emanuelsolicitors

26 April 2024

Department of Veterans' Affairs
GPO Box 9998,
BRISBANE QLD 4001

By email: legislation.reform@dva.gov.au

Dear Sir/Madam,

Re: Submissions on the Veterans' Legislation Reform

Emanuel Solicitors welcomes the opportunity to make submissions with respect to the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill (the **Veterans' Bill**). Emanuel Solicitors has for the past 10 years predominantly represented veterans to obtain compensation and entitlements under the VEA, the DRCA and the MRCA (the **Entitlement Acts**). Our current client list comprises approximately 150 veterans with active claims being managed by the Department of Veterans' Affairs (the **DVA**). Our firm's history in representing veterans in their claims under the Entitlement Acts gives us a unique perspective on the claims process and the difficulties arising from the interaction between the Entitlement Acts. We broadly support the Veterans' Bill and the aim of the legislative reform to simplify and harmonise entitlements for veterans. We submit the following comments and recommendations to ensure the Veterans' Bill achieves its stated aims.

1. Severe Impairment Payment 'primary responsibility' Requirement

The Severe Impairment Payment (the **SIP**) arises under s 80 of the MRCA and entitles a veteran to additional compensation for each dependent eligible young person of that member that was in existence at the relevant date determined under s 80(2). The original intention of the SIP was to provide compensation to the dependent children of veterans who had reached the maximum level of compensation.[1] The MRCA achieves this by providing the payment of the compensation directly to the veteran, thereby increasing the total compensation to the veteran and indirectly providing for the benefit of the eligible young person.

The Veterans' Bill proposes to include a new requirement under s 80A related to payment of the SIP.[2] Under that section the Military Rehabilitation and Compensation Commission (the **Commission**) or its delegates must determine who has the 'primary responsibility for the daily care' of the eligible young person. If the veteran has the primary responsibility, then the SIP is paid to them, otherwise it is paid to whoever has the primary responsibility. The intention of this amendment is to ensure flexibility to better 'serve the interest of the eligible young person or child.'[3] This new requirement obligates the Commission to enquire into the living arrangements for the eligible young person and determine who has primary responsibility.

This enquiry is complex and requires the Commission to interpret potentially complicated family arrangements before payment can be made. The term 'primary responsibility' is not defined and does not correlate with definitions under the *Family Law Act 1975* (Cth), or the *Social Security Act 1991*

1 Explanatory Memorandum, Military Rehabilitation and Compensation Bill 2003 (Cth), 41.
2 Veterans' Bill sch 2 pt 1 item 86.
3 Explanatory Memorandum, Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth), 48.

(Cth). To determine the person who has 'primary responsibility' for an eligible young person requires a complex factual enquiry involving evidence of living arrangements, day-to-day care, responsibility for the education, welfare, and development, among other things.[4] The requirement also leads to the absurd outcome of determining the primary responsibility for an eligible young person who is over the age of majority but still meets the relevant definitions. Given the overarching aim of the Veterans' Bill is to simplify the legislation, the inclusion of a complex factual enquiry is inappropriate and should be avoided.

It is also unclear, however determined, how adjusting the payment of the compensation to the person with the primary responsibility better achieves the stated outcome for the compensation; providing compensation to the dependent children of the veteran. For a child under the age of 18 years, whether the compensation is paid to the veteran or the person with primary responsibility, the benefit to the child is achieved by indirect means. That is, in neither situation is the compensation paid in some manner 'on trust' for the child. The payment to the person who has the primary responsibility could also create unintended consequences, such as the payment of a significant sum to a person who was not expecting the payment, or indeed does not want it due to potential impact on social security benefits. Where the payment to a person with primary responsibility for a child under the age of 18 years does not result in better outcomes, a better option is to provide the compensation to the veteran whose impairment gave rise to the entitlement.

It is therefore our recommendation that the proposed s 80A of the MRCA be redrafted to obligate payment to the veteran unless the eligible dependent young person is over the age of 18 years, in which case the payment should be made directly to the eligible dependent young person.

2. Need for Continued Appropriate Standards of Proof

The Productivity Commission Report recommended that a single standard of proof be adopted for the MRCA as part of the harmonisation of the Entitlement Acts.[5] The MRCA presently relies on two standards of proof to establish a connection between a claimed condition and the members service: reasonable satisfaction,[6] and reasonable hypothesis.[7] Reasonable satisfaction requires the Commission to be 'reasonably satisfied' that the claim for liability is established on a balance of probabilities.[8] Whereas reasonable hypothesis requires the Commission to accept a claim for liability unless satisfied beyond reasonable doubt that there is no reasonable hypothesis of connection.[9] Reasonable hypothesis, the lower, easier to satisfy standard applies where a veteran has operational service determined by the relevant Minister to be warlike or non-warlike service.[10] The reasonable satisfaction standard of proof applies for all other types of service.

The difference in the two standards reflects a historical development in veterans' compensation entitlements based on the rationale that veterans with service in operational environments were 'likely to have encountered greater danger and/or more arduous service than those who had home service and,

4 See, eg, *Social Security Act 1991* (Cth) ss 5(2)-(25).
5 Productivity Commission Report: Overview and Recommendations (n 11), 52 (Recommendation 8.4).
6 MRCA ss 335(3), 339.
7 MRCA ss 335(1), 338.
8 MRCA s 339(3); see also Royal Commission Interim Report (n 5) 173.
9 MRCA s 338; see also Royal Commission Interim Report (n 5), 173.
10 See *Military Rehabilitation and Compensation (Warlike Service) Determination 2019* and *Military Rehabilitation and Compensation (Non-warlike Service) Determination 2019*.

accordingly, they should have more extensive cover.'[11] Thus the reasonable hypothesis standard requires the Commonwealth to disprove the claim, rather than the claimant to prove the claim, ensuring that no valid claim is rejected due to insufficiency of proof.[12] The two distinct standards were initially introduced by the VEA and were adopted by the MRCA. In our firm's experience, the application of the reasonable hypothesis standard allows for acceptance of liability in situations where there are deficiencies in evidence to support a claim of liability. This is usually due to the veteran being in environments with limited access to medical services, other than for acute injuries, minimal reporting, and increased incidents of injuries in the context of life-threatening situations. In our experience, there are often significant delays in reporting incidents due to a combination of survivor's guilt, fear of disappointing fellow veterans, a desire to complete the deployment, and restrictions on some classified information.

For example, we have had multiple clients with operational deployments to Afghanistan and Iraq who have suffered ankle injuries whilst on deployment. The risk of ankle injuries was a known risk due to the rocky and uneven terrain. Our clients explained to us that suffering an ankle injury would likely result in being returned to Australia, and not completing the deployment. These clients suffered such injuries but did not report them because they did not want to take up valuable medic resources on a relatively minor injury and did not want to be returned to Australia. On return, these clients made minimal disclosure of the injury, often because other injuries were more severe. Applying the reasonable satisfaction standard to this fact scenario is likely to result in a rejection of liability, there is a lack of evidence to substantiate the onset of the condition within the operational environment. Comparably, applying the reasonable hypothesis standard resulted in acceptances of liability.

Removing the beneficial reasonable hypothesis standard would require veterans with operational service to attempt to establish claims using the civil reasonable satisfaction standard. Whilst the *MRCA* contains provisions to ameliorate for evidential deficiencies, (such as the beneficial standard and no onus of proof)[13] this is insufficient when balanced with the increased rigors of operational service, the likelihood of injury, and the frequent lack of evidence in support of claims. Removing the dual standard would result in significant detriment to those veterans the legislation is most designed to support. We would therefore support the rejection of the Productivity Commission's recommendation, and the continuation of the two standards of proof in the Bill.

3. Including Treatment Decisions as Reviewable Decisions

One of the principal purposes of the Entitlement Acts is to provide for treatment for veterans' injuries sustained as a result of service.[14] Decisions on approval of treatment are made under s 279 of the MRCA. Such decisions are not subject to merit review by operation of s 345(2)(h) which renders these decisions 'not *original determinations*' and therefore not subject to the reconsideration and review process. The Veterans' Bill does not propose to alter this regime.

The decision to exclude treatment decisions from the reconsideration and review process under the MRCA is problematic for veterans and causes additional claims which would be otherwise avoided. Our firm's experience is that approval of treatment under the MRCA, where a veteran is not in receipt

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[11] Frank Esparraga, 'The Administrative Review Council's discussion paper on tribunals: response of the Department of Veterans' Affairs' (1996) 79 Canberra Bulletin of Public Administration 44, 45 citing Justice Toose *Independent Enquiry into the Repatriation System* (Report, June 1975).

[12] *Repatriation Commission v Law* (1981) 147 CLR 635, 638-9 (Murphy J).

[13] MRCA ss 334, 337.

[14] Productivity Commission 'A Better Way to Support Veterans: Productivity Commission Inquiry Report: Volume 2' (no 93, 27 June 2019) 688 ('Productivity Commission Report: Volume 2').

of a Gold Card, can be extremely prescriptive and result in inappropriate decisions that cause detriment to a veteran's health and wellbeing. For example, an approval request was rejected for an arthroscopic surgery on a knee condition where the veteran had an accepted condition of 'chondromalacia patella' because the doctor had described the condition as 'osteoarthritis related to chondromalacia patella'. Practically, the treatment for the condition was the same, but the treatment was rejected because of the description and the prescriptive nature of the approvals process.

These types of decisions are routine in our experience, and result in additional liability claims being brought to cover treatment expenses for related conditions or further deteriorations. These claims may not necessarily be accepted and can result in no treatment or delayed treatment for a given condition. Provision for merit review to ensure the correct and preferable decision has been made would result in a reduction in new claims for such deteriorations. Presently, there is no option other than to claim for the newly diagnosed condition, with the attendant delays to the provision of treatment and additional stress caused to the veteran.

The lack of a merit review option for such a critical benefit under the MRCA is also incongruous in the context of review rights for other benefits. Most other determinations under the MRCA with a direct impact on the veterans' rights are subject to merit review, such as liability, permanent impairment, and incapacity benefits. Treatment benefits similarly impact on the veterans' rights and are arguably more deserving of merit review as the treatment sought is often time-sensitive, can be preventative of greater impairment in the long term, and is directly for the veterans' health and wellbeing. Given the beneficial nature of treatment, and the potential impact to the veteran, merit review should be available to ensure consistency for benefits under the MRCA.

Further, under the DRCA, treatment decisions are presently reviewable. Such decisions are 'determinations' made under s 16, which are subject to reconsideration.[15] As part of the harmonisation and simplification, veterans whose conditions were previously accepted under the DRCA would be subject to the MRCA treatment regime and would therefore lose their right to seek a reconsideration of treatment decisions. This lends greater support to amending the Bill to allow for treatment decisions under the MRCA.

Our recommendation is that the MRCA be amended so that approvals of treatment made under s 279 of the MRCA are 'original determinations' subject to merit review.

4. Discontinuation of VRB restriction on Legal Practitioner representation

The Veterans' Bill proposes to maintain the restriction on legal practitioners' representation in the Veterans' Review Board (the **VRB**). Presently s 147 of the VEA prohibits a veteran from being represented at a hearing by either a registered legal practitioner or a person who has undertaken legal training. The Veterans' Bill proposes that this prohibition is replicated as s 352G of the MRCA.[16] This prohibition has been long standing but considering the Royal Commission's Interim Report, the restriction should be re-examined.

The Royal Commission Interim Report identified that many veterans require support to navigate the claims process.[17] Approximately 44% engage the assistance of a representative, either an advocate, legal practitioner, family member, or other personal representative.[18] This number increases for any

[15] DRCA ss 60, 62.
[16] Veterans' Bill (n 1) sch 3 pt 1 item 10.
[17] Royal Commission Interim Report (n 5) 220.
[18] Ibid.

appeals process, with approximately 80% of veterans being assisted by a representative.[19] The Interim Report identifies this support as being necessary for several reasons, including the complexity of the claims process and the emotional and mental wellbeing of the veteran. Indeed, this firm's experience has been that veterans engage our support to insulate themselves from the claims process and to avoid aggravation of mental health conditions through the continued drain in pursuing their claims.

Prohibitions and restrictions on legal practitioners for merit review processes are a well-recognised phenomenon.[20] The rationale for such a prohibition is generally couched in terms of ensuring efficiency, low-cost, and quick resolution of claims.[21] The Cornall Report reviewed the issue and concluded that on balance the restriction should remain.[22] In coming to this conclusion, the report emphasised the cost of legal representation, the likely increase of adversarial processes, and the availability of 'competent, experienced advocate[s]'.[23] The Productivity Commission reviewed the legal practitioner prohibition, relying primarily on the Cornall Report,[24] but essentially considered the prohibition had been functionally removed by its recommendation that the VRB no longer conduct hearings and be restricted to ADR processes only.[25] The recommendation to abolish hearings in the VRB has not been adopted, and thus the prohibition remains.

It is our submission that a veteran who chooses to engage support to navigate the claims process should be able to maintain that support throughout all aspects of that process. The identity of the individual who is providing that support should not be a consideration which determines whether that support should continue. The conclusions of the Cornall Report, which the Productivity Commission relied upon, do not consider the prospect that a veteran may have already engaged legal representation prior to entering the appellate process. The arbitrary removal of legal practitioners for one aspect of the review process, being a VRB hearing, causes a situation where a veteran who is otherwise represented loses their choice of representation for a crucial component of the process, adding undue stress and complexity to their claim.

It is our recommendation that the proposed s 352G be amended to remove the restriction on legal practitioners appearing as a representative at a hearing in the VRB.

Emanuel Solicitors would welcome any inquiries you may have about this submission. These may be directed to me by phone on [redacted] or by email to [redacted]

Yours faithfully,

Melissa Emanuel
Director and Solicitor

[19] Productivity Commission Report: Volume 2 (n 26) 551.
[20] See Tom Mullen, 'Representation at Tribunals' (1993) 56(3) *The Modern Law Review* 393.
[21] Leighton McDonald, Kristen Rundle and Emily Hammond, *Principles of Administrative Law* (Oxford University Press, 4th ed, 2022), 286; see also *VEA* (n 2) s 138.
[22] Department of Veterans' Affairs, 'Veterans' Advocacy and Support Services Scoping Study' (Report, December 2019) 59 ('Cornall Report').
[23] Ibid.
[24] Productivity Commission Report: Volume 2 (n 26) 554.
[25] Productivity Commission Report: Volume 2 (n 26) 553.