Veterans' Legislation Reform – Exposure Draft: Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth)

Submitted by
Slater and Gordon Lawyers

26 April 2024

Commercial-in-Confidence

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Response to proposed legislative reform - Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth)

Dear Minister,

We thank you for the opportunity to provide our comments on the proposed legislative reform.

We highlight two points:

1. We acknowledge that the Royal Commission into Defence and Veteran Suicide Interim Report noted that "without delay" legislative reform was necessary to simplify and harmonise the veteran entitlement system. The final report is due in September 2024. We urge the Government to await the final recommendations from the Royal Commission, prior to tabling any proposed legislative reform.

2. The proposed legislative reform does not go far enough to ensure our military service men, women and veterans have access to justice, in a simple and straightforward manner. Further review and consultation of the proposed reform is needed.

Pre-eminent military compensation expert and lawyer, Brian Briggs has provided a legal analysis, that follows, which outlines concerns and solutions to the proposed reform.

Lastly, we urge the Government to reflect post Anzac Day, on the exceptional service that our veterans have provided. As one Australian writer has previously written "At Tobruk in 1941…in the wretched shimmering desert heat, the Australians were the first to stop the Germans. For the same Australian force to then be also the first to stop the Japanese Army in the jungle at Milne Bay and Kokoda in 1942, is nothing less than extraordinary…" Our soldiers have been described as "the finest." With those lasting remarks, we owe our veterans access to justice, delivered in a just, fair, and clear way.

Please do not hesitate to contact Brian Briggs, Senior Legal Counsel [redacted] or Clancy Dobbyn, Head of Government and Stakeholder Relations [redacted] if we can provide further input.

Sincerely,

Slater and Gordon Lawyers

Veterans' Legislation Reform – Exposure Draft: Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth)

BRIAN BRIGGS
Senior Legal Counsel Military Compensation
SLATER + GORDON LAWYERS

The Hon. Matt Keogh MP

Minister for Veterans Affairs

Minister for Defence Personnel

Dear Minister,

I refer to your email dated 28 February 2024 and your invitation to review the draft legislation.

I have recently returned from a month in the United States, so I apologise for not replying sooner. Whilst overseas I was fortunate to have an opportunity to meet with many American serving and ex-military personnel to discuss how veterans are treated in that country. This was a valuable experience which has provided me with further insight into the difficulties faced by our military. I have now been able to turn my attention to the draft legislation and embark on the task of providing a response to you.

The preparation of the draft bill is a positive step towards simplifying our current system. However, I am of the view that the legislation can be further significantly improved.

Australian Lawyers Alliance Submission

I have been able to peruse and provide input into the submission from the Australian Lawyers Alliance ('ALA'). I concur and agree with the commentary from the ALA. I am of the view that consideration and weight need to be given to the contents of that submission.

Previous Submissions

I refer to my previous submissions including my extensive submission to the Productivity Commission which addressed many of the key points now being raised in the Veterans'

Legislation Reform – Exposure Draft: Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth) (referred to as the '*Simplification Bill*.')

Relevant Legal Background

I am a legal practitioner admitted in 1987 and a Queensland Law Society Accredited Specialist in Personal Injury Law. I have specialised exclusively in Military Compensation claims since 2008 under the three compensation schemes, including the Veterans' Entitlements Act 1986 (VEA), the Safety, Rehabilitation and Compensation Act 1988 (SRCA and DRCA), and the Military Rehabilitation and Compensation Act 2004 (MRCA).

Military Compensation Experience

The Military Compensation Group at Slater and Gordon Lawyers (Slater and Gordon) is acknowledged as the largest legal practice in Australia acting on behalf of Australian Defence Force (ADF) personnel and Veterans. Slater and Gordon have assisted or represented numerous individuals and organisations in claims and reviews of military compensation, Veterans' entitlements and Comcare schemes, and in Senate Committee and Defence inquiries. We have strongly advocated for the improvement of safety, benefits, and services to injured Veterans and other defence personnel.

Our success in Federal Court and High Court appeals is a testament to our commitment to achieving the best possible outcomes for our clients.

We offer legal services to Veterans in relation to Australian Military Compensation Claims.

In my role as Senior Legal Counsel and Practice Group Leader of the Military Compensation practice at Slater and Gordon, I have connections with the wider defence community and I am a close associate of many RSL Advocates and members of a variety of Ex-Service Organisations. I also have close ties with other stakeholders who share an interest in the welfare of our defence personnel.

I am of the view that my extensive experience in this unique and complex area of the law enables me to provide informed commentary.

Firstly, I will refer you to my involvement with the Consultation Group and the Expert Members advice.

Legal and other Experts Consultation Group

I refer to the advice of the Legal and other Experts Consultation Group ("the Group") previously provided to you and the key issues raised by myself and my fellow members. I intend to begin my submission by addressing those issues before turning to other areas of the Exposure Draft Bill that I feel warrant comment. I have not addressed the Draft in its entirety as I believe that many submissions will be sent to you from a variety of stakeholders.

KEY ISSUES

1. **Heads of Liability**

Issue: Whether the 'heads of liability' provisions in the MRCA provide appropriate coverage for ADF members.

There are several heads of liability which may be relied on to link an injury, disease, or death to service. An important one, the concept of 'rendering defence service', is contained in sections

27 and 28 of the *Military Rehabilitation and Compensation Act 2004* (MRCA) and supported by detailed policy guidance.

The test is whether a person is on duty or is doing something required, authorised, or expected to be done in connection with, or incidental to, the person's duties (Roncevich v Repatriation Commission (2005) 222 CLR 115). The group considered that the legal test was well established and clear. However, difficulties arise in the application of the test to factual scenarios which are more or less unique to service in the Australian Defence Force (ADF). An example of this includes ADF members experiencing an injury, disease, or death during periods of 'down time' (or approved leave) while posted to seagoing ships or while on exercise.

The Group recommended the following changes:

• Legislation be amended to include clarity about 24/7 coverage where a member is on deployment, exercise, or operation.

• A temporal test be added to reflect the "in the course of" test in the DRCA, bypassing the causation system supported by the Statements of Principles (SOPs). This could potentially be achieved by including the equivalent of DRCA sections 6(1)(b), (c) and (d); and

• Amending the provision on compensation for unintended consequences of medical treatment (section 29 of the MRCA) to remove the limitation that compensation is payable only in respect of treatment for a "service injury". This would broaden its application to any treatment paid by the Commonwealth under the MRCA, aligning the MRCA with similar provisions in the DRCA and reflect the position outlined in the MRCA's Explanatory Memorandum.

The draft legislation does not deal with any of the Group's recommendations on Heads of Liability. This represents a failed opportunity to clarify the meaning of rendering 'Defence Service.' I suggest that this issue needs to be revisited by the drafters.

2. Clinical Onset

There are often difficulties in identifying a precise date of clinical onset to meet the requirements of a SOP. This could be addressed by requesting evidence from medical practitioners about a period in which onset occurred, rather than asking them to nominate a specific date. DVA should continue to encourage delegates to try to determine the date of clinical onset for the purposes of the *Act*.

3. The new *Simplification Bill* should add some clarity to the meaning of clinical onset. Whilst date of effect has been addressed later in this submission the amended MRCA should have provisions to overcome this problematic issue. **SOPs and the RMA**

I note that the draft Bill has failed to address the ongoing problems associated with the interpretation of the SOPS. This represents another missed opportunity to clarify and simplify the complexity of the MRCA scheme.

Whilst there are amendments to ss 335, 338,339, 340 and 370, the draft bill fails to deal with the different standards of proof and the strict interpretation of the SOPs in the claim process. This area is a constant source of dispute with DVA and needs to be revisited before any final act is tabled.

Issue: The role of SOPs in determining claims, including restrictions on acceptance of liability which arise from the prescriptive nature of SOPs.

The Group discussed the merits of the SOP system. It noted the significant benefits it provides, including equity and certainty for claimants, and was of the view that these instruments should be retained under the MRCA.

However, the Group was of the view that, in some cases, decision-makers are relying on SOPs to deny claims, rather than using them as a tool to accept a claim, and that there are cases in which the application of a SOP has led to the rejection of a claim where the medical evidence indicates that there is a link between the claimed condition and the claimant's ADF service.

To address this, the group suggested that the legislation should allow for increased discretion for decision makers at review level, including at the Veterans' Review Board and the Administrative Appeals Tribunal. This would enable decision makers to obtain medical evidence of causation outside the SOP factors where there is probative evidence that the claimed condition is related to ADF service.

However, two members noted that this suggestion risked opening the way for an O'Brien approach (*Repatriation Commission v O'Brien* (1985) 155 CLR 422), which is contrary to the fundamental principle underpinning the creation of the SOPS. The proposed system would work as follows - the MRCA sections 338(3) and 339(3) should be amended to remove the requirement that liability is accepted "only" if a SOP is met and instead make the SOP a first but not exclusive avenue of acceptance. This would give veterans two options.

First, the veteran could attempt to satisfy the relevant SOP and, if successful, the claim would be accepted.

Second, if the veteran could not satisfy the SOP at the primary level of decision making, then he or she could, on internal review and before the VRB and AAT, have recourse to the general test in sections 27 or 28 ('arising out of or in the course of' service) and in that way be in the same position as a claimant under regular workers' compensation law, instead of being worse off.

There could also be a more proactive use of section 340 of the MRCA by the Military Rehabilitation and Compensation Commission in appropriate cases. One member suggested that if the MRCC is requested pursuant to section 340 of the MRCA to use its discretion to override the SOP and it refuses to do so, that the refusal (and reasons) should be reviewable by the VRB/AAT. A request for the MRCC to consider using its discretion could be made subject to appropriate criteria or definition e.g. a requirement for the case to substantially comply with a SOP. The Group recommended that SOPs, particularly those that are more frequently used or are in contention, be more frequently reviewed by the Repatriation Medical Authority. The Group notes that this would likely require additional resourcing for the Repatriation Medical Authority. The Group did not support SOPs being exempted from mandatory sun setting under the *Legislation Act 2003*, as this would be inconsistent with its preference for more regular reviews of MRCA Permanent Impairment.

I am of the view that the drafters of the Simplification Bill have not considered any of the recommendations by the Group on the problems with the SOPs. This is a failed opportunity to simplify the legislation.

I therefore intend to revisit this issue in this submission. Further, I invite DVA to reconsider the matter and amend the Draft Bill to resolve the problems.

Statements of Principles - Why the new Simplification Bill needs to address same

The Statements of Principles used by the DVA to assess claims, and their interpretation, has provided a source of concern regarding the claims and appeals process for many years. To ignore the problems with the SOPs in a new Act is a failed opportunity and will only serve to compound the issue.

In a submission to the DVA Inaugural Legislation Workshop 2017, I said:[1]

"As evidenced by many submissions to various senate enquiries over the years, one of the areas which requires and is crying out for legislative reform is RMA Statements of Principles (SoPs) and the strict interpretation by DVA to deny claims based on them."

General Criticism of SoPs

Justice Logan in *Linwood v Repatriation Commission* [2016] FCA 90 had several criticisms of the SOP system and the language of SOPs:

1. *Since the SoP regime was introduced, a plethora of SoP have been determined, repealed, and re-determined. Within the limits of their language and application, they do achieve a consistency of sorts, but for those administering the Act or advisors, let alone an Australian Defence Force member who has rendered service covered by the Act or his or her dependents,* ***they have also in practice added an additional layer of complexity to the already elaborate provisions of the Act.***
2. Justice Logan describes the language employed by the RMA in its description in the SoP of what amounts to a 'category 2 stressor' **as not terribly well adapted to the nature of military service.**
3. Justice Logan also objects to the characteristic employment of ill-adapted language in the SoP. For example, the word "court" in paragraph (d) of the definition of "category 2 stressor" is apt to include an appearance before a discipline officer, subordinate summary authority, superior summary authority, Defence Force Magistrate, court martial or the Defence Force Discipline Appeal Tribunal, as well as a Chapter III or other court.

Justice Reeves in *Forster v Repatriation Commission* [2015] FCA 198, discussed the definition of a "category 1A stressor", and said:

1. The definition "**makes no express mention of the type of feelings experienced by the veteran**."
2. He noted that while the definition refers to several types of events that the veteran may have been forced to go through, all of which "would obviously evoke feelings of severe stress", the **definition seems to deliberately eschew any such subjective factor** as a relevant consideration in determining whether the event falls within the definition.

Issues Regarding Repatriation Medical Authority (RMA)

Overarching Issues

1. Lack of ex-military on the board of the RMA
2. No scrutiny of SOPs and RMA decisions

[1] Brian Briggs, Submission to Department of Veterans' Affairs*, Inaugural Legislation Workshop*, 27 October 2017, 6-12.

a. SOPs and RMA decisions are not subject to scrutiny in terms of the Standard of Proof legislative requirements;[2]

3. Length of time to review the SOP's.

What Case Law Has Shown

Case law related to the SOPs indicates that there are several major issues which require legislative reform:

- The SOPs are constantly changing;[3]
- There are cases and conditions suffered by veterans where there is no applicable SOP;[4]
- The Courts and Tribunals apply the tests strictly;[5]
- Veterans on occasion are not granted access to their medical documents, and often irrelevant medical reports are considered;[6]
- There is a high evidential bar which can be difficult to meet;[7]
- There is an extreme level of record-keeping required to fulfil the SOP requirements.[8]

Problems with SOPs raised in the previous Senate Inquiries

A range of issues have been identified in submissions to the past Senate Inquiry. Professor Nick Saunders, the Chair of RMA, identified several problems with the SoP system:

"The most common issues that have been raised seem to us to be that the statements of principles are not up to date, that they are inflexible, that they are too complex for non-expert people to use with ease, that they are designed to hinder rather than assist veterans who are seeking to make a claim and that the use of two standards of proof to write the statements of principles is inherently unfair."

Different Standards of Proof

The VEA and MRCA provide for two different standards of proof which are applied when assessing compensation claims under the SOPs depending on the type of service rendered Veterans or serving members:

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[2] http://www.vvaa.org.au/VVAA%20Part%208.PDF pg 5

[3] *Forster v Repatriation Commission* [2015] FCA 198.

[4] *Iliopoulos v Repatriation Commission* [2016] FCA 756; *Scott and Repatriation Commission (Veterans' entitlements)* [2017] AATA 1 (11 January 2017).

[5] *Sheridan and Repatriation Commission (Veterans' entitlements)* [2017] AATA 17 (12 January 2017); Repat*riation Commission v Watkins* [2015] FCAFC 10.

Blandthorn and Military Rehabilitation and Compensation Commission (Compensation) [2017] AATA 1270 (15 August 2017)*; French and Repatriation Commission (Veterans' entitlements)* [2017] AATA 297 (8 March 2017).

[7] *Burton and RC* [2017] AATA 606 (8 May 2017).

[8] *Reeday and MRCC (Compensation)* [2017] AATA 1320 (18 August 2017).

- The 'reasonable hypothesis' standard is applied to Veterans and serving members who have operational service.
- The harsher 'balance of probabilities' standard is applied to Veterans and serving members with defence service, and peacetime service.[9]

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.[10]

Allan Anforth states that this feature, though little used, 'demonstrates a straightforward case of unfairness.'[11] The two standards of proof also complicate matters where Veterans and serving members have rendered both types of service.[12] Although the ultimate recommendation of the report was for the Productivity Commission to make its own findings, the Committee noted 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.

Out of date

The SOPs are not regularly updated, with an average review being every 7 to 8 years. As a result, the SOPs are often out of date, and do not reflect medical advancements. This has an unfair impact on veterans, for whom evidence would be sufficient if the SOPs were up to date.
I do not see in the draft Bill where this problem is to be addressed.

Rigid Application

The Government has in the past indicated its unwillingness to introduce a more flexible approach in applying the SOPs.[13] This lack of flexibility was criticised in several submissions to the Committee.[14] DVA also acknowledged that staff were instructed to apply the requirements strictly. This approach can have a particularly harsh effect on Veterans who attempt to make claims outside of a defined SOP by using evidence from registered specialists.[15]

Allan Anforth, a Barrister, noted that this rigid application has moved the SOPs away from their original purpose:

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[9] Submission 32 of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

[10] Submission 208 see 120B (3) VEA and section 339(3) MRCA.

[11] Ibid.

[12] Submission 32 of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

[13] Government response to JSCFADT report into Care of ADF Personnel Wounded and Injured on Operations, December 2013, pp 12-13.

[14] Submission 172. of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

[15] Submission 171 of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

"The SOPs were constructed to set out a list of criteria linking service to the injury/disease such that if those criteria were satisfied then the parties would be spared the cost of calling expert evidence on this point."

The original intended use of the SOP has been lost in subsequent statutory amendments to the VEA:

(a) In non-operational service cases, even if a SOP is satisfied, the claim can still be denied based on other evidence that contradicts the proposition of the SOP.
(b) In all claims even if there is a large body of expert medical evidence pointing to the service cause of the injury, if the SOP is not satisfied the claim fails.[16]

Although the approach in (a) immediately above is not commonly used, its existence demonstrates a straightforward case of unfairness. If the SOP favours the veteran, then the Commission can reply upon other evidence to contradict the SOP and deny the claim. The more serious unfairness resides in the (b) immediately above; if the SOP does not favour the veteran, then the veteran cannot rely on other evidence to support what may otherwise be a valid claim.

There have been several submissions indicating that in many cases the DVA delegates considering claims approach them with 'a view to avoiding liability, rather than applying the principles underpinning beneficial legislation.'[17]

Recommendation

The SOPs are perceived to work against a veteran rather than in their support. Rigid, inflexible application of the SOP Risk Factors in determining a claim is inconsistent with the beneficial intent and provisions of the legislation, particularly where the veteran also suffers with PTSD. Despite improving, the time taken to undertake reviews still takes almost 2 years.

The Senate Inquiry suggested a potential system that could replace the SOP framework:

A better system might be one closer to that envisaged by the Baume review with one standard of proof (the civil standard, with a benefit of doubt in favour of veterans with relevant operational service), initially determined by the delegates primarily guided by the SOPs prepared by the RMA. However, delegates should not be completely bound by the SOPs. Keeping in mind, the beneficial nature of entitlements for veterans, delegates should have within their discretion the capacity to determine claims, provided there is a reasonable link to a person's service on the balance of probabilities.[18]

The current SOP structure is overly complicated and burdensome for veterans. Slater and Gordon supports several recommendations set out in the submissions above. Namely, we urge the current SOP system be reviewed with a view to simplifying the process and reducing the unreasonable evidence requirements. Furthermore, provisions should be made for conditions recognised in the medical community that are not yet reflected in SOPs. Legislation and specifically the Simplification Bill implementing this fundamental change should be a priority for the DVA.

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[16] Submission 208.1. of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

[17] Submission 169. of Suicide Enquiry, *The Constant Battle: Suicide by Veterans*.

The fundamental issue with SOPs is that they are premised on constantly evolving medical science, yet, despite endeavours by the RMA, they are not updated soon enough to reflect these changes. By the very nature of SOPs, they cannot be applied too rigorously and should only be referred to as a general guide. The strict interpretation approach needs to be removed.

The quantification and qualification required to prove the above factors is onerous on the veteran and serves to lengthen the claims process and restrict Commonwealth liability. If a claimant cannot immediately report the onset of symptoms or if their experience does not otherwise meet these strict parameters, their claim can be denied.

In comparison, a Commonwealth public servant covered by the existing SRCA must only demonstrate that on the balance of probabilities their injury arose out of or was aggravated in the course of their employment. In my experience, this test is less restrictive and contains fewer arbitrary technicalities that seem designed to block claims by veterans. The simplification Bill does not remedy this inequity.

The MRCA allows delegates to deny legitimate claims from veterans based on mere technicalities contained in the SOPs.

I therefore implore that the new legislation be drafted to provide more certainty and clarity with the SOP's. I do not see this in the draft.

Returning to the Consultation Group Advice

4. **Date of Effect**

I note that DVA have already issued a Date of Effect for Permanent Impairment Fact Sheet to accompany the draft Bill.

Issue: Complexity of the date of effect (DoE) provisions for permanent impairment (PI) compensation under the MRCA.

The Group considered that the current provisions reflected a conceptually correct policy position, in that the current date of effect is the later of the date on which:

- a claim for acceptance of liability was made; or
- each accepted condition became permanent, stable and reached the relevant degree of impairment.

However, the Group also noted the difficulty that is being experienced by medical practitioners and DVA in being able to identify a specific date on which a condition becomes 'permanent and stable'.

To address this complexity for medical practitioners, most of the Group recommended that the DoE be linked to the date of the needs assessment conducted under s325. Alternatively, the Group suggested it could be linked to the date of the PI claim itself, noting that a needs assessment occurs at a date determined by DVA and is therefore dependant on how quickly DVA processes the PI claim. However, this could incentivise very early speculative claims for PI. One member preferred retaining the discretion to determine when the injury became stable considering the definition of permanent and stability i.e. once all reasonable medical and other treatment is undertaken, as the proposal to link the DoE to the date of a needs assessment or

claim may result in compensation being paid for a condition that is not permanent and/or stable.

The Group cautioned against amendments to DoE provisions in a way that causes some claimants to lose their entitlement to an additional 'eligible young person' payment under section 80.

The Group noted that this issue primarily arises from the administrative difficulties posed by the current provisions and that an administrative solution could be considered, supported by legislative amendment if necessary.

DRAFT *Simplification and Harmonisation Bill (the Bill)* DATE OF EFFECT PROPOSAL

The Bill proposes that only an "estimated date of effect "will be required in order to commence payment. A Veterans medical practitioner will be asked to provide an estimated date of effect. Then a Delegate will determine that if all requirements are met, DVA will commence payment from the first day of the estimated month.

Whilst I consider in theory this would reduce complexity, I am of the view that this will only confuse medical practitioners further. The Doctors already struggle with the briefing letters from DVA requesting reports be prepared for assessment of injuries. I anticipate many doctors will either refuse to prepare reports which is already the case, or they will be returning to DVA seeking answers. This will lead to requests for supplementary reports.

This proposal lacks clarity and will compound the confusion. I query whether any research has been done in how this proposal would operate in practice.

From a legal perspective, it risks being rendered void for uncertainty. I anticipate that this will lead to many claims being referred to the VRB. The risk is that it will not carry out the intention of simplifying the legislation and to the converse, will likely create an environment of litigation and contention in the future.

I invite the drafters to again consider the suggestions of the Consultation Group to resolve this problem. The academics and legal experts have given a clear direction which seems to have been dismissed. This represents another failed opportunity to resolve a complexity in the current system.

5. REVIEWS and APPEALS- Single Review Pathway

Issue: Appeal pathway

The Group recommended legislative change to implement a single review pathway across all Acts. This pathway would consist of:

- Full de novo internal review/reconsideration – to be undertaken at the request or initiation of the claimant by more senior delegates than delegates making primary decisions. This would require adequate resourcing by Government.
- VRB review for all claims. Members of the group support removal of the current prohibition of legal representatives at the VRB stage. I note this recommendation has been ignored by DVA.
- Administrative Appeals Tribunal (AAT) review (noting that the government is proposing to replace the AAT with a new administrative review body). It is suggested that appeals from

the VRB to the AAT should be heard by a panel of members, rather than a member sitting alone, given it follows a multi-member panel at the VRB level.
- Federal Court on a point of law.

DRAFT *Simplification and Harmonisation Bill* – DVA Factsheet

Before I comment on the draft proposal and the DVA Fact sheet I will include the Australian Lawyers Alliance draft submission.

I respectfully submit that it is incredibly unhelpful and confusing that, while many interested parties support Veterans having access to legal representation, lawyers are still prevented from representing their clients in the VRB. We strongly submit that this needs to be reconsidered to allow veterans choice of representation and to ensure that veterans are properly supported and informed at all stages of their military compensation claim.

We make this submission in the context of advocacy services not always being able to provide the best advice and service to veterans. Advocacy services are currently in disarray with experienced advocates leaving this area at alarming rates. They are being replaced by persons who have little qualifications or experience, lack proper training, take percentages of a Veterans Lump sum compensation, have no Professional Indemnity Insurance, and/or request payment up front.

No doubt the Department is aware of what is occurring, but it seems powerless to remedy the situation. This is of great concern to those of us who have been practicing in this area for many years.

I will make further submissions on this point but to quote the ALA submission -

"Barriers to legal representation

1. *The ALA notes the following from the Explanatory Memorandum:*[19]

   > *The 'single review pathway' removes the internal reconsideration process for DRCA claimants and gives DRCA appellants access to the Veterans' Review Board (VRB) which is a less adversarial, veteran-friendly environment, where matters can be resolved without the involvement of lawyers. A second tier of merits review by the Administrative Appeals Tribunal would remain in place.*

2. *The ALA is concerned by the barriers to legal representation which are retained in the Exposure Draft of the Bill, including in the 'single review pathway'.*
3. *First, lawyers are prohibited from appearing before the Veterans Review Board (VRB), the first appeals mechanism.*[20] *Lawyers can assist in preparing documents and drafting submissions, although the veteran must present all the materials to the VRB, and lawyers cannot charge for that preparatory work.*

[19] Explanatory Memorandum, Exposure Draft: Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth) 58.

[20] Veterans' Review Board, 'Can I have someone represent me?', *Frequently Asked Questions* (Web Page) <www.vrb.gov.au/frequently-asked-questions>.

a. *This clearly limits the access veterans have to legal representation, which can compromise the veterans' experience through the claims process – especially for those veterans who are navigating the daily effects of physical and/or psychological injuries – and can significantly affect the outcomes of the review process.*

b. *The feedback ALA members receive from veterans is that legal assistance during the VRB stage is essential. As such, access to legal representation should, in the ALA's view, not be prohibited or discouraged by the Department.*

4. *Further, the ALA notes that there are cost restrictions in relation to the second tier of merits review – currently called the Administrative Appeals Tribunal (AAT) but what will soon be known as the Administrative Review Tribunal (ART).*

a. *If there is evidence presented to the AAT/ART that a veteran could theoretically have obtained during the VRB review process (for example, a medical report), then a veteran is not entitled to claim costs for their lawyers' time in managing that evidence.*[21]

b. *ALA members note with concern that if veterans are not allowed to have adequate legal representation at the VRB stage (as detailed above), then veterans are unlikely to be able to present a complete case, including all required evidence, at the VRB in the first place. A prohibition on claiming costs for evidence then presented at the AAT/ART stage is, therefore, unfair and an impediment to access to justice. This underscores the need for legal representation to be permitted in the review process from the outset.*

5. *ALA members are not proposing that the involvement of lawyers at any stage of the veterans claims process should make those processes take longer – on the contrary, ALA members are committed to facilitating compensation claims in a timely manner. It is essential, though, in the interests of fairness and access to justice that veterans have the option to utilise legal representation and assistance to:*

a. *navigate lengthy and complicated legislation;*

b. *ensure their claims are presented correctly from the outset and during review; and*

provide additional support to the veterans and their families through these processes.

[21] See: *Military Rehabilitation and Compensation Act 2004* (Cth) s 357, including s 357(6).

***ALA Recommendation**: That the Department amends the Exposure Draft of this Bill to ensure veterans have access to legal representation and support throughout the claims process, including throughout the review process in the VRB and AAT (soon to be the ART), and that legal costs can be claimed by veterans to fund that legal support. "*

Suggested Single Review Pathway

I note that the Fact sheet issued by DVA explains the steps to remove the DRCA internal reconsideration process for Veterans. In its place, an additional screening process, similar to the MRCA and VEA would be made available.

My experience with this process under the MRCA has been positive and I support the introduction of same.

VRB to AAT Appeals Process - WHERE IT CAN BE IMPROVED

The appeals process can promote unfairness and injustice. As of 1 January 2017, any veterans who disagree with decisions made by DVA in relation to claims under MRCA must be appealed to the Veterans' Review Board (VRB). As addressed previously, they are barred from having legal representation at the hearing.

There are several issues with the VRB to AAT appeal process that create an additional burden on veterans:

- Veterans can be legally represented in the AAT if they can afford it. Even if they are successful at the AAT, there are few instances where costs and disbursements are awarded to them. As a result, unrepresented veterans cannot afford to pay lawyers and their prospects of success are greatly diminished. It becomes a David and Goliath battle.
- The matter is heard de novo before the AAT. Veterans are expected to adduce medical and other evidence in support of their case. To obtain a report from an independent medical specialist requires that the veteran identify the relevant specialist, travel to the specialist office for examination, frame the relevant questions for the specialist to answer and then call the specialist to give evidence at the hearing. In comparison DVA have the resources to spend on medical specialists who, in many instances, have a reputation for producing consistently non-favourable reports.

DRCA Review and Appeal Routes

Under DRCA claims the administering authority is the Military Rehabilitation and Compensation Commission (MRCC) and not the Repatriation Commission. The veteran will proceed direct from a denial by MRCC to the Administrative Appeals Tribunal. If successful in the AAT appeal the veteran is entitled to recover a large portion of their costs for their lawyers and medical witnesses including the cost of independent medical reports.

MRCA Review and Appeal Routes

As things presently stand a veteran injured after 1 July 2004 comes under the MRCA.The new legislation will adopt the same path. I see the merits in a single pathway but there should be a

basic right for a Veteran to be treated the same as Commonwealth public servants and have a right to legal representation.

Presently, if the MRCC denied a claim the veteran could seek review either through the VRB or an internal reconsideration before proceeding to the AAT. Since the 1st of January 2017 a Veteran is subject to the unattractive constraints referred to above relating to appeals from the VRB/AAT. With the prospect of non-recovery of costs and the restrictions of the single pathway, Veterans in my opinion and that of many others will be worse off in the future.

Federal Court Review

Putting aside the problems with appeal, even if a veteran is successful before the AAT, the Commonwealth may appeal this to the Federal Court on a point of law. Not only is this an onerous and stressful experience for veterans, but the veteran must also pay the Commonwealth's Federal Court costs if the appeal succeeds. A conservative estimate of these costs is around $30,000 to $40,000 – well beyond what most veterans can afford.

Even if the veteran survives in the Federal Court, the matter could be referred to the Full Federal Court. Again, were the Commonwealth to succeed, the veteran is liable to pay the court costs, which at the Full Federal Court, can exceed $100,000.

There are legislative instruments that support financial support to claimants in managing costs where the Commonwealth appeals a decision favourable to the claimant. However, as noted by Allan Anforth in his submission in the Veteran Suicide Report, these grants have not been indexed for inflation in the past and possible since 1981.This is completely inadequate to ease veterans' costs and improve access to justice.

Slater + Gordon continues to support the earlier recommendation put forward by Mr Anforth that the F*ederal Proceedings (Costs) Act 1891* be amended to prove:

(a) That if the Commonwealth successfully appeals a decision from the AAT, no costs are to be ordered against the veteran or if the costs are awarded then the Commonwealth will pay itself.
(b) No costs should be awarded to the Commonwealth on test cases.

Recommendations for Appeal Process

Slater + Gordon contends that the prohibitions preventing lawyers appearing before the Veterans Review Board be repealed. Further, the VRB should become a full costs jurisdiction for the Applicant. That is, it will enable legal and other representatives to assess the merits of cases and pursue them on a 'no win, no fee' basis. Additionally, the AAT should become a full costs jurisdiction for the Applicant in the event of a successful outcome against the DVA.

6. PAYMENT TO A SOLICITOR'S TRUST ACCOUNT

Explanatory Memorandum Division 6 - Payment to solicitor's trust account: Item 98 repeals and replaces subsection 430(3D), removing the requirement that the payment account must be maintained by the compensation recipient or by the recipient jointly or in common with another person.

In ***Hansen vs Military Rehabilitation and Compensation Commission [2007] QSC 360*, Mullins J** held the view that section 430 is permissive and does not prohibit the Commission making the payment to the solicitors' trust account as requested and authorised by the applicant who has full capacity.

The revised wording of subsection 430(3D) is intended to avoid any confusion and is consistent with the outcome of Hansen. The practice of making payments to a nominated third-party is already available under the DRCA and this amendment would allow a consistent approach where persons may authorise for their MRCA compensation to be made to a third party, such as their legal representative. This change does not affect payments to trustees under section 432. If a trustee has been appointed on behalf of the client under section 432, the payments must be made to the trustee.

I welcome this amendment as it will greatly simplify matters for clients when it comes to the being paid the lump sum compensation and attending to payment of any legal professional fees. MRCA compensation paid directly to clients often means they have difficulties attending to any fees because of Regulations and rules imposed by their financial institutions. There are very few Solicitors who practice in this area so I do not anticipate there will be problems putting this into place. It aligns the DRCA with MRCA and creates a consistent approach. An ongoing problem occurs when DVA inadvertently pays other benefits such as Incapacity payments, Pensions, and pharmaceutical allowances into our Trust account. I anticipate this will be resolved by the amendment. This provision is practical and long overdue.

7. Posthumous Claims

Issue: Inability to convert PI weekly amounts to lump sums under the MRCA where claims are submitted but not determined before the death of the veteran. Though section 55 of the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA) allows a legal personal representative to claim for PI compensation after death, subsection 321(4) of the MRCA prevents this.

The Group recommended that the MRCA provisions be amended to reflect the DRCA provisions, including:

- removing the exception for PI claims in s321(4); and
- allowing conversion of PI payments to lump sums, using tables as at date of death.

Extracts from DVA Factsheet

Under the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA), a personal representative can both lodge a claim and receive PI compensation on behalf of the veteran's estate following the death of the veteran. Any lifestyle components associated with the payment(s) are, however, withheld.

Under the proposed changes, the MRCA will be modified to allow permanent impairment compensation to be paid as a lump sum to the estate of the deceased veteran where an initial liability or permanent impairment claim has been lodged prior to the veteran's death (whether determined or undetermined). This payment will exclude lifestyle components.

This change will benefit the beneficiaries of your estate if you die before your MRCA claim is determined.

Who will benefit? Beneficiaries of the estates of deceased veterans will now be able to receive permanent impairment lump sum compensation payments (excluding lifestyle components) provided an initial liability or permanent impairment claim has been lodged and is **posthumously accepted.**

I have highlighted "posthumously accepted" as whilst the proposed change certainly has merits, in practical terms, I anticipate that many claims will be denied.

My experience is that many claims are often poorly prepared by Veterans self-acting or using inexperienced advocates. Medical examinations and the preparation of expert reports are frequently required at the initial liability stage. The online claim process results in basic claims being lodged lacking in IDDS and diagnosis forms, supporting statements and medical documents. It will be impossible for a Delegate to determine a claim in the absence of vitally important evidence to support same.

I foreshadow that it will simply not be possible to have claims accepted where a Veteran has passed away unless a claim has all the necessary information to meet both the SOPS and the requirements of the GARP from the outset. The intention of the proposal is good, but I believe that, in reality, claims will unfortunately in all likelihood pass with the Veteran.

8.CONSULTATION GROUP-Information Sharing Provisions – MRCA s409

Issue: DVA access to ADF members' medical and other service documents.

The Group noted that an increase in information flowing from DVA to Defence may cause some concern to the veteran community, so it does not support altering these provisions.

However, the majority of the Group strongly supports improving existing legislative provision to allow DVA to proactively access information from Defence that is required for the functions of DVA under the MRCA, DRCA and VEA, except where the member has opted out.

Right to privacy and reputation

The Explanatory Memorandum states:

The legislative basis for the exchange of information between DVA and Defence varies between each of the current Acts. Amendments to the Act will continue the existing authority relating to the exchange of information between, to facilitate the investigation and determination of claims, promoting the right to privacy.

Unfortunately, recent events involving the "MATES" program has shown that the privacy provisions need to greatly be enhanced. The unauthorised sharing of Veterans medical information and records cannot be condoned. I note that one law firm has advised Veterans that there is sufficient information and evidence to support a class action. Any new legislation should enshrine safeguards to prevent a repeat of the "Mates" problem.

9.ACCESS TO COMMON LAW DAMAGES

Issue: Increase to, or indexation of, the $110,000 cap on common law damages for non-economic loss

The Group has divergent views about whether the existing cap should be increased and/or indexed:

- The majority recommends leaving the cap on common law damages as is, as it operates effectively to encourage the use of the statutory scheme. These members do not support removal of the cap altogether, as this may give rise to a mistaken perception of disadvantage to veterans when compared to Commonwealth public servants.
- Some members are in favour of increasing or indexing the damages cap. As the cap has not changed since 1988, it has become more of a disincentive to commencing a common law action over time. In addition, common law claims may also facilitate scrutiny of systemic issues which might otherwise not be brought to light.

One member advocated for linking the common law cap legislatively to the maximum permanent impairment lump payable to the claimant under the MRCA. The Group also recommends that DVA re-instate internal advocates for contested hearings before the AAT for the DVA, rather than using the current external panel of law firms and that applicants have access to trained advocates via a community legal centre, veterans' legal centre or legal aid to the private legal section. There is evidence that veterans who are unrepresented in the AAT find it difficult to succeed, particularly because of the adversarial nature of the process.

The MRCA also restricts damages that may be recovered through common law action for non-economic loss. The cap of $110,000 was set at the commencement of MRCA, which is the same maximum that was set when the SRCA commenced on 1 December 1988.

The Bill will increase this cap to $177,000, noting that common law action has the additional risks of losing on liability, and/or a worsening of the impairment after settlement or judgement is finalised. The amount will remain unindexed.

Of interest is the figure of $177,000 which I suspect is the current indexed amount. This figure seems to be a form of appeasement and will neither incentivise or disincentivise a Veteran to commence common law proceedings. I see no benefit in such an amendment considering the figure will remain unindexed. From a sceptical point of view this represents nothing but window dressing. I do not support this proposal. The no Fault Statutory Compensation scheme remains the preferable pathway for Veterans in my view.

10. Provision of Treatment- NEW claims

Part 2 - Amendments relating to treatment.

This Part transfers elements of the framework for the provision of treatment, including Non-Liability Health Care, and the Commission's powers to determine specific treatment programs and classes of eligible persons, from the VEA to the MRCA, with no change in eligibility requirements. Upon acceptance of a new or worsening compensable impairment under the MRCA, any existing VEA/DRCA impairment would be included for the points thresholds to be eligible for the relevant Veteran Card under the MRCA.

I support these amendments and the future possibility that Veterans will be able to access a Gold Card not currently available to Veterans and their dependants under the DRCA. Obviously, there will be cost implications for the Government but there will be harmonisation across the system and the 3 Acts which no doubt will remove much of the angst for older Veterans presently not covered.

11. Presumptive Liability-Streamlining

Part 3 of the Bill-Presumptive Liability. This Part streamlines claims processing by allowing for presumptive acceptance of liability for declared occupational injuries or diseases under the MRCA, with scope for conditions to be removed from, or added to, the list.

Since 2006, the Commissions have also approved arrangements variously referred to as decision-ready, streamlining, and straight-through processing, which apply to claims under the VEA and MRCA. There is a suite of approved medical conditions, known to be prevalent amongst veterans and have a high acceptance rate, or have a quantifiable SOP factor that can be associated with particular service requirements/duties. The changes in this Part will ensure equity and consistency with DRCA liability provisions and enshrine into legislation the existing administrative practices that are aimed at reducing the evidentiary requirements for individual liability claims and the time taken to process those claims.

I fully support and endorse the approach for streamlining certain service resulting in conditions being accepted without the onerous requirements of a drawn-out administrative process to have liability accepted. More injuries need to be added to the PAMT scheme where Veterans have the necessary service to meet same. The first port of call for a liability Delegate should be to visit a Veterans service history and personnel records and begin the assessment on the basis that an injury will be accepted unless there is clear evidence to the contrary.

CONCLUSION

I, together with Slater and Gordon Lawyers, welcome the opportunity to have input to the Department of Veterans' Affairs on the Exposure Draft of the *Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (Cth)*.

I am available to provide further assistance to the Department on the issues raised in this submission and look forward to the opportunity to meet those within the Department for the implementation of the new system.

I note however that the Royal Commission is still to report on the reviews and appeals process, including the role of the Veterans Review Board. The Final RC report will need to be carefully considered by Government prior to the tabling of the *Simplification and Harmonisation Act (Act)*.

I endorse the goal that the improvements should attempt to make the most modern Act, the MRCA, the only legislation that will apply to new compensation claims going forward from 1 July 2026, with existing VEA/DRCA entitlements operating to preserve existing payments.

However, the proposed single ongoing Act model needs further work.

I implore Government to revisit the areas I have highlighted in this submission to address longstanding complexities and difficulties inherent in the current legislative framework and ensure maximum simplification for the administration of claims by removing complexities associated with the existing tri-Act framework.

I believe that my recommendations will lead to the result in a system that veterans, families, and advocates find easier to navigate and less confusing, as well as being more efficient and streamlined for DVA to administer.

Yours sincerely,

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Military Compensation

Slater and Gordon Lawyers