

Veterans' Legislation Reform Consultation Pathway

Submission to Department of Veteran Affairs

11 May 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom, and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race, or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input into the Australian Government's proposed legislation reform pathway.
2. The ALA supports the core proposals for the Veterans' Entitlements Legislation Reform Pathway outlined in the consultation paper with several additional considerations.
3. The ALA is aware that Veterans encounter many issues when making claims under the three pieces of legislation regulating compensation entitlements. Consensus amongst the Veteran community is the current system is ineffective, broken and overly complex. This submission will address some of the inadequacies from a legislative angle when it comes to compensation claims made by Veterans for service-related injuries as well as broader considerations for institutional change.

The Complexity of Compensation Mechanisms

4. The military compensation scheme is generally considered to be one of the most complex legislative compensation schemes in Australia. Veterans attempting to claim compensation may potentially have coverage 'under one, two or three Acts, depending on their date of service and date of injury'.² Justice Logan in *McDermid v Repatriation Commission* [2016] FCA 372 (15 April 2016) commented:

... [The Applicant] has also had what he doubtless sees as the added misfortune of becoming enmeshed in the complexity of the provision made from time to time by Parliament in the VEA in an endeavour to prevent any duplication of benefits in respect of like injuries or incapacity as between those payable under the SRCA or its predecessors and those otherwise payable under the VEA. In turn, that complexity is but one pathway in the labyrinth that is the VEA, an Act which has been amended no less than 127 times over the 30 years since its enactment in 1986.... Both for the members of that class and for the respondent Repatriation Commission (the Commission) and those of its delegates within the Department of Veterans' Affairs (DVA)

² Submission 156, p 29-30. Of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

who must administer it, that complexity, to say nothing of the wider labyrinth, presents considerable challenges of comprehension as to its application.

5. The ALA draws attention to the fact that, over the last 20 years, there have been many recommendations made to DVA and Government. Recurrent in these recommendations is the complexity and inconsistency within the legislative schemes, and the need for simplification. Coupled with this are the difficulties experienced by Veterans when it comes to obtaining liability for injuries and the assessment process.

6. As stated in Submission 451, authored by Maurice Blackburn:

The methodologies applied to reigning the costs or fiscal burdens of the scheme commonly involve a process participants describe as “being ground into submission” with repetitious medical examinations and ongoing invasive scrutiny of their life and health.³

7. The South Australian Government also commented:

This legislative framework is cumbersome, complex, confusing, and difficult to navigate for advocates, DVA staff and members of the serving and ex-serving community.⁴

Commentary from the Veteran Community

8. The ALA is aware that the overwhelming feeling within the Defence Community is that the legislation as a whole is too complex and legalistic. For the assistance of the consultation, we take the opportunity to quote a few of the comments made by interested parties in the past.

- “The MRCA if it works at all, is a tribute to those who need to interpret it! MRCA needs urgent review, simplification, and that ‘DVA needs to be reasonably satisfied’ that the disability is services caused deleted and replaced with ‘Unless DVA can prove otherwise, the claim must be accepted!’

³ Submission 451 of Suicide Enquiry, The Constant Battle: Suicide by Veterans.

⁴ Submission 187, p 4 of Suicide Enquiry, The Constant Battle: Suicide by Veterans.

- “DVA needs to emphasise in all its training their Veterans have EARNED the right to beneficial interpretation of legislation AND benefit of doubt in THEIR favour!”
- “While DVA have been, over the last 2 years developing legislation with only one purpose – to stifle its critics’...120 + Veterans have taken their lives and DVA state that they are throwing cash at the problem which they admit they do not understand instead of fixing MRCA and DVA policy and processing, staffing, training and attitude, bureaucracy and TTP, just to mention a few.”
- “And let’s remember our esteemed Minister for Media Releases with many Titles has also failed miserably to address long standing Veteran issues like TPI Parity, DFRDB anomalies and Veteran suicides and homelessness.”

Single legislative scheme

9. The ALA contends that the current legislative scheme places an onerous burden on Veterans when attempting to claim benefits and compensation for injuries sustained in service. Whilst it must be recognised that there are difficulties in simplifying the legislation and ensuring existing benefits are not impacted, the complexity and inconsistency within the current legislative scheme warrants reform.
10. The ALA therefore support closing out the out VEA and DRCA to new compensation related claims in favour of a single Act. We strongly believe that to fulfil the intended purpose of Veterans’ legislation, it must be veteran and family centric and wellbeing focussed, supported by effective processes and a veteran-centric culture at DVA.
11. The ALA believes that schemes which by design foster lump sums and finality are more likely to achieve the goals of the DVA. That is, it will likely achieve veteran satisfaction and meaningful return to work. Other countries, such as the US, UK and Canada, operate a single legislative scheme for veteran’s compensation which greatly simplifies the compensation process and reduces the stress and confusion Veterans otherwise face in Australia. Excessive complexity within the Veterans compensation process in Australia places undue burden on

Veterans, and this should be rectified to ensure the purpose of this scheme, namely, to benefit Veterans, is upheld.

12. The ALA strongly supports the introduction of a single piece of legislation to cover all compensation claims for Veterans, rather than three overlapping Acts. In particular, we support the goal of having Veterans treated equally under the new legislative scheme. Currently, there is a high level of inconsistency between the compensation available under the existing Acts. TPI Federation illustrated this difference, noting that:

...under the MRCA, a DVA client's family is currently eligible to \$11,654 as a funeral allowance [but this] is markedly different with the VEA client's family where the same allowance is \$2,000.⁵

13. On 2 February 2017, when the DRCA was introduced into the veteran compensation scheme, there was this discussion at the Senate Foreign Affairs, Defence and Trade References Committee in which ALA member and military law expert Brian Briggs predicted issues that would arise because of the additional legislative scheme.⁶ In particular, it was noted that:

DRCA supposedly brings SRCA across into the realm of MRCC and DVA, so now they take it out of Comcare and it becomes the property of DVA MRCC. I see long-term what they intend to do, because one of the things it talks about is the power to amend, revoke, institute new guides—just do whatever they like with this piece of legislation later on down the track. I see what is going to happen is they will get rid of DRCA, it will all become MRCA and it will be all the statements of principles with all their restrictions, time periods and making it so hard to get claims accepted. Then they will pull that with the GARP M guides, the guides to the assessment, and even there the point scoring system is not as beneficial as, say, SRCA.

A classic example is the Fellowes High Court decision, which I ran. That benefited thousands of SRCA lower limb injuries. Under MRCA you can have 10 injuries for your lower limbs. One knee might go. You might have an ankle. We just bring it all in and pay substantially less money for those injuries, whereas under SRCA you are entitled to be paid for each individual injury as is the common law. We have got Commonwealth public servants who are going to have SRCA injuries who find they are all looked after, but under MRCA our Veterans again will be worse off.

⁵ Submission 307 p 5. of Suicide Enquiry, The Constant Battle: Suicide by Veterans.

⁶ Commonwealth, Parliamentary Debates, Senate Foreign Affairs, Defence and References Committee, 2 February 2017, 29-30 (Jacqui Lambie and Brian Briggs).

I have raised issues with all and sundry about this piece of legislation. The devil is in the detail in it. I know I have raised it with you, Senator. I have sent you some questions. I have sent it out to ex-service organisations. It is not just a straight, 'Oh, we're lifting SRCA and putting it in as a new piece of legislation, and it's just going to duplicate.' There is a lot more involved in this piece of legislation. Maybe I am just being cynical. Maybe there are good intentions with it. But it is not something we can look forward to if it passes, unfortunately. It needs more information. It needs to be spelled out.

14. The merging of Acts would also address long held concerns regarding the two different standards of proof under the VEA and MRCA when assessing compensation claims under the SOPs depending on the type of service rendered Veterans or serving members:
 - a. The 'reasonable hypothesis' standard is applied to Veterans and serving members who have operational service.
 - b. The harsher 'balance of probabilities' standard is applied to Veterans and serving members with defence service, and peacetime service.
15. This has been fairly labelled as 'inherently unfair' by Professor Nick Saunders, Chair of RMA. The divergence is exacerbated in non-operational service cases, where the legislation provides that even if the SoP is satisfied, the claim can still be denied based on other contradictory evidence.
16. The two standards of proof also complicate matters where Veterans and serving members have rendered both types of service. The ALA therefore contends that there should be one standard of proof, although that this should be the higher 'balance of probabilities' standard, which puts the onus on to the claimant to prove their claim. The chances of success in establishing compensation claims using the SOPs would be higher if a more beneficial standard is adopted. Regardless, this arbitrary discrepancy should be abolished; there can be no good basis to discriminate against Veterans and serving members who did not render operational service.

The Need for 'Veteran-centric' Reform

17. In addition to the proposed Veterans' Entitlements Legislation Reform Pathway, the ALA recommends that the Department of Defence and DVA publish periodic written assessments of the implementation of review recommendations, the progress of mental health reform and

any additional enhancements to current programs; and that the DVA be properly funded to undertake much-needed organisational restructure and reform in the areas of information and communication technology and the claim administration process.

18. In addition, the ALA strongly supports the following additional proposals: amendment of the Repatriation Medical Authority statements of principles to extend or remove the strict time frames and to explicitly provide that they are used as guidelines only; the introduction of time limits for the administration of claims by the DVA to bring the system in line with international and state-based compensation schemes; and the removal of the barriers to access to justice imposed by the restrictions on legal representation and cost recovery for veteran claimants under the new single appeal pathway.
19. Further, a lack of continuity in staff when processing claims was identified by the Foreign Affairs, Defence and Trade References Committee's 'The Constant Battle: Suicide by Veterans' Report as leading to much difficulty for Veterans attempting to claim compensation.⁷ The quality and training of DVA staff was also identified as a major issue, with many members of staff lacking in an appropriate understanding of military service, and the difficulties suffered by Veterans.
20. A range of submissions to that inquiry further identified that a lack of clear communication, and a lack of availability of information, was a major administrative issue within the DVA. Many claimants were not given the correct or appropriate information about the support available to them, or how this support could be obtained. Correspondence with DVA was also described by TPI Federation as 'confusing, ambiguous and too legalistic'.
21. The ALA emphasises that the veteran's compensation scheme was created with a beneficial and veteran centric purpose, however, it has been noted that the DVA takes an adversarial approach to claims.⁸ Claims are often seen as being assessed by DVA 'with a view to avoiding liability, rather than applying the principles underpinning beneficial legislation'.

⁷ Foreign Affairs, Defence and Trade References Committee's 'The Constant Battle: Suicide by Veterans' Report.

⁸ Ibid.

Conclusion

22. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Veterans' Legislative Reform Consultation Pathway.
23. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Genevieve Henderson', written in a cursive style.

Genevieve Henderson

National President

Australian Lawyers Alliance