
Inquiry into Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

Senate Foreign Affairs, Defence and Trade Legislation Committee

16 September 2015

Introduction

1. The Law Council is pleased to provide this submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee regarding Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015 (**the Bill**).
2. This submission was prepared by the Commonwealth Compensation and Employment Law Committee in the Federal Litigation and Dispute Resolution Section of the Law Council.
3. The Law Council of Australia is the peak national representative body of the Australian legal profession. It represents some 60,000 legal practitioners nationwide. [Attachment A](#) outlines further details in this regard.

Law Council concerns

4. This submission assesses the Bill against the Law Council's [Policy Statement: Rule of Law Principles](#) (2011) approved by its Directors. That policy provides that:
 - everyone should have access to competent and independent legal advice and a lawyer of their choice, in order to establish and defend their rights; and
 - legislation should treat all people equally, and should not, either directly or indirectly, discriminate between people on arbitrary grounds.
5. At present, veterans seeking review of original determinations have the following options:
 - they can apply for an internal reconsideration by another delegate of the Military Rehabilitation and Compensation Commission (MRCC); or
 - they can apply for a review by the Veterans' Review Board (VRB); and
 - if dissatisfied with the reconsideration by the MRCC or review by the VRB, they can apply to the Administrative Appeals Tribunal (AAT) for a further review.

Diminution of review rights

6. Schedule 2 of the Bill, amongst other things, will repeal [ss 349\(1\)–349\(3\)](#) of the *Military Rehabilitation and Compensation Act 2004* (Cth) (MRCA), effectively removing the right of injured veterans to seek internal review of decisions by the MRCC. Applicants will continue to be permitted to seek internal review of decisions by the VRB. Further, where dissatisfied with the review determination by the VRB, applicants may continue to seek merits review in the AAT.
7. The Law Council notes that the Explanatory Memorandum states that the proposed amendment will “simplify and streamline the appeal process,” and “[t]he effect of the amendments is that there is no limitation on the right to a fair hearing of a claimant seeking a review of an original determination by the [MRCC] ... as the avenue for an appeal remains in place through the ...[VRB] and the ...[AAT].”¹

¹ Explanatory Memorandum, page v.

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8. The Law Council considers, however, that the amendment will render decisions of the MRCC non-reviewable, which will amount to a diminution of review rights for applicants, notwithstanding that review of VRB decisions may still be sought.
 9. The Law Council considers that full rights of review not only benefit applicants, they also promote more effective administrative determinations at first instance and reduce the need for more costly review at a later point.
 10. The potential cost-savings arising from the amendment are not stipulated in the supporting materials. Moreover, the regulatory impact analysis does not appear to consider the potential additional cost of administrative appeals arising from the removal of an internal review mechanism designed to strengthen initial decision-making processes.
 11. The Law Council considers, on balance, that the proposed amendments to [s 349](#) may result in reduced protection for applicants, may be more costly in the longer term, and should not be supported. The Law Council recommends that Schedule 2 be removed from the Bill.

Limitation of right to legal representation

12. The Law Council is concerned that by restricting rights of appeal in the AAT to reviewable decisions of the VRB, veterans will be forced into a 'no-costs' jurisdiction with serious implications for access to justice.
13. Section [359](#) of the MRCA establishes a framework in which veterans exercising review rights cannot claim the costs of a successful application in the AAT against a decision of the VRB. If applicants successfully appeal decisions of the MRCC, however, under the present scheme, they are able to recover some of their costs.
14. By restricting review of MRCC decisions, the Bill effectively forces veterans to only seek review of decisions by the VRB, which is a no-costs jurisdiction. This creates a situation whereby the Department of Veterans' Affairs, as a sophisticated litigant, can test and oppose veterans' claims. However, unlike public servants under the *Safety Rehabilitation and Compensation Act 1988* (Cth), veterans will be required to meet their own legal costs, even if they successfully appeal the Commonwealth's decision in the AAT.
15. The Law Council is concerned that creates an obvious power imbalance, and this places veterans at a significant disadvantage, compounding any existing ailment forming the subject-matter of the appeal. For example, the Law Council is advised that applicants suffering Post Traumatic Stress Disorder or other psychiatric ailment may struggle to navigate the VRB appeals process without professional support and, in some cases, may disengage altogether.
16. The Law Council is further advised that law firms may be reluctant or unable to act for veterans on a no win/no fee basis, even if they have a meritorious claim, unless costs can be recovered at the AAT.
17. The effect of this will be that most injured veterans will be unable to obtain legal representation in their appeal to the AAT, which significantly limits access to justice for veterans, and undermines the rule of law.

18. The Law Council further notes that:

- (a) legal aid is typically not available for injured veterans pursuing statutory compensation. Even if a veteran were able to access legal aid, the \$1,500 typically available is far short of the funds needed to challenge the VRB through the AAT. The cost of medical reports alone can amount to far more than \$1,500. In certain states, legal aid will not fund such appeals at all, in any event; and
- (b) the proposed process will also take longer. A VRB case can currently take up to 24 months to be concluded. Under the proposed regime, this process is likely to take even longer as there will be a higher volume of cases.

19. In summary, the Law Council's primary concerns are:

- if the Bill is passed in its current form, injured veterans will be unable to recover legal costs in circumstances where they have been successful in having the decision of the MRCC varied in their favour. This is likely to deter applications for merits review by the AAT;
- the proposed legislation will create an asymmetric situation, where the Department of Veterans' Affairs will be able to test and oppose veterans' claims at the AAT stage. But veterans who are not permitted to use a lawyer before the VRB will be unable to recover their legal costs if they are successful in having a decision varied or set aside by the AAT.

The Law Council recommends that:

- (1) Schedule 2 be removed from the Bill; or
- (2) Schedule 2 of the MRCA be modified so that veterans can recover legal costs if they succeed before the AAT.

Michael Brett Young

**Law Council of Australia
Chief Executive Officer**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents its constituent bodies consisting of 16 Australian State and Territory law societies and bar associations and the Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.