

Chapter 1

Introduction

Referral of inquiry

1.1 On 7 September 2015, the Senate referred Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015 to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 25 September 2015.

Conduct of inquiry

1.2 The committee advertised the inquiry on its website, calling for submissions to be lodged by 14 September 2015. The committee also wrote directly to a range of people and organisations likely to have an interest in the bill, drawing their attention to the inquiry and inviting them to make written submissions.

1.3 The committee received 21 submissions and two supplementary submissions to the inquiry. These submissions are listed at Appendix A and are published on the committee's website.

1.4 The committee held a public hearing on 17 September 2015. The witnesses who appeared at the hearing are listed at Appendix B and the programs and *Hansard* transcripts of the hearings are published on the committee's website.

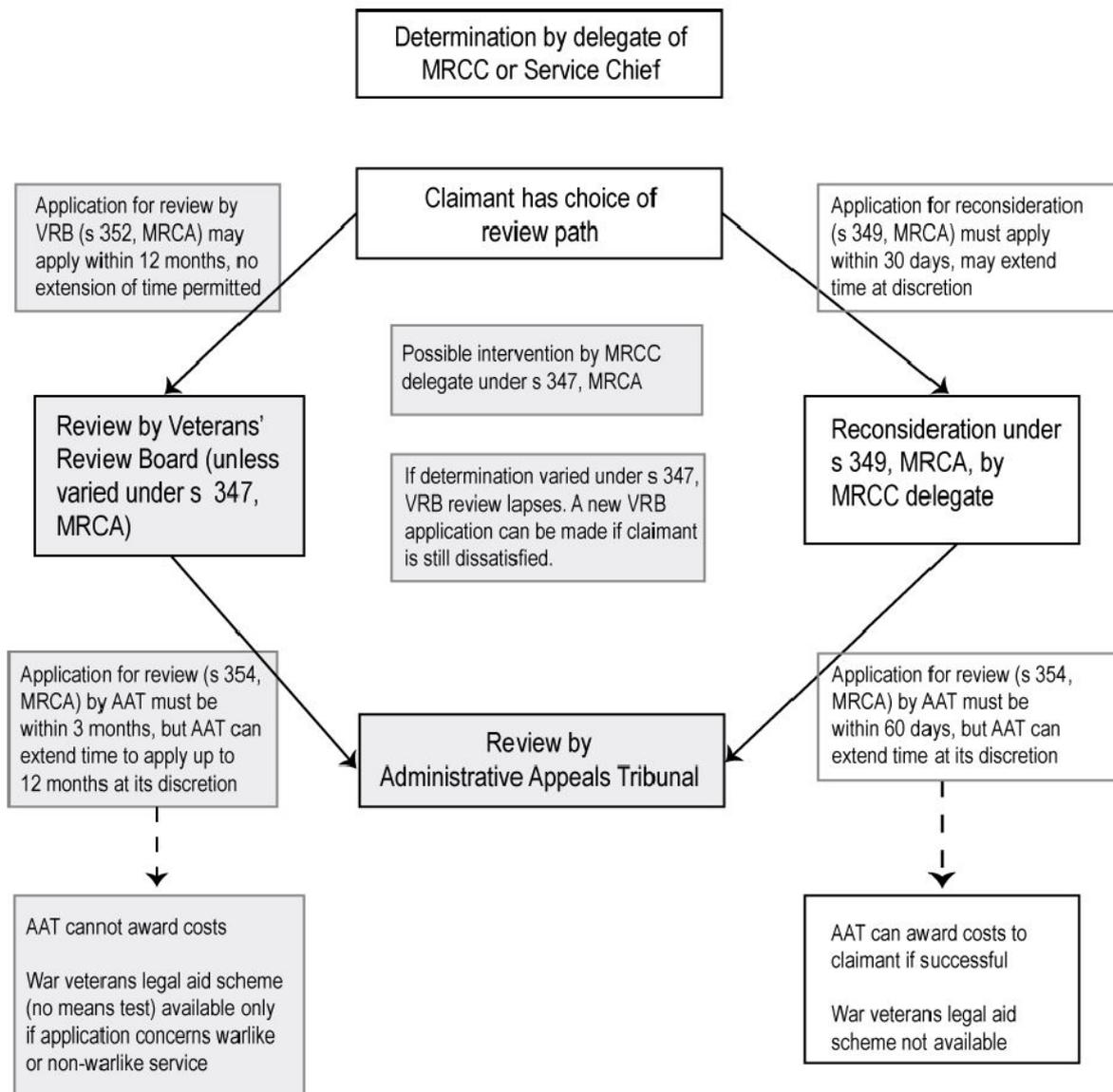
Background

1.5 The *Military Rehabilitation and Compensation Act 2004* (MRCA) provides compensation and other benefits for current and former members of the Australian Defence Force (ADF) who suffer a service wound, injury or disease (and for the dependents of some deceased members of the ADF).

1.6 MRCA provides two pathways through which a claimant can seek a review of an original determination:

- internal reconsideration by the Military Rehabilitation and Compensation Commission (MRCC) initiated by the claimant, under section 349; or
- review by the Veterans' Review Board (VRB), under section 352.

1.7 The claimant is able to choose only one of the two pathways. The next stage of appeal for both of these pathways is the Administrative Appeals Tribunal (AAT). See Figure 1.

Figure 1.1 – Current appeal pathways

Note: Shaded boxes show the same path as available under the *Veterans' Entitlements Act 1986*

Source: Department of Veterans' Affairs, *Submission 17*, p. 5.

1.8 If a claimant chooses internal reconsideration, he or she cannot access legal aid¹, but if 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.² If the claimant chooses review by the VRB, he or she may access

1 Explanatory Memorandum, p. 8.

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

legal aid at the AAT, but the AAT may not order that the costs of the proceedings be paid by the Commonwealth.³

1.9 The current appeals pathway was introduced to 'reflect the reconsideration and appeal rights available under the SRCA [*Safety, Rehabilitation and Compensation Act 1988*] for all service and for claims arising from warlike and non-warlike service' – this was the result of an inability to reach consensus amongst stakeholders regarding a single model.⁴ In explaining the development of the review model, the then Secretary of the Department of Veterans' Affairs (DVA), Dr Neil Johnston AO, noted that:

...we advised the government, in the light of the discussions in the working party where there was no consensus on a single preferred model, that the best option was to continue with two parallel tracks in a sense travelling more closely together now and providing more obvious points of comparison. We expect that over a period of some years now that there will be a better opportunity to compare the two and if possible meld them or learn from each other. At this point, we certainly have not been able to put forward a rationale or an analysis that has been persuasive to the veteran community on a preferred melding of the two.⁵

Review of Military Compensation Arrangements

1.10 In 2011, the Review of Military Compensation Arrangements (the Campbell Review) made the following recommendations with regards to improving the appeals process under MRCA:

- that the determining system under MRCA be refined to a single appeal path to the VRB and then the AAT, as a means of a more timely review that is less complex and less costly;
- that internal consideration by the MRCC be the first step in the review process, and the process for section 31 reviews under the *Veterans' Entitlements Act 1986* (VEA) be adopted, to help ensure the quality of decisions that are considered by the VRB and reduce workloads and costs;
- that there be access to a case conference process by the VRB so that, wherever possible, the key questions and relevant evidence are established as early as possible and the hearings can proceed without unnecessary delay;
- that, in advance of the adoption of a single path, a formal service level agreement between the MRCC and the VRB be negotiated to define a comprehensive case conference process within current legislation; and

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

4 Review of Military Compensation Arrangements Report, 2011, p. 224.

5 Senate Finance and Public Administration References Committee, Review of Veteran and Military Compensation, *Committee Hansard*, 26 September 2003, as quoted in Review of Military Compensation Arrangements Report, 2011, p. 224.

- that MRCA be amended to provide the VRB with explicit powers to remit a matter to the MRCC for needs assessment and compensation.⁶

1.11 Schedule 2 is intended to give effect to the Campbell Review's recommendations regarding the provision of a single pathway.

Purpose of Schedule 2 of the bill

1.12 The amendments contained in Schedule 2 of the bill create a single appeal pathway for the review of original determinations made under MRCA and remove the pathway, available under section 349, of claimant-initiated internal reconsideration by the MRCC.

Provisions of Schedule 2 of the bill

1.13 Items 1 to 4 amend section 344 of MRCA, which provides a simplified outline of Chapter 8, removing references to the right of a claimant to apply to the MRCC for reconsideration or review of an original determination as well as removing references to there being two possible pathways for reconsideration and review.

1.14 Item 5 repeals paragraph 345A(2)(c), which refers to subsections 349(2) and (3), which are repealed by Item 8.

1.15 Item 6 amends subsection 346(5) of MRCA, which requires that notification of original determinations include a statement advising that the claimant may, if dissatisfied with the original determination, request reconsideration of the determination by the MRCC.

1.16 Item 7 amends the heading of section 349 to remove reference to the claimant initiating reconsideration of determinations.

1.17 Item 8 repeals subsection 349(1) of MRCA, which states that the claimant may request that the MRCC reconsider an original determination. It also repeals subsection 349(3) of MRCA, which states that a claimant cannot request that the MRCC reconsider an original determination if the claimant has already made an application to the VRB for review of the determination.

1.18 Item 9 repeals subsection 352(2) of the MRCA, which states that a claimant cannot make an application to the VRB if the claimant has already requested that the MRCC reconsider the determination under section 349.

1.19 Item 10 provides that, after the item's commencement, the amendments made by Schedule 2 will only apply in relation to original determinations made on or after commencement. As such, original determinations made before the commencement of Schedule 2 of the bill will continue to be subject to the provisions of Chapter 8 of MRCA as they existed before the amendments.

6 Review of Military Compensation Arrangements Report, 2011, p. 247.

The proposed single appeal pathway

1.20 Following commencement of Schedule 2 of the bill, the proposed single appeal path will consist of review by the VRB and appeal to the AAT, as outlined in Figure 1.2 below.

1.21 Under the proposed single appeal path the MRCC or the Chief of the Defence Force retains the ability to initiate a reconsideration of an original determination, under section 347 of the MRCA; however, the ability for a claimant to initiate a reconsideration of an original determination by the MRCC under section 349 is removed.

1.22 DVA noted that this amendment to the appeals pathway will align the MRCA with the VEA appeals process:

The appeal process under the VEA allows for an internal review under section 31, a VRB review, or both at the same time. The reason for this is tied to the way appeals under the VEA are structured and the date of effect for entitlement claims. The VEA does not legislate for claimants to request a review under section 31, only for the Repatriation Commission to conduct a review on its own motion. In practice, the [Repatriation] Commission allows claimants to request a review under section 31 and the section 31 delegates will respond to a request.⁷

1.23 The proposed single appeal pathway will also include a 'screening process', to ensure that any cases that are appealed to the VRB are examined by the MRCC prior to the commencement of the VRB process:

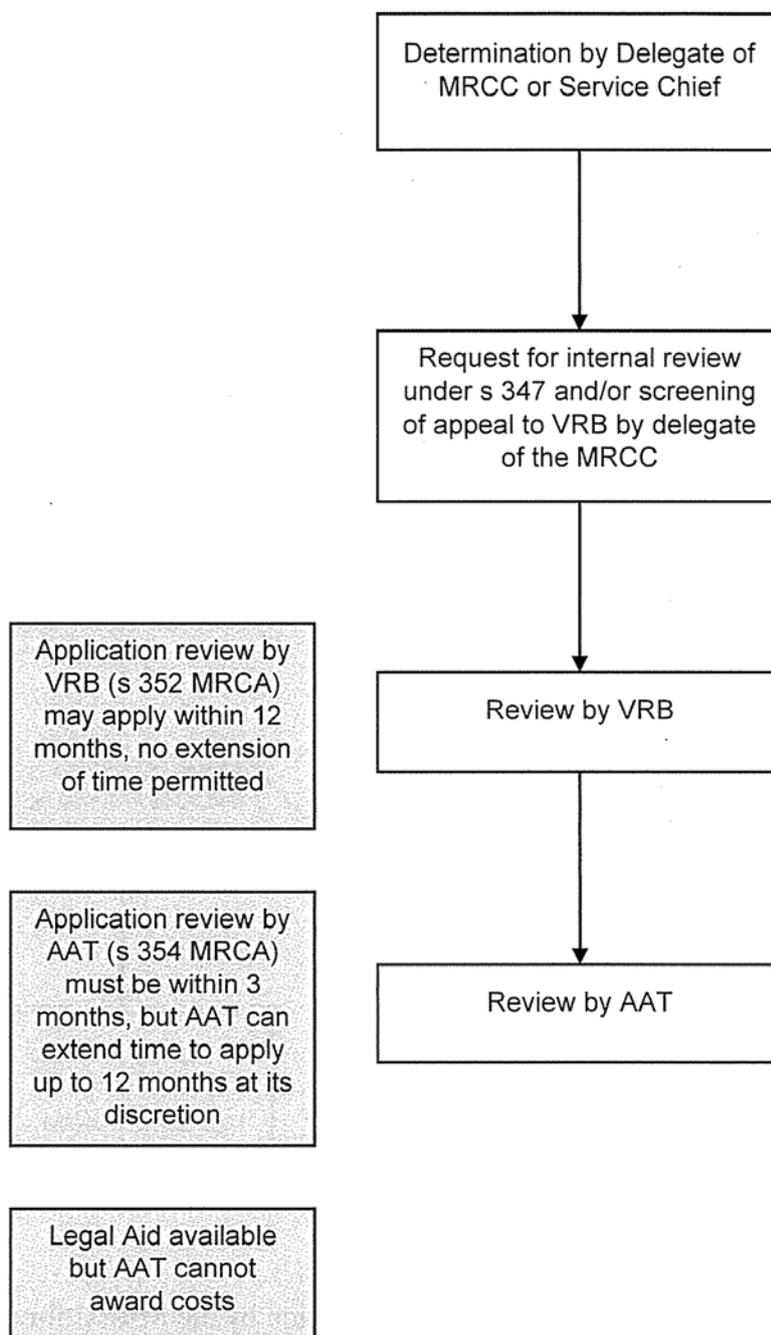
The MRCC has decided that all appeals to the VRB will undertake a 'screening process', similar to that currently undertaken with section 31 reviews under the VEA, upon receipt of a VRB application. The review will involve an examination of the evidence on file, including any additional statements/arguments or evidence that may have been provided...The MRCC review delegate will also have discretion to decide which appeals will benefit from a thorough investigation and which are best 'screened' and passed on to the VRB for a hearing before the Board.⁸

1.24 DVA advised the committee that the process will be finalised before an appeal is processed by the VRB. Further, if the MRCC review delegate, after investigation of the evidence, decides that a different decision could be made, then this new decision will replace the original determination. This is intended to 'save the claimant from having to undertake the VRB process, if they are satisfied with the new decision'.⁹

7 Department of Veterans' Affairs, *Submission 17*, pp 6-7.

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

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

Figure 1.2 – Proposed single appeal pathway

Source: Department of Veterans' Affairs, *Submission 17*, p. 6.

Alternate Dispute Resolution

1.25 In June 2014, the *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014* was enacted to give effect to the Campbell Review's recommendation that case conferencing be introduced at the VRB. The objective is to

have key questions and relevant evidence established as early as possible and hearings proceeded without unnecessary delay.¹⁰

1.26 This provides for alternate dispute resolution (ADR) through the VRB, including single member decisions, remittal powers and power to give directions, case appraisal, and neutral evaluation. Under the ADR guidelines, the VRB will allow lawyers to appear during the ADR process to make submissions; however, lawyers will continue to be prohibited from appearing at VRB hearings.¹¹

1.27 These changes are expected to 'substantially reduce the time taken for an appeal to the VRB to be finalised' providing the VRB with 'modern and effective ADR processes similar to other Commonwealth merits review tribunals':

The intent of the introduction of ADR is to improve the quality of service provided to applicants before their application is considered by the VRB. The VRB conference registrars are responsible for facilitating the ADR process at the VRB and undertake an initial 'outreach' contact with applicants and/or their representatives.¹²

1.28 DVA reported that, while the ADR trial is still in progress, early results are encouraging. The pilot being conducted in New South Wales (NSW) and the Australian Capital Territory (ACT) has processed 309 cases within the first six months of 2015. Each of the 309 cases was processed in under 48 days, with close to 50 per cent processed within 29 days. Furthermore, over 61 per cent of cases (189) were resolved without the need to proceed to a hearing at the VRB.¹³

Effectiveness of primary decision making

1.29 DVA advised the committee that it regularly conducts analysis of decisions which are set aside by the VRB to ensure that there are no systemic deficiencies in the primary decision making process. DVA report that the latest analysis, conducted in 2015, found that decisions were predominantly set aside when the VRB obtained new evidence in support of an appealed claim. The analysis of a sample of set aside cases showed that 75 per cent had new evidence submitted and 8.5 per cent had new contentions. DVA noted that 'a significant amount of this new evidence related to medical opinion that was not available at the primary assessment or internal review stage'.¹⁴

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

11 Department of Veterans' Affairs, *Submission 17*, p. 8.

12 Department of Veterans' Affairs, *Submission 17*, pp 7-8.

13 Ms Lisa Foreman, First Assistant Secretary, Rehabilitation and Support Division, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 26; Mr Neil Bayles, Assistant Secretary, Rehabilitation, Case Escalation and MRCA Review, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 27.

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

