

20 December 2023

Royal Commission into Defence and Veteran Suicide

By email: engage@thesocialdeck.com

Dear Commissioners,

Proposed new entity to promote the wellbeing of Defence members and veterans

Thank you for the opportunity to provide feedback on the proposed new entity to support the wellbeing of Defence members and veterans.

Our submission focuses on the following aspects of the Consultation Paper:

- Purpose and functions of a new entity.
- Governance and powers of the entity.

Purpose and functions of a new entity

The Consultation **Paper** states that the Royal Commission may recommend that the Australian Government establish a new oversight body (**entity**) focused on holding government agencies to account for the wellbeing of Defence members and veterans¹.

The Paper also states that such an entity is needed to monitor the response of the Government and its relevant agencies to the Royal Commission's recommendations. This would hopefully "achieve real outcomes and long-standing change"² and "be a significant part of good public governance"³.

According to the Paper, the entity would monitor and report on the extent of the adoption, implementation and success of the Royal Commission's recommendations and selected recommendations made by other inquiries (past, present and future)⁴. Among other things, the entity would also analyse and recommend improvements to

¹ Page 2.

² Page 3.

³ Page 5.

⁴ Page 6.

Defence, DVA and other agencies' policies, programs, systems and practices that affect Defence members' and veterans' wellbeing⁵.

A problem with recommendations, generally

A problem with recommendations is that they are not legally binding on the relevant agency to whom they are directed, and once made, a recommendation passes into the political domain to provide a stimulus to political debate. In the absence of a statutory obligation, an agency cannot be compelled to respond to a recommendation, even if a failure to do so might attract criticism or publicity⁶.

It is submitted that for the proposed entity to meaningfully hold agencies to account and monitor responses to recommendations, it should have the power to compel agencies to make a decision as to whether or not recommendations will be adopted within a reasonable time and provide a statement of reasons for that decision.

An example of this approach can be found in the United Kingdom under [section 31](#) of the *Local Government Act 1974* (UK). Among other things, section 31 places an obligation on the "authority concerned" to consider a report by the Local Commissioner and respond within three months of receiving the report with the details of the action it has taken or proposes to take: s 31(2).

If the Local Commissioner does not receive a response within the required time frame or is not satisfied with the action that has been taken or proposed, the Local Commissioner must make a further report setting out those facts with recommendations⁷. The Local Commissioner may also require the authority to provide a statement to be published consisting of:

- the details of any action recommended by the Local Commission in its further report which the authority has not taken,
- such supporting material as the Local Commissioner may require, and
- if the authority so requires, a statement of reasons for their having taken no action following the report⁸.

⁵ Ibid.

⁶ See for example, reports made by the Commonwealth Ombudsman under section 15 of the *Ombudsman Act 1976* (Cth). Section 16 of the *Ombudsman Act 1976* (Cth) allows the Ombudsman to inform the Prime Minister if it is of the opinion that adequate and appropriate action has not been taken by the relevant agency. However, *'[t]he report to the Parliament, with the attendant publicity and the possibility of Parliamentary censure of the Department or agency concerned, is the ultimate sanction possessed by the Ombudsman. He cannot compel the Department or other agency to put his recommendations into effect. Nor does he have the power to overrule a decision and substitute his own view of what ought to have been done'* (Explanatory Memorandum to the *Ombudsman Bill 1976*, page 1-2).

⁷ S 31(2A) of the *Local Government Act 1974* (UK).

⁸ S 31(2E) of the *Local Government Act 1974* (UK).

Under s 31, the statement must be published in two editions within a fortnight of a newspaper circulating in the area of the authority agreed with the Local Commissioner, or in default, a newspaper nominated by the Local Commissioner, and must be done at the earliest practicable date⁹.

It is submitted that the above powers, or similar powers, should be given to the proposed entity so that recommendations are responded to within a reasonable time and not “kicked into the long grass”.

It is submitted that the power to compel agencies to respond to recommendations and publish statements in the media if such responses were deemed to be unsatisfactory would enhance the entity’s ability to hold agencies to account, “be a significant part of good public governance”¹⁰ and “achieve real outcomes and long-standing change”¹¹.

Further accountability by way of judicial review?

The UK approach under s 31 of the *Local Government Act 1974* (UK) also means that the decisions of the authority concerned are amenable to judicial review and may be quashed if the response to a Local Commissioner’s report is unlawful¹².

In Australia, the courts would have jurisdiction to review a decision by an agency if the decision would confer, alter or otherwise affect legal rights or obligations¹³, or if a matter raised a justiciable controversy that concerned some immediate right, duty or liability¹⁴ for determination.

In the context of veteran suicide and wellbeing, the question of whether a decision by an agency in response to a recommendation would be amenable to judicial review may depend on the nature of the recommendation involved and whether the decision would affect legal rights.

Nonetheless, it is submitted that the mere possibility of judicial review of an agency’s decision in response to recommendations would promote good public governance and decision making and is therefore another reason why the proposed entity should have the abovementioned powers.

⁹ S 31(2F) of the *Local Government Act 1974* (UK).

¹⁰ Page 5.

¹¹ Page 3.

¹² *R (on the application of Bradley and others) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin).

¹³ *Griffith University v Tang* (2005) 221 CLR 99 (regarding whether a decision is made under an enactment for the purpose of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)).

¹⁴ *Re Judiciary Act and Navigation Act* (1921) 29 CLR 257 (regarding applications for constitutional writs under s 75(v) of the *Constitution* or 39B of the *Judiciary Act 1903* (Cth)).

Recommendation:

The proposed entity should have the power to compel relevant agencies to respond within a reasonable time to the recommendations of the Royal Commission and previous inquiries. Agencies should also be required to provide a statement of reasons in support of their decisions.

Governance and powers of the new entity

We agree with the Paper that the proposed entity should not be subject to public interest immunity and other objections, immunities and privileges. It is submitted that the actions and decisions of the proposed entity should also be susceptible to judicial review and not be immune from legal challenge for “want of jurisdiction”, even if decisions were made in good faith¹⁵. It is submitted that the possibility of judicial review would promote lawful decision making and good governance of the entity.

Submission to the National Commissioner for Defence and Veteran Suicide Prevention Taskforce

The functions and powers of the proposed entity in the Paper appear to be similar in some respects to those proposed in the Bill for the National Commissioner for Defence and Veteran Suicide Prevention in 2020.

Accordingly, we attach our submission to the National Commissioner for Defence and Veteran Suicide Prevention Taskforce in September 2020 which contained our feedback on the Bill at that time for your consideration.

Thank you again for the opportunity to provide feedback. If you have any questions or would like to discuss this matter further, please contact Gerard McAleese, Senior Solicitor, Veterans’ Advocacy Service at Legal Aid NSW

Yours sincerely



Monique Hitter
Chief Executive Officer

Enclosure:

Legal Aid NSW Submission to the National Commissioner for Defence and Veteran Suicide Prevention Taskforce

¹⁵ See by way of contrast, s 35A of the *Ombudsman Act 1974* (NSW).

National Commissioner for
Defence and Veteran Suicide
Prevention Bill 2020

Legal Aid NSW submission to the
National Commissioner for Defence
and Veteran Suicide Prevention
Taskforce

September 2020

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships

include 29 Women's Domestic Violence Court Advocacy Services.

Our Veterans' Advocacy Service is a state-wide service providing legal advice, assistance and representation to people who have served in the Australian Defence Force, including veterans and their dependants.

Legal Aid NSW welcomes the opportunity to make a submission about the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 (the Bill). Should you require any further information, please contact:

Gerard McAleese
Senior Solicitor
Veterans' Advocacy Service
Civil Law Division

Introduction

The Veterans' Advocacy Service

The Veterans' Advocacy Service (VAS) sits within the Civil Law Division of Legal Aid NSW and is a state-wide specialist service providing legal advice, assistance and representation to current and former members of the Australian Defence Force (ADF) and their dependants.

The VAS advises, assists and represents veterans regarding their rights and entitlements under the *Veterans' Entitlements Act 1986*, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and the *Military Rehabilitation and Compensation Act 2004*. This area of law is commonly described as 'veterans' law'.

Within this legislative framework, the VAS assists clients to obtain a range of benefits including disability pensions, compensation for incapacity for work and permanent impairment, medical treatment costs and rehabilitation.

Primary claims, representation and advocacy at tribunals and courts

The scope of the work of the VAS is broad and ranges from assistance with primary claims to representation and advocacy in the tribunals and courts.

The VAS has a team of advocates and solicitors who represent veterans in applications for merits review to the Veterans' Review Board (**VRB**) and the Administrative Appeals Tribunal (**AAT**), and in matters in higher courts including the Federal Court. The team's work involves case preparation and representation in proceedings, including hearings and alternative dispute resolution processes such as conferences and conciliations.

The VAS offers representation in all applications to the VRB subject to a merit test. Representation is provided by an in-house lawyer or advocate through Legal Aid NSW's Extended Legal Assistance (ELA) service. ELA includes funding of up to \$500 per case for disbursements, such as any necessary expert reports. ELA for this service is not means tested and is only provided by the in-house practice.

Legal Aid NSW provides representation through a grant of legal aid for veterans' law cases in the AAT in accordance with Legal Aid NSW policies and guidelines. A merit test applies, and a means test also applies for some matter types.

Where grants of legal aid are made for representation at the AAT or court, matters are conducted either 'in-house' by the VAS or assigned to private legal practitioners on the Legal Aid NSW panel for veterans' law.

The VAS provides advice on veterans' matters by phone, at face-to face appointments and by email. The VAS also has health justice partnerships with South Coast Private Hospital in Wollongong and the National Centre for Veterans' Healthcare at Concord Hospital in Sydney. This enables us to provide assistance to the most vulnerable veterans with severe mental

health issues and refer them to community support services and other specialist teams within Legal Aid NSW.

The VAS also attends Defence transition seminars. This involves providing a stall and engaging members of Defence to tell them about our legal service and how Legal Aid NSW can help them at the greatest point of risk to their mental health¹.

The VAS delivers community legal education (CLE) with ex-service organisations through the Australian Veterans' Law Advocacy Network and organises and hosts various activities. The VAS also engages with key stakeholders, such as ex-service organisations and hospitals, which are a source of referrals.

As well as offering expert help in veterans' law the VAS supports clients by making warm referrals to other specialist and general legal services within Legal Aid NSW. Veterans and their dependents frequently contact the VAS about other legal problems and the VAS is able to make effective referrals on a range of issues including consumer and debt problems, fines, employment, family law, and crime.

Our submission

Our submission focuses on the following aspects of the Bill:

- The Commissioner's power to make recommendations.
- Restorative engagement processes.

Recommendation powers

Clause 11(1)(b) of the Bill allows the Commissioner to make findings and recommendations following its inquiry into the circumstances of a death by suicide. Under the Bill, the recommendations may relate to:

- the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies, and
- any policy, legislative, administrative or structural reforms².

Clause 11(2) of the Bill provides that it would not be within the Commissioner's functions to make findings of civil or criminal wrongdoing or make findings about the cause of death in relation to a defence and veteran death by suicide.

It is our recommendation that the Commissioner should also have the power to recommend a **reparation payment** to the immediate family of the defence member or veteran in circumstances where the death was related to service, and where the family are not dependants of the defence member or veteran.

¹ <https://www.abc.net.au/radio/programs/am/young-veterans-at-increased-risk-of-mental-illness-and-suicide/10471736>

² Cl 11(1)(b) of the Bill.

Under the current veterans' entitlements legislation, dependants may claim compensation or damages for the death of the defence member or veteran. But compensation is not available for the immediate family members of the deceased who are not dependants, such as parents and siblings, who are nonetheless ineffably affected by the death of the deceased.

Non-dependant family members can make a claim under the Scheme for Compensation for Detriment caused by Defective Administration (**CDDA Scheme**). However, in our view such claims are inadequate in the context of veteran suicide for many reasons, including the following:

- i. It must be established that the death was contributed to by the defective administration of a Non-Corporate Commonwealth Entity (**NCE**), such as the Department of **Defence** or the Department of Veterans' Affairs (**DVA**).
 - o This involves establishing fault on the part of the NCE, which is not required for the dependants of the deceased under the veterans' entitlements legislation, which is a no-fault statutory compensation scheme. This causes inequity to the immediate families of the deceased.
 - o Research shows that ex-serving members are at greater risk of suicide than the general population³, and that the transition from Defence to civilian life is the greatest point of risk to the mental health of members leaving Defence⁴. Although suicide may be related to service, it can occur with or without fault being attributed to another individual or entity. In these circumstances, non-dependant family members would have no recourse to compensation under the veterans' entitlements legislation or the CDDA Scheme.
 - o For the purposes of the CDDA scheme, 'defective administration' is defined⁵ as:
 - a specific and unreasonable lapse in complying with existing administrative procedures; or
 - an unreasonable failure to institute appropriate administrative procedures; or
 - an unreasonable failure to give to (or for) an applicant, the proper advice that was within the officer's power and knowledge to give (or reasonably capable of being obtained by the officer to give); or

³ Report by the Australian Institute of Health and Welfare, *'National suicide monitoring of serving and ex-serving Australian Defence Force personnel: 2019 update'*, 29 November 2019

⁴ <https://www.abc.net.au/radio/programs/am/young-veterans-at-increased-risk-of-mental-illness-and-suicide/10471736>

⁵ Australian Government, Department of Finance, fact sheet, *'The Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)'*

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- giving advice to (or for) an applicant that was, in all the circumstances, incorrect or ambiguous.
 - It is uncertain whether systemic failures that may contribute to suicide, such as inadequate support services for current and former members, would fall within the above definition of defective administration, particularly if the failures involved more than one individual or entity.
- ii. A claim under the CDDA Scheme may take years to be determined, which is unsuitable for grieving families who want immediate action in response to a death or suicide.
 - iii. The CDDA Scheme is an administrative, not a legislative, scheme established under section 61 of the Constitution⁶. Decisions under the CDDA Scheme are therefore not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)⁷. This limits the options for review for families claiming compensation under the CDDA Scheme and means that decisions under the scheme are less accountable than those made under legislative schemes. This is an undesirable outcome in matters involving suicide.
 - iv. Compensation under the CDDA Scheme is discretionary, which means there is no certainty of outcome for the family of the deceased (either by way of an acknowledgement that defective administration occurred or by way of an appropriate amount of compensation).
 - Reparation payments under legislation, while also discretionary, would at least provide some certainty as to the potential amounts that can be provided to claimants, as they would be prescribed by legislation. Examples include the reparation payments that were available under the Defence Abuse Response Taskforce (**DART**) and those currently administered by the Defence Force Ombudsman (**DFO**) under the *Ombudsman Regulations 2017* (Cth).

In our submission, a reparation payment would be a fairer, more appropriate and suitable mechanism for the surviving families of deceased members than a claim under the CDDA Scheme, as it would acknowledge that veteran suicides are preventable and have a lasting and serious impact on the surviving families. This can be achieved without the Commission making a finding of wrongdoing or fault, as is required under the CDDA Scheme. A reparation payment would not be compensation and would not release the Commonwealth from liability⁸.

The following case study is based on information provided to us by the surviving mother of a veteran who died by suicide in 2017 and illustrates the issues which have been discussed

⁶ Australian Government, Department of Finance, fact sheet, '*The Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)*'

⁷ *Smith v Oakenfull* [2004] FCA 4.

⁸ See, for example, the Explanatory Statement to the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017*.

above. Legal Aid NSW has not corroborated this information but believes it to be true based on discussions with the late veteran's mother.

Case Study 1

The second of three sons, Martin⁹ had a very happy childhood. He did well at school, was popular and was an intelligent and focused young man. In 2014, after working in several casual and short-term jobs, he enlisted in the Army aged 25. He successfully completed Basic and Infantry training, before posting as a rifleman to one of the battalions of the Royal Australian Regiment. He successfully completed Jungle Warfare, Reconnaissance and Sharpshooter training.

After these courses, Martin reported to his family that he was subjected to various bullying episodes. His family was not made aware of all the details but understood he was subjected to denigrating comments, being picked out for trivial and demeaning tasks and experiencing threats and harsh punishments for minor infringements.

Martin was becoming more anxious and by Christmas break in 2016 he was struggling with his mood – he was extremely angry and quick to react in an abusive and angry (but non-violent) manner. As the time to return to his post approached, his demeanour deteriorated further.

Upon his return to duty, Martin was feeling very anxious and depressed about having to resume work. He could not sleep and was not coping with his situation. He reported these issues with the Padre on base, which resulted in him being immediately admitted to hospital in the Psychiatric Ward for approximately 6 weeks. He did not have visitors and felt abandoned and isolated. After discharge from hospital, Martin was administratively discharged as it was not in the interests of the ADF to retain him. This denied him a medical discharge and an invalidity pension from MilitarySuper.

After discharge he found it difficult to hold down jobs and maintain relationships. His anger, anxiety and depression had become severe. His long-term girlfriend ended their relationship and he started using tobacco and alcohol excessively.

Martin's family contacted a psychiatrist and an ex-service organisation advocate to pursue rehabilitation, a retrospective medical discharge and his entitlements with DVA. Delays with the first psychiatrist providing a report and delays with DVA all combined to increase Martin's despair.

Martin discharged in April 2017 and attempted suicide for the first time in early October by gassing himself in a car, which was self-terminated. At that point his family made Martin an urgent appointment with a psychiatrist at a DVA-contracted psychiatric hospital in Sydney.

⁹ Martin is not his real name.

Despite Martin having multiple major risk factors, such as attempted suicide, weight loss, increased alcohol intake as well as medication from another psychiatrist, the new psychiatrist stated that she felt he was not a risk to himself or others and did not need to see him again. He was sent away without any new therapy, pharmaceutical support or follow up.

At the end of October 2017, Martin tragically suicided. He died without dependants.

Martin's abuse in Defence occurred after 30 June 2014, which meant he had no recourse to the DFO's reparation and restorative engagement scheme.

His family are traumatised and are grieving his loss. They have no recourse to compensation under the *Military Rehabilitation and Compensation Act 2004*, as they are not dependants. They are also not eligible to participate in a restorative engagement conference under the DFO's scheme for reporting abuse.

Recommendation 1

The Commissioner's recommendation powers under the Bill should be extended to include reparation payments for the immediate families of the deceased (parents and siblings), particularly where the death was related to service.

Restorative engagement

Clause 12(2) of the Bill states that the Commissioner should take a trauma-informed and restorative approach as a general principle for the performance of the Commissioner's functions.

The Explanatory Memorandum to the Bill states that a trauma-informed and restorative approach '*means the principles of choice, safety, confidentiality, consultation and informed participation, for example, will underpin the way the Commissioner undertakes their role*'¹⁰.

It is not possible to tell from the Bill or the Explanatory Memorandum what a trauma-informed and restorative approach by the Commissioner will look like until it is implemented. Guidance can be taken from the approach taken by the DFO, which offers restorative engagement conferences to eligible claimants who report abuse in Defence.

A restorative engagement conference is defined under the *Ombudsman Regulations 2017* to mean '*a process facilitated by the Defence Force Ombudsman or another person in which a complainant engages with a member of Defence to have their complaint of abuse acknowledged*'¹¹.

¹⁰ At [6], page 3.

¹¹ Reg 5 of the *Ombudsman Regulations 2017*.

The website of the DFO elaborates on this definition by stating that restorative engagement is designed to support the complainant to tell his/her personal story of abuse to a senior representative from Defence in a safe, private, facilitated meeting. The conference also provides the opportunity for Defence to acknowledge and respond to his/her personal story of abuse¹².

In our experience, the DFO's restorative engagement processes have been valuable to our clients, and clients have generally expressed an interest in participating in this process. It is our recommendation that the Commissioner adopts a similar approach to restorative engagement in performing the functions under the Bill.

We also recommend that the Commissioner should have the power to order the ADF to engage in restorative engagement processes with the family members of veterans who suicide, including non-dependant members.

Our experience with the DFO restorative engagement process has generally been positive, and it has highlighted the need for an approach which has as some of its important features:

- i. a deep understanding of military culture by service providers and meeting facilitators
- ii. skilled and trauma-informed practices
- iii. access to free, independent advice and support for participants about the process
- iv. independent personal support in restorative engagement conferences
- v. participant feedback about the restorative engagement process in order to improve its effectiveness

Recommendation 2

The Commissioner should adopt a similar approach to the Defence Force Ombudsman in reports of abuse matters by adopting restorative engagement processes as defined by the *Ombudsman Regulations 2017*.

Recommendation 3

The Commissioner should have the power to order the ADF to engage in restorative engagement processes with the family members of veterans and defence members who suicide, including non-dependant members.

¹² <https://www.ombudsman.gov.au/How-we-can-help/australian-defence-force/reporting-abuse-in-defence>