24 April 2024

The Hon Matt Keogh MP
Minister for Veterans' Affairs
Minister for Defence Personnel

By email: legislation.reform@dva.gov.au

Dear Minister

Veterans' Legislation Reform – Exposure Draft Consultation

Thank you for the opportunity to provide feedback on the proposed Veterans' Legislation Reform - Exposure Draft Consultation (**Exposure Draft**).

We also refer to our letter to you on 11 May 2023 (**earlier letter**), which provided feedback on the Veterans' Entitlements Legislation Reform Consultation Pathway. A copy of our earlier letter is **enclosed**.

Our earlier letter raised concerns that closing out the *Veterans' Entitlements Act 1986* (**VEA**) to fresh claims could disadvantage veterans seeking to make a claim to increase their current payments for sequelae or new claims.

These concerns arise primarily from the payment offsetting provisions (a major source of complexity in the legislation[1]), and the likelihood that the changes will create uncertainty for veterans as to whether they would be better off under the new *Military Rehabilitation and Compensation Act 2004* (**MRCA**). Under the proposed amendments to the MRCA, veterans with pensions under the VEA would be prevented from claiming a pension above the General Rate for sequelae or new claims. It is also uncertain whether they would benefit from additional compensation under s 80 of the MRCA. This is because veterans under the VEA are less likely to have dependants who meet the s 80 criteria for dependant children as they tend to be an older cohort.

[1] The Department of Veterans' Affairs has publicly stated that offsetting is the *'clearest manifestation of complexity from having three Acts'*: DVA's Submission to the Productivity Commission Inquiry into Compensation and Rehabilitation for Veterans, July 2018, Executive Summary page vii.

To rectify these problems, we recommend that:

a) veterans currently receiving entitlements under the VEA be offered the opportunity to make a one-off choice to either continue under the VEA or switch to the MRCA scheme for fresh claims; and
b) veterans should have access to free financial advice to help them make this choice.

Please see our earlier letter for the reasons provided in support of these recommendations.

Offsetting under the Exposure Draft

Schedule 7 – Application and transitional provisions of the Exposure Draft clarifies how interactions between certain entitlements under the VEA and the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act* 1988 (**DRCA**) would be treated under the MRCA.

Section 12(2) states that:

*(2) a person is **not entitled to compensation** under Part 3 or 4 of Chapter 4 of the MRCA for a period **in respect of incapacity resulting from an injury** sustained, or a disease contracted, by the person if the person:*

(a) has received compensation for that period in respect of that incapacity under:

(i) section 19, 20, 21, 21 A, 22 or 31 of the DRCA; or

(ii) the 1912 Act, the 1930 Act or the 1971 Act; or

*(b) **is entitled to, and is receiving, a pension under Part II or IV of the VEA for that period in respect of that incapacity**.*

(emphasis added)

The effect of s 12(2) of Schedule 7 is that a veteran would not be entitled to compensation for incapacity for work under the MRCA for sequelae or new claims if the incapacity arising from those conditions overlapped with the incapacity for which the veteran was receiving a pension under Part II or Part IV of the VEA.

Legal Aid NSW is concerned that s 12(2)(b) could leave veterans with pensions under the VEA worse off than if they remained under the VEA, as it is unclear how this offsetting would operate in practice and whether they would have been better off simply claiming an increase in the pension under the VEA.

For example, would the offsetting apply to the whole claim under the MRCA or would the overlapping incapacity somehow be separated out so that residual compensation could be paid? If the latter, would the veteran be better off than if they had simply claimed an increase in the pension under the VEA? These scenarios do not appear to

have been contemplated in the Explanatory Memorandum to the *Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation)* ***Bill*** *2024*.

Further, s 12(2) of Schedule 7 appears to conflate economic loss payments under the DRCA and MRCA with a Part II or IV pension under the VEA, which is a payment for the '*medical impairment'* and *'lifestyle effects'* of the veteran[2]. The fact that a Part II or IV pension is not taxed reflects the intention that it is not compensation for economic loss. Further, a Part II or IV pension under the VEA only contemplates economic loss in the criteria for the Intermediate or Special Rate, whereas the General Rate criteria do not.

It also appears that the intention of s 12 of Schedule 7 is to reflect the offsetting provisions in Division 5A of Part II and Division 4 of Part IV of the VEA, which require that pensions under Part II and IV be reduced by compensation received elsewhere for the same incapacity regardless of whether the incapacity arose from that or any other injury or disease[3]. These provisions have been crossed out in the marked-up version of the VEA in the Exposure Draft and appear to have been replaced by s 12(2) in Schedule 7.

We understand from consultations with the Department of Veteran's Affairs (**DVA**) that in practice, offsetting would not involve MRCA incapacity pay and pensions under Part II and Part IV, as both payments have different purposes (economic loss and non-economic loss respectively). However, the wording of s 12 of Schedule 7 does not reflect this as s 12 states that MRCA incapacity payments will interact with pensions under Part II or Part IV of the VEA.

Under the VEA, "incapacity" refers to the *'the effects of [the] injury or disease and not a reference to the injury or disease itself'*[4]. The "effects" of the injury for the purposes of assessing the rate of pension under Part II or Part IV are assessed according to the criteria of the *Guide to the Assessment of Rates of Veterans' Pensions (No.2) (2016)* (**GARP V**)[5].

GARP V states that the effects of an injury or disease comprise the *'medical impairment'* and *'lifestyle effects*'[6] of the veteran to arrive at a *'percentage of incapacity'*[7], which is then used to assess the rate of pension under Part II or Part IV. "Medical impairment" is assessed by reference to the physical and functional loss of

[2] *Guide to the Assessment of Rates of Veterans' Pensions (No.2) (2016)* (GARP V), pages 4-5.
[3] For example, see section 30D of the VEA.
[4] Section 5D(2) of the VEA.
[5] S 29(1)(a) of the VEA.
[6] GARP V page 5.
[7] Section 29(1) of the VEA.

the relevant body system[8], and does not consider employment, or economic loss, but the *'everyday functions'* of the veteran[9].

While the veteran's ability to engage in employment activities may be assessed as a lifestyle effect, the effects on employment are assessed in conjunction with the effects on domestic activities and may not be considered if the impairment rating for the former is lower than the latter[10]. In any event, the criteria for employment activities do not consider economic loss.

Accordingly, a pension under Part II or IV does not compensate veterans for economic loss (save for pensions at the Intermediate or Special Rate) and should not be conflated with compensation for incapacity for work under the MRCA, as both payments have different purposes. By way of an analogy, s 12(2) of Schedule 7 in its current form would be akin to offsetting compensation for incapacity for work by compensation for permanent impairment under the MRCA. This would lead to an absurd outcome as the payments compensate different losses, namely economic loss and non-economic loss, respectively.

Recommendation 1:

Section 12(2)(b) should be <u>amended</u> as follows to clarify the provisions relating to compensation for economic loss across the VEA, DRCA and MRCA:

(2) a person is not entitled to compensation under Part 3 or 4 of Chapter 4 of the MRCA for a period in respect of incapacity resulting from an injury sustained, or a disease contracted, by the person if the person:

(a) has received compensation for that period in respect of that incapacity under:

(i) section 19, 20, 21, 21 A, 22 or 31 of the DRCA; or

(ii) the 1912 Act, the 1930 Act or the 1971 Act; or

(b) is entitled to, and is receiving, a pension <u>at the Intermediate or Special Rate</u> under Part II or IV of the VEA for that period in respect of that incapacity.

Costs for providing assistance in veterans' matters

Section 352G(3) of the Bill states:

'(3) A person is not entitled to ask for or receive any fee or other reward, or any payment for expenses, for representing a party to a review [before the Veterans' Review Board]'

[8] Garp V, page 5.
[9] Garp V, page 5.
[10] GARP V, page 273.

The Explanatory Memorandum to the Bill states that *'[s]ubsection 352G(3) has been included to place a restriction on charging fees or any payments for review representations. The aim is to avoid the benefit of a compensation decision on review being eliminated by the costs of the review proceedings. The approach is consistent with section 46PQ of the Australian Human Rights Commission Act 1986 and section 282 of the Migration Act 1958'*[11].

Legal Aid NSW supports this proposal to restrict fees at the Veterans' Review Board (**VRB**) and recommends that the restriction should be extended to prevent advocacy and representation services from charging unfair and unreasonable fees in claims against DVA.

Case study

Legal Aid NSW has helped a veteran who entered into a contract with a non-legal advocacy service to help with his DVA claims. The contract stipulated that the fee would be contingent on the overall compensation amount received, and that this amount would almost double if representation were required at the VRB or the Administrative Appeals Tribunal. The fee was expressed as a percentage of the overall compensation amount.

In Australia, there is a national prohibition on lawyers charging contingency fees[12], although there is an exception for class action proceedings in the Supreme Court of Victoria if certain criteria are met[13]. Legal Aid NSW considers it to be inconsistent with these provisions that non-lawyers, who are generally not legally trained or regulated and are working in a complex legal environment, are able to charge contingency fees to veterans.

Legal Aid NSW is concerned that the current practice of some non-legal advocacy services could lead to the exploitation of veterans' compensation payments, which could undermine their ability to act in the best interests of veterans.

Similarly, Legal Aid NSW is concerned that private law firms may also be charging unfair and unreasonable costs for assistance provided in DVA compensation claims. We have encountered a costs agreement between a veteran and a private law firm that charged around $5,000 inclusive of GST for a successful liability decision and around $10,000 inclusive of GST for *each* condition that resulted in an offer of

[11] Explanatory Memorandum, page 60.
[12] See *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act 2006* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3 cl 27; Legal Profession Act 2007 (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 183(1)*; Legal Profession Act 2008* (WA) s 285.
[13] A contingency fee in such matters is not a right; the Court must be '*satisfied that it is appropriate or necessary to ensure that justice is done*': section 33ZDA(1) of the *Supreme Court Act 1986* (Vic).

permanent impairment compensation under the MRCA. Therefore, if five conditions were assessed by DVA to contribute to the veteran's overall level of permanent impairment compensation, the law firm would charge the veteran close to $50,000 inclusive of GST. This would be an unfair outcome in circumstances where an accepted condition may have only contributed a small amount to the overall impairment rating. Therefore, such costs could be disproportionate to the work performed and the amount of compensation received by the veteran, contrary to the obligations of lawyers under the legislation[14].

Recommendation 2:

Costs in veterans' matters should be regulated in a similar way to workers compensation claims in New South Wales with capped fees for discrete parts of the claims and appeals process[15]. This would avoid unfair and unreasonable costs being incurred by non-legal advocacy services and private law firms in the DVA claims and appeals process.

Thank you again for the opportunity to provide feedback on the Exposure Draft. If you have any questions or require further information, please contact Gerard McAleese,

Yours sincerely

Monique Hitter
Chief Executive Officer

[14] For example, s 172(1) of the *Legal Profession Uniform Law* (NSW) states that legal costs must be fair and reasonable and *'proportionately and reasonably incurred'* and *'proportionate and reasonable in amount'*, among other things.
[15] See Schedule 6 of the *Workers Compensation Regulation 2016* (NSW).