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NAVAL ASSOCIATION OF AUSTRALIA - RESPONSE TO THE DRAFT HARMONISATION BILL 2024

Reference: A. DVA Website message on Veterans' Legislation Reform – Consultation on proposed changes – Have your say; of 28 February 2024

B. RAAC Corporation Ltd Submission to Have your say of 14 April 2024

Thank you for the opportunity given to comment on proposed changes to simplify veterans' entitlements, compensation and rehabilitation legislation as outlined at (Reference A.)

The response of the National Council of the Naval Association of Australia Inc (NAA) is attached and forwarded for your consideration.

Whilst generating its response, the NAA received a copy of the submission made by the RAAC Corporation Ltd (RAAC). (Reference B).

The NAA fully supports the brief by the RAAC forwarded to the Minister in response to Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 released on 28 February 2024 which examines the proposed legislative landscape sent out from the Minister's office, including the need to travel down a number of lateral pathways and address issues that are also organic to the matters arising from this such a major policy initiative.

Yours sincerely,

Russell W. Pettis

Russell Pettis AM
National Administration Officer
National Council
Nava Association of Australia Inc

28 April 2024

ONCE NAVY ALWAYS NAVY

Attachment

Naval Association of Australia National Council's submission to the Draft Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024

Naval Association of Australia response to the draft Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024.

References:

A. *Veterans Entitlement Act 1986* ('the VEA').
B. *Military Rehabilitation and Compensation Act 2004* ('the MRCA').
C. *Safety, Rehabilitation and Compensation (Defence Related Claims) Act 1988* ('the DRCA').
D. Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024.
E. Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024, Exposure Draft.
F Commonwealth, Royal Commission into Defence and Veteran Suicide – *Interim Report,* 11 August 2022.
G. Commonwealth, A Better Way to Support Veterans. Productivity Commission Inquiry Report, Volume 1 and Volume 2, No 93, June 2019.
H Veterans' Entitlements and Military Compensation Law, Robin Creyke and Peter Sutherland, The Federated Press, 2016.
I Veterans' Entitlements and Support (Simplification and Harmonisation) Bill, 2024. Explanatory Memorandum ('the EM').
J Commonwealth, Royal Commission into the Robedebt Scheme, *Report,* vol 1,2, and 3. 2023.

Introduction

The Naval Association of Australia ('the NAA') welcomes the opportunity to comment on the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024.

In developing a response to the proposed Bill, the NAA has considered the opinions and submissions of its membership and consulted Ex-Service Organisations (ESOs). In particular, the NAA has had the opportunity to examine the submission to the Harmonisation Bill from the Royal Australian Armoured Corps (RAAC) Corporation. The NAA wishes to extend its gratitude to the Chairman of the RAAC Corporation, Noel Mc Laughlin OAM MBA.

Despite consulting with other ESOs, the views expressed in this submission are those of the NAA. If views expressed are like those of other ESOs this should indicate a common theme.

'Lest we Forget' is not just a phrase mouthed on ANZAC Day or similar remembrance ceremonies, it is a solemn vow made to those who have served and still serve their country, and to their families that their service and sacrifice will be remembered always. Whilst the ADF has kept is vow to the nation, unfortunately, the veterans' community is often left with the impression that governments have been less than conscientious in remembering veterans' service.

There have been several inquiries into veterans' conditions and benefits over the years. Each one has raised fresh issues associated with the gaps between veterans' expectations of government and effectiveness of government programmes.

The most recent inquiries initiated by government have been the 2019 Productivity Commission report 'A Better Way to Support Veterans' and the current 'Royal Commission into Defence and Veteran Suicide' which released an interim report in August 2022 and is due to release its final report in June 2024.

Both the Productivity Commission and the Royal Commission found complexity in individual veterans' Acts (i.e. the VEA, the MRCA and the DRCA) and in the individual Acts themselves. This complexity has, over the years, led to complaints from veterans, frustration by veterans, and ESOs, criticism by the Courts and confusion within the DVA itself.

This complexity and resultant frustration have often resulted in unfair criticism of DVA staff's commitment and professionalism. The NAA believes that shooting the messenger for the message is unfair but is often a first response.

Given the history of veterans' legislation in Australia it is perhaps opportune to remember the words of Mr Justice Lee in the Tracy v Repatriation Commission case[1] that:

> *'If there is ambiguity in the meaning of the legislation a beneficial construction is to be preferred and the Act is to be construed "to give the fullest relief which the fair meaning of its language will allow.'*

On 28 February 2024, the Minister for Veterans' Affairs and Defence Personnel, The Honourable Matt Keogh MP announced the commencement of public consultation on proposed changes to simplify veterans' entitlements, compensation, and rehabilitation legislation.

The Government is seeking comments on the draft Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 that, if passed by Parliament, will reform veteran compensation legislation and come into effect on 1 July 2026.

The Bill combines the *Veterans' Entitlement Act* 1986 ('the VEA') and the *Safety, Rehabilitation and Compensation (Defence Related Claims) Act* 1988 ('the DRCA') and the *Military Rehabilitation and Compensation Act* 2004 ('the MRCA') into a single Act modelled on the MRCA but including grandfather segments from the VEA, the DRCA. And the current MRCA (i.e. 'MRCA II').

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[1] *Tracy v Repatriation Commission* [1999] FCA 1523, at para 13. See also among others *Repatriation Commission v Hawkins* [1993] FCA 479, *Repatriation Commission v Law* [1981] HCA 57, CLR 635 per Aickin J at 652, *Repatriation Commission v Hayes* [1982] FCA 107, per Keely J at 219; *Starcevich v Repatriation Commission* (1987) 18 FCR, 221 at 225, per Fox, J; *Miller v Minister for Pensions* [1947] 2 All ER at 372.

The proposal is that MRCA II will be the only legislation applicable to veterans post 1 July 2026. However, the government assures those veterans and their families covered by previous legislation that veteran's will maintain their existing level of benefits.

The proposed changes will include:

- the introduction of a new Additional Disablement Amount (ADA), similar to the Extreme Disablement Adjustment (EDA) available under the VEA
- the introduction of 'presumptive liability', which means the Repatriation Commission would be able to specify injuries and diseases that can be determined on a presumptive (in other words – automatic unless proven otherwise) basis where they are known to have a common connection with military service.
- consolidation of household and attendant care, travel for treatment, and retention of automatic granting of VEA funeral benefits in the MRCA.
- an increase to $3,000 for funeral allowance for previous automatic grant categories under the VEA, and the availability of reimbursement of funeral expenses up to $14,062 for all service-related deaths.
- the availability to all veterans of the higher travel reimbursement amount, regardless of kilometres, when a private vehicle is used to travel for treatment.
- standardisation of allowances and other payments, including: acute support packages, Victoria Cross and decoration allowances, education schemes, prisoner of war ex gratia payments, and additional compensation for children of severely impaired veterans.
- enhancement of the Commission's ability to grant special assistance to veterans and their dependants.

NAA Contentions

The NAA makes comments on the Explanatory Memorandum on those issues it feels competent to express an opinion. We represent the interests of the Australian Defence Force in general and the Royal Australian Navy in particular.

SPECIFIC ISSUES AND RECOMMENDATIONS

Hazardous service

The EM refers to 'hazardous service' as being based on sub-section 120(7) of the VEA with and is defined in the EM as:

> *'...service with the Defence Force, before 1 July 2004, that is of a kind determined by the Defence Minister by legislative instrument, to be hazardous service for the purposes of this section.'*

The Exposure Draft at Section 6C Defines 'Hazardous service' as being '...service with the Defence Force before 1 July 2004, that is of a kind of service determined by the Defence Minister, by legislative instrument, to be hazardous service for the purposes of this section.' The EM goes on to say that 'hazardous service' will in future be declared 'non-operational service.'

There are two issues here.

Section 7 of the *Legislation Act* (2003) states 'Generally legislative instruments cannot be backdated ...' Therefore, in the examples cited below ADF veterans would be disadvantaged.

Example 1. There are several ADF personnel who have and will continue to be involved in 'hazardous service'. For example, members serving on surface vessels and submarines who may be operating or exercising with foreign navies or executing dangerous manoeuvres. Given that DVA is still abiding by the 'service differential' despite recommendations to the contrary, then a death or injury sustained by an ADF member on this exercise would not be operational service and a widow may not be eligible to a war widows pension. The sinking of HMAS Voyager following a collision with HMAS Melbourne in 1964 killed 81 naval personnel and one civilian worker employed by the Garden Island Naval Dockyard.

Example 2. Another example where ADF personnel may be exposed to hazardous conditions would be Special Air Service (SAS) or other special forces soldiers who may be exercising with a friendly power overseas and who are injured or killed whilst on these exercises (e.g. a helicopter crashes whilst undergoing counter terrorist exercises overseas). The helicopter was not operated by ADF personnel but by foreign nationals whose skills may not be as well developed as ADF personnel. The training was hazardous but was not declared as such by the Minister. ADF leadership have been known in the past to acknowledge the activities or duties were of a hazardous nature and 'with the benefit of hindsight we would have done things differently'.

This 'benefit of hindsight' is of little use to the bereaved widow of an ADF member killed undertaking hazardous service on the mission overseas, but not on 'operational service' and because of a lack of forethought by senior leadership or an administrative oversight the activity was not proclaimed in a legislative instrument as 'hazardous'.

In the above examples, it would be difficult for DVA to accept the claim for a war widows' pension.

To address these issues which are within the realms of possibility, the NAA believes the definition of hazardous service should be expanded to include dangerous service which is not operational service. But is of a nature, is of such a dangerous phenomenon to increase the likelihood to ADF personnel to serious injury or death.

Recommendation. 1 The NAA recommends the term 'hazardous service' be expanded to include modern Defence Force tasks and the date should be open ended to allow for continuing coverage of personnel involved. This may include an example that assists decision makers but is an example only and not a definitive event.

Recommendation 2. The NAA recommends the term 'special mission' be expanded to include any special operation comprising 1 or more Defence personnel or 1 or more Defence units who may from time to time engage in a special operation in support of Australian Government objectives or the protection of Australian or allied nationals overseas or domestically.

This will include members of Defence Special Forces who may engage in counter terrorist operations such as aid to the civil authorities, hostage rescue or other small scale operations.

This will require an expansion of the definition 'operational service' on page 40 of the Bill to include ' a person either individually or as a member of a unit whilst rendering continuous full-time operational service as a member of the Defence Force, who partakes in a special operation.

Retesting claims EM page 23

The proposal is that claims rejected under the VEA of DRCA may be reconsidered under MRCA II provided the claimant can present new evidence support their original claim. This needs to be clarified. Will the re-testing be available to all rejected claims or only those that have not been appealed to a higher court or tribunal?

Recommendation. 3 The NAA cannot agree to this amendment being incorporated into MRCA II until more information is available.

Whole of person assessment EM page 5

The proposed MRCA assessment methodology is whole-of-person impairment, with the impairment ratings for all the person's conditions combined using a legislated formula, rather than the current method of assessing each condition individually.

The High Court in *Canute v Comcare* (2006) HCA 47 cast doubt on the whole of person approach arguing that one injury may result in more than one impairment. This was followed in *Fellowes v MRCC* (2009) HCA 38.

As the legislation upon which *Canute* was determined (i.e. *Social Security Act 1991*) has not changed, if the proposed MRCA amendment is accepted the veteran runs the risk of being treated less beneficially under MRCA II that a person sustaining similar injuries under the Social Security Act 1991. This is discriminatory and is against the HCA common law judgements in *Canute* and *Fellowes*.

Recommendation 4. The NAA cannot agree to this amendment being incorporated into MRCA II until more information is available.

Recommendation 5. The NAA recommends the judgements in *Canute* and *Fellowes* be the foundation of this assessment.

Review pathway EM page 13

The MRCA, DRCA and the VEA will be amended to standardise the review pathway for all veteran compensation claims, ahead of the commencement of the single ongoing Act.

The government argues the amendments are compatible with the right to an independent, impartial and competent court or tribunal, by making consistent the application of a common appeal pathway for all veterans and by making the Veterans' Review Board, which is a less

adversarial, veteran-friendly environment, where matters can be resolved without the involvement of lawyers, available to all veterans.

The NAA is concerned by the continuing ban on legal representatives representing veterans at the VRB.

A review by an advocate of the Page Veterans' Support Centre found that currently there are 43 members of the VRB available to hear appeals. Of these 26 have had legal training with 2 holding a Diploma of Law and 24 with a Bachelor of Laws (LLB).

Of the 24 with LLBs, five are solicitors in private practice, eight hold a Masters of Law (four of whom are barristers), and one is an Associate Professor of Law.

Arrayed against this bevy of lawyers in a VRB is an advocate who invariably is a volunteer and works part time.

The odds are against the veteran simply on legal experience alone.

The NAA is concerned about this imbalance of justice and what appears to be a breach by the Commonwealth of its obligations under its Model Litigant Policy. In particular, not taking advantage of a claimant who does not have the resources to litigate a legitimate claim.

Although several ESOs agree that legally qualified persons should not represent veterans at the VRB, there are other ESOs who have an opposing view.

The NAA believes that if a veteran elects to be legally represented it is their decision not a legislators.

Recommendation. 6 The NAA recommends veterans should be given the option of legal representation at the VRB.

Definition of veteran

The NAA notes that in the Exposure Draft there is no definition of a veteran. This is inconsistent with the definition as contained in s 5 of the VEA. The NAA believes this may be an oversight in drafting.

Recommendation: 7. The NAA recommends the definition of 'veteran' as contained in the VEA be used in MRCA II.

Service differential EM page 25

The NAA is disappointed the Bill makes no allowance for dispensing with the current service differential in favour of a single operational environment for injuries, illnesses, or the death of a veteran. The NAA believes if the current system was designed to show that operational service is of greater value than non-operational service, it is discriminatory. If it was designed to reduce the chances of a financial payout it is unconscionable. An injury or disease incurred in the service of the nation whether in peace or war has the same effect on the veteran.

The Royal Commission accepted at pages 198 to 199 that combining the service differential is a contentious issue.

The NAA agrees that this is a difficult issue. However, it is an issue that needs to be addressed sooner or later. The issue will not get easier with the passage of time. The current system of distinguishing operational from non-operational service is discriminatory. The NAA believes that a citizen joins the defence force to defend Australia. An individual not being sent into an operational environment is not a choice he or she makes. It is determined by the operational and strategic environment at the time. In Vietnam for example, many veterans in base areas such as Saigon or Vung Tau faced no more danger than their counterparts in Australia, yet the Vietnam veteran has easier access to benefits when compared to an Australian serviceman injured whilst in Australia.

The Productivity Commission at Recommendation 14.1 said in part 'The Australian Government should amend the *Military Rehabilitation and Compensation Act 2004* ... to remove the service differential,

The amalgamation was supported by the Chief of the Defence Force, General Angus Campbell AO DSC in a statement to the Royal Commission. General Campbell said.

> *'I think the nation's responsibility to support its service personnel to enable their wellbeing is an inherent and reciprocal duty of the State and arises irrespective of the nature of the circumstances of the service they are directed to perform. If your need for assistance arises because of a period of service, you should be supported and/or where relevant, compensated.'*[2]

The Royal Commission in its Interim Report stated,

> *'We conclude that the Australian Government should remove the distinction between different types of military service when prescribing the level of care, support and compensation provided to veterans.'*[3]

The Royal Commission went on to observe,

> *'...we accept that there may be particular issues or budgetary considerations ...[but] ... the Government should remove the distinction between the different types of military service when prescribing the level of care, support and compensation provided to veterans.'*[4]

It appears from the evidence, a significant stumbling block to removing the service differential is finance, and a few ESOs who are also in favour of keeping the differential, are using it to justify the greed of government.

Recommendation 8. The NAA recommends the service differential when prescribing the level of care, support and compensation provided to veterans be removed.

Commission to prepare a report (MRCA II s 352D)

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2 *Commonwealth, Royal Commission into Defence and Veteran Suicide, Interim Report (2022). 199.*
3 *Ibid.*
4 *Ibid.*

Section 137 of the VEA requires the Secretary [of DVA] within 6 weeks of an application for a review being made, cause or prepare a report for the Veterans' Review Board (VRB) and to serve the report to the applicant. However, the document served on the applicant in pursuance of paragraph (1)(b) shall not contain or refer to that information, opinion or other matter.

The MRCA II echoes the content of VEA s137 by stating at s 352D (2)

> *'If the report contains or refers to any information, opinion or other matter that, in the opinion of the Commission:*
>
> *(a) is of a confidential nature; or*
> *(b) might be prejudicial to the physical or mental health or well-being of the applicant to communicate to the applicant;*
> *the document served on the applicant must not contain or refer to that information, opinion or matter.'*

In the past, the caveat at s 137 of the VEA has been used by the DVA to withhold information or opinions expressed or provided by Departmental Medical Advisers (DMAs). However, this information has been available to delegates to reach their decision and has been provided to the VRB.

The deliberate withholding of vital information from the veteran or their advocate whilst at the same time using this information in judgement is a deliberate attempt by the Commonwealth to frustrate a veteran's case. It is an attempt to corrupt the administrative law process and may be in breach of the United Nations Covenant on Human Rights which states in part 'all persons are equal under the law'. The practice creates an inequality.

In addition, it is unethical and raises the question of how committed is the Commonwealth in abiding by its' Model Litigant' guidelines.

Obtaining access to such a document by the veteran would necessitate a costly discovery process and place a further burden on the veteran. In *Forrester v Repatriation Commission* (2013) FCA 898 Mortimer J in referring to veterans' legislation said, 'It is not a process intended to put insuperable hurdles in the way of the veteran ...'

Recommendation 9. The NAA recommends Section 352D be amended to reflect that all information used in the deliberations by a delegate of the Commission, or any tribunal charged with reviewing the decision.

Schedule 2 – Common law damages for non-economic loss (NEL)

The Common Law damages for NEL are currently restricted to $110,000 under MRCA from 1 July 2004. This cap was set in 1988 and remains the upper limit today. There has been no allowance made for cost-of-living increases or of rises in legal expenses for the past 38 years.

The NAA believes this to be penny pinching on the part of government at the expense of the veteran. It shows a government prioritising financial concerns over veteran's benefits. The NAA understands there are finite funds for all programmes but questions why the government must be so parsimonious when dealing with veterans.

Recommendation 10. The NA recommends the NEL upper limit be indexed twice a year to keep abreast of inflation as is currently the case for those in receipt of all Military Comsuper recipients and veterans receiving the Service Pension

Division 5 – Overpayments and debt recovery

The NAA appreciates that from time to time, overpayments have been made for a variety of reasons. The notification of an overpayment and total amount owing to be can cause enormous stress and distress to debt action recipients.

The unjust and illegal debt recovery practices recently highlighted in the Robodebt case indicates how corrupt government practices can lead to significant hardship.

The current s 30C of the VEA (now covered in ss415, 416, 428 and 429 MRCA II) give little guidance on debt recovery and the case of *Smith v Commonwealth of Australia* [2009] FCA 684 shows how DVA can become confused by its own legislation.

The Royal Commission into the Robodebt Scheme recommended that the Social Security Act be amended to reflect an effective limitation period for proceedings to recover debts be legislated to an effective limitation period of six years[5].

Recommendation 11 The NAA recommends examination of the Robodebt Royal Commission Report
Be referred to as a baseline for debt recovery procedures.

Recommendation. 12 The NAA recommends consideration be given for DVA to have discretion in the waving of small debts.

Reporting on Veterans' Review Board decisions
Until about 2022, the VRB reported regularly on items of interest such the cases decided and the reasons for such decisions via its magazine 'Verbosity'. This has been stopped in recent years and now the VRB is silent on its decision-making process.

Verbosity was a good source of knowledge and should be continued.

Recommendation. 12. The NAA recommends that MRCA II incorporate a requirement that the VRB or DVA produce reinstate verbosity as a valuable tool for advocates and veterans.

Conclusion

The NAA has made 12 recommendations on the Harmonisation Bill. A complete reading of all aspects of the proposed legislation was not possible given the short time frame (two months) allowed for responses. ESOs are staffed by volunteers and the refusal by DVA to extend the time frame for responses was disingenuous.

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[5] *Commonwealth, Royal Commission into the Robodebt Scheme (2023), Vol 2, Pages 508 and 509.*