

# Opening Statement

Senate Foreign Affairs Defence and Trade Committee's Inquiry into  
Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016

David Jamison

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## Introduction

Australia has a proud history of committing the ADF to help its neighbours and friends fight against tyranny and oppression and, in the process, maintain its freedoms. In the course of doing so, some 100,000 men and women have paid the ultimate price with many more hundreds of thousands sustaining physical and mental wounds and injuries.

DFWA and its partner associations in the Alliance of Defence Service Organisations exist to represent the interests of our serving and former ADF personnel and their families. We seek however imperfectly to ensure that government legislation and policies appropriately recognise the uniqueness of their service and provide the service (or employment) conditions and veteran support programs needed to address the inevitable consequences suffered as a result of their service to the Nation.

As with most ex-service organisations, DFWA and its ADSO partners are voluntary associations dependent on contributions from members and donations from the general public. As such we have access to limited personnel and financial resources and are no match for the considerable expertise and taxpayer funds available to government departments and instrumentalities.

This "David & Goliath" situation is far from ideal and I believe a sad reflection on our elected representatives understanding of their obligations toward those they are prepared to send into conflict to protect the interests of Australia. Never the less, we seek to do the best we can to encourage governments to accept and meet their responsibilities to our serving and former ADF personnel and their families.

## Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016 (DRCA)

This situation has impacted on the way we have approached this particular Bill. We have been assured by the Government and DVA that the Bill contains no changes which will operate to degrade the current beneficial entitlements available under the SRC Act 1988 and the DRCA Bill is a complete copy of the SRCA and is veteran-specific. We have taken this assurance at face value.

Briefings by the Department and statements from the Minister which are greatly appreciated have reinforced this but now as we scrutinise the Bill more thoroughly we are able to form a more detailed understanding of the implications of the Bill's clauses. It is only now as we receive input from legal specialists are we able to understand there are provisions that are cause for concern.

### For example:

1. **Section 89B of SRCA**, which deals with ensuring equity in outcomes, is repealed in DRCA and not replaced. We are concerned this may conceivably result in inequities for veterans in future outcomes.
2. **Claims Determinations by Computer Program**: The DRCA Bill authorises sweeping powers in VEA, SRCA and MRCA to make determinations on claims by way of computer program. This could serve to disadvantage veterans. A recent example of problems is the recent Centrelink data matching issue, where estimates using the Department of Human Services computer programs were wrong in something like 20% of cases. So if this were to be replicated in DVA's case this would take enormous resources from ESOs who perform voluntary unpaid advocacy services for veterans as

there will likely be an increase in appeals. In addition, computer programs may not be able to recognise well-settled High Court and Federal Court precedent and as such veterans could be disadvantaged. We see that future digitisation of processes should be focussed on the sorting and assembly of data to allow delegates to make decisions etc and not a means of decision making without human intervention. Data matching and re-identification of those with protected identities (such as Special Forces etc.) has not been considered either especially given that there will be transfer of information.

3. **Transfer of Veterans Information with Other Agencies**, in addition the transfer of information from DVA with Defence may cause a chilling effect on those DVA clients still serving in the ADF and will act to discourage ADF personnel from frankly speaking with doctors, psychologist and psychiatrist. A similar provision exists, which is also found in the Veterans Digital Readiness Bill, which allows the Secretary of DVA to publicly release information on individual veterans' cases to correct public "misinformation" without regard to protected identities or those who previously had a protected identity. We seek comfort from DVA that this will not occur.
4. **Henry VIII Clause**, found in section 121B of DRCA, provides unfettered power by delegating legislation power to a person who will then make regulations, including permitting modification of this Act (clause 121B(1)). That is why this is called a Henry VIII Clause. The difference is that our understanding that in normal circumstances the Governor-General may make regulations prescribing matters:
  - a) required or permitted by an Act to be prescribed; or
  - b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

This proposal is a whole new aspect by specifically permitting the Executive Branch of Government to modify the operation of the Act itself. We agree this provision has been included to potentially benefit veterans but it is a "two edged sword" and has the distinct potential to allow regulations that have the opposite effect. Bearing this in mind, there is a distinct lack of checks and balances in this aspect of the Act as Parliament will not have oversight of these regulations.

Our concerns are grounded in a report tendered by **Mr Stephen Argument, Legal Adviser (Subordinate Legislation) to the ACT Legislative Assembly Standing Committee on Justice and Community Safety** in November 2011, in which he cited from a paper by two NZ Parliamentarians; Tim Macindoe MP and the Hon Lianne Dalziel MP, entitled "***New Zealand's response to the Canterbury earthquakes***".

In his paper to the Committee, Mr Argument stated inter alia:

***"The Legislative Assembly has no control over the form of subordinate legislation or when it takes effect.....in short, "Henry VIII" clauses detract from the legislative power of the Legislative Assembly"***.

As a paper delivered to the 2011 Australia-New Zealand Scrutiny of Legislation Conference stated:

***Henry VIII powers provide the executive with a power to override primary legislation by way of delegated legislation. The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. In other words, matters of policy can be determined by the executive without the effective scrutiny of Parliament.***

Bearing this in mind, there is a distinct lack of checks and balances in this aspect of the Act as Parliament will not have oversight of these regulations. We believe that the uncertainty surrounding the application of the Clause is creating significant anxiety within the veteran community.

We see the potential for the application of this Clause to threatening entitlements and consider it is vital for the Government to provide comfort to the veteran community as to the beneficial application by the Minister and his administration on veterans' compensation matters.

## **Conclusion**

The spirit and intent of this legislation must remain remedial and beneficial toward those who put their lives on the line in defence of the Nation. A significant body of case law at both High Court and Federal Court level supports this contention.

We are of the very strong view that due to concerns now arising, the Bill needs further examination and we seek to have it referred to the Senate Scrutiny of Bills Committee as a matter of priority and for further external consultation between DVA and the ex-service community, before it proceeds further.

Lastly, the veteran community requires a more detailed understanding of its implications and sufficient time to absorb these implications, before a final version could have its confidence.

**Dated: 14 March 2017 @ 1600**