The Hon Matt Keogh MP
Minister for Veterans' Affairs
Parliament House
CANBERRA ACT 2601

Dear Minister

Thank you for inviting us to provide views on the Government's Veterans' Legislation Reform Consultation Pathway.

As outlined in our Purpose Statement, we have provided the attached advice on key matters relating to the implementation of Recommendation 1 of the Royal Commission into Defence and Veteran Suicide's interim report and the legislation reform pathway that has been developed by Government. Our advice attempts to focus on legislative issues rather than the policies or their application by decision makers.

We urge the Government to ensure that this process of legislative reform does not impede or halt incremental changes and improvements to the *Military Rehabilitation and Compensation Act 2004* (MRCA), the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and the *Veterans' Entitlements Act 1986* (VEA) while it is underway. Veterans' legislation should be veteran and family centric and wellbeing focussed, supported by effective processes and a veteran-centric culture at DVA.

We also note that the Royal Commission has yet to consider reviews and appeals, including the role of the Veterans' Review Board, and that its recommendations will need to be considered by Government.

Thank you again for the opportunity to provide our views.

Yours sincerely

Mr Allan Anforth AM

Emeritus Professor Robin Creyke AO

Mr Peter Sutherland

Professor Ben Wadham

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Ms Jasmine Stanton

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Legal and other Experts Consultation Group – Veterans' Legislation Reform Consultation Pathway

Purpose Statement

In August 2022 the Royal Commission into Defence and Veteran Suicide released its Interim Report making 13 recommendations. The Report confirmed that veterans' legislation is complex and difficult. Recommendation 1 states that:

> The Australian Government should develop and implement legislation to simplify and harmonise the framework for veterans' compensation, rehabilitation and other entitlements.

The Government agreed to Recommendation 1 and stated that:

> The Government will develop a pathway for simplification and harmonisation of veteran compensation and rehabilitation legislation on the basis of this recommendation, noting that funding will be considered in the context of budget processes and fiscal constraints. The timing of implementation will be informed by what is required for necessary consultation and the passage of legislation.

On 16 February 2023, the Minister for Veterans' Affairs announced the commencement of consultation on a legislation pathway that has been developed by Government. This consultation seeks feedback on a proposed pathway to a future model where all claims would be considered under the *Military Rehabilitation and Compensation Act 2004*. It anticipates that new claims under the *Veterans' Entitlements Act 1986* and *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* would cease after a transition period. Existing benefits under those schemes would continue unaffected, with new claims or claims relating to deteriorated conditions to be covered by the single ongoing Act.

The purpose of this consultation group is to provide advice to Government and the Department of Veterans' Affairs on matters relating to the implementation of Recommendation 1 of the Royal Commission's interim report and the legislation pathway that has been developed by Government.

Members

Mr Allan Anforth AM, Barrister and Adjunct Professor of Law, University of Canberra
Mr Peter Sutherland, Visiting Fellow, ANU College of Law
Dr Bernadette Boss CSC, Barrister
Mr Matt Black, Barrister
Mr Greg Isolani, KCI Lawyers
Emeritus Professor Robin Creyke AO
Professor Ben Wadham, Academic, Flinders University
Ms Jasmine Stanton, Director, Defence and Veterans' Legal Service
Mr Brian Briggs, Slater & Gordon Lawyers
Mr Mathew Jones, SAS Regiment Association

Advice

KEY ISSUES

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 considers that the legal test is 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). A prime 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 recommends 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.

There are often difficulties in identifying a precise date of clinical onset to meet the requirements of a SOP. The group considers that 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 date of clinical onset for the purposes of the Act.

SOPs and the RMA

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 notes the significant benefits it provides, including equity and certainty for claimants, and is of the view that these instruments should be retained under the MRCA.

However, the group is 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 suggests 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 review 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 note that this suggestion risks opening the way for an *O'Brien*[1] approach, 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 suggests 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 recommends 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 does 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 some SOPs.

MRCA Permanent Impairment Date of Effect

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

The group considers that the current provisions reflect 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 notes 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, the majority of the group recommends that the DoE be linked to the date of the needs assessment conducted under s325 noting that a needs assessment occurs at a date determined by DVA following an initial liability determination. Alternatively, it could be linked to the date of the PI claim itself, however, this could incentivise very early speculative claims for PI.

[1] Repatriation Commission v O'Brien (1985) 155 CLR 422

One member prefers retaining the discretion to determine when the injury became stable taking into account 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 cautions 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 notes 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.

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. In addition, although 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 recommends 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.

Information Sharing Provisions – MRCA s409

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

The group notes 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. One member dissented, expressing the opinion that the current system of seeking and obtaining such information operates effectively and also protects the privacy of veterans.

Reviews and Appeals

Issue: Legal Aid funding for veterans/advocacy support

While the Commonwealth's policy with respect to legal aid is generally managed by the Attorney-General's portfolio, the *Veterans' Advocacy and Support Services Scoping Study* undertaken by Mr Rob Cornall AO recommended that funding to assist veterans with reviews should be provided by Government through DVA. That study also examined alternative advocacy models. The government has not formally responded to the recommendations in the Cornall scoping study.

The group notes DVA's advice that, while the Government has not responded to that report, there is separate policy consideration underway on how Government should support the provision of advocacy services to veterans. While sympathetic to issues around advocacy, the group is generally of the view that this issue is not part of the current legislative reform.

One member of the group is of the view that legal assistance for veterans could be provided by Community Legal Centres in partnership with ex-service organisations.

Issue: Appeal pathway

The group recommends 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.
- 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.

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.

Issue: Reimbursement of costs for veterans when the Commission/s appeal a decision

While the group does not recommend any changes to the way costs are currently regulated, it suggests that:

- The amounts available under the *Federal Proceedings (Costs) Act 1981* are insufficient and should be increased and indexed going forward, noting this is a matter for the Attorney-General's Department and not the Department of Veterans' Affairs.
- Where a MRCA entitlements decision is before the Federal Court (generally via an appeal), the Commission/Department should have a published policy of generally not pursuing a costs order against the veteran unless there are special circumstances and the veteran is first given notice that the Commission/Department intends to pursue a costs order. This would remove a significant hurdle that confronts veterans in possible Federal Court proceedings, whilst reserving the Department a discretion to seek costs where a matter is frivolous etc.