

Dissenting report by Senator Jacqui Lambie

1.1 Senator Jacqui Lambie, of the State of Tasmania, dissents in part from the Committee's recommendation with respect to Schedule 1 of the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017 [Provisions]* which would grant a single member of the Veterans' Review Board ("VRB"), that being the Principal Member, the power to dismiss frivolous applications by amending the *Veterans' Entitlement Act 1986* ("VEA 1986") with proposed section 155(8A).

1.2 A party to review of a veterans' entitlement appeal, pursuant to section 147(2)(a) of the *VEA 1986*, may "appear in person, or be represented at the party's own expense by a person ***other than a legal practitioner . . .***"¹ (***Emphasis added.***) Conversely, a party to review of a veterans' entitlement appeal in the Administrative Appeals Tribunal ("AAT") Veterans' Appeals Division is permitted to be represented by a legal practitioner.² In this regard, the common law doctrines of procedural fairness and natural justice would disfavour adopting the AAT's model for summary dismissal, by a single board member versus a panel of three,³ because veterans are not permitted to be represented by legal counsel at VRB hearings.

1.3 Since 2010, DVA's own reviews of Ex-Service Organisations ("ESO") advocacy services indicates that there are issues with the adequacy of non-lawyer advocacy services available to the veterans' community appearing before the VRB. Indeed, "some ESOs have reported difficulty in attracting, training and retaining a sufficient number of advocates, welfare and pension officers to act on behalf of DVA beneficiaries and claimants and to deal with increasingly complex legislation."⁴ Nearly one year ago, on 30 June 2016, the DVA-Training and Information Program ("TIP"), which trained layman advocates, was scrapped by DVA for implementation of a different model yet to be proven effective.⁵

¹ "Legal practitioner" is read as including a reference to any person who: holds a degree of Bachelor of Laws, Master of Laws or Doctor of Laws or Bachelor of Legal Studies; or is otherwise qualified for admission as a barrister, solicitor, or barrister and solicitor, of the High Court or of the Supreme Court of a State or Territory. See section 147(3) *VEA 1986*. While there is no bar for a "legal practitioner" to assist a veteran in preliminary matters at the VRB, it can be said that s147(2)(a) *VEA 1986* has served as a deterrent to a veteran seeking a legal practitioner's assistance even with preliminary matters and thus the veteran either relies upon a lay advocate or is self-represented in both preliminary matters and the hearing.

² See section 32 of the *Administrative Appeals Tribunal Act 1975*. Thus, procedure in the AAT's Veterans' Appeals Division affords applicants an opportunity for full consideration and resolution of the matters when counsel is acting as an advocate.

³ The composition of the VRB, for the exercise of its powers of review, consists of traditionally three members: (1) a Principal Member or Senior Members; a (2) Service Member; and (3) one other member or various combinations that would provide a panel of three. See section 141 *VEA 1986*.

⁴ See [DVA Review of DVA-Funded ESO Advocacy and Welfare Services Final Report dated December 2010](#) at p. 9.

⁵ See DVA website "[Advocacy Training and Development Program](#)" webpage (retrieved 10 June 2017); [Training and Information Program \(TIP\) webpage](#) (retrieved 10 June 2017) and [DVA Training and Information Program webpage](#) (retrieved 10 June 2017).

1.4 Given the fact that there are issues with the adequacy and availability of layman advocacy services for veterans together with the fact that a legal practitioner is barred from appearing before the VRB by operation of section 147(2)(a) of the *VEA 1986* a self-represented veteran's right to review should not be further impeded by granting a single member of the VRB the power to summarily dismiss a veteran's application prior to an opportunity to be heard by a three-member panel at a hearing.

1.5 The Returned & Services League of Australia (RSL) noted that "many [veterans] are grateful for the opportunity to see if they qualify for assistance from DVA . . . [a] panel affords them the chance to be heard by three individuals in contrast to one delegate . . ." ⁶

1.6 Some veterans are vulnerable as evidenced by this Committee's recent inquiry into the mental health of Australian Defence Force serving personnel.⁷ In light of this vulnerability the granting of powers to summarily dismiss a veterans' appeal, particularly by a single member of the VRB, should not be permitted unless the veteran is first afforded a hearing before a three-member VRB board panel.⁸

1.7 Mr Brian Briggs, a national expert in veterans' entitlement law and military compensation, opined that it is inadequate to allow summary dismissal by the Principal Member of the VRB citing Federal Court cases as examples of incorrectly dismissed applications to the AAT.⁹

1.8 The Alliance of Defence Service Organisations ("ADSO"), the Principal Member of the VRB¹⁰ and the DVA Principal Legal Advisor (collectively the "proponents") fail to address common law doctrines of procedural fairness and natural justice, in granting special powers to the VRB Principal Member, to summarily dismiss an application where a self-represented veteran applicant has no right to legal representation at a hearing before such body and where there are known issues with the adequacy of layman veterans' advocates. Self-represented

⁶ Returned & Services League of Australia, Submission 6 at p. 5.

⁷ See generally report on Mental health of Australian Defence Force members and veterans, Senate FADT References Committee, March 2016.

⁸ For example, a self-represented veteran applicant at the VRB may have a diminished mental capacity due to PTSD, depression, anxiety disorder, drug or alcohol dependency or some other medical condition that impairs brain function and which may be service related. In that case, the self-represented veteran may not have been able to adequately state his or her case on the DVA claim's forms. But given the chance to attend a VRB hearing where three panel members are able to question the self-represented veteran, may enable the veteran to more fully present a successful application to the VRB instead of his or her case being summarily dismissed by the Principal Member prior to any hearing.

⁹ Slater and Gordon Lawyers, Submission 2 at p. 6.

¹⁰ Assurances by Mr Doug Humphreys, the current VRB Principal Member, to this Committee that he will only use the power in the rarest of cases and that he will not delegate the power to other Board Members or Registrars is a hollow argument and misses the point. (See VRB, Submission 8 at p. 2.) The 45th Parliament would not, *per se* be granting such power directly to Mr Humphreys, rather if this Parliament was to enact the proposed section 155(8A) it would be granting such power to whomever is the Principal Member of the VRB. Mr Humphreys will not be the Principal Member of the VRB *in perpetuity* and there is no fortune telling of how a future Principal Member will exercise such power if it was granted by this Parliament.

veterans should continue to enjoy the right to a hearing without the fear of a single VRB member summarily dismissing their case.

1.9 The DVA Principal Legal Advisor's attempt to argue that this Committee should support summary dismissal power of a veteran's appeal, by a single VRB member, in providing a list of bodies that currently possess the power to dismiss frivolous or vexatious claims fails because none of those bodies ban legal practitioners in representing¹¹ applicants or appellants.¹²

1.10 In the 33rd Parliament, during the second reading of the *Repatriation Legislation Amendment Bill 1984*, which created the VRB, it was noted by the late Senator Arthur Gietzelt, who served as the 29th Minister for Veterans' Affairs, that:

"[A]t the VRB a claimant will have the opportunity of an oral hearing. Country people will be given the option of a telephone conference hookup. A claimant will also have the right to be represented by a lay advocate if desired. Only if a claimant fails to advise of his or her intention to attend or be represented at a hearing will the review proceed in his or her absence."¹³

1.11 Thus, for this 45th Parliament to now consider granting powers to a single VRB member to summarily dismiss a veterans' appeal prior to a hearing is contrary to the 33rd Parliament's intent on the very creation of the VRB which was to afford a veteran the opportunity to be heard by way of an oral hearing. This Committee, in its haste to report out the Bill, fails to reconcile the lack of need for such change in procedure versus decades of long standing precedent and the historical reasons for the creation of the VRB. In doing so, it assists in eroding a veteran's right to a fair hearing.

1.12 The granting of such powers to a single VRB member to summarily dismiss a veteran's case would be a significant deviation from 30-plus years of veterans' entitlement law practice as explained above. Statistical data gleaned from the VRB annual reports does not support the proposition that there has been such a drastic increase in caseload at the VRB necessitating the Principal Member being given such extraordinary power to summarily dismiss a veteran's application in order to effectively manage the annual caseload of the VRB. To the contrary, the VRB caseload has significantly decreased over the last decade.¹⁴ Thus, there is no need to deviate from decades of practice in affording a self-represented veteran a hearing by a panel of three VRB members especially since there has been a long trend in decreased caseloads.

¹¹ The Social Services and Child Support Division of the AAT may grant leave for a person to be represented. See section 32(2) – (4) of the *Administrative Appeals Tribunal Act 1975*.

¹² Department of Veterans' Affairs. *List of bodies that can dismiss frivolous and vexatious* (tabled 26 May 2017).

¹³ [Remarks of Senator Gietzelt, Hansard, 29 May 1984 at p. 2048.](#)

¹⁴ See generally [VRB annual reports ranging from years 1999 to 2016](#). For example, in [reporting year 2015-16](#) there were 2,804 applications lodged with the VRB. A decade ago, in [reporting year 2005-06](#) there were 4,497 lodged applications. This shows that there were 1,693 fewer cases lodged in the most recent reporting year compared to a decade ago

1.13 The Committee is misled by the representations of the proponents, as explained above, in recommending the granting of summary dismissal powers thereby potentially thwarting three decades of deeply rooted common law doctrines of procedural fairness and natural justice in VRB proceedings to those who have served in uniform in defence of our nation. Further, this new power may serve to harm self-represented vulnerable veteran applicants at the VRB in the event that an application, with merit, is summarily dismissed in error by the single member of the VRB. So, there is no doubt, Mr Briggs cited clear examples of cases where the use of summary dismissal was in error.¹⁵

1.14 There can be no alignment of the VRB's operations with those of the AAT with respect to procedures for summary dismissal as the proponents would have this Committee believe without there being unintended consequences for vulnerable self-represented veteran applicants. The proponents sidestep these issues in their submissions and in testimony before this Committee. The risk of unintended consequences to those vulnerable self-represented veterans is far too great for this Parliament to grant special summary dismissal power. There is no compelling need for a change in the law.

1.15 Senator Lambie concurs, in part, with the remainder of the Committee's report.

Recommendation 1

1.16 Omit proposed section 155(8A) to *VEA 1986* from the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017 [Provisions]*.

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Senator for Tasmania

¹⁵ Slater and Gordon Lawyers, Submission 2 at p. 6.