referred to. But this bill does not impact on that at all. That power still sits there. There is a procedural fairness process built into that as well, in that the individual is encouraged to progress their claim. But, if there has been absolutely no activity for two years, the head of the VRB can—reluctantly—strike out that matter for want of action.

CHAIR: Does the head of the VRB also have the power to extend it instead of striking it out—for example, if an advocate falls off the perch?

Ms Spiers : While the two-year period is prescribed for inactivity, the discretion lies with the Principal Member of the VRB. If there are cogent reasons—for example, the person has been sick or in hospital or their advocate has not been well—the VRB has the ability to say, 'That is fine, but we need to get it moving again.' Then they would look at actively managing the case to get it progressed.

CHAIR: They do not have to go to the back of the queue?

Ms Spiers : No, not at all.

Section 155AA – 155AC of the Veterans’ Entitlements Act 1986 (pre 2014)

155AA Power to dismiss application—initial consideration

(1) In this section:

standard review period, in relation to an application for review, means the period of 2 years after the day on which the application was received at an office of the Department in Australia.

(2) This section applies to an application for review unless:

(a) the hearing of the review has finished within the standard review period; or

(b) as at the end of the standard review period, a date, time and place is fixed for the commencement or resumption of the hearing of the review.

(3) For the purposes of paragraph (2)(a), the hearing of a review is taken to have finished when there are no further submissions to be made to the Board by any of the parties to the review.

(4) If, at the end of the standard review period:

(a) this section applies to an application for review; and

(b) the Principal Member considers that the applicant should be ready to proceed at a hearing; the Principal Member must give a written notice to the applicant requesting the applicant to provide to the Principal Member, within 28 days after receiving the notice;

(c) a written statement indicating that the applicant is ready to proceed at a hearing; or

(d) a written statement explaining why the applicant is not ready to proceed at a hearing.

(5) If the applicant does not provide a written statement under paragraph (4)(c) or (d) within the 28 days, the Principal Member must dismiss the application and must notify the applicant and the Commission of the dismissal.

(6) If:

(a) the applicant provides a written statement under paragraph (4)(d) within the 28 days; and

(b) the Principal Member considers that the statement contains a reasonable explanation for the applicant’s failure to be ready to proceed at a hearing;

the Principal Member must notify the applicant and the Commission of this.

(7) If:

(a) the applicant provides a written statement under paragraph (4)(d) within the 28 days; and

(b) the Principal Member considers that the statement does not contain a reasonable explanation for the applicant’s failure to be ready to proceed at a hearing;

the Principal Member must dismiss the application and must notify the applicant and the Commission of the dismissal.

155AB Power to dismiss application—subsequent consideration

(1) In this section:

extended review period, in relation to an extension notice, means the period of 3 months after the day on which the Principal Member has given the extension notice to the applicant for review.

extension notice means a notice under subsection 155AA(6) or subsection (6) of this section.

(2) If the Principal Member has given an applicant for review an extension notice, this section applies to that application unless:

(a) the hearing of the review has finished within the extended review period; or

(b) as at the end of the extended review period, a date, time and place is fixed for the commencement or resumption of the hearing of the review.

(3) For the purposes of paragraph (2)(a), the hearing of a review is taken to have finished when there are no further submissions to be made to the Board by any of the parties to the review.

(4) If this section applies to an application for review at the end of the extended review period, the Principal Member must give a written notice to the applicant requesting the applicant to provide to the Principal Member, within 28 days after receiving the notice:

(a) a written statement indicating that the applicant is ready to proceed at a hearing; or

(b) a written statement explaining why the applicant is not ready to proceed at a hearing.

(5) If the applicant does not provide a written statement under paragraph (4)(a) or (b) within the 28 days, the Principal Member must dismiss the application and must notify the applicant and the Commission of the dismissal.

(6) If:

(a) the applicant provides a written statement under paragraph (4)(b) within the 28 days; and

(b) the Principal Member considers that the statement contains a reasonable explanation for the applicant's failure to be ready to proceed at a hearing;

the Principal Member must notify the applicant and the Commission of this.

(7) If:

(a) the applicant provides a written statement under paragraph (4)(b) within the 28 days; and

(b) the Principal Member considers that the statement does not contain a reasonable explanation for the applicant's failure to be ready to proceed at a hearing;

the Principal Member must dismiss the application and must notify the applicant and the Commission of the dismissal.

155AC Representation of applicant where outcome could be dismissal of application

(1) An applicant for review may authorise another person to represent the applicant in relation to a notice under subsection 155AA(4) or 155AB(4).

(2) An authorisation under subsection (1) must be in writing.

- (3) The applicant may authorise the representative only after the applicant has received the notice.
- (4) If the Principal Member has approved a form for the purposes of subsection (1), the applicant must authorise the representative in that form.
- (5) If the applicant does authorise a representative, the representation is to be at the applicant's own expense.

Section 155 of the Veterans' Entitlements Act 1986 (as inserted by Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014)

155 Dismissal of applications

Dismissal if parties consent

(1) If each party to the review by the Board of a decision consents, the Principal Member may dismiss the application for review without proceeding to review the decision or, if the Board has started to review the decision, without completing the review.

Dismissal if applicant discontinues or withdraws application

(2) A person who has made an application to the Board for a review of a decision may, in writing, notify the Board that the application is withdrawn or discontinued.

(3) If notification is so given, the Principal Member is taken to have dismissed the application without proceeding to review the decision.

Dismissal if applicant fails to appear

(4) If the applicant for the review of a decision fails to appear in person, or to appear by a representative, at a directions hearing, or an alternative dispute resolution process under Division 4A, held in relation to the application or at the hearing of the review:

(a) the Principal Member may dismiss the application without proceeding to review the decision; and

(b) if he or she does so, he or she must notify each party to the review of the dismissal.

(5) For the purposes of subsection (4):

(a) a person is taken to appear in person or by a representative at an alternative dispute resolution process if the person or representative participates in it by a means allowed under section 145F; and

(b) a person is taken to appear in person or by a representative at a directions hearing, or the hearing of the review, if the person or representative participates in it by a means allowed under subsection 148(8).

(6) The Principal Member must, before exercising a power under subsection (4), be satisfied that appropriate notice was given to the applicant for the review of the time and place of the directions hearing, the alternative dispute resolution process or the hearing of the review.

Dismissal if decision not reviewable

(7) If:

(a) the applicant for the review of a decision is notified in writing by the National Registrar that the decision does not appear to be reviewable by the Board; and

(b) before the end of the period prescribed in a legislative instrument made by the Minister for the purposes of this paragraph, the person is unable to show that the decision is so reviewable;

the Principal Member may dismiss the application without proceeding to review the decision.

Dismissal if applicant fails to proceed or fails to comply with Board's direction

(8) If the applicant for the review of a decision fails within a reasonable time:

(a) to proceed with the application; or

(b) to comply with a direction given to the applicant under this Part in relation to the application;

then:

(c) the Principal Member may dismiss the application without proceeding to review the decision; and

(d) if he or she does so, he or she must notify each party to the review of the dismissal.

Review taken to be concluded

(9) If an application is dismissed under this section, the review to which the application relates, unless the application is reinstated under subsection (10) or (11), is taken to be concluded.

Reinstatement of application

(10) If the Principal Member, under subsection (4), dismisses an application:

(a) the applicant may, within 28 days after receiving notification of the dismissal, apply to the Principal Member for reinstatement of the application; and

(b) if the Principal Member considers it appropriate to do so, he or she may reinstate the application and give such directions as appear to him or her to be appropriate in the circumstances.

(11) If it appears to the Principal Member that an application has been dismissed under this section in error, he or she may, on the application of a party to the review or on his or her own initiative, reinstate the application and give such directions as appear to him or her to be appropriate in the circumstances.