THE NAVAL ASSOCIATION OF AUSTRALIA

Patron-In-Chief: His Majesty King Charles III

President
David Manolas

www.navalassoc.org.au

Foreign Affairs, Defence and Trade Committee Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024

Dear Senators,

The Naval Association of Australia (NAA) has been monitoring closely the proceedings and reports of the Royal Commission into Defence and Veteran Suicide (the Royal Commission) and the Exposure Draft of the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024.

We have also made submissions to the Royal Commission and the draft Veterans' Entitlements Bill. Before that the NAA also made submissions to the Productivity Commission Inquiry Report 'A Better Way to Support Veterans' 2019.

In addition to this we have had the opportunity to discuss with the Royal Australian Armoured Corps Corporation Ltd ('the RAAC Corporation') their submissions and their views on the harmonisation of the three Acts that currently comprise veterans' legislation. We support the views expressed by Mr. Noel Mc Laughlin OAM MBA on behalf of the Royal Australian Armoured Corps (RAAC) AAC Corporation Limited.

The NAA as a national association representing former and current members of the Royal Australian Navy expresses opinions on only those issues it feels to have some expertise and which we believe are in the best interests of our shipmates and their families.

Generally, we commend the Minister for Veterans' Affairs and the department for biting the bullet and, in a short space of time producing draft legislation designed to reduce the burden of compensation and rehabilitation claims of veterans and their families.

However, the NAA believes that there are several issues which still concern us. We believe the proverb of 'Act in haste and repent at leisure' is appropriate because we seek to ensure that our shipmates now and in the future are not disadvantaged simply because we could not spend the time raising our concerns.

I have attached a list of our concerns to this letter, and I am willing to appear before the Committee to expand on the issues or answer any questions you may have.

Yours faithfully

President, ACT Section NAA
13 August 2024

Attachment A to:
Submission dated 13 August 2024

Naval Association of Australia

Response to:

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024

References:

A. *Veterans Entitlement Act 1986* (the 'VEA')
B. *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (the 'DRCA')
C. *Military Rehabilitation and Compensation Act 2004* (the 'MRCA')
D. A Better Way to Support Veterans – Productivity Commission Inquiry Report, Volumes 1 and 2, June 2019 (the 'Productivity Report')
E. Royal Commission into Defence and Veteran Suicide, Interim Report, August 2022 ('the Royal Commission Interim Report') Royal Commission Interim Report
F. Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (the 'Harmonisation Bill') Harmonisation Bill
G. Exposure Draft Consultation Report – 2024 ('the Consultation Report') Consultation Report
H. Thematic Analysis of Submission Received on the Exposure Draft of the Veterans' Entitlements, Treatment and Support and Harmonisation Bill) 2024 (the DVA Thematic Analysis') DVA Thematic Analysis

Introduction

The Naval Association of Australia ('the NAA') represents former and current members of the Royal Australian Navy.

The main objective of the veteran support system should be to improve the lives and wellbeing which is due to a number of issues. These issues include

- money,
- the changing nature of Australian Defence Force deployments,
- the lack of communication between those responsible for providing benefits; and
- those who seek those benefits.

The 2019 Productivity Commission report 'A Better Way to Support Veterans' made a number of recommendations designed to improve service to the veterans. Not all of the recommendations were followed by government. It is arguable that if the Productivity Commission's recommendations had been followed there would not have been a requirement for the Royal Commission into Defence and Veteran Suicide. Particularly as the Royal Commission has echoed many sentiments expressed by the Productivity Commission. It was the alarming number of suicides among the veteran community which alarmed the Australian public and forced the government into action. Government action with respect to veterans welfare should not be confused with altruism or a

commitment to do the right thing by the veteran community. It was public pressure that forced action.

On the DVA Website under the heading 'Transforming DVA' it states:

> 'We have been listening to you and improving services so we can meet your needs in a way that suits you.[1]

It is our submission that DVA may not have been listening as closely as it should to veterans' views which may result in many of the problems experienced in the past are doomed to be repeated.

Veterans are heavily reliant on the service of voluntary advocates to help them navigate the maze of veterans' legislation and the NAA believes that even with the proposed new legislation, advocates will still be very important. The issue of advocates training is very important and the Royal Commission report at page 220 said

> 'Advocates can play a significant role assisting veterans during claim lodgement and processing, and in helping veterans to understand their entitlements, locate supporting documentation for their claims and access supports.

Given the history of veterans' legislation in Australia it is perhaps opportune to remember the words of Mr Justice Lee in *Tracy v the Repatriation Commission*, said:

> 'If there is ambiguity in the meaning of the legislation a beneficial construction is to be preferred and the Act is to be construed "to give the fullest relief which the fair meaning of its language will allow."[2]

In our submission we intend to raise a number of issues, some of which were raised by the Productivity Commission reports and /or the Royal Commission reports. These are detailed below together with our concerns as to the impact this is likely to have on RAN veterans and their families.

Examination of the Thematic Analysis

In the Consultation Report released by the Minister in 2024 (Reference G), DVA has classified submissions received from the veteran community concerning the draft Harmonisation Bill, into three categories:

> '1) issues that will be addressed in the draft Bill;
> 2) an ongoing issue that may be considered in the future; or
> 3) issues that are out of scope for this legislation reform …'

It is unfortunate the Minister, in point (2) above uses the phrase 'may be considered in the future'. The *Acts Interpretation Act 1901* (Cth) at s 33 defines 'may' as '…something that may be done at the discretion of the person, court or body'.

It is this discretionary power that is of concern to the NAA. For example, the common law damages to be discussed later in our submission, is one of those issues that 'may' be considered. The training of advocates which, since being taken over by DVA four years

[1] https://www.dva.gov.au/about/overview/transforming-dva

[2] *Tracy v Repatriation Commission* [1999] FCA 1523, at para 13. See also among others *Repatriation Commission v Hawkins* [1993] FCA 479, *Repatriation Commission v Law* [1981] HCA 57, CLR 635 per Aickin J at 652, *Repatriation Commission v Hayes* [1982] FCA 107, per Keely J at 219; *Starcevich v Repatriation Commission* (1987) 18 FCR, 221 at 225, per Fox, J; *Miller v Minister for Pensions* [1947] 2 All ER at 372.

ago, has proceeded at a dilatory and lethargic pace is another of those to be listed under the 'may' be considered umbrella.

The Thematic Analysis of submissions received (Reference H) lists 380 issues raised by the veteran community in response to the Harmonisation Bill. Of these 281 are categorised as 'NFA', 20 are 'for policy consideration', 38 are 'for later consideration' and 32 are for 'administration consideration'. From analysis of DVA documents these categories are likely to form the 'may be considered in the future' category.

Examination of the Thematic Analysis indicates that NFA would be an appropriate category for some issues raised by the veteran community. For example, 'the Queensland Government does not recognise the term Wholly Dependent Partner for State Government rebates' or 'Supportive of attempts to harmonise veterans' legislation'. These are outside the remit of the Commonwealth and best reside in the State or Territory governments.

Some others however need a more positive response. The NAA believes that the elastic terms such as 'for policy consideration', 'for later consideration' or 'for administration consideration' are not appropriate and are opaque. A constant criticism of DVA is that it is not transparent when dealing with veterans. After such an expensive exercise as the Royal Commission combined with the appalling loss of veterans' lives, much of it related to DVA's lack of compassion and transparency, DVA should be able to provide more strategic responses to those given in the Thematic Analysis. The responses indicate many of the veterans' concerns will be confined to the 'too hard basket' in the hope they will be forgotten.

Recommendation

The NAA recommends DVA responses to veterans' concerns as outlined in the Thematic Analysis should be more positive.

The NAA recommends DVA, and the Minister should provide an action plan complete with dates when actions are to be completed and that this action plan be submitted to parliament and made public in order that DVA is to be held accountable.

Contentions that medical reports are sometimes withheld

If a veteran or their advocate appeals a decision from the VRB to the AAT (now the Administrative Review Tribunal (ART)), the veteran or their advocate is provided with a section 137 Report. This report is supposed to contain all information used by the delegate of the Repatriation Commission in determining a claim.

In the Royal Commission public hearings, the Royal Commission was told of a practice whereby DVA withholds medical records from veterans seeking to appeal a delegate's decision.

The Exposure Draft s at 352D (2) (Reference F) which grandfather's s 137 (2) of the VEA, contains shield provisions which allow the Repatriation Commission to withhold information in a medical report concerning a veteran, from the veteran or their advocate. The Exposure Draft states:

> *'If the report contains or refers to any information, opinion or other matter that, in the opinion of the Commission:*
>
> *(a) is of a confidential nature; or*

(b) might be prejudicial to the physical or mental health or well-being of the applicant to communicate to the applicant;

the document served on the applicant must not contain or refer to that information, opinion or other matter.'

The NAA has been told by two senior advocates of the practice by DVA of withholding information is common.

On 7 April 2022, Mr Peter Singleton, Counsel Assisting the Royal Commission asked Mr Geoff Lazar, one of the three senior solicitors for the Veterans' Advisory Service of NSW, if DVA relied upon its in-house medical advisor but did not provide this information to the veteran or their advocate. Mr Lazar said it was routine for DVA to withhold such information.[3]

The Thematic Diagram, Attachment A, page 3, states,

'There has been no practice of not including (sic) a Medical Adviser opinion that has been provided for the purpose of the primary determination in the s 137 report. – NFA '

This would mean that despite evidence to the contrary, DVA is closing its mind to this practice which is unconscionable and may be seen as a denial of natural justice.

It may also be contrary to Article 10 of the United Nations Declaration on Human Rights which states:

'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'[4]

Recommendation

The NAA recommends that in the interests of a fair and equitable system for veterans s352(D)(2) should be removed from the Harmonisation Bill.

[3] Submission by the RAAC Corporation Ltd to the Royal Commission into Defence and Veteran Suicide, 14 April 2024 reproduced by permission of Mr. Noel Mc Laughlin OAM, MBA, Chairman, RAAC Corporation

[4] United Nations Declaration on Human Rights, https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf, downloaded 8 August 2024.

Preservation of case law

This is confusing because the Thematic Analysis, Attachment A, item at page 2, states 'all MRCA case law will be retained'. Some of the most significant cases in support of veterans have not related to MRCA case law. For example, in *Canute v Comcare* [2006] HCA 47, the applicant successfully appealed a lower court ruling on the subject of a sequela and whether further compensation was payable for a secondary injury. The applicant in this case was not a veteran but the reasoning in the decision has significant impact and success for veterans' claims.

A number of other cases followed Canute which unfortunately for the Commonwealth has resulted in success for veterans. If DVA is attempting to legislate to restrict the use of common law cases in veterans' law, then this will be an attempt to deny justice for veterans.

Recommendation

The NAA recommends DVA should spell out what it means by 'all MRCA case law will be retained'

Review pathway

Currently under veterans' legislation people with legal training are not permitted to represent a veteran at the Veterans Review Board (VRB) hearing. This restriction has been grandfathered into the Harmonisation Bill.

The government argues the restriction ensures the VRB remains less adversarial, with a veteran-friendly environment where matters can be resolved without the involvement of lawyers, available to all veterans.

The NAA is concerned by the continuing ban on legal representatives representing veterans at the VRB.

A review of the present membership of the VRB indicates there are 43 members of the VRB who are available to hear appeals. Of these 26 have had legal training with 2 holding a Diploma of Law and 24 with a Bachelor of Laws (LLB).

Of the 24 with LLBs, five are solicitors in private practice, eight hold a Master of Law (four of whom are barristers), and one is an Associate Professor of Law.

When putting a case to this bevy of lawyers in a VRB; is an advocate, who invariably is a volunteer and works part time, the odds are against the veteran simply on legal experience alone.

The NAA is concerned about this imbalance of justice and what appears to be a breach by the Commonwealth of its obligations under its Model Litigant Policy [5]. In particular, not taking advantage of a claimant who does not have the resources to litigate a legitimate claim.

[5] Commonwealth of Australia, Attorney-General's Department, Legal Services Directions 2017, Appendix B, https://www.legislation.gov.au/F2017L00369/latest/text

Although some ESOs agree that legally qualified persons should not represent veterans at the VRB, there are other ESOs who have an opposing view.

The NAA believes that if a veteran elects to be legally represented it is their decision not a legislator's.

Recommendation

The NAA recommends veterans should be given the option of legal representation at the VRB.

Service differential

The NAA is disappointed that the Bill makes no allowance for dispensing with the current service differential (between warlike and non warlike service, or operational and non operational) in favour of a single operational environment for injuries, illnesses, or the death of a veteran. The NAA believes if the current system was designed to show that operational service is of greater value than non-operational service, it is discriminatory. If it was designed to reduce the chances of a financial payout it is unconscionable. An injury or disease incurred in the service of the nation whether in peace or war has the same effect on the veteran.

The current system of distinguishing operational from non-operational service is discriminatory. The NAA believes that a citizen joins the defence force to defend Australia. An individual not being sent into an operational environment is not a choice he or she makes. It is determined by the operational and strategic environment at the time.

The Productivity Commission at Recommendation 14.1 said in part 'The Australian Government should amend the *Military Rehabilitation and Compensation Act 2004* … to remove the service differential,

The amalgamation was supported by the Chief of the Defence Force, General Angus Campbell AO DSC to the Royal Commission. General Campbell said.

> *'I think the nation's responsibility to support its service personnel to enable their wellbeing is an inherent and reciprocal duty of the State and arises irrespective of the nature of the circumstances of the service they are directed to perform. If your need for assistance arises because of a period of service, you should be supported and/or where relevant, compensated.'*[6]

The Royal Commission in its Interim Report stated,

> *'We conclude that the Australian Government should remove the distinction between different types of military service when prescribing the level of care, support and compensation provided to veterans.'*[7]

The Royal Commission went on to observe,

> '…we accept that there may be particular issues or budgetary considerations …[but] … the Government should remove the distinction between the different types of military service when prescribing the level of care, support and compensation provided to veterans.'[8]

[6] Commonwealth, Royal Commission into Defence and Veteran Suicide, Interim Report (2022). p 199.
[7] *Ibid.*
[8] *Ibid.*

The Thematic Analysis, (Reference H) Attachment A, showed the issue of service differential was raised on 13 separate occasions.

One issue raised on page 12 was that;

> *'....all ADF members and veterans receive the same entitlements'.*

The DVA response to this is;

> *'Noted. This is a core element of the reform'.*

However, at page 20 of Reference H, an issue raised was for a single standard of proof. The DVA response to these was;

> *'... The distinction based on service type(s) was retained when MRCA was developed and continues to be supported.*'

The evidence shows the differentiation is not supported by the Productivity Commission, the Royal Commission and a number of responses to the draft Harmonisation Bill.

The NAA believes this is a financial decision because if as the Minister states, no one will be worse off, future claims will be assessed on the Reasonable Hypothesis standard as opposed to the Balance of Probability. The Reasonable Hypothesis is more in keeping with the beneficial legislation concept. However, the Reasonable Hypothesis would make it easier for veterans to have their claims accepted which would impact on the Treasury. If this is the case, the differentiation is not based on what is best for the veteran but what suits the Treasury purse.

Recommendation

The NAA stands by its recommendation made earlier this year to the Harmonisation Bill that the service differential be deleted from the draft legislation

Common law damages for non-economic loss (NEL)

The Common Law damages for NEL are currently restricted to $110,000 under MRCA from 1 July 2004. This cap was set in 1988 and remains the upper limit today. There has been no allowance made for Consumer Price Index increases or of rises in legal expenses for the past 38 years or the reduced value of the Australian dollar.

Section 389(5) of the Harmonisation Bill will increase the common law damages from $110,000 to $177,000. However, it is not intended to index this amount to keep pace with inflation. If history is to be a guide, then for the next 40 years, the common law damages will be capped at $177,000. This tends to indicate that veteran's monetary compensation is ruled by the Treasury.

Recommendation

The NAA recommends the NEL upper limit be indexed twice a year to keep abreast of inflation as is currently the case for those in receipt of all Military Comsuper recipients and veterans receiving the Service Pension

Overpayments and debt recovery

The NAA appreciates that from time to time, overpayments have been made for a variety of reasons. The notification of an overpayment and total amount owing be can cause enormous stress and distress to debt recipients.

The current s 30C of the VEA (now covered in ss415, 416, 428 and 429 in the Harmonisation Bill) give little guidance on debt recovery and the case of *Smith v Commonwealth of Australia* [2009] FCA 684 shows how DVA can become confused by its own legislation.

The unjust and illegal debt recovery practices recently highlighted in the Robodebt case indicates how corrupt government practices can lead to significant hardship.

The Thematic Analysis, Attachment A at page 22 states that '…delegates have discretion to assess the financial circumstances of the individual and consider how recovery occurs.'

Whilst it may be argued that delegates may understand the veteran's situation, this does not give them the expertise to undergo a full financial analysis regarding repayments.

The NAA has previously stated that based on the experiences of the Robodebt scandal and similar scandals associated with the Post Office in the UK. There is a need for a more humane approach to recovery of debts from veterans.

Recommendation

The NAA recommends that prior to any debt recovery, the veteran be contacted and offered counselling as to the best method of repayment.

The NAA recommends that an amount be set by which a debt will be written off. The Robodebt Royal Commission recommended a limitation period of six years.

Conclusion

The NAA considers the harmonisation of the three Acts to be a positive step but is compelled to raise issues which in our opinion, if not addressed will result in disadvantages to the veteran community.

The NAA is prepared to appear before the Committee to discuss our concerns.

			THEMATIC TABLE					
Page	**No Further Action**	**For policy consideration**	**For later consideration**	**For Admin consideration**	**Refer to claims area for review**	**May need cross dept policy**	**Changes incl in draft Bill**	**Consideration to be given in lead up of single Act**
1	9	4	1	0	0	0	0	0
2	7	1	0	2	0	0	0	0
3	4	1	2	7	0	0	0	0
4	4	0	2	5	0	0	0	0
5	11	0	3	5	1	0	0	0
6	4	1	3	0	0	0	2	0
7	2	0	0	5	0	1	1	0
8	3	0	1	4	0	0	1	0
9	4	0	2	1	0	0	1	0
12	9	0	0	0	0	0	0	0
11	7	0	5	0	0	0	0	0
12	11	0	2	1	1	0	0	0
13	10	2	0	0	0	0	0	0
14	15	0	0	0	0	0	0	0
15	10	0	1	0	0	0	0	0
16	18	0	0	0	0	0	0	0
17	11	2	1	0	0	0	0	0
18	8	1	1	2	0	0	0	0
19	6	2	3	0	0	0	0	0
20	13	1	0	0	0	0	0	0
21	6	0	0	0	0	0	0	0
22	6	0	2	0	0	0	0	0
23	8	5	0	0	0	0	0	0
24	11	0	0	0	0	0	0	0
25	14	0	0	0	0	0	0	0
26	10	0	0	0	0	0	0	0
27	5	0	0	0	0	0	0	0
28	9	0	0	0	0	0	0	1
29	21	0	0	0	0	0	0	0
30	6	0	5	0	0	0	0	0
31	8	0	3	0	0	0	0	0
32	10	0	1	0	0	0	0	0
33	1	0	0	0	0	0	0	0
TOTAL	281	20	38	32	2	1	5	1