

# **Dissenting Report**

## **Senator Jacqui Lambie**

### **Introduction**

1.1 I write in order to submit my official Dissenting Report to the Foreign Affairs, Defence and Trade Legislation Committee into the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015, Schedule 2.

1.2 As you are aware I attended the committee hearings, participated in the questioning of witnesses and followed proceedings closely.

1.3 You will recall I was one of the first elected representatives in the Australian Parliament to raise concerns about the harm this proposed legislative change will cause to our veterans.

1.4 I was also part of the group of Senators who lobbied to have this legislation examined by the Foreign Affairs, Defence and Trade Legislation Committee.

1.5 Given the articulate and compelling arguments presented to the Senate Committee by expert legal witnesses and external service organisations – I am stunned that the committee initially recommended that the Bill be passed, however I'm relieved that after a phone conference yesterday a new 3<sup>rd</sup> recommendation has been introduced which states:

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

1.6 But, given the quality of the expert arguments against the passage of this Bill in its current form - and the change in leadership of the coalition government, I would have thought the only logical and fair recommendation would be for the Committee to oppose the passage of the Bill in its current form.

1.7 Your original committee's recommendation that the bill be passed, was nothing short of a disgrace. And had it not been changed I would have called for your resignation as committee chair.

1.8 It ignored the facts and followed a pattern of behaviour where the dysfunction and misconduct by the members of the Department of Veterans' Affairs is covered up, minimised and legitimised in an attempt to limit political damage. This will surely occur when the general public discovers the truth about the adverse effects that this proposed legislation will have on our veterans

1.9 The original report and its recommendations are more reasons why an independent Royal Commission into Defence Abuse and Veterans' Welfare must be established, in order for veterans and their representatives to have a chance to detail their experiences and have them fairly heard and acted upon in a just manner.

### **DVA's Failures during the Committee Hearings**

1.10 During Committee Hearings all the Department of Veterans' Affairs and government representatives failed to rebut any arguments from the expert legal

witnesses during committee hearings, by identifying or referencing any section of various Acts, which contradicted their assertions or assuaged concerns.

1.11 The Department representatives offered assurances, affirmations and advice to the committee knowing full well that - should the legislation pass, veterans would have to rely on the better nature and kindness of government officers to win fair entitlements – rather than their rights written into Australian law.

1.12 The Department officers failed comprehensively to properly address the following points and arguments and references in your committee's original report:

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:

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.

### **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...

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.

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.

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 needs to be time frames. There needs 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.

## 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. 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 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.

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.

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.

...the proposed changes would be at odds with the current cost provisions in the civilian community and would plainly place military personnel in a position of disadvantage and discrimination.

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.

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.

## **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, 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 different eligibility requirements. Consequently, the federal government cannot promise that legal aid will be granted without agreement from the states and territories.

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

2.27 Some submitters raised concerns regarding unequal access to legal advice and representation between veterans and DVA. 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.

2.28 KCI Lawyers pointed to a case 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 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.

## **20 submissions were “generally supportive” - Misleading**

1.13 The Senate Committee report gave the impression that the 20 submissions were “generally supportive” of the government plans to amend the Veterans’ Affairs legislation by stating:

2.1 The committee received 20 submissions and two supplementary submissions. The submissions were generally supportive of the proposed single appeal pathway...

1.14 In my view this is an incorrect and misleading statement.

## **RSL forced to reconsider position**

1.15 As the facts emerged during the hearings, bodies like the RSL, who in the beginning acted like a schoolgirl cheer squad for the government, were forced to reconsider their position.

1.16 The RSL’s striking change of tune and attitude was best captured by a letter from the VVFA (Vietnam Veterans Federation Association – incorporating Peacemakers and Peace keepers) distributed within the Australian veteran community on Tuesday the 22<sup>nd</sup> of September.

1.17 It read:

Leadership Missing – The RSL

The National leadership of the RSL has failed again. Its failure to effectively and positively represent its membership and the broader Australian defence community was exposed at the recent Senate Inquiry into the Veterans’ Affairs Legislation Amendment (2015) Budget Measures Bill 2015 where the National President Ken Doolan was wrong footed by the astute Senator Xenophon (SA).

In an embarrassing admission the National President, Ken Doolan was forced to reconsider the RSLs position.

The Senate Committee comprising Senators Back (Chair), Fawcett, Gallacher, Lambie, McGrath and Xenophon was inquiring into Schedule 2 of the Veterans’ Affairs Legislation Amendment (2015 Budget Measures) Bill 2015.

The Labor Party sent the Legislation to this Senate Committee and it swung on the proposal to take away the right under certain circumstances to costs for a successful AAT appeal. The Government sought to deny that avenue of appeal and the RSL meekly supported it.

While being conscious not to “threaten or disadvantage a witness on account of evidence given to a committee, and such an action may be treated by the Senate as a contempt.” it is evident that the National President of the RSL and therefore the RSL was ill prepared to effectively represent its case to the committee.

There were 20 written submissions to the inquiry. Some were lengthy and detailed providing background and rationale for the position taken by the particular ESO or, in several cases, legal firms and individuals.

The RSL submission was all of one page and simply acknowledged that the appeal process as outlined on Schedule 2 of the Legislation will best serve the MRCA claimant and therefore simply advised that “The RSL supports this process unconditionally.’ No background, no rationale.

Senator Xenophon politely suggested to Ken Doolan that with some “negotiation and some sensible amendments ---- veterans would not be disadvantaged.” Ken Doolan advised that “we (the RSL) will do that and we will do it expeditiously.” This has since been done but in words indicative of the hesitant approach of our once mighty organisation Ken Doolan advised the Senate Committee that the RSL would “not oppose” the awarding of costs to a claimant.

Whatever has happened to emphatic terms such as ‘fully support’ or is there an issue of Government and RSL relations at play here?

The question needs to be asked. “Why did it take the prodding of Senator Xenophon to get the RSL, the largest and best resourced ESO in the country, to reconsider its position?

Sadly the RSL leadership has a track record of failing to work with or acknowledge the expertise of other ESOs’ on the substantive issues confronting the Australian defence community.

It recently stood aside from a joint Media Statement issued by 10 ESO Leaders who are members of the ESO Round Table representing some 150,000 serving and former members of the ADF.

The Statement expressed concern at the imbalance in legal resources available to the DVA while such is out of the reach of ordinary veterans. Instead the RSL submitted that it supports the MRCA amendment proposal unconditionally.

The government and DVA are being given a free pass to ignore the aspirations of the Australian defence community because the leadership of the RSL persists in the belief that it and it alone should project the voice of the veteran and ex-service community.

That leadership ignores the reality of the 21<sup>st</sup> century which says that advocacy and selling the issues of the Australian defence community will be all the more effective by working in concert with all ESOs, utilising their intellectual and personal expertise. Addressing the issues of the Australian defence community is not a competition!

Kel Ryan

22 September 2015

Life Member RSL

### **VVFA Submission Ignored**

1.18 I am disappointed the Foreign Affairs, Defence and Trade Legislation Committee’s report into the Veterans’ Affairs Legislation Amendment (2015 Budget Measures) Bill 2015 — Schedule 2 also failed to mention, by name or quote, a strong and comprehensive submission by the VVFA.

1.19 It reads as follows:

Inquiry into the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

This submission is made by the Vietnam Veterans Federation of Australia Inc. We represent some 6,200 Veterans, former and serving ADF Members and their families.

We strongly oppose the proposal in Schedule 2 of the Bill:

- a. to remove the option for internal reconsideration, by the Military Rehabilitation and Compensation Committee (MRCC), of a decision by the Department of Veterans Affairs (DVA) to refuse a Veterans claim for benefits under the Military Rehabilitation and Compensation Act (MRCA); and
- b. to allow only for a 'single pathway' review of that decision by the Veterans Review Board (VRB); and

This proposal is directly contrary to the recommendation by the recent Review of Military Compensation Arrangements (the Review), which recommended that the single pathway appeal process should involve internal reconsideration by the MRCC first, then the VRB process, and then the AAT, thus creating a faster and less costly process:

The (Review Committee) believes that reconsideration by the MRCC should be the first step in the review process. This would help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs' and would align with the review process under the VEA.

The Government claims that the proposed changes give effect to the Review recommendations. However, while implementing Recommendation 17.1 for a single appeal path, the proposed amendments ignore Recommendation 17.2, i.e. for internal reconsideration by the MRCC to be the first step in this review process.

Instead, the proposed amendments will remove internal reconsideration by the MRCC from the appeals process altogether, so that the VRB review becomes the first tier of the single appeal pathway.

The Government has provided no explanation for its failure to adopt the Review's Recommendation 17.2 in full. However it might be surmised that the underlying policy of the more restrictive proposal is intended to have a twofold effect-

1. first, without explanation, it will in effect abolish the present long-standing arrangement, by which a Veteran may appeal an unfavourable internal DVA 's349 decision' direct to the AAT; if successful there, the AAT is empowered to award costs in the Veteran's favour; by contrast, the AAT cannot award costs if the Veteran has appealed an unfavourable VRB decision.

Plainly, the Government is concerned about the 'open-ended' scope for the AAT to award costs against DVA if the Veteran wins. The new policy will potentially save DVA money, but to the detriment of Veterans.

2. second, perhaps less obvious but equally feasible in the general context of the opaque official explanation of this proposal, it may be that the policy is intended to ‘nudge’ Veterans away from seeking any review of any kind of an unfavourable decision. The ‘nudge’ concept is by now well-known and frequently used by governments in the Western world.<sup>[2]</sup> It is therefore not fanciful to speculate that by depriving Veterans of the present relatively straightforward process of seeking an internal review and thereby ‘nudging’ them into the more complex process of the VRB, with no prospects of a favourable costs order on appeal to the AAT, the policy is intended to discourage appeals against DVA decisions. Once again, this is to the detriment of Veterans.

The Minister for Veterans’ Affairs has stressed the support of the ESO Round Table (ESORT) members for the Government proposal. I have dissented from the ESORT decision to support the proposed amendment. I now suspect that the ESORT has also been influenced by ‘nudge’ tactics.

Our members are dismayed and in many cases, angry, about those proposed changes, and also about the opaque and disingenuous method of their presentation and explanation.

It is our submission that the Committee should-

1. recognise the disproportionate and seriously adverse impact of the present proposal upon Veterans, and
2. recommend that the Government abandon the proposal and instead implement the full recommendation by the recent Review of Military Compensation that the single pathway appeal process should involve internal reconsideration by the MRCC first, then the VRB process, and then the AAT, retaining the right to have costs awarded if successful at the AAT.

James Wain

President

Vietnam Veterans Federation of Australia Inc

## **In Closing**

1.20 In closing I refer you to 2.34 of the report where it says:

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.

1.21 Given the current crisis with veterans’ suicide and self-harm, and given most veterans I meet say they would rather face the enemy than the Department of Veterans’ Affairs - I am not satisfied with any of DVA’s assurances.

1.22 DVA’s word and assurances have tragically failed many veterans and their families.

1.23 I will be satisfied when veterans' rights to fair compensation and entitlements are properly enshrined and guaranteed in legislation passed by the Federal Parliament, not at the whim of a government officer whose first unwritten priority— but very real key performance indicator - is to save the government as much money as possible at the expense of Australian veterans.

1.24 My advice to government members of this committee is if you can't afford to look after our veterans when they return from war or war-like service, then don't send them in the first place.

1.25 For too long this country has committed troops to battle in the Middle East without consulting the people through Parliament and without debating the true cost of war.

1.26 One measure that may alleviate the majority of concerns relating to these amendments and still adopts the streamlined approach advocated by the Committee is to amend the Bill so as to:

- Allow legal representatives to appear in the VRB; and
- Allow the recovery of costs and outlays for further medical evidence and legal costs and representatives to the Tribunal for review of a determination of the Board.

1.27 This would require the amendment of Sections 375, 358 and 359 of the MRCA, and Section 147 of the VEA.

1.28 Concern would still remain as to the length of time that it takes for matters to proceed through the VRB.

1.29 However, if the Government is willing to put measures in place to remedy this, the adoption of the above recommendation will ensure that:

- There is a streamlined pathway for review of decisions;
- Veterans are not effectively denied access to legal representation;
- Veterans remain on the same footing as the general community and Commonwealth civilian employees in terms of recovery of costs and outlays in Tribunal applications;
- The anticipated further burden on the Legal Aid system will, in turn, be reduced;
- Many of the concerns raised by those who provided submissions to the Committee will be addressed.

**Senator Jacqui Lambie**

