

The Senate

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Foreign Affairs, Defence and Trade  
Legislation Committee

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Veterans' Affairs Legislation Amendment  
(2015 Budget Measures) Bill 2015—  
Schedule 2

September 2015

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## Abbreviations

AAT	Administrative Appeals Tribunal
ACT	Australian Capital Territory
ADF	Australian Defence Force
ADR	alternate dispute resolution
DVA	Department of Veterans' Affairs
ESOs	Ex-Service Organisations
MRCA	<i>Military Rehabilitation and Compensation Act 2004</i>
MRCC	Military Rehabilitation and Compensation Commission
NSW	New South Wales
RSL	Returned and Services League of Australia
VEA	<i>Veterans' Entitlements Act 1986</i>
VRB	Veterans' Review Board



## **List of recommendations**

### **Recommendation 1**

**2.38 Subject to the satisfactory completion of the alternate dispute resolution (ADR) trial in NSW and the ACT, the committee recommends that ADR be extended to all other states and territories.**

### **Recommendation 2**

**2.39 The committee recommends that the Explanatory Memorandum be amended to remove any confusion or misunderstanding as to how the single review pathway will function.**

### **Recommendation 3**

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



# 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.

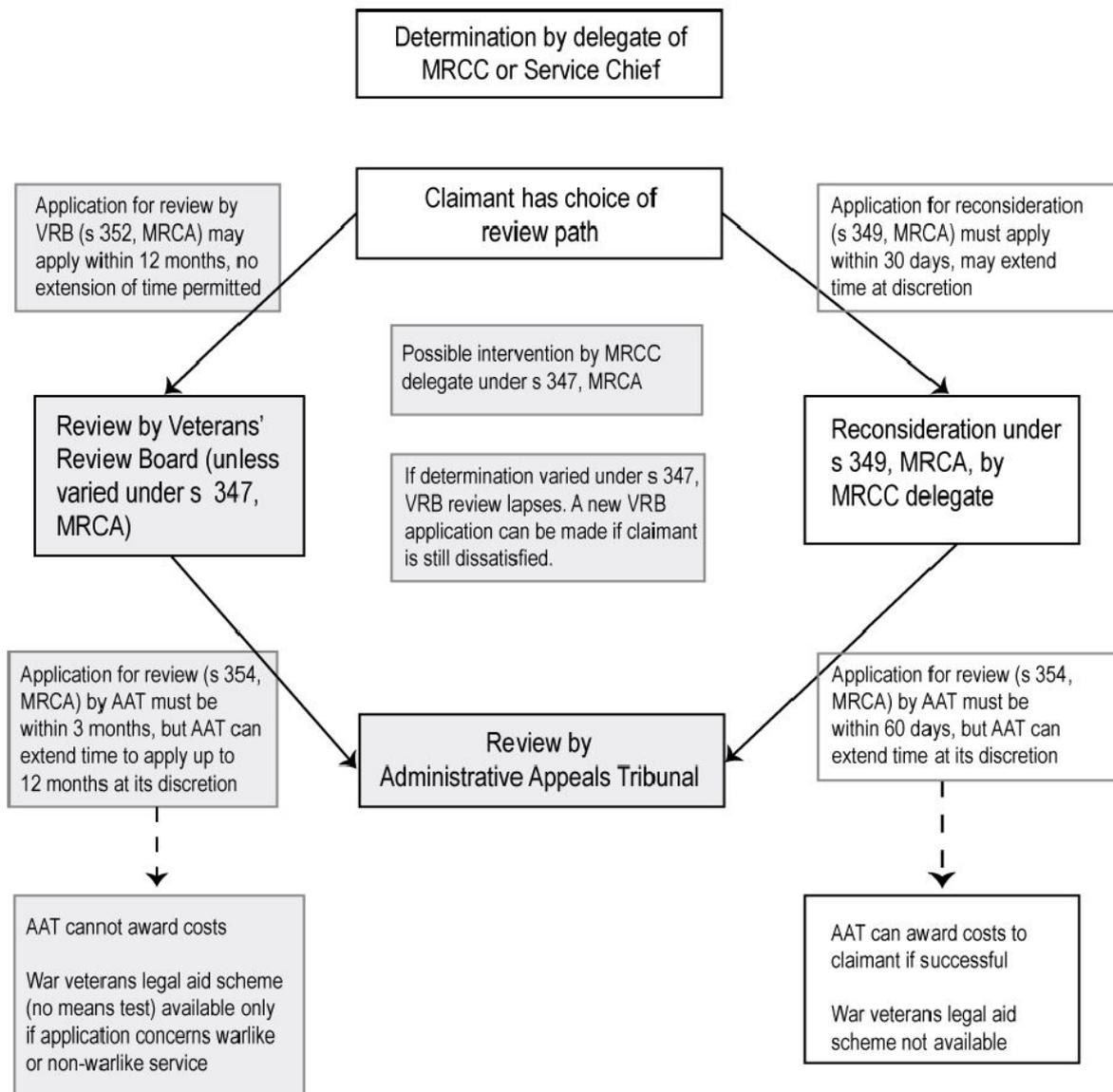
### Background

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 aid<sup>1</sup>, 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

### ***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

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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.<sup>6</sup>

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.

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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.<sup>7</sup>

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.<sup>8</sup>

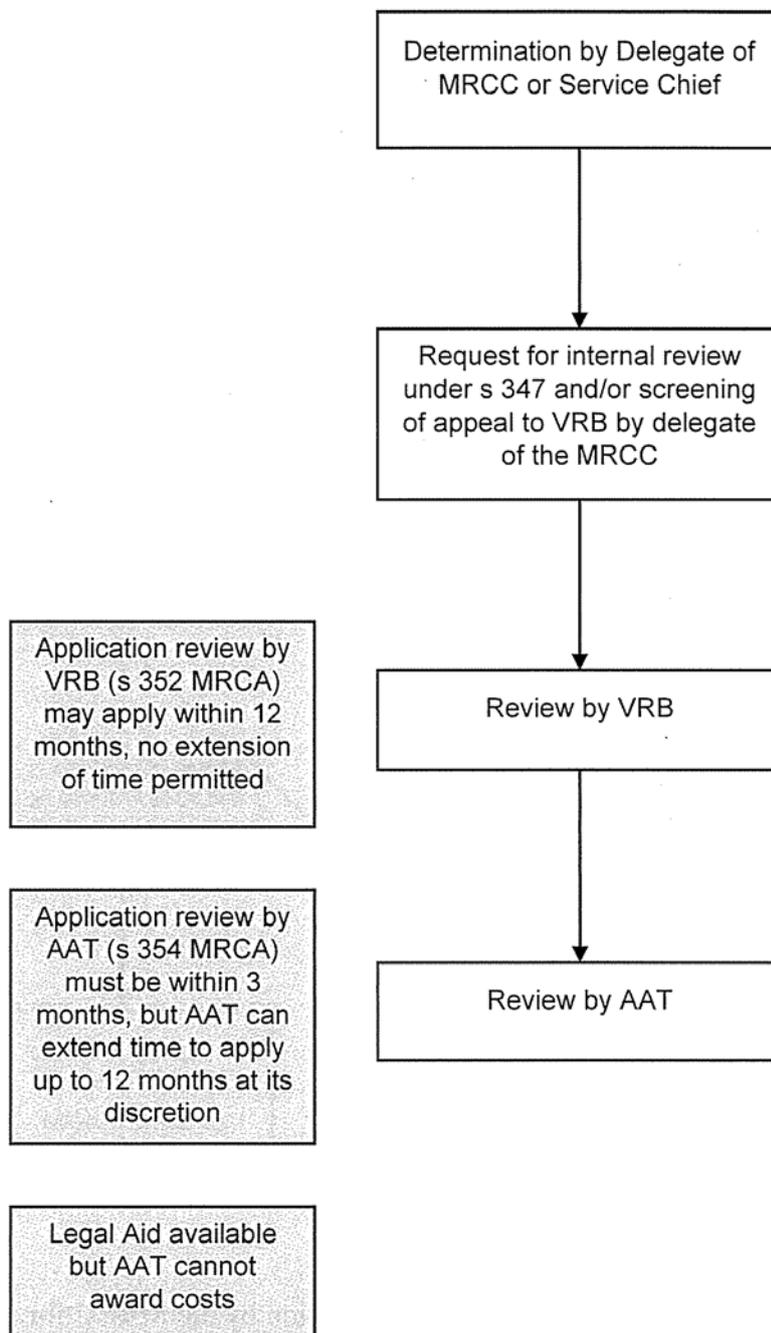
1.24 DVA advised the committee that the process will be finalised before an appeal is processed by the VRB. Further, if the MRCC review delegate, after investigation of the evidence, decides that a different decision could be made, then this new decision will replace the original determination. This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

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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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

### **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'.<sup>14</sup>

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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.



## Chapter 2

### Consideration of Schedule 2 of the bill

2.1 The committee received 21 submissions and two supplementary submissions. The submissions were generally supportive of the proposed single appeal pathway but raised three key areas of concern:

- the removal of claimant-initiated internal reconsideration (under section 349) and the efficiency of the proposed single appeal pathway;
- the costs of the appeal process and veterans' access to legal representation, including the availability of legal aid; and
- the expected budget saving of \$2.2 million over four years.

#### Section 347 vs Section 349 and the proposed single pathway

2.2 Currently, there are two ways in which an internal reconsideration of an original determination can occur: under section 347, the MRCC can initiate an internal reconsideration; under section 349, a claimant can initiate an internal reconsideration (provided that the claimant has not already applied to the VRB for a review). Schedule 2 removes the option for claimant-initiated internal reconsideration.

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. Mr Greg Isolani of KCI Lawyers stated:

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.<sup>1</sup>

2.4 DVA advised the committee that under the proposed single pathway, the MRCC will initiate an internal reconsideration under section 347 for all claimants who have submitted an original determination to be reviewed by the VRB.<sup>2</sup> This claim was affirmed by the MRCC, who assured the committee that the MRCC-initiated reviews would operate in the same way as the section 31 reviews under the VEA:

I can advise that on 13 November 2013, the Military Rehabilitation and Compensation Commission (MRCC) agreed to a DVA recommendation that the MRCA be refined to a single pathway that progresses from internal review to the VRB and then to the AAT. The MRCC further agreed that the process for handling internal reviews should be modelled on the VEA section 31 review powers. The MRCC reaffirmed this decision in September 2014. This is the pathway reflected in Schedule 2 of the

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1 *Committee Hansard*, 17 September 2015, pp 5-6.

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

Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015.<sup>3</sup>

***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...<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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 need to be time frames. There need 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.<sup>7</sup>

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3 Mr Simon Lewis, Chair, Military Rehabilitation and Compensation Commission, *Statement*, tabled by Department of Veterans Affairs, Canberra, 17 September 2015.

4 KCI Lawyers, *Submission 18*, p. 2.

5 Mr Greg Isolani, Partner, KCI Lawyers, *Committee Hansard*, 17 September 2015, p. 7.

6 Slater & Gordon Lawyers, *Submission 8*, pp 2-3.

7 Ms Rachael James, General Manager, Slater & Gordon Lawyers, *Committee Hansard*, 17 September 2015, p. 3.

2.7 DVA advised the committee that the proposed single appeals pathway will be beneficial for veterans, as it will be more timely and more straightforward than the current model:

The department's and the government's objective with this amending legislation is a reform of the determining system to bring evidence forward as early as possible and to have the appeal matters resolved in a timely, less costly, less adversarial and more straightforward way. Overwhelmingly the winners in this process are the veterans themselves.<sup>8</sup>

2.8 DVA assured the committee that the MRCC-initiated internal reconsideration will be finalised before an appeal is processed by the VRB. Furthermore, if the MRCC review delegate, after investigation of the evidence, decides that a different decision should be made, then this new decision will replace the original determination, saving the claimant from having to undertake the VRB process, if they are satisfied with the new decision.<sup>9</sup>

2.9 DVA also highlighted the purpose of the VRB and the advantages that it offers veterans:

The VRB...was introduced specifically to provide the veteran community with a veteran-friendly, less adversarial, less formal external review mechanism [than] the AAT. Importantly for veterans, the MRCC is not represented at the Veterans' Review Board, providing the DVA client with the opportunity to present their case without the other party, the MRCC, present or involved, a practice specifically intended to make it a non-adversarial forum for DVA clients to make their case before the board. Lawyers cannot appear either.<sup>10</sup>

As part of this, DVA clients and their advocates can provide additional evidence and can appear before the board in person at a hearing. In addition, one member of the board panel of three members must be an ex-Defence Force member. I should stress that the VRB is independent of the Repatriation Commission and the Military Rehabilitation and Compensation Commission.<sup>11</sup>

2.10 The Returned & Services League of Australia (RSL) expressed its support for the proposed single appeals pathway, noting the non-adversarial nature of the VRB and its inclusion of a member with either service experience or a strong understanding of service who has been recommended by the Ex-Service Organisations (ESOs):

We support this current one because that is the way that we feel is the best option for the veteran—he gets an independent review by a senior delegate

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8 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

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

10 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

11 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

in the department, and he gets another independent review by the Veterans' Review Board. You have to remember that the Veterans' Review Board is normally made up of three members and one of them is a service member—either an ex-serving member or someone that the ex-service organisations have recommended to the minister to be placed on the board. That person, be they Army, Navy or Air Force, should have knowledge of occurrences in all three services. Normally they are at least commanders and above...the senior member will say, 'We are here to give you your entitlements if we possibly can—we are not here to block; we are here to give.' That is the beneficial nature of the legislation...It does not say to investigate them—they are to award pensions unless there are reasons why they cannot.<sup>12</sup>

2.11 The VRB informed the committee that over the last three financial years the average time taken to resolve all types of applications, including those made under MRCA, was approximately 50-51 weeks. The VRB noted that the primary control of applications are with the parties, stating that over the last three financial years:

- 57 per cent of outstanding applications were under the control of claimants and their representatives;
- 15 per cent of outstanding applications were under the control of DVA; and
- 28 per cent of outstanding applications were under the control of the VRB.<sup>13</sup>

2.12 As the above statistics indicate, the delay in processing cases is often within the control of claimants and their representatives.

### **Legal aid and awarding costs**

2.13 Currently, if a claimant initiates an internal reconsideration of an original determination under section 349 and 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.<sup>14</sup> However, if a claimant chooses this pathway, he or she cannot access legal aid.<sup>15</sup>

2.14 If a claimant chooses to apply for a review by the VRB, and the determination is varied or set aside and remade by the AAT, the AAT may not order that the costs of the proceedings incurred by the claimant be paid by the Commonwealth.<sup>16</sup> However, the claimant can access legal aid, subject to the usual legal aid eligibility criteria.<sup>17</sup>

2.15 Under Schedule 2, the proposed single pathway (see Figure 1.2) includes review by the VRB; therefore, under section 359, the AAT may not order that the

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12 CMDR John Hodges RAN (Rtd.), National President, Returned & Services League of Australia, *Committee Hansard*, 17 September 2015, p. 11.

13 Veterans' Review Board, *Submission 4*, p. 2.

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

15 Explanatory Memorandum, p. 8.

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

17 Explanatory Memorandum, p. 8.

costs of the proceedings incurred by the claimant be paid by the Commonwealth, regardless of the outcome of the appeal.

### ***Cost of medical reports***

2.16 A number of stakeholders raised concerns regarding the expense of medical reports needed by veterans throughout the appeals process, specifically the matter of veterans paying the costs associated with obtaining medical reports. Similar concerns were raised by a number of submitters.<sup>18</sup>

2.17 The RSL noted that, whilst medical reports can be quite expensive, veterans can seek assistance from the Registrar of the VRB, who can arrange for DVA to pay for any necessary medical reports or other relevant materials:

...if the claimant needs more medical evidence or the evidence that he has for his condition is not full and complete – there are gaps missing and he needs more or better medical evidence – then he can get that and the department pays for it. He does not have to put his hand in his pocket to do it.<sup>19</sup>

2.18 DVA confirmed this, stating that the VRB can request that DVA obtain and pay for medical reports required by the VRB. In addition, claimants can also seek reimbursement for the costs of medical reports up to \$467.50.<sup>20</sup>

### ***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.<sup>21</sup> 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

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18 Veterans' Support Centre, *Submission 2*, p. 17; Slater & Gordon Lawyers, *Submission 8*, pp 4, 6-7, and 10; Defence Force Welfare Association, *Submission 15*, p. 2; KCI Lawyers, *Submission 18*, pp 2-3; Law Council of Australia, *Submission 20*, p. 4.

19 CMDR John Hodges, Returned and Service League of Australia (RSL), *Committee Hansard*, 17 September 2015, pp 11-12.

20 Department of Veterans' Affairs, *Submission 17*, pp 10-11.

21 Veterans' Support Centre, *Submission 2*, p. 16; Mr Greg Niven, *Submission 3*, p. 1; Australian Lawyers Alliance, *Submission 5*, pp 2-3; Legacy Australia, *Submission 6*, p. 2; Returned & Services League of Australia, *Supplementary Submission 7.1*, p. 1; Slater & Gordon Lawyers, *Submission 8*; Defence Force Welfare Association, *Submission 15*, pp 2-3; Vietnam Veterans Federation of Australia, *Submission 12*; Mr Nathan Mark, *Submission 14*; KCI Lawyers, *Submission 18*; Law Council of Australia, *Submission 20*, pp 3-4.

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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

...the proposed changes would be at odds with the current costs provisions in the civilian community and would plainly place military personnel in a position of disadvantage and discrimination.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

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22 Defence Force Welfare Association, *Supplementary Submission 15.1*, p. 1.

23 Returned & Services League of Australia, *Supplementary Submission 7.1*, p. 1.

24 Slater & Gordon Lawyers, *Submission 8*, p. 4.

25 Mr Greg Niven, *Submission 3*, p. 1.

26 KCI Lawyers, *Submission 18*, p. 2.

27 Law Council of Australia, *Submission 20*, p. 3.

2.22 DVA responded to assertions that veterans might be disadvantaged by the bill by emphasising the unique role of the VRB in the appeals process, and the advantages that it provides veterans:

...it is important to note that public servants do not have the advantage of an external review body like the Veterans' Review Board to consider their appeals before they reach the AAT – they have to appeal directly to the AAT following an unfavourable internal reconsideration by a Comcare delegate. The VRB, on the other hand, was introduced specifically to provide the veteran community with a veteran-friendly, less adversarial, less formal external review mechanism than the AAT. Importantly for veterans, the MRCC is not represented at the Veterans' Review Board, providing the DVA client with the opportunity to present their case without the other party, the MRCC, present or involved, a practice specifically intended to make it a non-adversarial forum for DVA clients to make their case before the board...DVA clients and their advocates can provide additional evidence and can appear before the board in person at a hearing. In addition, one member of the board panel of three members must be an ex-Defence Force member.<sup>28</sup>

2.23 DVA informed the committee that in 2014-15, of the 20,070 original determinations made under MRCA, 585 applications were lodged with the VRB and 485 claimant-initiated internal reconsiderations were lodged.<sup>29</sup> Furthermore, only 40 determinations were considered by the AAT, of which 13 (0.06 per cent of all MRCA original determinations) were set aside.<sup>30</sup>

### ***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.<sup>31</sup> 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

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28 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

29 Some of these were from previous years.

30 Mr Shane Carmody, Chief Operating Officer, Department of Veterans' Affairs, *Committee Hansard*, 17 September 2015, p. 21.

31 Veterans' Support Centre, *Submission 2*, p. 18; Australian Lawyers Alliance, *Submission 5*, p. 2; Slater & Gordon Lawyers, *Submission 8*, pp 11-12; Vietnam Veterans' Federation of Australia, *Submission 12*, p. 2; Defence Force Welfare Association, *Submission 15*, p. 2; Australian Families of the Military Research and Support Foundation, *Submission 16*, p. 5; KCI Lawyers, *Submission 18*, pp 9-10; Law Council of Australia, *Submission 20*, p. 4; Mr Bill Marklew, *Submission 21*, p1 1-2.

different eligibility requirements. Consequently, the federal government cannot promise that legal aid will be granted without agreement from the states and territories.<sup>32</sup>

2.25 The RSL directed the committee to the National Partnership Agreement on Legal Assistance Service from the Council of Australian Governments, which commenced on 1 July 2015. The agreement provides that, 'applicants should be exempt from legal aid commission means tests when seeking merits review of decisions about eligibility for Commonwealth military entitlements or military compensation payments'.<sup>33</sup>

2.26 DVA confirmed that this was the reasoning behind the decision not to alter the current position in relation to costs, noting that 'the situation has changed from that described in the 2011 report'. It stated that 'Legal aid is now available irrespective of the type of service rendered by the veteran'.<sup>34</sup>

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

2.27 Some submitters raised concerns regarding unequal access to legal advice and representation between veterans and DVA.<sup>35</sup> 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.<sup>36</sup>

2.28 KCI Lawyers pointed to a case<sup>37</sup> 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

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32 Ms Rachael James, General Manager, Slater & Gordon Lawyers, *Committee Hansard*, 17 September 2015, p. 2.

33 Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services*, 1 July 2015, B-3.

34 Department of Veterans' Affairs, answer to question on notice, 17 September 2015 (received 21 September 2015).

35 Slater & Gordon Lawyers, *Submission 8*; KCI Lawyers, *Submission 18*; Mr Bill Marklew, *Submission 21*, p. 1.

36 Ms Rachael James, General Manager, Slater & Gordon Lawyers, *Committee Hansard*, 17 September 2015, p. 2.

37 *Jensen and Military Rehabilitation and Compensation Commission* [2014] AATA 807 (30 October 2014).

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.<sup>38</sup>

2.29 DVA confirmed that it has an in-house legal branch and a panel of external legal providers assisting in the handling of MRCC matters, but noted that veterans facing a government respondent at the AAT are 'no different to other claimants in non-veteran jurisdictions (for example, claimants in Comcare matters)'. It stated that, 'However, veterans have better access to legal aid when compared to non-veterans in any other jurisdictions.'<sup>39</sup>

### **Budget savings**

2.30 A number of submitters raised concerns regarding the financial impact statement for Schedule 2 of the bill, which estimates a saving of \$2.2 million over four years.<sup>40</sup> Some submitters speculated that the decision not to alter the current position, in relation to the awarding of costs by the AAT, would result in a saving for the department at the expense of veterans. For example:

I can't help but think that this amendment that the government wants to pursue is purely a cost cutting exercise.<sup>41</sup>

...the real savings are likely to accrue because DVA will be less accountable for its decisions and veterans will not be able to access their entitlements because they cannot afford the costs, including medical evidence and representation, associated with challenging the DVA.<sup>42</sup>

2.31 DVA refuted these claims, explaining that the \$2.2 million is a net saving comprising:

- reduced legal costs incurred by DVA(\$5 million);
- reduced award of legal costs to applicants (\$0.7 million);
- increased costs for DVA and VRB staff to support VRB processes (\$1.3 million); and

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38 KCI Lawyers, *Submission 18*, p. 3.

39 Department of Veterans' Affairs, answer to question on notice, 17 September 2015 (received 21 September 2015).

40 Australian Lawyers Alliance, *Submission 5*; Veterans' Support Centre, *Submission 2*, p. 2; Slater & Gordon Lawyers, *Submission 8*, p. 3; Australian Peacekeeper & Peacemaker Veterans' Association, *Submission 11*, p. 2; Vietnam Veterans Federation of Australia, *Submission 12*, p. 2; David Tones, *Submission 13*, p. 2; Mr Nathan Mark, *Submission 14*; Mr Rod Thompson, *Submission 19*, p. 4; Law Council of Australia, *Submission 20*, p. 3.

41 Veterans' Support Centre, *Submission 2*, p. 2.

42 Slater & Gordon Lawyers, *Submission 8*, p. 3.

- increased VRB hearing costs (\$2.2 million).<sup>43</sup>

### **Committee view**

2.32 The prospect of challenging an administrative decision may be intimidating for a civilian but the prospect of challenging a decision made by DVA can be especially daunting for former service personnel who have been wounded or injured, mentally or physically, serving their country. The process for seeking reconsideration of a decision under MRCA should be quick, simple, non-adversarial, and inexpensive.

2.33 The committee acknowledges the concerns raised by stakeholders regarding the costs associated with challenging a decision and the potential for these costs to discourage or deny veterans the opportunity to appeal a decision made under MRCA at the AAT. In particular, the committee recognises the need to ensure that veterans will not be required to pay for costly medical reports or legal representation in order to exercise their right to appeal a decision.

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.

2.35 The single appeals pathway provided by Schedule 2 of the bill, together with further improvements relating to alternate dispute resolution, will provide more opportunities for cases to be resolved before reaching the AAT. In the initial stages of the proposed single appeals pathway, the VRB is able to order DVA to pay for any medical reports necessary for a veteran's claim. Furthermore, if the appeal continues through to review by the AAT, the National Partnership Agreement on Legal Assistance Service's guarantees that veterans are exempt from legal aid commission means tests.

2.36 However, the committee is of the view that due to the short timeframe in which it was asked to conduct the inquiry, it has not been able to finalise its position in relation to several of the contentious issues raised in evidence. For this reason, the committee would benefit from having more time to re-visit Schedule 2 of the bill.

2.37 The committee commends the efforts made by DVA to reduce the time taken to settle and reduce claims made by veterans, and to promote non-adversarial avenues of dispute resolution which saves time and money.

### **Recommendation 1**

**2.38 Subject to the satisfactory completion of the alternate dispute resolution (ADR) trial in NSW and the ACT, the committee recommends that ADR be extended to all other states and territories.**

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43 Department of Veterans' Affairs, answer to question on notice, 17 September 2015 (received 21 September 2015).

**Recommendation 2**

**2.39** The committee recommends that the Explanatory Memorandum be amended to remove any confusion or misunderstanding as to how the single review pathway will function.

**Recommendation 3**

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

**Senator Chris Back**

Chair



# **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**



# **Appendix 1**

## **Public submissions**

- 1 Federation of Totally and Permanently Incapacitated Ex-Servicemen & Women
- 2 Veterans' Support Centre
- 3 Mr Greg Niven, Henry Parkes Chambers
- 4 Veterans' Review Board
- 5 Australian Lawyers Alliance
- 6 Legacy Australia
- 7 Returned & Services League of Australia
- 7.1 Supplementary to submission 7
- 8 Slater & Gordon Lawyers
- 9 Vietnam Veterans Association of Australia
- 10 Mr John Smith OAM, JP (Qual)
- 11 Australian Peacekeeper & Peacemaker Veterans' Association Inc
- 12 Vietnam Veterans Federation of Australia
- 13 Mr David Tones
- 14 Mr Nathan Mark
- 15 Defence Force Welfare Association
- 15.1 Supplementary to submission 15
- 16 Australian Families of the Military Research and Support Foundation
- 17 Department of Veterans' Affairs
- 18 KCI Lawyers
- 19 Mr Rod Thompson
- 20 Law Council of Australia
- 21 Mr Bill Marklew JP (Qual), AFAIM, AHRIM



## **Appendix 2**

### **Public hearings and witnesses**

**Thursday 17 September 2015, Canberra**

**Slater & Gordon Lawyers**

Ms Rachael James, General Manager

**KCI Lawyers**

Mr Greg Isolani, Partner

**Australian Lawyers Alliance**

Mr Walter Hawkins

**Returned & Services League of Australia**

RADM Ken Doolan AO RAN (Ret.), National President

CMDR John Hodges, RAN (Ret.) National Veterans' Affairs Advisor

**Vietnam Veterans Federation of Australia**

Mr James Wain, National President

**Australian Families of the Military Research and Support Foundation**

Mr Frank Benfield, Ambassador

**Department of Veterans' Affairs**

Mr Shane Carmody, Chief Operating Officer

Mr Neil Bayles, Assistant Secretary, Rehabilitation, Case Escalation and MRCA  
Review

Ms Lisa Foreman, First Assistant Secretary, Rehabilitation and Support Division



## **Appendix 3**

### **Tabled documents, additional information and answers to questions on notice**

#### **Tabled documents**

1. Military Rehabilitation and Compensation Commission, statement from the Chair
2. Department of Veterans' Affairs, opening statement

#### **Answers to questions on notice**

1. Department of Veterans' Affairs, responses to questions on notice, received 21 September 2015

