Foreign Affairs, Defence and Trade Committee
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National Commissioner for Defence & Veteran Suicide Prevention Bills

This submission responds to the Committee's invitation to comment on the *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) and the *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020* (Cth).

In summary, the two Bills seek to establish a new agency with extraordinary powers but inadequate accountability and engagement with rank & file servicepeople, veterans and their families. There is no rationale for exclusion of protection under the *Privacy Act 1988* (Cth) and presumably other legislation. In the absence of effective scrutiny the disregard of privacy law is disquieting and has the potential to exacerbate rather than reduce harms. The expectation of very wide collection and sharing of sensitive personal information without consent and inadequate oversight is contrary to respect for current/ex servicepeople and their families. It is contrary to the reasonable expectation that human rights and confidentiality will be respected rather than disregarded on the basis of bureaucratic convenience. Overall the proposed scheme represents a flawed response to systemic failure on the part of the Department of Veterans' Affairs – highlighted in a succession of reports – and parts of the Department of Defence.

The following pages articulate underlying concerns regarding the proposed Commissioner scheme before addressing specific issues.

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National Commissioner for Defence & Veteran Suicide Prevention Bills

This submission addresses the *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) and the *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020* (Cth).

1. Basis

The submission reflects my research and teaching over the past decade regarding privacy, health data management, mental health and institutional reform. That work is reflected in a range of peer-reviewed publications, cited submissions to law reform commissions and parliamentary inquiries, and membership of Australian and overseas policy advisory bodies (notably OECD working parties on health data management).

The submission does not represent what would be reasonably construed as a substantive conflict of interest.

2. Context

In his 27 August Second Reading Speeches regarding the Bills the Attorney-General stated

> The government recognises the great sacrifices made by our serving and former Australian Defence Force (ADF) members and their families, on behalf of the Australian community.
>
> As a government, we are totally committed to supporting our ADF members and veterans during their service, in transitioning from service, and in their lives beyond service.

Regrettably, there are few indications that the 'total commitment' is substantive. Veterans, their families and other stakeholders are entitled to be sceptical about the Government's willingness to fix a broken system that fails to effectively support Australia's defence personnel and veterans. That failure is long-standing and systemic.

The 2019 *A Better Way to Support Veterans* report by the Productivity Commission highlighted systemic problems regarding the operation of the $13.2 billion Department of Veterans' Affairs. As the Commission noted, the system –

- is "not fit for purpose",
- "requires fundamental reform", and
- "fails to focus on the lifetime wellbeing of veterans".

The system's structural defects are evident in a succession of reports by the Australian National Audit Office and Parliamentary Committees. The Senate Standing Committee on Foreign Affairs, Defence and Trade 2017 report *The Constant Battle: Suicide by Veterans* for example noted that "the need to streamline the administrative practices of DVA was the overwhelming concern of the majority of submissions to the inquiry".

An inward-looking unresponsive culture that fails to treat people with respect is exacerbated by ongoing data collection and analysis failures. Those failures are reflected in changes to the next Census that mandate health data provision by veterans and families, a tacit acknowledgement that Veterans Affairs is incapable of accurately identifying the needs of those people and providing effective services to those people. They have not been resolved by the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Act*

2017 (Cth), which emphasised sharing of information about veterans and was accompanied by the Government's 2017 commitment to 'independent scrutiny' of powers regarding veterans administration. It is unclear how that commitment has been given effect and the two Bills that are the subject of this submission do not provide necessary scrutiny or responsiveness.

The two Bills seek to address a tragic problem. It is significant in terms of human suffering among current/ex service people and their families, with the latter often being the forgotten people in terms of both statistics and support. It is also significant in terms of lost productivity, erosion of the national tax base and demands on the public health and welfare systems.

The salience of that problem does not, however, mean that the Parliament should endorse flawed aspects of a Bill that –

1) avoid the need to fix systemic problems across the service and veterans' systems,
2) provide insufficient accountability alongside the grant of extraordinary powers,
3) disregard the importance of rank & file involvement in governance,
4) unnecessarily remove privacy protection,
5) disregard legitimate expectations regarding consent in relation to very wide data collection,
6) and thereby reinforce perceptions among veterans, their families and other stakeholders that serving personnel and veterans are merely data subjects – case studies for the DOD/DVA bureaucracy – rather than people.

In essence, the Bills have a very laudable object but are not an effective response to systemic problems, not an excuse for ongoing failure that should be investigated by a Royal Commission, and should not be passed without substantial amendment.

Specific concerns are addressed below.

3. Accountability

The two Bills provide the Commissioner with extraordinary powers to gather, analyse and share a very wide range of information from and with Commonwealth, state and territory entities rather than merely from individuals.

As noted below, that activity excludes the *Privacy Act 1988* (Cth). That exclusion is neither necessary nor appropriate. The Bills read as excluding privacy protections that are embedded in other statutes.

The extraordinary powers will be used in an environment where, as noted in a succession of reports by parliamentary committees and law reform commissions, privacy is not protected through a justiciable – as distinct from aspirational – Bill of Rights that is enshrined in the national Constitution. Enshrinement and justiciability are salient because they preclude arbitrary carve-outs from the existing weakly-enforced Privacy Act and other statutes on the basis of bureaucratic convenience or partisan political advantage.

It is axiomatic that agencies should only be gifted with extraordinary powers in truly exceptional circumstances. The failure of the Department of Veterans' Affairs noted by the Productivity Commission and in other independent reports, including those noted above, is not an exceptional circumstance that justifies undue authorisation of the proposed

Commissioner instead of fixing Veterans' Affairs (and realigning Defence Department practice with the needs of serving members), particularly in the absence of comprehensive information about how the Commissioner will operate.

It is also axiomatic that bodies with extraordinary powers should be accountable. The accountability framework should be visible and effective. It should be more than a matter of selecting the 'right people' as Commissioners and/or a belief that the Attorney-General's Department and Attorney-General will 'do the right thing'. One reason for the public disquiet about democratic processes and deepening distrust of government highlighted in the recent ANU *Australian Election Study* is that Ministers are perceived as acting in self-interest and disregarding lawfulness.[1] A salient example is *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* where the Federal Court has again damned a Minister as behaving in a way that is 'disgraceful' and 'unlawful'.[2] Neither the Attorney-General nor Prime Minister have publicly reproved Mr Tudge and Mr Dutton for the specific incidents or a pattern of behaviour in which Ministers unilaterally place themselves above the law.

On that basis we need a transparent and effective accountability mechanism beyond the hope that the Attorney-General will do the right thing. We can assume that the Commissioner will be diligent, honest and apolitical but more is needed, given the absence of protections and scope to over-ride rights embodied in confidentiality. Reliance on administrative protocols that are not embodied in statute is inadequate and stakeholders are entitled to question the Explanatory Memoranda that are peppered with 'coulds'. Such wording is vague, non-justiciable and an invitation to disregard on the basis that respectful implementation will be bureaucratically inconvenient.

4. Independent Advice and Scrutiny

Concerns regarding accountability, privacy and other matters might be offset by enshrining an independent scrutiny body. Such a body is consistent with the Government's 2017 commitment to 'independent scrutiny' of powers regarding veterans administration and with the extraordinary powers featured in the *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth).

There is no indication that the Commissioner will be guided by an independent expert advisory panel that –

- includes veterans and other members chosen on the basis of expertise and is representative of the rank & file cohorts most seriously at risk of self-harm (as distinct from Veterans' Affairs and other bureaucrats),
- has a statutory basis and discrete adequate funding,
- reports independently of the Commissioner and Minister directly to Parliament.

[1] The ANU study reports signalling that satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s. Just as worryingly, trust in government has reached its lowest level on record. Only 25% of Australians believe people in government can be trusted. 56% believe government is run for 'a few big interests' and only 12% believe the government is run for 'all the people'. That disquiet is increasing, with for example a 27% decline since 2007 in stated satisfaction with how Australia's democracy is working. Overall trust in government has declined by nearly 20% since 2007; three quarters believe that people in government are looking after themselves.

[2] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354, [68] and [74].

Advisory Councils of varying effectiveness are a feature of public administration in the Commonwealth, states and territories. They include the Australian Bureau of Statistics, the National Archives and Office of the Australian Information Commissioner.

Inclusion of rank & file veteran and service members (distinct from officers and executives within the Veterans' Affairs Bubble) goes some way to offsetting perceptions among those cohorts that they are disregarded and a matter of statistics.

Independent reporting offsets the history of government agencies –

- engaging in inhouse Privacy Impact Assessments,
- emphasising activity counts rather than evaluation as the basis for ongoing process improvement, and
- disregarding internal expressions of concern (for example instances regarding RoboDebt, SportsRorts, the MyHR scheme and the administration of the *Environment Protection and Biodiversity Conservation Act 1999*).

5. Privacy

The Commissioner will be dealing with information that relates to individuals rather than merely agencies. That information will come from a range of sources. It is not restricted to material from the Department of Veterans' Affairs and Department of Defence. The proposed legislation is intended to authorise sharing with a wide range of entities, which under clauses 56(2)(k) and 56(2)(l) include any 'Commonwealth, State or Territory body'.

Much of the information will be 'sensitive personal information' in terms of the *Privacy Act 1988* (Cth), other current/proposed enactments such as the *Data Availability & Transparency Bill 2020* (Cth), and a range of state/territory legislation. The broadness of the draft legislation means that assessment is difficult but it is reasonable to believe that much of the information handled by the Commissioner will have been acquired/generated by source agencies on a mandatory basis, without consent and from individuals in a position of subordination.

The legislation will exclude privacy protection. That exclusion is extraordinary. It is not necessary. It is not justified in the 2nd Reading Speeches or the Explanatory Memoranda. It should not be a feature of the Commissioner's regime. It is not obviated by reference in the Explanatory Memoranda to administrative practice that 'could' take place. Disquietingly, it has not been publicly condemned by the Office of the Australian Information Commissioner, unsurprising given the incapacity of that Office.

a) <u>Exclusion is not necessary</u>

Neither the Bills, the Explanatory Memoranda nor 2nd Reading Speeches identify the necessity to over-ride privacy protection *per se* and to specifically exclude the *Privacy Act 1988* (Cth) alongside over-riding protection in unspecified state/territory legislation under Subclauses 41(1) and 41(4) of the *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth). It is unclear why privacy protection has been excluded and the absence of explanation is disquieting.

Privacy is a human right rather than a luxury that can be ignored in favour of bureaucratic convenience. It is a feature of the international human rights agreements to which Australia is a signatory. It has been emphasised in a range of law reform commission and other reports. It is consistent with best practice public administration. It is valued by ordinary Australians,

highlighted for example in the latest annual survey by the Office of the Australian Information Commissioner.[3]

Parliament should adopt great care in making yet another carve-out from the Privacy Act and thereby signalling to both officials and the broader community that respect for the private sphere is neither necessary nor legitimate.

Exclusion is not required. The Privacy Act as it stands will accommodate the Commissioner's operation.

Amendment of the Bills to properly respect privacy does not involve substantive administrative costs and does reassure current/ex service people and their families that their dignity is acknowledged by government. Amendment more broadly substantiates the Government's recurrent statements regarding the importance of privacy, which the community is otherwise justified as considering merely a matter of lip service.

b) <u>There is no statutory right of access and correction</u>

Paragraph 25 of the Explanatory Memo for the *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020* states that

> If a person wished to access or correct their own personal information held by the Commissioner or the Attorney-General's Department, for example, this could be facilitated administratively, notwithstanding the Privacy Act exemption.

A salient feature of the *Privacy Act 1988* (Cth) is the scope for individuals to access information about themselves and in doing so identify errors in that information and consequently make corrections. That correction is significant for the individuals and is also a basis for a self-aware organisation to identify and correct any systemic problems in data management that caused those errors. It is axiomatic that government agencies on occasion both do make errors in data management and deny the existence of those errors. One recent example is RoboDebt.

Reports by veterans and their families indicate that much data in the veterans' system is incorrect. Accordingly there is a need to both correct that data and to improve data management processes. One start is inclusion of a statutory right, through the Privacy Act, of access and correction. There may well be an administrative cost. Such a cost, however, pales into insignificance within the $13 billion Veteran's budget. It is a cost we should be pleased to bear as a sign of respect for the people who serve Australia. It is also analogous to the cost of having legislatures, courts, public schools and other entities that are not a matter of commercial return on investment.

c) <u>Implementation</u>

The Commissioner will be using a substantial and wide-ranging collection of personal data from individuals and Commonwealth agencies, with scope for data from state/territory entities. The expectation is that the Commissioner will authorise sharing of information, including sensitive personal information, with Commonwealth, state and territory entities.

That sharing in the absence of privacy protection is disquieting. Concerns are not obviated by non-justiciable statemenents such as those in the Explanatory Memorandum that

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[3] Office of the Australian Information Commissioner, *Australian Community Attitudes to Privacy Survey 2020* (2020).

> a restorative and trauma-informed approach means that the principles of safety, confidentiality, consultation and informed participation will underpin the way the Commissioner exercises their functions and powers.

Such statements beg the question and induce little confidence when read in conjunction with the over-riding of confidentiality. They are, with respect, at the same level as the Government's stated commitment to supporting our ADF members and veterans.

The legislation will empower the Commissioner to disclose information to Commonwealth, state and territory entities on the basis that disclosure will assist those entities to perform their functions or exercise their powers (clauses 56 and 57), including to enable investigation of a possible criminal offence or civil penalty. That is a broad remit. Little comfort is provided by the Explanatory Memorandum's comment that the Commissioner's powers –

- *could* be exercised in a broad range of ways which did not involve disclosing personal information, or
- *could* include seeking consent to do so (for example, the Commissioner could disclose de-identified information only, or apply procedures to consult a person whose information may be disclosed).

There is no requirement for proportionality and as a matter of drafting 'seeking' is not identical with 'gaining'.

The legislation provides for Commonwealth entities to proactively disclose information to the Commissioner on their own initiative, 'despite' – as noted in the Explanatory Memorandum – 'other laws or obligations'. That authorisation is very broad and exacerbates the erasure of privacy protection. There is no requirement for compulsion: it might simply be a matter of an email, phone call or the sort of undocumented chat in coffee shops that the Australian National Audit Office referred to in its recent 'Leppington Triangle' report.[4]

Subclause 40(4) purports to provide that authorisation of sharing has effect despite any state/territory law that restricts or prohibits the disclosure of information. The Explanatory Memorandum comments

> Clause 41 authorises State and Territory bodies, appointed office holders, a Coroner or a Coroner's Court (relevant bodies), to disclose information to the Commissioner, including on their own initiative, to assist the work of the Commissioner. The intention is that this clause will facilitate information being proactively disclosed to the Commissioner, and clarify the capacity for relevant bodies to so disclose despite other laws or obligations.

In the absence of complementary state/territory legislation the provision is ineffective. The Commonwealth cannot unilaterally authorise disclosure by the Australian states contrary to specific protections in state law.[5]

6. Confidentiality?

Preceding paragraphs have voiced concerns about accountability and privacy because the proposed legislation appears to encompass over-riding confidentiality.

That is of deep concern for both the rule of law (something that is not the same as bureaucratic convenience) and trust in health systems (of particular importance for people with PTSD, depression and other ills).

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[4] Australian National Audit Office, *Purchase of the 'Leppington Triangle' Land for the Future Development of Western Sydney Airport* (Auditor-General Report No.9 2020–21).

[5] Ironically, the Commonwealth has on occasion sought to justify the weakness of the national privacy regime – in particular the absence of a cause of action for serious invasions of privacy – by claiming that it lacks power.

a) Transparency

There is no requirement for servicepeople, veterans and their families to consent to the Commissioner over-riding confidentiality. There is indeed no requirement in the Bills that individuals be alerted by the Commissioner or by another entity that over-riding is intended in a specific instance, is underway or has taken place.

b) Confidentiality

It is axiomatic that confidentiality is fundamental to the operation of the public and private health systems. It is a foundation of individuals trusting health practitioners and other entities. It is also a foundation of how health practitioners respond in dealing with people to whom they provide health services, remembering that practitioners are subject to ethical codes that on occasion will be in conflict with law that is contrary to human rights.

Any over-riding of confidentiality alongside disregard of privacy should be of deep concern to legislators. In practice it is likely to create harms – fear, mistrust, avoidance – that the Bills are meant to alleviate.

7. Reporting

The scheme is identified by the Government as part of the total commitment to

> supporting our ADF members and veterans during their service, in transitioning from service, and in their lives beyond service.

That support requires respect for current/former service people and their families alongside the immunisation of the Commissioner and other persons under clause 64. As such there is a need for a statutory requirement to alert current/ex service people and their families on a timely basis that information is being shared by entities – whether Commonwealth, state or territory – that should act as data custodians rather than data owners. A failure to do so will perpetuate perceptions among those people that they are data subjects. Custodianship and accountability is consistent with reference in other government initiatives to control by individuals, notably what has been badged as 'My Health Record'.

The Bills do not encourage confidence in timely and comprehensive reporting by the Commissioner. Such reporting is essential for trust by service people, veterans, their families and other stakeholders. Alongside the Commissioner's extraordinary powers and exclusion from the Freedom of Information Act it will be necessary for the Commissioner to proactively communicate with the community at large about the operation of the legislation.