5 May 2017

Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Re: *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017*

Thank you for your letter dated 6 April 2017 and the invitation to provide a written submission addressing the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017*. Please find enclosed a submission prepared by Slater and Gordon Lawyers.

I have now had the opportunity to review this bill, the explanatory memorandum and the Minister's reading in some detail.

Fortunately, this legislation does not raise as much concern as recently occurred with the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2017*. I note that the majority of the proposed legislation relates to purely procedural matters in order to align legislation with the Veterans' Review Board, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* ('DRCA'), *Military Rehabilitation Compensation Act 2004*, other pieces of legislation, procedures and sections already in place in the *Administrative Appeals Tribunal Act 1975* and amendments made by the *Tribunals Amalgamation Act 2015*.

Accordingly, I see no need to suggest amendments, criticise or raise issues with the bulk of the bill.

I am however particularly concerned about certain proposals contained in the amendment to subsection 155(8), that I believe deserves comment. These concerns are addressed in this submission.

I am available to speak with the Committee at short notice.

My contact details are

Should you require any further information, please do not hesitate to contact me.

Yours faithfully,

Brian Briggs
Practice Group Leader
Military Compensation
Slater and Gordon Lawyers

Slater Gordon Lawyers

Inquiry into the Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017

Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade by Slater and Gordon Lawyers

5th May 2017

Submitted on behalf of Slater and Gordon Lawyers

Brian Briggs, National Military Compensation Expert

Introduction

Slater and Gordon Lawyers is a national consumer law firm and is recognized as a leading provider of legal advice and representation to injured Australian Defence Force ('ADF') personnel, military veterans and their dependants in every State and Territory. We have a dedicated military compensation team that has assisted thousands of ADF personnel, veterans and their families.

Slater and Gordon Lawyers have had a longstanding commitment to working with this Committee, the Department of Veterans' Affairs ('DVA') and the ADF on the administration and improvement of military and veterans' compensation schemes.

I refer the Committee to my previous submissions outlining my position as the Practice Group Leader heading the Military Compensation Group at Slater and Gordon Lawyers and the vital role our firm plays by acting on behalf of ADF personnel and veterans. I do not believe it is necessary to revisit this information which is readily available to the Committee.

I thank the committee for their foresight in forwarding the proposed amendment together with the explanatory memorandum with sufficient time for us to review and consider the impact of same.

I note in this instance as the Bill comprised a number of schedules, it was automatically referred for review.

I concur with the Honourable Minister Tehan's reading that the legislation is indeed designed to clarify, improve and streamline the operation of the law with respect to Veterans' entitlements. Accordingly, this submission will principally concentrate on one area that in my respectful opinion requires clarification and if necessary some amendments or at least fine-tuning to give a greater explanation to the defence community.

My concern in this instance is with:

1. Schedule 1 – Veterans' Review Board – Amendments to *Veterans' Entitlements Act 1986* Subsection 155(8).

I believe this amendment is unwarranted and should not be enacted. My submission hopefully will assist the Committee in their deliberations. Apart from subsection 155(8), I do not believe the Defence community should hold any fears about the rest of this legislation. However, I am troubled about the potential damage that could result from the expansion of powers to dismiss applicants in the Veterans' Review Board ('VRB').

The issue with proposed s 155(8A)

The proposed insertion of section 155(8A) which mirrors the powers of s 42B of the *Administrative Appeals Tribunal Act 1975* is concerning as I would respectfully submit it is unnecessary and threatens a claimant's right to natural justice and the right to a fair hearing. This is despite the reasoning contained in the explanatory memorandum statement.

On review, I consider that the proposed amendment goes against article 14(1) of the *International Covenant on Civil and Political Rights*.[1] It is also counterintuitive to the VRB's objective under s 133A of the *Veterans' Entitlements Act* 1986 ('VEA') to provide a mechanism for review that is fair and just.

The consequences of the proposed s 155(8A) are particularly alarming in light of recent amendments that have reduced pathways to appeal under the *Military Rehabilitation and Compensation Act 2004* ('MRCA'), which, as the Committee is aware, have made the VRB the only avenue of internal appeal for decisions made under this Act.[2]

Background

Item 6 of Schedule 1 of the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017* purports to insert s 155(8A) as follows:

> The Principal Member may dismiss an application for the review of a decision, at any stage of the proceeding, if the Principal Member is satisfied that the application:
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) has no reasonable prospect of success; or
>
> (c) is otherwise an abuse of the process of the Board.

The Explanatory Memorandum says the purpose of s 155(8A) is to align the grounds for summary dismissal by the VRB with those that apply to the Administrative Appeals Tribunal (AAT) under s 42B of the *Administrative Appeals Tribunal Act 1975* ('AATA').

Section 42B of the AATA was introduced in its current form in July 2015 under the *Tribunals Amalgamation Bill 2014*. The Explanatory Memorandum for that Bill said the purpose of this amendment was to give the tribunal greater power to dismiss unmeritorious matters where appropriate.[3] The memorandum continued that these dismissal grounds were aligned to similar summary dismissal powers for other review bodies, specifically, Rule 26.01 of the Federal Court Rules 2011 as well as s 47 of *the Queensland Civil and Administrative Tribunal Act 2009*. While it is arguably appropriate that these review bodies possessing a broad jurisdictional base 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.

The VRB is now the only path of review for determinations made by a delegate of the Military Rehabilitation and Compensation Commission ('MRCC') or Service Chief. As I have highlighted in the past, this single review pathway, while seemingly more efficient, is prejudicial and biased against veterans. Application times from lodgement to finalisation at the VRB take roughly one year on

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[2] *Budget Savings (Omnibus) Bill 2016* (Cth) sch 24.
[3] See *Mills and Secretary, Department of Employment* [2016] AATA 121.

average, with no improvement in efficiency in the past six years.[4] Since becoming the single review pathway from 1 January 2017, it is expected that the VRB workload will increase considerably. I fear the VRB is ill-equipped to handle this influx, resulting in applications potentially being summarily dismissed to save time when the matters otherwise deserved to be heard. This proposed amendment will facilitate such harsh actions being taken against the interests of veterans.

In contrast, the *Safety, Rehabilitation and Compensation Act 1988* ('SRCA') has no dismissal power like the proposed s 155(8A). This means that Commonwealth public servants can have their cases reconsidered without fear of summary dismissal, yet past and present members of the defence force are not afforded the same certainty about their application.

Requirements of s 42B of the *Administrative Appeals Tribunal Act 1975*

In ***Re Filsell and Comcare***, the deputy president D G Jarvis, applying ***Pitt v OneSteel Reinforcing Pty Ltd***,[5] described the terms **'frivolous'** and **'vexatious'** as follows:

> "The word 'frivolous' in combination with 'vexatious' is a technical legal term, which means that there is no legal basis for the proceedings ... The expression 'vexatious' can include proceedings brought with the intention of annoying or embarrassing or harassing the other party, or for some collateral purpose other than having the court or tribunal adjudicate on the issues raised by the proceedings, or, irrespective of the motive of the litigant, if the proceedings are so obviously untenable or manifestly groundless as to be utterly hopeless, or if the proceedings have no reasonable prospect at all of success."[6]

It must have no legal basis, or be brought with the sole intention of annoying, embarrassing or harassing the other party. It is not enough that the Tribunal has formed the view that the applicant is unlikely to succeed in respect of such issues. [7]

I am concerned that appeals will be able to be summarily dismissed by Members of the Review Board on their interpretation of prospects, not if they are frivolous or vexatious. It follows from this decision that precedent already exists to address the addition and amendments contained in sub paragraphs 8A(a),(b) and (c).

French CJ and Gummow J took a similar position in the High Court case of ***Spencer v Commonwealth***. Their Honours said that the test to dismiss an application as frivolous, vexatious and an abuse of process is a test requiring certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success.[8]

The High Court has also addressed the isolated definition of 'abuse of process'. *In* ***Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd and Others***, French CJ, Gummow, Hayne and Crennan JJ

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[4] Veterans' Review Board Annual Reports 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014- 2015 and 2015-2016.
[5] [2008] FCA 923.
[6] (2009) 109 ALD 198, [33]
[7] Ibid.
[8] (2010) 269 ALR 233, [54].

described an abuse of process extending to "proceedings that are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment."[9]

Inadequate to allow summary dismissal by a 'Principal Member'

The Principal Member is appointed by the Governor-General as a full time member of the board as set out in s 158(1) and (5) of the *Veterans' Entitlement Act 1986* (Cth). Section 166 of the Act allows the Principal Member to delegate all its powers to a senior member or acting senior member.[10] It may also delegate certain powers to the National Registrar, Deputy Registrar or Conference Registrar,[11] including those listed under the s 155.

The proposed amendment, as it stands, opens the possibility that the dismissal powers under s 155(8A) could be conferred upon a Registrar or a Senior Member that may not even have a legal education. While I expect these delegation powers would not be used so recklessly, the severity of the proposed summary dismissal powers calls for explicit limitations on its delegation and operation.

Such a proposition strikes at the heart of natural justice principles of a free and fair hearing. This would deny the applicant the right to present their case before the board for deliberation of why the application is a reasonable one. Maintaining a fair mechanism of review is the board's objective in s 133A and this proposal attacks the ability of the board to achieve this.

Only in the rarest of cases will the strict grounds for summary dismissal be established. The concern I raise is that the Principal Member, to whom s 155(8A) refers, is ill-equipped and may not be sufficiently educated in the law to properly identify when an unlikely claim holds any merit, albeit having a slim chance of success. Superior Tribunals that may exercise summary dismissal powers, such as the AAT, are better equipped and more experienced in a broad range of matters. It can be trusted that the AAT will exercise dismissal powers competently, but I am concerned the same cannot be said for the VRB Principal Member and those persons who have the powers delegated to them.

In order to appeal a summarily dismissed application to the VRB, the applicant must spend additional time and resources to have the decision reviewed before the AAT. This can have a significant detrimental financial impact on applicants; in addition to the costs spent on an 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 Veteran's Affairs,[12] 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.

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[9] (2009) 260 ALR 34, [28].
[10] *Veterans' Entitlements Act* 1986 s 166(1).
[11] Ibid ss 166(1A-B).
[12] https://www.dva.gov.au/consultation-and-grants/reviews/review-military-compensation-arrangements/implementation-activiti-15

With the restrictions on recovery of costs, an applicant who wishes to seek legal assistance could be out of pocket for many thousands of dollars with no prospect to recover same. Again, Commonwealth public servants appearing in the AAT would be better off.

This notion in light of recent legislation proposed and passed in the parliament is of serious concern to myself and should raise alarm within the Defence community. Whilst it is not as dramatic as the privacy provisions contained within the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2017*, it could easily be interpreted as a further attack on our veterans and military by eroding their rights to contest adverse decisions.

Ambiguity surrounding section 155(8A)

The proposed s 155(8A) is, with respect to the draftee, incomplete and vague. There are no directions that supplement the proposed amendment which purport to instruct the stage of the proceedings at which the Principal Member may dismiss a claim. The proposed amendment makes it 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.

Furthermore, as discussed earlier, there is no clear instruction as to whether s 155(8A) is a power that can be delegated under s 166. With no explicit limitations on the delegation of this power, I am concerned this will create confusion and lead to an unintended misuse of these summary dismissal powers.

I must also flag my concern with the poorly articulated notification requirement in s 155(8A). While to its credit, it requires the Principal Member to notify relevant parties of the dismissal, there are no guidelines as to the timing and the form this notification must take. This could allow undue delay to the notification of a dismissal, impeding the claimant's ability to seek legal advice or recourse.

The danger of summary dismissal

Case law is clear that summary dismissal powers are only to be cautiously applied in the most extraordinary of circumstances, as a person ought not to be denied the opportunity to have their case heard. It should follow that the legislature should not bestow such a significant power without meticulous consideration and extensive justification.

In ***Paraponiaris v Secretary, Dept of Employment*** **[2015] AATA 895**, Deputy President F J Alpins said "The exercise of the Tribunal's power to dismiss proceedings under s 42B, being a power to dismiss a proceeding summarily, must always be attended with caution and is not to be exercised lightly." This echoed similar concerns expressed by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in ***Spencer v Commonwealth***.[13]

In ***Cooper v Comcare*** regarding an appeal against a decision of a judge of the Federal Court (French J), dismissing the appeal against a decision of the AAT, the Full Court said:

[13] (2010) 269 ALR 233, [24], [60].

> "There is an additional consideration pointing to the undesirability of summary dismissal which was evident in this case. If a primary decision-maker dismisses an application summarily, findings may not have been made concerning all relevant facts. In our opinion the preferable course, other than in the clearest of cases, is for the Tribunal to determine the application on the merits and, in so doing, find all relevant facts."[14]

The decision in ***Cooper*** was followed by French J in ***Duncan v Fayle*** where his Honour said that the desirability of a sparing approach to the application of the summary jurisdiction under s 42B was highlighted in ***Cooper***. [15] Further, these comments were made with regard to the previous version of s 42B which was considered to be narrower than the current s 42B of the AATA and the proposed s 155(8A) amendment of the VEA.[16] It follows that even greater caution should be exercised in granting and applying the modern rules for summary dismissal.

Incorrectly dismissed applications

While the AAT is the peak administrative tribunal, even it has failed to properly apply s 42B in some instances. In light of this, granting this same power to the Principal Member of the VRB under s 155(8A) dangerously increases the risk that genuine claims will be erroneously dismissed summarily.

In ***Abrahams v Comcare***, Madgwick J of the Federal Court upheld an appeal against the decision by the AAT to summarily dismiss a Comcare injury claim pursuant to the former version of s 42B.[17] In finding that the Comcare review division misapplied relevant principles when considering the appellant's claim, Magwick J commented that "it was mistaken to think that it was so devoid of merit as to be able to be labelled vexatious. It is only when there is no reasonable prospect at all of success that a legal proceeding can properly be so termed."[18]

In ***Theo v Secretary, Department of Family & Community Services***, Spender J held that an application for review of the decision concerning an aged person was erroneously dismissed under s 42B. In reaching this decision, Spender J said that it could not possibly be subject to dismissal as it did not satisfy the essential requirement that it have no prospect of success.[19]

Section 42B is a cautiously applied provision with far-reaching consequences. However, the Committee should note that the AAT has proven itself to be incapable in some circumstances of correctly applying its rules. To introduce a similar power to the Veterans' Review Board by way of s 155(8A) unnecessarily puts at risk the basic right to a fair hearing. 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, I consider, a potentially fatal move. Whilst I acknowledge the experience of many members of the Board, the public perception and how our veterans will view this future exercise of rights cannot be disregarded.

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[14] (2002) FCR 157, [20].
[15] (2004) 138 FCR 510, [22].
[16] *Mills and Secretary, Department of Employment* [2016] AATA 121.
[17] (2006) 93 ALD 147.
[18] Ibid [24].
[19] [2006] FCA 279, [29].

Where social media and communication to the masses is such a powerful tool, I question why send this message at this point in time when it is not necessary? Why make changes that are, in some aspects, purely cosmetic when decided case law already grants the power that this amendment seems to enact?

Conclusion

This proposal threatens our veterans' access to justice by allowing the Board to deny them a fair hearing. The legislature has a duty to implement laws that facilitate the rehabilitation of the men and women who serve our country, yet this proposal seeks to make it more difficult for veterans to claim the compensation they deserve.

The DVA compensation application process is a stressful experience for many applicants, and s 155(8A) will only exacerbate this. It is a mockery in light of recent calls for inquiry submissions on suicide by veterans and ex-service personal. The Minister for Veterans' Affairs claimed in a recent media statement that the government is committed to supporting the veteran community, yet this proposal is completely contradictory to that claim.

I strongly advise that this Bill be revised with item 6, 7 and 8 of part 1, schedule 1 removed. Whilst I have faith that the Principal Member would exercise this expansion of powers in a fair and just way, the potential exists that the amendment could be used as a double-edged sword by error or deliberate design to strip claimants of their rights to present their case to the Board. In certain circumstances this would constitute an abuse of that power. I therefore must oppose this amendment. In the current environment involving the Department of Veterans' Affairs and the widespread calls by the veteran community for a Royal Commission into its operation, further controversial legislation—even if it has good intentions—is not a road this parliament needs to take.

Article 14(1) of the *International Covenant on Civil and Political Rights* includes the provision that:

- "All persons shall be equal before the courts and **tribunals** ..."
- "... everyone shall be entitled to a **fair and public hearing** ..." [20]

To confer powers that so easily can strip away such a fundamental right will always raise the eye of those who seek to protect our democratic process.

When our veterans continue to take their own lives on a weekly basis to the dismay of us all as a nation, I would plead on their behalf that this Committee closely examine the proposed amendment and the serious ramifications that could flow from the same.

I take this opportunity to thank the Committee for the invitation. I trust that our submission will assist.

[20] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Acknowledgments

I would like to acknowledge the valuable assistance that I have received from Ms Monica Taylor, Director and Ms Jennifer Gibbons, Senior Administration Officer, as well as Wil Alam, Riley King and Brendon O'Neill from the University of Queensland Pro Bono Centre.

I thank you for this opportunity to comment.

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SLATER AND GORDON