

Chapter 2

Issues raised in evidence

Introduction

2.1 This chapter examines the issues raised in evidence during the committee's inquiry into the Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017 (the bill). As participants of the inquiry were supportive of the bulk of changes proposed by the bill, this chapter will focus on Schedules 1 and 5, and conclude with the committee's view and recommendation.

2.2 While the chapter focuses on evidence particular to this inquiry, it is worth noting that many of the concerns raised go to larger issues that have been forming within the Veterans' Affairs portfolio for some time. The veteran community's experience with bureaucratic barriers to entitlements and an existing general dissatisfaction with government handling of personal data has likely contributed to concerns with elements of the bill. Indeed, submitters expressed concerns that the amendments in Schedule 1 of the bill are a further erosion of veterans' rights while Schedule 5 has been viewed with some suspicion for its information sharing provisions. This chapter seeks to allay some of those concerns.

Schedule 1

Power to dismiss frivolous applications

2.3 Following recent amendments under the Budget Savings (Omnibus) Bill 2016, the Veterans' Review Board (VRB) is now the only avenue for internal appeal of a decision. Concerns were raised by a number of submitters regarding Schedule 1 of the bill, which proposes to provide the Principal Member of the VRB with the power to 'dismiss an application for review of a decision if he or she is satisfied that the application is frivolous, vexatious, misconceived or lacking in substance', as well as introduce the option to delegate this power.¹

2.4 For example, it was argued by Mr Brian Briggs, National Military Compensation Expert, Slater and Gordon Lawyers, in his submission that the amendments contained in Schedule 1 could potentially interfere with the basic right to a fair hearing by denying applicants the opportunity to present their case before the board for deliberation.² Mr Briggs contended that the bill's amendments reduce the ability of the VRB to achieve its objective of maintaining a fair mechanism of review

1 For example: Commonwealth Ombudsman, *Submission 1*; Slater and Gordon Lawyers, *Submission 2*; Returned and Services League of Australia, *Submission 6*.

2 *International Covenant on Civil and Political Rights*, New York, 16 December 1966, entry into force 13 November 1980, [1980] ATS 23, Part III, Article 14—However, whether administrative review proceedings constitute a 'suit at law' is not fully settled.

and—with an expected increase in the board's workload—would also place applications at risk of being dismissed to save time.³

2.5 Although Mr Briggs acknowledged the experience of members of the VRB, he highlighted that even the Administrative Appeals Tribunal (AAT) had wrongly dismissed genuine claims in the past. To introduce similar powers to the VRB would increase the risk that genuine claims could be erroneously dismissed. Mr Briggs pointed out that for many applicants, the Department of Veterans' Affairs (DVA) compensation application process is already a difficult experience—applicants seeking appeal of a summarily dismissed application by the VRB would be required to spend additional time and resources to have the decision reviewed by the AAT:

This can have a significant detrimental impact on applicants; in addition to the costs spent on application to the VRB, the applicant must potentially bear the costs of an appeal process through the AAT. According to figures from the Department of Veterans' Affairs, this can easily compound the average cost of the initial VRB hearing of approximately \$1,450 with the average costs of an AAT case—whether it proceeds to a hearing or not—of between \$2,600 and \$14,620. This can be a stressful and lengthy process, and potentially dangerous to applicants already experiencing enormous hardship.⁴

2.6 By way of comparison, Mr Briggs drew attention to the *Safety, Rehabilitation and Compensation Act 1988* which does not enable applications brought by Commonwealth public servants to be summarily dismissed. He pointed out that the proposed amendments contained in Schedule 1 could be interpreted as a further attack on veterans, arguing:

In an environment where claimants frustrated with their experience with the claims process are already taking their own lives, to widen the Board's powers to dismiss claims is...a potentially fatal move.⁵

2.7 Similarly, the Returned and Services League of Australia (RSL) submission contended that a lone decision of a Principal Member is likely to be perceived by the community as less independent and impartial than a decision by a panel of three members. The RSL also highlighted that whilst a small number of claims are frivolous, the majority of applications are not:

[A]lmost all veterans who approach RSL DefenceCare for assistance want to lodge a claim with the DVA as they believe that an injury or illness they have *is* or *maybe* connected to their military service. A few openly admit they are not sure if their injury or illness is connected to service or that the connection is tenuous at best, but most of these accept the DVA or VRB's decision if it is in the negative. Many are grateful for the opportunity to see if they qualify for assistance from the DVA...The panel affords them the chance to be heard by three individuals in contrast to the one delegate at the

3 Slater and Gordon Lawyers, *Submission 2*, p. 2.

4 Slater and Gordon Lawyers, *Submission 2*, p. 4.

5 Slater and Gordon Lawyers, *Submission 2*, p. 6.

DVA. In our experience, members of a panel often make comments during a hearing that indicate they are not in agreement about various aspects of the case.⁶

2.8 Mr Briggs also argued against aligning the VRB's grounds for summary dismissal with those that apply to the AAT and other review bodies:

While it is arguably appropriate that these review bodies possessing a broad jurisdictional case have summary dismissal powers at their disposal, appeals to the Veterans' Review Board are of a niche jurisdiction and should not be considered to be in the same category.⁷

2.9 Indeed, Mr Briggs argued that the proposed delegation powers in Schedule 1 could potentially allow the Principal Member to delegate the dismissal power to a Registrar or Senior Member who could be ill-equipped to identify whether a claim has merit.⁸ Similarly, the Commonwealth Ombudsman submission suggested that the VRB consider limiting the option to delegate the proposed dismissal power to senior level officers.⁹

2.10 In addition to arguments around whether or not the proposed powers in Schedule 1 should be granted, concerns were raised as to how the dismissal powers would actually operate. For example, submitters noted that there is no requirement for the Principal Member to provide reasons for a dismissal or notify relevant parties within a reasonable amount of time. It was argued that instruction on the form, content, and timing of dismissal notifications should be included in the bill.¹⁰ In a similar vein, Mr Briggs also contended that there is ambiguity around *when* the board would be able to dismiss a claim, arguing that:

The proposed amendment makes it is entirely unclear whether the Principal Member can dismiss an application upon receiving it, or more fairly, whether this order can only be made once the claimant has had the opportunity to make their case at a hearing.¹¹

Support for Schedule 1

2.11 A number of submitters were supportive of the bill's intent to improve services to veterans.¹² It was argued that by formalising provisions to deal with applications unlikely to succeed, the proposed amendments in Schedule 1 would

6 Returned and Services League of Australia, *Submission 6*, p. 5.

7 Slater and Gordon Lawyers, *Submission 2*, p. 2.

8 Slater and Gordon Lawyers, *Submission 2*, p. 4.

9 Commonwealth Ombudsman, *Submission 1*, p. 4.

10 For example: Alliance of Defence Service Organisations, *Submission 3*, pp. 9–13; Slater and Gordon Lawyers, *Submission 2*, p. 5.

11 Slater and Gordon Lawyers, *Submission 2*, p. 5.

12 For example: Commonwealth Ombudsman, *Submission 1*; Alliance of Defence Service Organisations, *Submission 3*; Department of Defence, *Submission 5*; Department of Veterans' Affairs, *Submission 7*.

manage the board's resources more efficiently. It was also pointed out that the power to dismiss frivolous or vexatious application would only be used in the rarest of cases and abuse of the power would be prevented through the right of appeal to the AAT.

2.12 Indeed, the Alliance of Defence Service Organisations (ADSO) submission argued that, 'vexatious, frivolous, and hopeless appeals come at a cost to the Australian taxpayer and to the detriment of veteran applicants through costly and time-consuming appeals of this nature'.¹³ The ADSO contended that while the VRB continued to operate on a merits review basis, the alignment of the objectives of the VRB and AAT would only enhance the consistency and administration of the legislation.

2.13 In response to concerns raised by submitters as to the operation of the proposed dismissal power, the Principal Member of the VRB, Mr Doug Humphreys OAM, provided written clarification to the committee to explain his position on the matter and help allay fears in the community.

2.14 Firstly, Mr Humphreys reassured members that the law on the area of 'frivolous and vexatious' is well settled and has a very high threshold, and that the proposed dismissal power would only be used in the rarest of circumstances.¹⁴

2.15 In terms of an expected increase in workload, Mr Humphreys pointed out that the board's workload had in fact decreased when compared to the same time last year:

To date, the VRB has not experienced a significant increase in in appeals following the introduction of the Single Appeal Pathway. As at the end of April 2017, new appeals at the VRB totalled 2227, which compares to 2324 appeals in April 2016. Given that applicants have more than 12 months to lodge a MRCA appeal with the VRB, the single appeal pathway may not start to impact on the VRB's level of appeals until well into 2017–18.¹⁵

2.16 With regards to concerns that the Principal Member would have the option to delegate the power, Mr Humphreys wrote:

I can assure the Committee that I will not delegate the power to other Board Members or Registrars. This would be set out in the VRB's General Practice Direction, which is publicly accessible. The Practice Direction would also clearly set out that adequate notice of any preliminary hearing would be required to be given to the applicant, any hearing would be required to afford full procedural fairness, including the opportunity to address the Board on the issue.

2.17 Concerns that Schedule 1 does not contain any requirement for the Principal Member to provide reasons for the dismissal were also addressed:

13 Alliance of Defence Service Organisations, *Submission 3*, p. 5.

14 Veterans' Review Board, *Submission 8*, pp. 1–2.

15 Doug Humphreys OAM, Principal Member, Veterans' Review Board, additional information received 25 May 2017, p. 1.

[A]s with all VRB decisions, a full and comprehensive set of reasons would need to be provided if the power were exercised, in accordance with section 140 of the VEA, which provides that the Board must give a copy of its decision to each party to the review.¹⁶

2.18 Mr Humphreys also shed light on when an application could be dismissed, explaining that:

The VRB's General Practice Direction would set out that in the circumstances where the VRB was considering exercising its power to dismiss an application, this would only be done following a preliminary hearing. Parties would be given full notice of any preliminary hearing and they would be invited to provide any submissions addressing the issue, preferably in writing. At the preliminary hearing itself, an applicant would also be afforded full procedural fairness, by being given an opportunity to address the Board orally on the issue, in addition to any written submissions.¹⁷

2.19 The Principal Legal Advisor of DVA, Ms Carolyn Spiers, also assisted to address some of the concerns raised by submitters. For example, in response to Mr Briggs' concerns that claimants would potentially be burdened with additional costs and stress by having to take their case to the AAT, Ms Spiers argued:

First of all, taking a veterans' matter to the Administrative Appeals Tribunal is exempt from filing fees and all of that, so they would not have the cost of that. The tribunal allows people to be self-represented, and I suspect the people we are talking about are likely to be the more was self-represented people who are used to those environments. The other issue would be that there is nothing stopping the board and the tribunal sitting down—the two registrars—and actually having a discussion about being able to streamline those sorts of cases so that they get an early hearing at the AAT.¹⁸

2.20 During the hearing, Ms Spiers provided the committee with a list of bodies that currently possess the power to dismiss frivolous or vexatious claims. There are over 20 on the list, including the Administrative Appeals Tribunal, Australian Competition and Consumer Commission, Australian Communications and Media Authority, Fair Work Commission, Office of the Australian Information Commissioner, and Office of the Commonwealth Ombudsman.¹⁹

2.21 Indeed, Ms Spiers pointed out that the introduction of the single appeal pathway may have actually increased appeal options for some individuals:

16 Veterans' Review Board, *Submission 8*, p. 2.

17 Doug Humphreys OAM, Principal Member, Veterans' Review Board, additional information received 25 May 2017, p. 3.

18 Ms Carolyn Spiers, Principal Legal Advisor, Department of Veterans' Affairs, *Proof Committee Hansard*, 26 May 2017, p. 22.

19 Department of Veterans' Affairs, *List of bodies that can dismiss frivolous and vexatious* (tabled 26 May 2017).

There has never been legal representation at the board, ever, and the single appeal pathway does not remove that. It, in fact, gives those people that only had one level of external merits review, the AAT, another level so they actually have two now: the VRB and the AAT. So I think it is actually broadening the scope, not lessening the scope.²⁰

2.22 During the hearing, officers of the department took the opportunity to reassure the committee that the VRB's power would only be exercised in an application-specific rather than applicant-specific way and that an individual's right to review would not be impacted by cases they may have brought before.²¹

2.23 During the hearing, Mr Noel McLaughlin, Chairman, ADSO advised that if the bill was amended to include clear definitions, his organisation would be in support of the proposed amendments.²² His colleague, Colonel David Jamison, AM (Retired), National Spokesman, ADSO, explained:

[W]e believe the terms 'frivolous', 'vexatious' and 'misconceived' should be defined in the act and such definitions should relate back to definitions that come out of case law. We emphasise that this is a legislative issue that we are pursuing—it has nothing to do with the performance of either the members of the board or its performance over the years.²³

2.24 During discussions on the expected increase to the VRB's workload, Mr McLaughlin recommended that the board reintroduce the two-year period in which applicants can bring an appeal before the board—with an extension of three months allowed on appeal to the board—via its General Practice Direction:

The process then is: if you do not bring it before the board, your appeal is dismissed. It does not mean that is the end of the world; you are just put to the back of the queue, you resubmit and start again... We think that the two-year window is more reasonable in all the circumstances for the board to exercise its powers and functions in this regard...²⁴

2.25 However, when committee members questioned the department on whether it could review the two-year process, Ms Spiers provided the following clarification:

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

20 Ms Carolyn Spiers, Principal Legal Advisor, Department of Veterans' Affairs, *Proof Committee Hansard*, 26 May 2017, p. 23.

21 Ms Edel Kairouz, Assistant Secretary, Rehabilitation, Case Escalation and MRCA Review, Department of Veterans' Affairs, *Proof Committee Hansard*, 26 May 2017, pp. 21–22.

22 Mr Noel McLaughlin, Chairman, Alliance of Defence Service Organisations, *Proof Committee Hansard*, 26 May 2017, p. 4.

23 Colonel David Jamison, AM (Retired), National Spokesman, Alliance of Defence Service Organisations, *Proof Committee Hansard*, 26 May 2017, p. 1.

24 Mr Noel McLaughlin, Chairman, Alliance of Defence Service Organisations, *Proof Committee Hansard*, 26 May 2017, p. 3.

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.²⁵

Schedule 5

Information sharing

2.26 Submitters raised a number of privacy concerns with the amendments proposed in Schedule 5. Specifically, the amendments which would allow the Commonwealth Superannuation Corporation (CSC) to obtain medical and other information from the Military Rehabilitation and Compensation Commission (MRCC) in order to conduct superannuation investigations were the subject of criticism.²⁶

2.27 According to submitters, there is some confusion within the Defence community as to what type of information is being shared, for what purposes, and to whom. These concerns are magnified by scepticism around how personal data is stored and shared on government systems. Following the Centrelink debt recovery scheme and Australian Taxation Office system failures, it would appear that the community's distrust of government handling of data has been aggravated.²⁷

2.28 The Office of the Australian Information Commissioner submission pointed out that it can be difficult for current or former ADF members to understand how their personal information is being handled. For example, it noted that whilst the CSC is prohibited from using or disclosing information for purposes other than a purpose relating to the performance or function of the CSC-related legislation, 'the range of functions undertaken by the CSC and breadth of CSC legislation may mean that the full extent of those purposes is unclear'.²⁸

2.29 Indeed, the ADSO submission speculated whether information sharing between the MRCC and the CSC would be a general requirement for access to superannuation entitlements or whether it would be specific to veterans who are medically discharged and entitled to access superannuation on the grounds of disability.²⁹

2.30 The ADSO also expressed concern that increased information sharing between agencies could potentially prejudice entitlements to superannuation payments.³⁰

25 Ms Carolyn Spiers, Principal Legal Advisor, Department of Veterans' Affairs, *Proof Committee Hansard*, 26 May 2017, p. 23.

26 For example: Alliance of Defence Service Organisations, *Submission 3*; Office of the Australian Information Commissioner, *Submission 4*; Returned and Services League of Australia, *Submission 6*.

27 Alliance of Defence Service Organisations, *Submission 3*, pp. 9–13.

28 Office of the Australian Information Commissioner, *Submission 4*, pp. 1–2.

29 Alliance of Defence Service Organisations, *Submission 3*, p. 10.

30 Alliance of Defence Service Organisations, *Submission 3*, pp. 9–13.

2.31 Submitters drew comparisons with the recently enacted *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Act 2017* arguing that similar criminal sanctions to those imposed on the Secretary of DVA should be included in this bill.³¹ Under that legislation, the Secretary is required to comply with certain safeguards before public interest disclosure of information about a case or class of cases. If the Secretary does not comply with the requirements before disclosing personal information, he or she commits an offence punishable by 60 penalty units.³²

2.32 Many submitters encouraged the department to promote greater transparency by undertaking a Privacy Impact Assessment (PIA) of Schedule 5 of the bill. It was argued that a PIA would go some way toward allaying fears in the community by explaining to individuals why the sharing of information is necessary, what information would be shared, and how personal information would be handled.³³

Support for Schedule 5

2.33 In support of the changes, the department argued that the proposed amendments contained in Schedule 5 would reduce the need for individuals to attend unnecessary medical assessments and retell their story multiple times. The changes are expected to improve access to care and support, and be of particular benefit to those with mental health conditions. It was argued that the changes would ultimately be of most benefit to recipients by enabling quicker determinations.³⁴

2.34 Other submitters also highlighted the expected benefits of the Schedule 5 provisions, arguing that increased information sharing would reduce existing complexity in the system, help to minimise errors, and speed up delivery times for clients.³⁵

2.35 At the public hearing, the Chief Executive Officer of the CSC, Mr Peter Carrigy-Ryan, reassured the committee that there is currently a range of protections in place which ensure his organisation engages in secure information sharing practices:

All of our information is personnel-in-confidence and is subject to all of the Commonwealth government security requirements. We have obligations under each piece of legislation and all of the privacy principles, as well as obligations under our superannuation licensing regime, to make sure that the highest level of protection is provided to members' information and members' data. I am not aware of any incident—that I can remember—in

31 Alliance of Defence Service Organisations, *Submission 3*, p. 10.

32 *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Act 2017*, s. 409A, 151B, 131A.

33 For example: Alliance of Defence Service Organisations, *Submission 3*; Office of the Australian Information Commissioner, *Submission 4*; Returned and Services League of Australia, *Submission 6*.

34 Department of Veterans' Affairs, *Submission 7*, p. 5.

35 For example: Commonwealth Ombudsman, *Submission 1*; Department of Defence, *Submission 5*; Department of Veterans' Affairs, *Submission 7*.

recent years involving a breach of that privacy in relation to any of the military cases that we are assessing.³⁶

2.36 During the hearing, the committee brought to the attention of CSC officers the Commonwealth Ombudsman's submission which raised concerns that delays in information sharing between the CSC and DVA had resulted in debts being raised many years afterwards. Following the hearing, the committee received written reassurance from Mr Carrigy-Ryan that the CSC had been working with the department to mitigate similar potential delays and errors:

CSC...are aware that debts can arise because of the interrelationship between CSC and DVA payments, and tax legislation. To address these issues, the CSC agreed with DVA to flag when CSC is paying a person. This initiates a process within DVA to consider if DVA has an interest in any of the funds CSC is about to release. DVA entitlements are means tested, CSC pensions are not.³⁷

2.37 Officers of the department advised the committee that consideration had already been given to the privacy concerns raised by submitters, and an independent Privacy Impact Assessment had been commissioned:

I can confirm with this committee that I have instructed the Australian Government Solicitor to undertake that independent PIA of schedule 5. We instructed them earlier this week, so I am planning to have that PIA available to me, hopefully, sometime later next week. Then obviously we would be looking at making that available publicly.³⁸

2.38 Ms Spiers also advised the committee that the department was continuing to improve its communication with the veteran community and, to that effect, had begun to update its website to include brief explanations on potential changes to veterans' legislation. Although the webpage currently only contains one bill, the service would continue to expand:

We have also produced short and non-bureaucratic—if I can put it that way—summaries of the eight measures from the omnibus bill, which allows people to download those pages. I spoke to the ex-service members that were here in this committee as they walked out the door. I was telling them that we will give them the link. They are going to disseminate that link across their network. It will allow people to download. There is a broad summary of the bill and the specific details of each of the measures. They can be printed off. There is also an email address on the website...It is www.dva.gov.au/about-dva/legislation. The format of it is a very short overview of DVA's legislation on the first page, and then it references any new bills that DVA might have...We clearly need to do a little more work

36 Mr Carrigy-Ryan, Chief Executive Officer, Commonwealth Superannuation Corporation, *Proof Committee Hansard*, 26 May 2017, p. 13.

37 Mr Peter Carrigy-Ryan, Chief Executive Officer, Commonwealth Superannuation Corporation, additional information received 30 May 2017, p. 2.

38 Ms Carolyn Spiers, Principal Legal Advisor, Department of Veterans' Affairs, *Proof Committee Hansard*, 26 May 2017, p. 19.

and put some more bills there, but the purpose of it was to ensure that at least we had the omnibus details up and running...³⁹

Committee View

2.39 While the committee acknowledges submitters' concerns regarding Schedules 1 and 5 of the bill, it has been reassured by evidence received from the Principal Member of the Veterans' Review Board, and from officers of the Commonwealth Superannuation Corporation and the Department of Veterans' Affairs in response to those concerns. It should be noted that a majority of submitters supported most of the bill's proposed amendments, and that two out of the three most pressing concerns discussed during the committee's public hearing have already been addressed by the relevant agency.

2.40 With regards to Schedule 1, the committee is of the opinion that all of the concerns raised by submitters have been adequately addressed by the Principal Member of the VRB, Mr Humphreys. The committee is confident that the board would appropriately exercise the proposed power to dismiss frivolous and vexatious applications. The committee notes and agrees with the evidence given by Mr Humphreys' that there would be no delegation of the proposed dismissal power. The committee considers that formalisation of such a provision would improve the agency's efficiency, and would bring the agency into alignment with other review bodies who have had access to similar powers for some time without cause for concern.

2.41 The committee notes the suggestion by representatives of the Alliance of Defence Service Organisations that the bill should be amended to include clear definitions of the words 'frivolous' and 'vexatious' as derived from case law, however, it agrees with the Principal Member that the law on the area of 'frivolous and vexatious' is well settled and already has a high threshold.

2.42 Turning to Schedule 5, the committee acknowledges submitters' concerns regarding potential impacts to privacy; however it is reassured that the department has listened to the community on this matter and worked to promptly address the issue by commissioning an independent Privacy Impact Assessment from the Australian Government Solicitor. The committee looks forward to the results of the PIA being made publically available and disseminated to the community. The committee expects that the proposed information sharing amendments will ultimately be of benefit to veterans and their families by enabling the CSC to conduct faster superannuation benefits assessments as well as prevent the need for veterans to undergo unnecessary medical examinations where the MRCC already holds the relevant information. The committee is satisfied that the interference to privacy is reasonable and agrees that the amendments will result in better access to care and support for veterans.

2.43 The committee commends the bill to the Senate.

39 Ms Carolyn Spiers, Principal Legal Advisor, Department of Veterans' Affairs, *Proof Committee Hansard*, 26 May 2017, p. 19.

Recommendation 1

2.44 The committee recommends that the bill be passed.

**Senator Chris Back
Chair**

