

## Chapter 2

### Consideration of Schedule 2 of the bill

2.1 The committee received 21 submissions and two supplementary submissions. The submissions were generally supportive of the proposed single appeal pathway but raised three key areas of concern:

- the removal of claimant-initiated internal reconsideration (under section 349) and the efficiency of the proposed single appeal pathway;
- the costs of the appeal process and veterans' access to legal representation, including the availability of legal aid; and
- the expected budget saving of \$2.2 million over four years.

#### Section 347 vs Section 349 and the proposed single pathway

2.2 Currently, there are two ways in which an internal reconsideration of an original determination can occur: under section 347, the MRCC can initiate an internal reconsideration; under section 349, a claimant can initiate an internal reconsideration (provided that the claimant has not already applied to the VRB for a review). Schedule 2 removes the option for claimant-initiated internal reconsideration.

2.3 KCI Lawyers expressed concerns regarding the removal of claimant-initiated internal reconsideration, noting that there is no legislated requirement that an internal reconsideration will take place. Mr Greg Isolani of KCI Lawyers stated:

What was uncertain to me in the proposed schedule of amendments is whether that internal review will be undertaken...it appeared to be discretionary, so it will not necessarily always be undertaken.<sup>1</sup>

2.4 DVA advised the committee that under the proposed single pathway, the MRCC will initiate an internal reconsideration under section 347 for all claimants who have submitted an original determination to be reviewed by the VRB.<sup>2</sup> This claim was affirmed by the MRCC, who assured the committee that the MRCC-initiated reviews would operate in the same way as the section 31 reviews under the VEA:

I can advise that on 13 November 2013, the Military Rehabilitation and Compensation Commission (MRCC) agreed to a DVA recommendation that the MRCA be refined to a single pathway that progresses from internal review to the VRB and then to the AAT. The MRCC further agreed that the process for handling internal reviews should be modelled on the VEA section 31 review powers. The MRCC reaffirmed this decision in September 2014. This is the pathway reflected in Schedule 2 of the

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1 *Committee Hansard*, 17 September 2015, pp 5-6.

2 Department of Veterans' Affairs, *Submission 17*, p. 7.

Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015.<sup>3</sup>

### ***Efficiency of the proposed single appeal pathway***

2.5 Slater & Gordon Lawyers and KCI Lawyers questioned the efficiency of the proposed single appeal pathway, asserting that it is faster for a claimant to initiate an internal reconsideration under section 349 and appeal to the AAT than it is to seek a review by the VRB:

The practical effect of removing the reconsideration appeal path is to deny a Veteran a quicker system of review that is currently available...<sup>4</sup>

In 2009, it took 418 days to hear an appeal [at the VRB] whereas the internal review will take up to 127 days... you can go through the internal review and get to the end of an AAT process faster than you can even get through the VRB to begin with.<sup>5</sup>

We believe Schedule 2 will further weaken the DVA decision making process and is likely to lengthen delays in processes that are already delay ridden...Veterans would no longer have the right to request an internal reconsideration of a poor DVA decision through the s 349 MRCC pathway. This is the quicker of the two review pathways, has procedural and cost advantages for Veterans, and since the inception of the dual appeal pathway is preferred by Veterans more often.<sup>6</sup>

2.6 Slater & Gordon Lawyers and KCI Lawyers also advocated for the introduction of timeframes within which decisions must be made, stressing the importance of minimising the impact of the claims process on the physical and mental health of veterans:

There need to be time frames. There need to be times within which decisions need to be made because, as you know, there are so many veterans that are essentially in limbo, waiting for decisions to be made. It is during that time that their mental health significantly suffers. Veterans who may well have physical conditions have the prospect of developing psychological conditions as well because of the impact and the stress of not understanding the time frames.<sup>7</sup>

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3 Mr Simon Lewis, Chair, Military Rehabilitation and Compensation Commission, *Statement*, tabled by Department of Veterans Affairs, Canberra, 17 September 2015.

4 KCI Lawyers, *Submission 18*, p. 2.

5 Mr Greg Isolani, Partner, KCI Lawyers, *Committee Hansard*, 17 September 2015, p. 7.

6 Slater & Gordon Lawyers, *Submission 8*, pp 2-3.

7 Ms Rachael James, General Manager, Slater & Gordon Lawyers, *Committee Hansard*, 17 September 2015, p. 3.

2.7 DVA advised the committee that the proposed single appeals pathway will be beneficial for veterans, as it will be more timely and more straightforward than the current model:

The department's and the government's objective with this amending legislation is a reform of the determining system to bring evidence forward as early as possible and to have the appeal matters resolved in a timely, less costly, less adversarial and more straightforward way. Overwhelmingly the winners in this process are the veterans themselves.<sup>8</sup>

2.8 DVA assured the committee that the MRCC-initiated internal reconsideration will be finalised before an appeal is processed by the VRB. Furthermore, if the MRCC review delegate, after investigation of the evidence, decides that a different decision should be made, then this new decision will replace the original determination, saving the claimant from having to undertake the VRB process, if they are satisfied with the new decision.<sup>9</sup>

2.9 DVA also highlighted the purpose of the VRB and the advantages that it offers veterans:

The VRB...was introduced specifically to provide the veteran community with a veteran-friendly, less adversarial, less formal external review mechanism [than] the AAT. Importantly for veterans, the MRCC is not represented at the Veterans' Review Board, providing the DVA client with the opportunity to present their case without the other party, the MRCC, present or involved, a practice specifically intended to make it a non-adversarial forum for DVA clients to make their case before the board. Lawyers cannot appear either.<sup>10</sup>

As part of this, DVA clients and their advocates can provide additional evidence and can appear before the board in person at a hearing. In addition, one member of the board panel of three members must be an ex-Defence Force member. I should stress that the VRB is independent of the Repatriation Commission and the Military Rehabilitation and Compensation Commission.<sup>11</sup>

2.10 The Returned & Services League of Australia (RSL) expressed its support for the proposed single appeals pathway, noting the non-adversarial nature of the VRB and its inclusion of a member with either service experience or a strong understanding of service who has been recommended by the Ex-Service Organisations (ESOs):

We support this current one because that is the way that we feel is the best option for the veteran—he gets an independent review by a senior delegate

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8 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

9 Department of Veterans' Affairs, *Submission 17*, p. 7.

10 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

11 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

in the department, and he gets another independent review by the Veterans' Review Board. You have to remember that the Veterans' Review Board is normally made up of three members and one of them is a service member—either an ex-serving member or someone that the ex-service organisations have recommended to the minister to be placed on the board. That person, be they Army, Navy or Air Force, should have knowledge of occurrences in all three services. Normally they are at least commanders and above...the senior member will say, 'We are here to give you your entitlements if we possibly can—we are not here to block; we are here to give.' That is the beneficial nature of the legislation...It does not say to investigate them—they are to award pensions unless there are reasons why they cannot.<sup>12</sup>

2.11 The VRB informed the committee that over the last three financial years the average time taken to resolve all types of applications, including those made under MRCA, was approximately 50-51 weeks. The VRB noted that the primary control of applications are with the parties, stating that over the last three financial years:

- 57 per cent of outstanding applications were under the control of claimants and their representatives;
- 15 per cent of outstanding applications were under the control of DVA; and
- 28 per cent of outstanding applications were under the control of the VRB.<sup>13</sup>

2.12 As the above statistics indicate, the delay in processing cases is often within the control of claimants and their representatives.

### **Legal aid and awarding costs**

2.13 Currently, if a claimant initiates an internal reconsideration of an original determination under section 349 and the determination is varied or set aside and remade by the AAT, the AAT may order that the costs of the proceedings incurred by the claimant be paid by the Commonwealth.<sup>14</sup> However, if a claimant chooses this pathway, he or she cannot access legal aid.<sup>15</sup>

2.14 If a claimant chooses to apply for a review by the VRB, and the determination is varied or set aside and remade by the AAT, the AAT may not order that the costs of the proceedings incurred by the claimant be paid by the Commonwealth.<sup>16</sup> However, the claimant can access legal aid, subject to the usual legal aid eligibility criteria.<sup>17</sup>

2.15 Under Schedule 2, the proposed single pathway (see Figure 1.2) includes review by the VRB; therefore, under section 359, the AAT may not order that the

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12 CMDR John Hodges RAN (Rtd.), National President, Returned & Services League of Australia, *Committee Hansard*, 17 September 2015, p. 11.

13 Veterans' Review Board, *Submission 4*, p. 2.

14 *Military Rehabilitation and Compensation Act 2004*, ss. 357, 358.

15 Explanatory Memorandum, p. 8.

16 *Military Rehabilitation and Compensation Act 2004*, s. 359.

17 Explanatory Memorandum, p. 8.

costs of the proceedings incurred by the claimant be paid by the Commonwealth, regardless of the outcome of the appeal.

### ***Cost of medical reports***

2.16 A number of stakeholders raised concerns regarding the expense of medical reports needed by veterans throughout the appeals process, specifically the matter of veterans paying the costs associated with obtaining medical reports. Similar concerns were raised by a number of submitters.<sup>18</sup>

2.17 The RSL noted that, whilst medical reports can be quite expensive, veterans can seek assistance from the Registrar of the VRB, who can arrange for DVA to pay for any necessary medical reports or other relevant materials:

...if the claimant needs more medical evidence or the evidence that he has for his condition is not full and complete – there are gaps missing and he needs more or better medical evidence – then he can get that and the department pays for it. He does not have to put his hand in his pocket to do it.<sup>19</sup>

2.18 DVA confirmed this, stating that the VRB can request that DVA obtain and pay for medical reports required by the VRB. In addition, claimants can also seek reimbursement for the costs of medical reports up to \$467.50.<sup>20</sup>

### ***Cost of appealing to the AAT***

2.19 A number of submitters raised concerns regarding the AAT's ability to order that the costs of proceedings, outlined in section 357, be paid by DVA in cases where the AAT finds in favour of the claimant.<sup>21</sup> The Defence Force Welfare Association described the retention of section 359, which states that sections 356, 357 and 358 do not apply to reviews of determinations of the VRB, as an 'oversight', commenting that:

We notice that the Bill contains no provision for removal of that part of S359 which provides that S357 does not apply to review by the AAT of a determination of the VRB. We feel sure that retention of this provision is an oversight, and we think, a serious one. S357 provides for award of costs against the Commonwealth in some circumstances, in the event of a decision by the AAT in favour of the Veteran...we hold strongly to the view

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18 Veterans' Support Centre, *Submission 2*, p. 17; Slater & Gordon Lawyers, *Submission 8*, pp 4, 6-7, and 10; Defence Force Welfare Association, *Submission 15*, p. 2; KCI Lawyers, *Submission 18*, pp 2-3; Law Council of Australia, *Submission 20*, p. 4.

19 CMDR John Hodges, Returned and Service League of Australia (RSL), *Committee Hansard*, 17 September 2015, pp 11-12.

20 Department of Veterans' Affairs, *Submission 17*, pp 10-11.

21 Veterans' Support Centre, *Submission 2*, p. 16; Mr Greg Niven, *Submission 3*, p. 1; Australian Lawyers Alliance, *Submission 5*, pp 2-3; Legacy Australia, *Submission 6*, p. 2; Returned & Services League of Australia, *Supplementary Submission 7.1*, p. 1; Slater & Gordon Lawyers, *Submission 8*; Defence Force Welfare Association, *Submission 15*, pp 2-3; Vietnam Veterans Federation of Australia, *Submission 12*; Mr Nathan Mark, *Submission 14*; KCI Lawyers, *Submission 18*; Law Council of Australia, *Submission 20*, pp 3-4.

that just treatment of Veterans' claims ought not to depend on their ability to meet the costs of access to the ordinary processes that are put in place to deal with those claims.<sup>22</sup>

2.20 The RSL expressed strong support for the proposed single pathway but noted that it would not oppose an amendment to allow the awarding of costs:

The Returned & Services League of Australia (RSL), after consultation with the RSL's National Veterans' Affairs Committee, would not oppose an amendment to the Veterans' Affairs Legislation (2015 Budget Measures) Bill 2015 to the awarding of costs by the Administrative Appeals Tribunal (AAT) to a claimant when a claim had followed the single appeal path to the Veterans' Review Board (VRB) and then to the AAT. This process should mirror Section 357 of the Military Rehabilitation and Compensation Act 2004.<sup>23</sup>

2.21 Legal firms and members of the legal community were critical of the inability for veterans to be awarded costs, asserting that this would place veterans at a disadvantage compared with the general community and may limit their access to the AAT:

Even Veterans with very strong cases will not be able to afford to appeal to the independent umpire as is currently their right. Win, lose or draw Veterans cannot be awarded their costs at the AAT if this Bill is passed...Injured civilian workers who come under Comcare, including DVA staff, will continue to be awarded costs at the AAT when they win, whilst no injured Veteran could be awarded costs against DVA under any circumstances.<sup>24</sup>

...the proposed changes would be at odds with the current costs provisions in the civilian community and would plainly place military personnel in a position of disadvantage and discrimination.<sup>25</sup>

The impact of this amendment limits a Veterans' ability to access justice by proceeding to the *Administrative Appeals Tribunal* – AAT as they will no longer have the right to payment for their legal costs and disbursements.<sup>26</sup>

The Law Council is concerned that by restricting rights of appeal in the AAT to reviewable decisions of the VRB, veterans will be forced into a 'no-costs' jurisdiction with serious implications for access to justice...unlike public servants under the Safety Rehabilitation and Compensation Act 1988 (Cth), veterans will be required to meet their own legal costs, even if they successfully appeal the Commonwealth's decision in the AAT.<sup>27</sup>

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22 Defence Force Welfare Association, *Supplementary Submission 15.1*, p. 1.

23 Returned & Services League of Australia, *Supplementary Submission 7.1*, p. 1.

24 Slater & Gordon Lawyers, *Submission 8*, p. 4.

25 Mr Greg Niven, *Submission 3*, p. 1.

26 KCI Lawyers, *Submission 18*, p. 2.

27 Law Council of Australia, *Submission 20*, p. 3.

2.22 DVA responded to assertions that veterans might be disadvantaged by the bill by emphasising the unique role of the VRB in the appeals process, and the advantages that it provides veterans:

...it is important to note that public servants do not have the advantage of an external review body like the Veterans' Review Board to consider their appeals before they reach the AAT – they have to appeal directly to the AAT following an unfavourable internal reconsideration by a Comcare delegate. The VRB, on the other hand, was introduced specifically to provide the veteran community with a veteran-friendly, less adversarial, less formal external review mechanism than the AAT. Importantly for veterans, the MRCC is not represented at the Veterans' Review Board, providing the DVA client with the opportunity to present their case without the other party, the MRCC, present or involved, a practice specifically intended to make it a non-adversarial forum for DVA clients to make their case before the board...DVA clients and their advocates can provide additional evidence and can appear before the board in person at a hearing. In addition, one member of the board panel of three members must be an ex-Defence Force member.<sup>28</sup>

2.23 DVA informed the committee that in 2014-15, of the 20,070 original determinations made under MRCA, 585 applications were lodged with the VRB and 485 claimant-initiated internal reconsiderations were lodged.<sup>29</sup> Furthermore, only 40 determinations were considered by the AAT, of which 13 (0.06 per cent of all MRCA original determinations) were set aside.<sup>30</sup>

### ***Legal aid***

2.24 Some submitters expressed concerns that legal aid may not provide adequate support for veterans seeking to appeal to the AAT and that some veterans may not be eligible for assistance from legal aid.<sup>31</sup> Slater & Gordon Lawyers argued that:

...the provision of legal aid is a piece of fiction. The government has suggested that legal aid will be available to veterans. This is simply not the case. Legal aid is administered by state governments with funding provided by the federal government. Legal aid services are already under enormous pressure due to inadequate funding which has been declining year on year. Legal aid is also means and merit tested, and each state and territory applies

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28 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

29 Some of these were from previous years.

30 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

31 Veterans' Support Centre, *Submission 2*, p. 18; Australian Lawyers Alliance, *Submission 5*, p. 2; Slater & Gordon Lawyers, *Submission 8*, pp 11-12; Vietnam Veterans' Federation of Australia, *Submission 12*, p. 2; Defence Force Welfare Association, *Submission 15*, p. 2; Australian Families of the Military Research and Support Foundation, *Submission 16*, p. 5; KCI Lawyers, *Submission 18*, pp 9-10; Law Council of Australia, *Submission 20*, p. 4; Mr Bill Marklew, *Submission 21*, p1 1-2.

different eligibility requirements. Consequently, the federal government cannot promise that legal aid will be granted without agreement from the states and territories.<sup>32</sup>

2.25 The RSL directed the committee to the National Partnership Agreement on Legal Assistance Service from the Council of Australian Governments, which commenced on 1 July 2015. The agreement provides that, 'applicants should be exempt from legal aid commission means tests when seeking merits review of decisions about eligibility for Commonwealth military entitlements or military compensation payments'.<sup>33</sup>

2.26 DVA confirmed that this was the reasoning behind the decision not to alter the current position in relation to costs, noting that 'the situation has changed from that described in the 2011 report'. It stated that 'Legal aid is now available irrespective of the type of service rendered by the veteran'.<sup>34</sup>

### ***Inequity of access to legal representation***

2.27 Some submitters raised concerns regarding unequal access to legal advice and representation between veterans and DVA.<sup>35</sup> Slater & Gordon Lawyers asserted that DVA has access to internal and external legal advice and representation, whilst veterans, if unable to recover costs at the AAT, will not:

The DVA employs in-house lawyers and private-sector lawyers chosen from a panel to defeat a veteran's claim, the latter alone to the tune of some \$6.2 million for external advice and \$586,000 for barristers, as we understand to be at the last count... If this bill passes, veterans who may wish to be represented by a lawyer will not be able to afford such representation because no costs will be awarded, even upon a successful outcome. A veteran with no legal experience will be fitted against a [legal] expert.<sup>36</sup>

2.28 KCI Lawyers pointed to a case<sup>37</sup> in which a highly experienced barrister was engaged to represent DVA against a self-represented veteran:

DVA engaged a private law firm, Moray Agnew for the entire AAT preliminary process leading up to the hearing and attended the AAT hearing

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32 Ms Rachael James, General Manager, Slater & Gordon Lawyers, *Committee Hansard*, 17 September 2015, p. 2.

33 Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services*, 1 July 2015, B-3.

34 Department of Veterans' Affairs, answer to question on notice, 17 September 2015 (received 21 September 2015).

35 Slater & Gordon Lawyers, *Submission 8*; KCI Lawyers, *Submission 18*; Mr Bill Marklew, *Submission 21*, p. 1.

36 Ms Rachael James, General Manager, Slater & Gordon Lawyers, *Committee Hansard*, 17 September 2015, p. 2.

37 *Jensen and Military Rehabilitation and Compensation Commission* [2014] AATA 807 (30 October 2014).



with 2 staff members. Moray Agnew used a barrister with over 20 years' experience, with the DVA lawyers sitting opposite him to manage the case. Mr Jensen [the veteran] sat there on his own and did the best he could to argue technical points of law and pleaded his case for income support as he no longer could work due to his injury.<sup>38</sup>

2.29 DVA confirmed that it has an in-house legal branch and a panel of external legal providers assisting in the handling of MRCC matters, but noted that veterans facing a government respondent at the AAT are 'no different to other claimants in non-veteran jurisdictions (for example, claimants in Comcare matters)'. It stated that, 'However, veterans have better access to legal aid when compared to non-veterans in any other jurisdictions.'<sup>39</sup>

### **Budget savings**

2.30 A number of submitters raised concerns regarding the financial impact statement for Schedule 2 of the bill, which estimates a saving of \$2.2 million over four years.<sup>40</sup> Some submitters speculated that the decision not to alter the current position, in relation to the awarding of costs by the AAT, would result in a saving for the department at the expense of veterans. For example:

I can't help but think that this amendment that the government wants to pursue is purely a cost cutting exercise.<sup>41</sup>

...the real savings are likely to accrue because DVA will be less accountable for its decisions and veterans will not be able to access their entitlements because they cannot afford the costs, including medical evidence and representation, associated with challenging the DVA.<sup>42</sup>

2.31 DVA refuted these claims, explaining that the \$2.2 million is a net saving comprising:

- reduced legal costs incurred by DVA(\$5 million);
- reduced award of legal costs to applicants (\$0.7 million);
- increased costs for DVA and VRB staff to support VRB processes (\$1.3 million); and

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38 KCI Lawyers, *Submission 18*, p. 3.

39 Department of Veterans' Affairs, answer to question on notice, 17 September 2015 (received 21 September 2015).

40 Australian Lawyers Alliance, *Submission 5*; Veterans' Support Centre, *Submission 2*, p. 2; Slater & Gordon Lawyers, *Submission 8*, p. 3; Australian Peacekeeper & Peacemaker Veterans' Association, *Submission 11*, p. 2; Vietnam Veterans Federation of Australia, *Submission 12*, p. 2; David Tones, *Submission 13*, p. 2; Mr Nathan Mark, *Submission 14*; Mr Rod Thompson, *Submission 19*, p. 4; Law Council of Australia, *Submission 20*, p. 3.

41 Veterans' Support Centre, *Submission 2*, p. 2.

42 Slater & Gordon Lawyers, *Submission 8*, p. 3.

- increased VRB hearing costs (\$2.2 million).<sup>43</sup>

### **Committee view**

2.32 The prospect of challenging an administrative decision may be intimidating for a civilian but the prospect of challenging a decision made by DVA can be especially daunting for former service personnel who have been wounded or injured, mentally or physically, serving their country. The process for seeking reconsideration of a decision under MRCA should be quick, simple, non-adversarial, and inexpensive.

2.33 The committee acknowledges the concerns raised by stakeholders regarding the costs associated with challenging a decision and the potential for these costs to discourage or deny veterans the opportunity to appeal a decision made under MRCA at the AAT. In particular, the committee recognises the need to ensure that veterans will not be required to pay for costly medical reports or legal representation in order to exercise their right to appeal a decision.

2.34 The committee is satisfied with DVA's assurance that internal reconsiderations and screening will automatically take place before matters proceed to the VRB. It appears that the Explanatory Memorandum, as currently worded, has inadvertently given rise to confusion and misunderstanding by legal firms as to how the proposed single review pathway will operate in practice.

2.35 The single appeals pathway provided by Schedule 2 of the bill, together with further improvements relating to alternate dispute resolution, will provide more opportunities for cases to be resolved before reaching the AAT. In the initial stages of the proposed single appeals pathway, the VRB is able to order DVA to pay for any medical reports necessary for a veteran's claim. Furthermore, if the appeal continues through to review by the AAT, the National Partnership Agreement on Legal Assistance Service's guarantees that veterans are exempt from legal aid commission means tests.

2.36 However, the committee is of the view that due to the short timeframe in which it was asked to conduct the inquiry, it has not been able to finalise its position in relation to several of the contentious issues raised in evidence. For this reason, the committee would benefit from having more time to re-visit Schedule 2 of the bill.

2.37 The committee commends the efforts made by DVA to reduce the time taken to settle and reduce claims made by veterans, and to promote non-adversarial avenues of dispute resolution which saves time and money.

### **Recommendation 1**

**2.38 Subject to the satisfactory completion of the alternate dispute resolution (ADR) trial in NSW and the ACT, the committee recommends that ADR be extended to all other states and territories.**

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43 Department of Veterans' Affairs, answer to question on notice, 17 September 2015 (received 21 September 2015).

**Recommendation 2**

**2.39** The committee recommends that the Explanatory Memorandum be amended to remove any confusion or misunderstanding as to how the single review pathway will function.

**Recommendation 3**

**2.40** The committee recommends that Schedule 2 of the bill be re-referred to the committee for further consideration.

**Senator Chris Back**

Chair

