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Proof Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

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

(Public)

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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

Wednesday, 15 March 2017

Members in attendance: Senators Back, Fawcett, Kakoschke-Moore, Lambie, Moore.

Terms of Reference for the Inquiry:

To inquire into and report on:

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

WITNESSES

McCABE, Ms Pat, OAM, President, TPI Federation of Australia

THORNTON, Mr Peter, Private capacity

Committee met at 09:30

CHAIR (Senator Back): Good morning. I declare open this public hearing of the Senate Foreign Affairs, Defence and Trade Legislation Committee. This public hearing is in relation to the committee's inquiry into the provisions of the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016. I welcome everyone here today. In the room we have Senator Lambie, Senator Moore, Senator Fawcett and Senator Back and I understand we have coming in via the airwaves Senator Kakoschke-Moore. This is a public hearing and a *Hansard* transcript of the proceedings is being made.

Before the committee starts taking evidence I remind all witnesses that in giving evidence to the committee you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee of the Senate.

I emphasise that, while the committee prefers all evidence to be given in public, under the Senate's resolutions witnesses have the right to request to be heard in private session. If you would like any of your evidence to be heard in camera, please do not hesitate to alert the committee. If a witness objects to answering a question, the witness should state the grounds upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. As noted previously, such a request may be made at any time.

I remind people in the hearing room to ensure that their mobile phone is turned off or switched to silent. If it is audible, you may care to make a donation to the RFDS.

I welcome Mr Peter Thornton and Ms Pat McCabe. I acknowledge and thank you for the quality and depth of the submission that you have made to this committee. It is a long flight from Perth to Canberra, Mr Thornton, and I can assure you that the time is well spent. I understand Ms McCabe will make an opening statement and you have furnished us with a copy. Would you like to proceed before we go to questions?

Ms McCabe: Peter and I would like to thank the committee for the opportunity to appear here today. Peter and the federation believe that the recommendations developed for not only this inquiry but also the veteran suicide inquiry need to fully recognise that the scale of issues affecting ADF personnel and the veteran community is enormous and that any final determinations must produce real, tangible and beneficial outcomes.

The complex nature of the three interrelated compensation acts that generally impose higher standards of proof on a veteran seeking fair compensation is clearly the nexus upon which many concerns rest. The Senate committee's inquiry into veteran suicide, where many hardships and frustrations have been well demonstrated and articulated, is surely testament to this. Peter's submissions, and that of the federation, have attempted to highlight and address some of these concerns for the committee's serious consideration. Peter's recommendations to this inquiry, which also accord with the federation's views, aim to reduce this complexity and associated administrative burden by suggesting that the parliament (1) amend legislation so it reintroduces dual eligibility to VEA and SRCA for all veterans concerned from 1972 up until the effective date of the MRCA, (2) provide all VEA gold card holders and the equivalent classification under SRCA immediate and reciprocal access to the provisions of compensation to which a veteran may be entitled but to which that veteran may not have yet claimed, (3) remove the offensive 'safety net payment' term and repeal the offsetting mechanism that applies specifically to special rate disability pension recipients and (4) increase the quantum of the SRDP TPI compensation payment because 65 per cent of the minimum wage is hardly a fair and equitable level of compensation for a lifetime of economic loss for our most disabled special rate TPI veterans.

These recommendations complement the many found in Peter's submission to the veteran's suicide inquiry, particularly his recommendation 10, where Peter clearly illustrates by way of his runner's knee example the prescriptive and inflexible nature of the SOP assessment system. This is an example that should reinforce in the minds of the committee the dire need to empower DVA claims delegates with powers of discretion so as to invite harmony back into the claims determination process not only for the benefit of veterans but also for DVA staff. Peter's research sadly illustrates how DVA staffing levels have been decimated over the last decade or so and this, together with the knowledge that staff continue to operate antiquated and disparate IT systems, clearly explains why DVA service delivery to our veterans has suffered over time.

The need for a dedicated, well-resourced, knowledgeable, empathetic and patient DVA is considered absolutely paramount to the long-term stability and wellbeing of our ADF personnel and veteran community and their families when dealing with issues not least pertaining to civilian transition, rehabilitation, compensation, income support, medical provisions and aged care. Any suggestion or notion that another department or agency could do it better just fails the litmus test when one considers the constant bureaucratic quagmire the failures that occur almost daily elsewhere. The parliament can ill afford to subject its ADF personnel and veteran community to such an environment, no matter what assurances are proffered by the government of the day.

Again, we thank the committee for this opportunity and we now welcome any questions you may have in determining real, tangible and beneficial outcomes for the veteran community.

CHAIR: Thank you.

Senator LAMBIE: Mr Thornton, first of all, thank you for all the submissions you put in—they help me out a lot—and thank you for the continual correspondence I have with you. You have raised issues in this submission and in the submission to the veteran's suicide inquiry about complexity. Can you go into that further?

Mr Thornton: Thank you, Senator Lambie, and the committee as well. The complexity of the three acts that impact on ADF personnel and the veteran community is summarised to some degree in annex A of this submission. From 1973, the Whitlam government introduced dual eligibility for both the Commonwealth compensation act and the veterans' entitlements act at that time which was the Repatriation Act. In 1986 that all changed with the introduction of the VEA. Subsequent to that, there were changes where some people would have their eligibility for dual eligibility taken away. Again, I would refer you to annex A because it really spells it out. That is why there is a recommendation to go back and get rid of all that complexity. The problems are for veterans and their representatives trying to frame claims and work out where they fit in that quagmire, and it is just as difficult for DVA staff. They have to sit there and try and pinpoint whether the fellow is eligible under that, whether that date is consistent. Then they have to work out whether it is operational service, peacetime service or hazardous service. I can go on and on and on, but the reality is that the whole thing has just become so complex, and it is overlaid with significant changes. That would be a very major positive outcome from the committee—if we were able to achieve a reduction in complexity not only for the veterans but for the department as well.

Senator LAMBIE: I have one more question to follow up about that. You have heard us alert that they are screaming for a royal commission into veterans affairs. I am not 100 per cent sure exactly what that is going to do. What do you think about a forensic audit into veterans affairs, by an independent body, to finally get to the bottom of what is going on?

Mr Thornton: I guess that may have merit. A lot of the things are already known, so an audit would help perhaps to quantify and qualify that into a set of—

Senator LAMBIE: The reason I ask for a forensic audit is it is going to go into every nook and cranny. That is why I am asking you for a forensic audit, and that is what I expect to be done by an independent body. We can do so much here as an inquiry, and that is great, but, quite frankly—I think you know what I know—a group of people need to be in there, and they need to be seeing it from the top of the executive right down to the bottom. We already know there are over 100, or 130, computer systems that they are using. Something needs to be done, and I think this is the only way we are going to be able to clean it up; otherwise, you and I are going to be sitting here in six years time doing this.

Mr Thornton: Being an ex-director of development I would suggest that computer systems are modelled on whatever you input into those systems. So, if those systems are complex already, developing algorithms that will spit out a favourable outcome, or not, will be a difficult process. Again I come back to: if you actually deal with the complexity—perhaps you could use the forensic inquiry or investigation, as you suggest, to pinpoint that complexity—and break it down into finite chunks, I think there is probably merit in that.

Senator MOORE: Welcome, and thank you for your submission. I have a couple of points. One, Mr Thornton, is about the question you put on page 3 of your submission, which is a direct question to the department. I will ask that question of the department directly so we can get something on record for you on that.

Mr Thornton: Thank you.

Senator MOORE: The other thing I want to ask you is about consultation. A number of the submitters have said that they felt that there was very limited consultation on this process. You would be aware that the minister, in his speech, actually talked about the fact that this bill has been around for a long time and everyone has had a chance to have their say. You and Ms McCabe, from your organisation, are both deeply involved in everything

that is going on around DVA. Would you like to make a comment about how you feel about the consultation and the timing of this bill?

Ms McCabe: It has been around for about two years—I am on ESORT as well—and it was not really brought to ESORT's notice as being a piece of legislation that was due to be passed. It was still in the consultation process. And then the minister made the announcement that it was going through. Then the Senate hearing happened. We had such a short time frame to get ready for that. So it has all been very, very fast. We have not had time to go through it properly. That is my criticism of it. Do you want to add to that?

Mr Thornton: I would like to actually thank the committee for laying some tank traps down and putting some speed bumps in place because—

Senator MOORE: Are they technical terms, Mr Thornton!

Mr Thornton: Yes! I found out about this bill just by happenstance. I only had a chance to really read the explanatory memorandum, which is ultimately what parliamentarians read. They do not get into the nitty-gritty of line items within the draft bills themselves unless someone raises an issue, so you are relying on those explanatory memoranda. I will put that excerpt into the submission. It was only by the very kind considerations of Mr Griffiths, the secretary, who provided an extension of time that I was able to contribute to this; otherwise I would not have been able to. I think you are 100 per cent right. It may be known in some circles, but, unfortunately, there is an element of secret men's business that goes on with some of this. I am not going to apologise for saying that. I think that is rather unfortunate. ADF Super was rushed through parliament with no open consultation—white papers or green papers—on such a significant piece on conditions of service. For people not to be able to make a contribution to that was appalling.

By the kindness of Mr Les Bienkiewicz, who is sitting in the public gallery here, DFWA published an article I wrote about that. Unfortunately, the parliament has now passed a piece of legislation that effectively provides no financial protections for ADF personnel. They are exposed to financial risk in the passage of that superannuation legislation. That is why I have recommended—I think in the veteran suicide submission or perhaps in this one—that the parliament should reopen MSBS and allow members to choose which scheme they would like to be in.

Senator MOORE: I think that is the veteran suicide one.

Mr Thornton: Yes.

Senator MOORE: I just want to get it clear in my mind that your submission to this one is actually looking at issues way beyond just the bill that is in front of us and that you are looking at this being an oncoming discussion with the department and with the minister over a range of issues. I know you have read the minister's speech, and in that speech he makes the point that this is a step in bringing this particular piece of legislation under the control of the DVA; it is a step towards an ongoing process. From my point of view, as someone who does not have a lot of experience in this portfolio, in reading your recommendations it seems that this also warrants further discussion. You have linked it to this piece of legislation because it is in front of you more than there being a particular link with this legislation. You want more discussion around a range of issues which you have highlighted in your submission. Am I verballing you or is that an accurate reading?

Mr Thornton: I think you are 100 per cent correct there. The biggest problem is that this piece of legislation has been introduced in preparation to supposedly 'harmonise it' with MRCA. I can tell you that MRCA and VEA are why you are holding a veteran suicide inquiry. Last week, there was another veteran—after two years of dealing with a department that had continued to push back because he could not comply with the very rigid and prescriptive guidelines. The problem is that the department has presented this current legislation. Clearly, it already knows what it is going to change and how it is going to harmonise. Why aren't they revealing that as part of the consideration as to whether this bill is actually worthy of going through or whether it just remains with SRCA in its current form? I think that is the thing.

Senator KAKOSCHKE-MOORE: I only have a couple of questions. This is flowing on from the questions Senator Moore just asked. What, in your view, is the benefit of having the Veterans' Affairs-specific provisions of the SRCA remain in the SRCA rather than pulling them out and making the Veterans' Affairs provisions stand alone in their own act?

Ms McCabe: If it were just excising the Defence portion of SRCA into DRCA that would probably be better than nothing. It would be better to have something beneficial come out of that. But to be told that there are no alterations except the name of it has proven to be totally wrong. That is the worrying part: what is really behind it all.

Senator KAKOSCHKE-MOORE: Is there any specific alteration that is of the most concern to you?

Mr Thornton: I think it has been well articulated—I must admit I have not researched this in any detail myself—that the Henry VIII clause at face value appears to be beneficial. But it then effectively could potentially take away legislative and parliamentary oversight. Changes can happen and it is only by virtue of the fact that a parliamentarian of either house could put in—I cannot remember what the actual order was—something that sits in that regulation or that change. It would take 15 days and then it—

CHAIR: Disallowance.

Mr Thornton: A disallowance, that is right. That disallowance can be looked at from two perspectives. It could be beneficial, but only if someone in the know actually knows that that regulation is going to be changed under the clause. Let's face it: we did not even know about this bill going through. That disallowance is 15 days. That is on the beneficial side. On the detrimental side it could end up being something that becomes part of political skulduggery by someone that is a parliamentarian—I apologise up-front for casting an aspersion—or a representative of an electorate that has no veteran constituents or very few veteran constituents and for whom putting that disallowance in would have no impact. I do not know that the political jockeying would go to that extent, but that is one of the initial concerns that I had. We see a lot of it here in the parliament and it is unfortunate that it happens. Whether it would happen with regard to veterans—I apologise again for casting aspersions against the honourability of anyone specifically—I think is a concern. I think that clause does not allow the parliament to have proper parliamentary oversight and the ability to actually engage with people that could spend the time to research and provide you with good advice or at least put another tank trap in place to be sure.

CHAIR: In general terms, I can assure you having a disallowance clause present is an awful lot better than not having it present. Senator Kakoschke-Moore, have you finished?

Senator KAKOSCHKE-MOORE: I just have one more. In Slater and Gordon's submission they touched on the fact that with the current SRCA claims are treated generally more favourably than under the MRCA or the VEA because the statements of principles apply to Defence members and all Commonwealth public servants. One of the concerns about aligning the SRCA with the MRCA and the VEA is that claims may in fact become more difficult to prove. In your submission you raise the example of runner's knee. Are there any other examples of claims where you have experienced differences in the ease or otherwise with which they can be proven?

Mr Thornton: For myself, personally, no, because I do not operate in that pensions office or advocate space. I am sure there would be a plethora of examples where the prescriptive nature of the SOP would be detrimental to the—I guess what I said in my submission is that you just have to look at SRCA at the moment. My understanding of SRCA—I have not applied for that—is that under SRCA you have two doctors' certificates and then Comcare signs off on it. This is just talking generally now. But, with regard to MRCA and VEA, the application of SOP is so prescriptive and inflexible that that would definitely be a disadvantage. The subsuming of DRCA into and underneath the umbrella of the veterans' portfolio, particularly where they have said they want to harmonise to the MRCA, I think there needs to be a lot of questions placed in front of the department about what harmonisation—and, perhaps, even the minister himself. Where you have made these comments, cough up what amendments you already know you are going to do. What is the long-term projection before we go and change the landscape here?

Ms McCabe: There is also an impact on entitlements. This has already been reflected in the hearing aid entitlements for people under SRCA. Once it changes to DRCA the entitlement will be lowered to what the other three acts have. The public servants get a higher hearing aid entitlement. About 525—I think it was—already have hearing aid entitlements, and they will lose some of those entitlements or have it lowered.

Senator FAWCETT: Firstly, on the disallowance, whilst one member can put it in it has to be voted on by the whole of the Senate. It means that lots of people get a chance to either say, 'Yes, it's a sensible disallowance,' or , 'No, it's not.' So it is not as though one person holds sway—just to give you some comfort there, Mr Thornton.

On that last point that you just raised, Ms McCabe, item 2 of part 2 of schedule 1 in the bill specifically says that at the time an injury was sustained—so, perhaps, a hearing loss—that part means that the conditions of SRCA that were relevant at the time when that hearing was sustained will continue to apply to the veteran. And the Henry VIII provision means that the minister has the discretion to ensure that that occurs. I am just struggling to understand why you think there will be a detriment when the bill very specifically says that the conditions that exist currently will be sustained.

Ms McCabe: At ESORT, we have been trying to get confirmation of this. The department to date has not been able to confirm that these 525 will not have their entitlements lowered. Even would it is in the act, they have not been able to actually confirm that.

Senator FAWCETT: The act, at the end of the day, is the rule against which things will be measured. And the act says—

Ms McCabe: Well, it seems strange that they will not confirm that.

Senator FAWCETT: We can certainly ask them today to confirm that. But in their written submission they highlight right upfront that that clause exists and that the intent of the Henry VIII clause—by bringing this under the minister—means that he has the ability to make sure that the application of that works to the benefit of the veteran so that the veteran does not in fact lose any level of entitlement they may have previously had. So we can ask them, again, to put it on the record. But the act—

Ms McCabe: You will get an answer—yes.

Senator FAWCETT: The submission seems to lead towards that.

In your opening statement, you talked about reintroducing the dual eligibility for VEA and SRCA. My understanding is that, in 1994, SRCA was expanded to include operational service, and that the reason dual eligibility was removed was so that somebody was not eligible for compensation twice for the one injury. I am just wondering why you are looking to see the dual eligibility. Are you really looking for somebody to have the option to either go VEA or SRCA, or are you actually saying they should be eligible to be compensated twice for the one injury?

Mr Thornton: No.

Ms McCabe: No. It is definitely not double-dipping. But there are services available in SRCA that are not available in, say, VEA, and if you served in times overlapping those periods, because you are under VEA, say, you are not entitled to anything under SRCA, even though it is not available under VEA. So it is those sorts of entitlements more than anything where we are looking at cross-pollinating between the two.

Mr Thornton: If I could just add to that: one critical thing I hope that the committee may have picked up from both of my submissions—and, Senator Fawcett, I know that you have a background in the military, so you would know this—is that peacetime service, training for war in peacetime, can be as high-risk as being in a field of conflict.

Again, I come back to this: you just have to look at the statistics now to know. Five thousand people in the Army alone, let alone in the other services, were injured and/or sick to some degree as of 30 September last year. That gives you some sort of an idea.

You all remember the old adage—and Senator Lambie would remember this as well—that you have to train hard to fight easy. That is what underpins military training. I am not sure whether you guys actually did it, but I did truck exits on the move, where you are running from the front of the vehicle and launching yourself out of the back of the truck, with webbing and rifle on—hopefully not going 't-t-t-t-t-t'—and having to overcome that forward momentum of the truck, and then going to ground to take up a firing position, or a defensive position or whatever the drill is. I could not count on two hands the number of times we did those drills, let alone doing a live-fire and shoot, leopard-crawling up the range on knees and elbows, firing and shooting. So all of that stuff underpins that adage, 'Train hard to fight easy'. That is the reason for bringing back the dual eligibility, as was originally intended in '73: it is so that there is no disparity between the service of the individual.

Again I come back to the point that you just reduce the complexity of trying to assess where that person fits into the whole scheme of things. As to the 1994 act that you spoke about, it was operational service and non-hazardous service and peacekeeping; I think those were the three categories that were reintroduced. So, again, it is just another element of complexity, but a recognition that, 'Aw, gee, maybe we went a bit too far there.' But again, just add it back in.

Senator FAWCETT: So is what you are suggesting there that the way these have often worked in the past is that you are either under one scheme or the other? What it sounds like you are proposing is that a veteran should be entitled to the best elements of either scheme if they were eligible during that period.

Mr Thornton: Yes. When the parliament introduced dual eligibility in 1973, there was always the clause that the individual could not draw double compensation. This would actually allow veterans to be eligible for both SRCA or DRCA and VEA, up until 2004, and then give them a greater range of provisions to draw upon. As an example, under SRCA, the individual's estate can be reimbursed—I cannot remember the exact figure—about $10,000 for a funeral, but, under the VEA, it is only $2,000. I can tell you that for a family or a spouse and/or the veteran that has lived a lifetime of financial deprivation because of the significant erosion in their compensation, as I illustrated in my submission, that $10,000 would be if damn sight better than $2,000. That is just one very small example of the range of provisions that could be available. I would do some gardening, which would

include cleaning gutters, but some of those things are not available in the VEA, and then there are other aspects of VEA provisions. It basically allows and gives the flexibility to the veteran and veteran's family to be able to cherrypick between the two schemes so that they can have better outcomes.

It is already there with MRCA. MRCA has essentially brought those provisions underneath one umbrella. I am suggesting that this be beneficial to the department as well, in my opinion, because if they have got dual across the board then they do not have to qualify whether the veteran was in this camp or in that camp or whether they had this or they had that. Then there is the complexity of whether he had operational service at the same time he had VEA.

Senator FAWCETT: If the Henry VIII clause was expanded to give the minister the ability to allow a veteran to do what you have suggested, which is not to be compensated twice but, for example, for their estate to access the better of the two funeral provisions, would that go some way to addressing your concerns?

Mr Thornton: Effectively, that was the case leading up to 1986. I cannot see why you cannot just legislate that. If you remove all of these arbitrary things from this table, you would simplify the whole process.

Senator LAMBIE: That is common sense, Mr Thornton—we do not do that!

Mr Thornton: The power of the parliament should be doing this. You have to remember these are legislative—sorry if I am telling you how to suck eggs now—acts of parliament. Parliament should be dealing with this. That is my opinion.

I will go back to the complexity side of it. We have done up a mock example of the runner's knee SOP. This is a legislative instrument. If you were to go and put a caveat on the top of every one of those SOPs to say, 'DVA delegates have impunity to use discretion when consulting this statement of principles where other substantiations and extenuating circumstances exist in the consideration and final determination of a claim,' all of a sudden that would reduce a whole heap of complexity and potentially suicides. For example, there was a young fellow who spent two years trying to navigate—and I do not know the full background of this—such an inflexible and prescriptive set of SOPs that he ended up committing suicide in frustration, leaving a wife and a young child, I am led to believe.

To extend on that, if I may, the DVA ran a review on the MRCA. I talked about that. Then there was a separate review again. It is worth the committee understanding this, so I will just read this. It was with regard to a whole heap of submissions by advocates at the time where they cited section 334 of the MRCA. Basically, that section said that it should provide discretion to discretion makers. But the committee turned around and said:

> While the Committee is of the view that this provision confirms that a decision maker 'must act from a position of fairness and equity and honestly consider all matters relating to the claim', the Committee does not see this provision as conferring the power to decision makers to exercise discretion in individual circumstances where there is 'substantial compliance' with the SoP. The SoPs are legislative instruments and are legally binding on decision makers.

And I think that is something that people do not get—the veteran community included. The DVA staff are handcuffed to the legislation. There is no flexibility for them. They go on to say:

> The system is designed such that decisions are based on a factor in the SoPs being met, and not 'substantially met' for reasons of consistency and adherence to expert evidential judgement.

So, if you want to deal with all the suicides and the complexity of three interrelated acts—one of which is now going to be introduced and they are going to suggest that somehow it is going to be blended or harmonised with MRCA—if it is going to just produce the same outcome, then we have all failed.

CHAIR: Thank you for that. And on that note, the enemy has beaten us. So I do thank you both for your submission and for your presence. I now call representatives from the Alliance of Defence Service Organisations.

JAMISON, Colonel David AM (Retired), National Spokesman, Alliance of Defence Service Organisations

MCLAUGHLIN, Mr Noel, Chairman, Alliance of Defence Service Organisations

[10:11]

CHAIR: Welcome. Could you please state the capacity in which you appear.

Col. Jamison: I am the National President of the Defence Force Welfare Association and National Spokesman for the Alliance of Defence Service Organisations.

Mr McLaughlin: I am Chairman of the Royal Australian Armoured Corps Corporation, appearing in conjunction with Mr Jamison on behalf of ADSO and the RAAC Corporation.

CHAIR: Thank you. Would one of you like to make a brief opening statement before we go to questions?

Col. Jamison: 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 exists 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 partners are voluntary associations dependent on contributions from members and donations from the general public. As such, we have limited access to personnel and financial resources and are no match for the considerable expertise and taxpayer funds available to government departments and instrumentalities. This David-and-Goliath situation is far from ideal and I believe a sad reflection on our elected representatives' understanding of their obligations towards those they are prepared to send into conflict to protect the interests of Australia. Nevertheless, 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.

In relation to DRCA, this situation has impacted the way we have approached this 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 SRCA 1998, and the DRCA 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 that. But now that we have scrutinised 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 that we are able to understand that there are provisions that are cause for concern.

For example, section 89B of SRCA, which deals with ensuring equity in outcomes, is repealed and not replaced. We are concerned that this may conceivably result in inequities for veterans in future outcomes. Claims determinations by computer program: the DRCA bill authorises sweeping powers VEA, SRCA and MRCA to make determinations on claims by way of computer program. This could serve to disadvantage veterans. A recent example of the problems is the recent Centrelink data matching issue, where estimates using the Department of Human Services computer program were wrong in something like 20 per cent of cases. If this were to be replicated in DVA's case, it would take enormous resources from ESOs who perform voluntary unpaid advocacy services for veterans, as there will be a likely increase in appeals. In addition, computer programs may not be able to recognise well settled High Court and Federal Court precedents, and as such veterans could be disadvantaged.

We think that the future digitisation of processes ought to be focused on the sorting and assembly of data to allow delegates to make decisions et cetera and not as a means of decision making without human intervention. Data matching and re-identification of those with protected identities, such as Special Forces, does not seem to have been considered either, especially considering there is going to be a transfer of information.

Transfer of veterans' information with other agencies: in addition the transfer of this information from DVA to 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, psychologists and psychiatrists. A similar provision exists which is found in the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2017, which allows the secretary of DVA to publicly release information on individual veterans' cases to correct public misinformation, without regard to the protected identities or those who previously had protected identity. We seek comfort from DVA that this will not occur.

The Henry VIII clause found in section 121B of DRCA provides unfettered power by delegating legislative power to a person who will then make regulations, including permitting modification of this act. That is why it is a Henry VIII clause. The difference is that our understanding is that in normal circumstances:

> The Governor-General may make regulations … prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act …

This proposal give 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 double-edged sword and has the distinct potential to allow regulations that have the opposite effect. Bearing this in mind, there is also a distinct lack of checks and balances in this aspect of the act, as parliament will not have oversight of these regulations.

CHAIR: Can I just ask how much longer—

Col. Jamison: I am going to conclude now.

CHAIR: Thank you.

Col. Jamison: The spirit and intent of this legislation must remain remedial and beneficial to 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 support this contention. We are of the very strong view that, due to the 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 it to be the subject of 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 before a final version could have its confidence. Thank you.

CHAIR: Thank you for that. Senator Kakoschke-Moore.

Senator KAKOSCHKE-MOORE: I want to go to a comment you made in your opening statement that reinforced a few lines from your submission. Those were concerns that by harmonising the three acts there could be an erosion of the level of support being provided to veterans. Can you expand on that for me?

Col. Jamison: It is in the nature of the administration to try to gain efficiencies out of its operations. When you have three distinct acts, all with their own little wrinkles and components, it is only natural that the department will try to harmonise its processes and the provisions made to veterans.

We have already seen one instance where we believe there has been a degradation in the level of support for hearing impaired personnel. Under the previous SRCA, they were given what were called 'top aids', and these are now being denied. There is great potential—more than great potential, and I believe it will probably happen—that in the harmonisation of the provisions of support available to veterans, the lowest common denominator will become the standard.

Senator KAKOSCHKE-MOORE: You also raised some concerns in your submission about the implementation of more efficient departmental processes. Can you expand on that?

Col. Jamison: At the moment, it takes 150 days for a claim to go through on average. That is outrageous. We should have a simple to administer system that allows a veteran's claim to be processed without any further angst to the veteran and in a very efficient way. And if it is not done within, say, 21 days, we should be asking questions, which we have been for some time.

Senator KAKOSCHKE-MOORE: In your experience, is there a stark difference between processing times for claims made under the SRCA versus the MRCA and the VEA?

Col. Jamison: I do not have that specific detail, I am afraid. I would only be speculating.

Senator KAKOSCHKE-MOORE: Finally, the previous witness made a comment that one of the reasons we are having the inquiry into veteran suicide is due to the VEA and the MRCA. Would you care to comment on that?

Col. Jamison: There is a whole range of components that are causing veteran suicides and the suicides of serving people. The complexity of the whole process and the barriers they face, particularly for those who are most vulnerable and least able to cope with the bureaucratic processes, simply adds to the stress and the tension. When you think about it, it becomes too much when these are heaped on the veteran who is already suffering, often from some sort of mental issue. I hear that there have now been 15 suicides this year, and this has got to stop. We are all getting it wrong. It is about time we focused on the veteran and not on the processes or the niceties of structures and legislation. We need to focus on the individual veterans.

Senator LAMBIE: In your view, do the Comcare functions traditionally recognised in the SRCA that have applied to the MRCC carry over to the DRCA?—it's all very confusing, isn't it!

Col. Jamison: Your question just highlighted the complicity issue. You asked that question, and I cannot give you a straightforward, simple answer. That is what is wrong with the whole veteran compensation and rehabilitation system. It needs to be simple, straightforward, understood and beneficial to the veteran. It needs to recognise the veterans, the people we send overseas in support of the nation's foreign policy—I have to say, that is what has been going on. We need to recognise that they are all impacted. We need to ensure that that is recognised, and the easiest way to do that, and probably the most cost-effective way of doing that, is to ensure they get lifelong health support when they leave the ADF, because we know that they are going to come to DVA and seek help, and we know that from age 70 they are going to be given that help. We just need to bring that date forward. These people put their lives on the line for us and we owe it to them to ensure that the support they need is there when they need it, without having to go through the hoops.

Senator LAMBIE: For how long has your organisation been on these roundtables?

Col. Jamison: We have been on the roundtable since its inception.

Senator LAMBIE: How long has it been for? Do you know?

Col. Jamison: A number of years.

Senator LAMBIE: What is the breakdown here? You know what the problems are. You have been saying the same thing to me since I got up here—that we have the same problems. I am hearing. The only people who are not hearing it are the veteran affairs ministers and veterans' affairs? What is going on in those roundtables, where the breakdown is that you are not getting through to these ministers and the department? I am not the only one who has worn a uniform who is out there asking for this. We want to know what is going on behind closed doors. The job is not getting done.

Col. Jamison: The department has now produced information that we can distribute through our organisations about the issues discussed at the roundtable. Not to put too fine a point on it, we are not doing all that well. I do not want to assign blame; we all share the blame for the performance of the consultative structure. We are trying to contribute to the understanding of the department on the issues impacting veterans as they come to us. They are trying to get us to understand how they are trying to address them. Unfortunately, it is a bureaucratic process and we are all suffering because of that. We are going to have to change. The ex-service organisations themselves have to step up to the mark and put things on the agenda and get discussion on these issues, and then get some sort of resolution of those issues, after the discussion. It is a criticism, I think, that we all need to accept, and we need to change.

Senator FAWCETT: Thank you for your evidence and for being here today. Going to your comment about the use of digitisation for processing, I understand the criticisms about complex cases. One of the things the department has put forward is that there are many claims that the very simple, as in claims for compensation for transport and things like that, where computerisation of that a) could make it quicker for the veteran to get the refund and b) it offloads the department, so they can apply that human effort more to the complex cases, where there is some question. Particularly, if in the early rollout it was at that level of uncontested simple claims, would you support that as a measure to speed up the time of claims and to give the department more time to consider the more complex cases?

Col. Jamison: Don't get us wrong: digitisation is a very worthwhile objective. It is something that will make the process shorter, simpler and easier to manage, but we do not want it to be a decision-making computer system. It is for the sorting and assembly of information so that the delegate can make a decision without having to do an awful lot of administrative process to give a decision. It should provide him or her with the claim, in a way that highlights that it has been made against the criteria, or there are areas that need further investigation, but simply and quickly.

Senator FAWCETT: You raised concerns about the Henry VIII clause. In item 2 of part 2 of schedule 1 of the bill it talks around the fact that essentially replicates all previous versions, transitional arrangements et cetera, certainly to make sure that nobody is disadvantaged. Then, the Henry VIII clause provides the minister with the power to say, 'This is the intended operation, to the benefit of the veteran.' Does that allay any of your concerns about the operation of DRCA—the fact that those two things are actually very front and centre in the legislation?

Col. Jamison: No. We are not opposed to the Henry VIII clause. We think it would be beneficial, but it also has the potential to provide a pathway for decisions adverse to the veteran, on the act itself, and without the scrutiny of parliament or anybody else. There are no checks and balances there. We are simply saying that there need to be, somehow, some checks and balances, because over time the administration will try to harmonise and render more efficient in its own operations and in the process the veteran benefit may be changed in an adverse way, and that can be done without scrutiny and without any oversight.

Senator FAWCETT: The conundrum we have is that on the one hand we are being asked to make the department work more speedily to resolve things, to have more discretion to perhaps not be so handcuffed—I think that is the word that was used before—to the statement of principles. Yet, at some point there needs to be a decision-making head of power for that flexibility, that discretion, to be applied. One of the purposes of DRCA is to bring veterans under one minister, as opposed to being split across two, and at some point you have to give someone a head of power to respond. As soon as you have those additional checks and balances you introduce delay into the system. If you take the view that the department and the minister are always trying to disadvantage veterans, I understand why you would be concerned. But if you take the alternate view, which is that this is trying to provide exactly what people are asking for, how can we make this better? What would give you comfort that the construct that is being proposed will have transparency and will work to the benefit of the veteran? A no-detriment clause? What would give you comfort that the degree of flexibility this is trying to build in will be a good thing?

Col. Jamison: It is an issue of trust, of course, but we are talking about checks and balances. In a large administration you do need to maintain your checks and balances. They do not need to be onerous. They do not need to limit the power of that head of power. But there does need to be some avenue whereby, if something is decided by the minister that the veteran community believes is adverse to them, there needs to be some way where that can be efficiently addressed, with an outcome that is acceptable to both parties.

Senator FAWCETT: At the moment, item 2 of part 2 of schedule 1 is in legislation that will be law that says whatever applied in the past there will be no detriment to the veteran from what they were entitled to in the past. That is about as absolute as you can get. The previous witnesses were talking about whether we could make that better by providing the best of whatever schemes they may have been eligible for, but that is a separate discussion. But in terms of drawing a line under disadvantage to veterans, putting it in law is about as tight as you can get under our system of government.

Col. Jamison: I accept your point, but you have to understand that the veteran community is extremely nervous about unfettered use of power by the government and its administration. We are nervous about this. I guess that is the way to put it.

Mr McLaughlin: Perhaps I could assist here. First, I have a disclosure: I am the nominated representative for ADSO to what is known as the ESO Ginger Group. It is a group of five ESOs who meet with senior departmental officers on an as-required basis. We met for the first time on 9 November to discuss this bill, which had been introduced to parliament that day. We had to have prime ministerial approval to discuss it. We met again on 24 November to discuss the digital measures bill.

When the principal legal adviser for the department mentioned the Henry VIII clause I stated to her that, in other words, it is best described as reverse disadvantage on the Commonwealth, and she agreed completely. We have no brief with the Henry VIII provision. I think anything that is a handmaiden of the act—that can be actually turned around and used to tell the act to do what it is told and when it is told—is a brilliant thing. But, as my colleague said here, when we looked into it further and looked at the learned submission from Slater and Gordon it created what we would call a reasonable doubt, and we had to look at that reasonable doubt for the simple reason that perceptions of the diesel fuel of the public service and the government and the diesel fuel of the veteran community are particularly where rights and entitlements are at stake.

I refer you to a document—a Henry VIII fact sheet—prepared by Mr Stephen Argument, Legal Adviser (Subordinate Legislation) to the ACT Legislative Assembly Standing Committee on Justice and Community Safety in 2011, in which he cited from a paper by two New Zealand parliamentarians, Tim Macindoe MP and the Hon. Lianne Dalziel MP, entitled *New Zealand's response to the Canterbury earthquakes.* In this paper Mr Argument state, 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.

The two New Zealand parliamentarians 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.

The leading High Court case, as I understand it, is a 1931 case—Dignan's case, if I cite it correctly—but I note that other high courts recognise the validity of the Henry VIII clause but also its repugnance. And the Lord Chief Justice of England and Wales is very condemnatory of the Henry VIII clauses in the same legislative assembly document.

That is an itch that we need to scratch. We definitely need to scratch that itch. We are comfortable with the fact that it will reverse a detriment to one veteran that may have an overall effect on numerous other veterans through case law. But this particular concern is worrying the community out there. There has been a bit of a backlash about it. Unless we have this honourable committee refer the bill back for further scrutiny and further consultation it will be difficult for us to cross the road and change our support for the bill from conditional to absolute.

Senator FAWCETT: In some other areas of law—the intelligence and securities area that I am involved with, where we have powers granted to an agency or a minister that appear to be out of the ordinary—they are required to report back to the committee or to the parliament via the committee, as well it is often to an independent oversight body, whether it is an ombudsman, that that power has been used and the circumstances under which it has been used. That then gives the legislature an opportunity to ask, 'Was that as we intended that power to be used? Do we need to change anything?' If there was a provision like that, would that give any comfort that it would not be an unfettered power but every time it was used there would be transparency and the opportunity for the legislature to respond?

Mr McLaughlin: Absolutely, without a doubt, because one of the primary pieces of ammunition in our ready round bin, as a general member of the community, is the Administrative Decisions (Judicial Review) Act 1977, sections 5 and 6. That is the ammo that any class of veteran or veterans would probably rely on to have an adverse Henry VIII decision hopefully reversed by a court of competent jurisdiction. But I agree with what you say: it would be very good indeed.

Senator FAWCETT: I have one final question. We heard earlier a concern about issues around hearing aids and that the DRCA may be to the detriment of what is available to veterans. In your opening statement you said you have heard that they are now being denied, which seems to be an acceleration of a concern, particularly given that DRCA is not actually in force yet. Perhaps I can just clarify: are you saying you are concerned that it may change? Or do you have evidence that there is already change, in which case is it related to DRCA?

Col. Jamison: It is used as an example of what we do not want to see happen with DRCA coming into the mix as a standalone act. When white cards were issued to those veterans who were being serviced by the Commonwealth SRCA, all of a sudden there were restrictions brought in on the level of support. Hearing aids is the example of that, where people who had a certain level of hearing aid that was established prior to their having to replace it were denied that level of support when they went back through the DVA process to get a replacement for the aid they already had. There are about 500 of those personnel, as we understand it, who are potentially disadvantaged in this way, and we do not want to see this replicated as a consequence of DRCA being enacted.

CHAIR: Before we go to Senator Moore, I want to make two points. You may or may not have been in the room when we had this discussion with previous witnesses. Any clause invoked under Henry VIII of course is an amendment, and it is required in legislation that such an amendment is what is referred to, as you know, as a disallowable instrument, which has 15 sitting days—not 15 days but 15 sitting days. In other words, anybody in the parliament—as Senator Fawcett pointed out earlier, anyone can seek it—can seek the authorisation of the chamber for it to be debated as a disallowable instrument, and of course something of this nature would always excite this level of interest.

The other point, as an adjunct to this—and we will test it further with the officers—is that the statement has been made that any changes cannot be made to benefit the government, only to the benefit of veterans and clients. So, we need to firm up that, but I think that disallowable instrument—I know I have certainly used it in the past in different sets of legislation when in opposition, and you generally tend to find, if your case is strong, that you get very strong bipartisan support for the debate of a disallowable instrument.

Mr McLaughlin: Perhaps I could respond to that. The detail at page 24 of the explanatory memorandum is quite specific, and it is quite illuminating. But your comments in respect of the disallowance of the relevant amendments gives us greater confidence and would go some way to helping us cross that attitudinal road from conditional to absolute, subject to the other caveats we have put on it here.

CHAIR: And remembering again: the 15 days is only required to actually call for the disallowance. It does not have to be debated or concluded in the 15 days; you just have the 15 days to put your hand up and say, 'I seek the endorsement of the chamber to have this matter investigated further.'

Senator MOORE: My question is about consultation. Mr McLaughlin, you said that this bill was taken to the round table in November—

Mr McLaughlin: That is correct—9 November.

Senator MOORE: which is a long time ago—November.

Mr McLaughlin: No—I must correct you, with respect: not the round table; it was taken to the ESO Ginger Group, or what we call the ESO working group—

Senator MOORE: It works under ESO—the group—

Mr McLaughlin: It is a creature of the deputy secretary, Major General Cosson. It is chaired by Mr Neil Bayles, who, among other things, is Assistant Secretary, MRCA Review, and numerous other titles. What I do when I finish at that meeting is prepare a formal brief. It goes to the ADSO leadership and it goes out to my constituent associations for information. That is basically my role, until the next meeting.

Senator MOORE: So, in terms of the consultation, it went to that group for consideration?

Mr McLaughlin: It did indeed. It was discussed there at the time. The principal legal adviser led the discussion of that and explained to us in six sentences the necessity for the bill. We could see that. There were no concerns raised at that meeting by those of us present on the other side of the table. And, as of now, there have still been no concerns raised by the others with respect to what we were told.

Senator MOORE: Right. So, the concern you have raised with us today about the Henry VIII clause was not mentioned in November?

Mr McLaughlin: No. As I said, we were very comfortable that these concerns have come since that date from other sections of the veteran community, and we owe a duty to them to articulate those concerns. As I said, it is an itch that needs to be scratched.

Senator MOORE: Have you gone back to the department with these concerns?

Mr McLaughlin: No, we have not.

Senator MOORE: Why?

Mr McLaughlin: We were summoned to the second meeting to discuss the digital measures bill. These concerns in relation to the Henry VIII provision only reached me last Friday.

Senator MOORE: And so you did not go immediately to the department with your concerns?

Mr McLaughlin: No, I could not.

Senator MOORE: Why is there not that relationship where, when you are linked into discussion with the department at this level, when you have a concern you do not go straight to the department and raise it?

Col. Jamison: Could I answer that? We would normally do that but I hark back to what we said before: we are group of voluntary organisations staffed by volunteers, mainly part-time, and it takes us 10 times as long to do anything as even a government department let alone an efficient commercial concern. We have been up to our ears trying to understand some of the issues that are now being raised about this bill and to prepare to talk to you people today. We have not yet had the opportunity to address this in detail with the department, but we will.

Senator MOORE: My concern is that I hear about the department meeting with people and saying they have consulted. You actually did have access to this legislation in a voluntary capacity in November but, now that it has reached the stage where decisions are coming, it does not seem to me that there is a communication link. Automatically I would expect that if there was a relationship between the department and the various volunteer organisations that they service—and there are a number—that it would just be an automatic response. You have identified quite serious concerns about this. This is not just a one-liner. You have raised several points about this clause which takes your ability to support the bill from—I cannot remember the two terms you had—something to absolute so it is quite a determining factor. I am trying to get to the bottom of why, if there is a worry, you do not have the confidence to just immediately go to the department and say: 'Hey this has come up. Can you give us more information.'

Col. Jamison: Sometimes you have to get a better understanding of the issue before you go to the bureaucracy or the administration. Because if you do not do that, you will be given an answer that will seem perfectly reasonable but you will really not understand the implication. We are in the process of gaining a greater understanding of some of the complexities that have been raised to us by some of our advisers.

Mr McLaughlin: As I stated, I only became aware of this on Friday. I have spent since Friday until four o'clock yesterday getting my head around the concerns that were brought to my attention, in between preparing two appeal briefs for two clients amongst other things. I agree with what my colleague says. And I am quite sure Senator Lambie would appreciate that the 7p test in this instance is critical and we have to comply with that to make sure that we do not go to the department half baked and made look like fools. We cannot read the minds of other entities.

Senator MOORE: I do not know what a 7p is.

Mr McLaughlin: I will allow Senator Lambie to explain that.

Senator MOORE: I am sure I will get that briefing later. Is your organisation on the round table?

Mr McLaughlin: No, I am not at the round table as a big M member. I go to the pre e sort meetings. It is the founding members of ADSO that have a place at that table.

Senator MOORE: Is ADSO at the round table?

Mr McLaughlin: Yes.

Col. Jamison: Most of the constituent members of ADSO are on the round table. All the national ex-service organisations are represented on the round table.

Senator MOORE: Did the round table have consideration of this legislation?

Col. Jamison: I would have to say we did not really scratch the surface because it was put to us in a way that it was simply replicating the Commonwealth SRCA act into a veterans' specific DRCA act. The DRCA name came to mind as an appropriate thing but never mind. We simply took the assurances. It has taken us some time to go through and get the advice and input from the specialists that we needed to gain a greater understanding, hence at this fairly late hour we are saying the things we are saying.

CHAIR: Senator Moore is now appraised of what the 7p's test is, so that is very good. There is a minute or so left to me. You make the point:

The complexity of the military rehabilitation and compensation structure is such that the Alliance will continue to advocate vigorously for the creation of a single purpose veteran-specific legislation …

We of course have the benefit of the nine pages of Mr Thornton's appendix, in which he goes through the differences between them all. Our level of frustration on this side of the table probably matches yours, that of the people whom you represent and that of the department, when, as the secretary says, they are dealing with a computing system that is the equivalent of a Commodore 64, when you see the 150 days and when you see the ridiculous complexity. When you subject it to Mr Thornton's appendix, it is so obvious, in today's world of data analysis and spreadsheet analysis, that that is what it is for. It is so frustrating for us to hear your evidence, to see what you are pleading for, when there is just the inherent logic of us moving to a system in which all of these areas can be subjected to that analysis, and people can be freed up to investigate and deal with amicably and equitably those areas that you and other witnesses identify to us.

I thank for your submission and for your presence. We are going to break now for about 10 minutes.

BRIGGS, Mr Brian, National Military Compensation Expert, Slater and Gordon Lawyers

[11:00]

Evidence was taken via teleconference—

CHAIR: Welcome. Thank you for your submission to the inquiry and for appearing. Would you be good enough to make a brief opening statement before we go to questions, please.

Mr Briggs: Thank you for the opportunity to actually appear before you by way of video link. Initially, I did not intend to make an opening statement, but I had the good fortune of listening to some of the other witnesses this morning and so I thought I would just make a brief opening statement of my initial thoughts when this bill first came to my attention back in November of last year. I actually had not had a chance to look at the legislation. As you will know, it is a bit of a job to get up to speed with what is going on because this legislation is complicated; it is not as straightforward as everyone seems to think.

Firstly, MRCC, which is the Military Rehabilitation and Compensation Commission, were previously constrained by Comcare, with SRCA being governed by that body. MRCC will, therefore, now reign supreme and can make policy decisions—amend, revoke and introduce whatever it sees fit to do. This was included in the explanatory memo. The reference to 'consultation in the future between the department and the veteran community on areas of potential alignment' suggests they will consult with those bodies that support their view—just like the single pathway—no doubt excluding the wider interest of Defence communities. We have already seen from past experience how the government and the department consult. They already know the answer before they open the consultation process.

These are my initial thoughts. I foreshadow that this absolute control will result in a new permanent-impairment guide for DRCA members, more in line with the GARP M guide as opposed to the more beneficial Comcare guide for claims lodged after 28 February 2006. In that respect, there are already numerous complaints about MRCA and GARP M now before the Senate inquiry into suicide. I anticipate that one of the first areas to be impacted will be the SRCA Fellowes-type cases for lower limbs. By this backdoor method, MRCC will render Fellowes obsolete and members will be worse off. There will be no payments for separate lower limb injuries in contrast to the Commonwealth situation. The result: the military will be worse off than the wider Australian public.

Similarly, the area of psychological or psychiatric injuries will, in my opinion, be restricted to GARP. Therefore, there will not be different payments of lump-sum compensation for different psych injuries such as PTSD and then, say, depression. See the Federal Court decisions of Irwin and Robson. As we know, GARP has higher requirements to meet thresholds, say, for back injuries or lower limbs, to name just two. My crystal ball prediction is that there will be less money being paid out as lump-sum compensation.

Initially, the DRCA suggests the existing guide will apply. However, you will note that, under DRCA:

… the MRCC will be able to prepare, amend, vary or revoke such a Guide if required.

Reading between the lines, this means MRCC will have absolute control over the assessment of injuries. We have seen from MRCA what this has meant when it comes to denying impairment and compensation for injured veterans and members. I do not have faith in DVA or MRCC or in the so-called assurances from the minister.

We have heard all this talk about this Henry VIII clause. The new regulation-making power—section 121B—operating in a purely beneficial way creates more doubts for me. I ask: why fix something that is not broken and why go to the trouble of inserting a new section, 121B, if DRCA is purely to duplicate SRCA as a standalone act for the military? Just like the single pathway, I feel that it will end up with Commonwealth public servants being better off than the military. The wider defence community is not happy with MRCA or the GARP M guide, but this bill is leading to MRCA becoming the all-powerful legislation with the added punishment of the SOPs that are currently under so much fire in so many submissions into the practices of DVA. Let's just slip in another attack on our veterans while the Senate is busy with its inquiry—and I am talking about the suicide inquiry. That in itself creates problems for me. Why is there such a rush? I note that most of you senators are sitting on the suicide inquiry and that the findings will have to be handed down in the next month or so. Why are we rushing this bill before we even know the findings of that inquiry, which is far more detailed? I have concerns with this department having absolute power. I can see the benefits of one minister controlling, but we already know that DVA is a dysfunctional department. Look at all the submissions into the suicide inquiry. It seems that we are actually rewarding DVA for its inefficiency by giving it absolute unfettered power.

Senator LAMBIE: Good morning, Mr Briggs. Can you tell me the advantages of Comcare controlling SRCA as opposed to the MRCC and DVA?

Mr Briggs: Comcare is a larger scheme. It has far more employees. It also has these checks and balances over MRCC. Those checks and balances make sure that equity of decisions occurs. It has far more employees on its books; there are far more court cases decided. The Comcare guide part 2 is better for the military. Comcare having control is a way of keeping MRCC fettered—let's use that word. For example, at any one time the AAT issues decisions that are going through with Comcare, and you will notice there are very few decisions dealing with the rights and entitlements of veterans. They mainly deal with Commonwealth public servants. Those decisions are actually beneficial. I understand why we have to acknowledge the unique nature of military service, but they only have 50,000 members at any one time, whereas around the country there are hundreds and hundreds of thousands of public servants. So you have a greater pool of court decisions and things being decided, including around entitlements. That is why I think Comcare staying in this picture is a good thing.

Senator LAMBIE: The committee members are all trying to get our heads around this Henry VIII clause being inserted. I am led to believe that this new section in the DRCA is the first time it has happened in veterans entitlement law. Can you explain from your experience a little more about that and whether this is the first time this has been used in veterans entitlement law.

Mr Briggs: From my understanding, it is. It is a slippery slope when we start playing with a new piece of legislation. Everyone seems to be talking about this Henry VIII clause, and I acknowledge that it has some benefits to it in that they talk about the legislation operating in time—when a claim is made or an injury occurred, that legislation will be applied. That is one aspect of the Henry VIII clause. But you will see from my submission that it is also a very double-edged sword in that this clause allows a single person or a department to modify, vary and amend legislation. I can see this coming with the Comcare guide. Henry VIII put himself in power, made himself the head of the church and changed the legislation. He could then annul marriages, and then he could chop off his wives' heads. With the whole Henry VIII notion, Henry VIII was not a nice guy. We refer to the Henry VIII clause as if it is some sort of magic, brilliant solve-all and it is a great piece of legislation to have a Henry VIII clause. I have had law students look into it and I have heard that other people have gone into this clause and done a lot more research into its legalistic overtones. It is a confusing little clause and it is being slotted into DVA entitlements to allow a regulation power—and I understand about the disallowable instrument and I thank the senators for enlightening me about that, because I am not really au fait with parliamentary procedures. For sure, I would be all over this clause. I would not be letting this go in. Where the parliament's power to have checks and balances over the amendment of this legislation is gone and where we have a single individual unrestrained power in a dysfunctional department—they can do whatever they like. Hopefully that sort of sums it up. I am not happy with this Henry VIII clause at all. The more research I do into it, the more I am worried that senators' heads will get lopped, just like Henry VIII did with his wives.

CHAIR: We should call it the Mal Meninga clause!

Mr Briggs: Mal never did head-high tackles, Senator.

Senator KAKOSCHKE-MOORE: Mr Briggs, you said in your opening statement that some of the advantages of Comcare administering SRCA include the fact that Comcare has more employees. Can you clarify for me, and forgive my ignorance, but does Comcare administer the claims made by veterans under SRCA rather than DVA?

Mr Briggs: No. It is put to the Military Rehabilitation and Compensation Commission. The act delegates power out of SRCA to them, but Comcare then issues the guidelines and policies. It is like an overriding power over the top of what MRCC do. They do not do it themselves, but they are the overriding insurer and body. They are the one that sets the legislation arm. They are the one that issues all of the policy decisions and guidelines. They also control the Comcare guide that deals with the assessment of injuries. I can give you example after example as to why Comcare in that guide is better than the GARP M guides. Just on that point, for example, under the statement of principles for knee injuries, only 52 per cent were accepted and they ended up having to have a look at that statement of principles, whereas under SRCA and the Comcare guide, under the balance of probabilities test, 92 per cent of claims were accepted. You get this great big disparity between the statement of principles and the Comcare guides. Hopefully that answers your question.

Senator KAKOSCHKE-MOORE: Can you give us some examples of policy guidelines or policy decisions that Comcare has made that you think are more beneficial for veterans under SRCA?

Mr Briggs: In my submission I have given you some examples of back injuries and psychological injuries. Lately, I have had a growing fear that DVA are actually now using DRCA and, ultimately, the abolition of the Comcare guide and are going over to the SOPs in dealing with claims right now—and this legislation is not even in place. I do not know if there is some policy or something, but I saw an example of this the other day with a SRCA claim. Normally the beneficial nature of the guide says you could put information about your service in by

way of statements and detailing how much lifting or what you have done without the necessity of these detailed claimant reports—for lifting, for example, you have to have so many hundred thousand kilos et cetera. In this example the delegates are now saying, 'We want claimant reports', which will delay matters. They are not accepting statements. Previously, under MRCA, they would request it, but it never used to apply to SRCA. Requesting this under SRCA claims suggests that they are now relying on this technicality before DRCA has even come under their power.

I saw another one recently where they were using technicalities—that is one of the questions too, about this equity. Under section 89B and 142(5)—that has all gone now. That has not been replaced in the new legislation. In this situation, a guy, who has just turned 65, was suffering from sexual dysfunction at the same time as PTSD—it was aligned—and due to a technicality the delegate has said that instead of getting it assessed from the time the guy was first diagnosed with it, the delegate is going to assess him as over 65, which is a lesser amount—a five per cent impairment as opposed to, say, a 15 per cent impairment for the time that the onset occurred. Again, that is a technicality that we had to jump down on that previously we would not have seen. Now it is starting to seem that delegates are being trained in this, and it has not even come into operation yet. And there are other examples in my submission.

Senator KAKOSCHKE-MOORE: Thank you.

Senator FAWCETT: Mr Briggs, can I take you to one of the examples in your submission about your client who had a psychiatric condition and the bruxism, and the technical wording issue that saw the claim disallowed. I take it from your line of work and your submissions that through legal action you are getting an outcome for veterans that applies more common sense to that. Doesn't the ability of the minister under this proposed legislation to make a common-sense decision in terms of the Henry VIII clause provide a less costly, less obtrusive way for the veteran to receive a just outcome?

Mr Briggs: The problem is not the minister. The minister having that power with the Henry VIII clause is a good thing. That is one of the benefits of a Henry VIII clause, where a minister can make a common-sense decision. The problem is it is not the minister making the decision; it is the delegates down at the grass level who are not trained making the decision, and that is where the problems occur. That is when it gets into reconsideration and appeal processes because, somehow, in not using beneficial nature of the legislation delegates lose the plot. That is the issue.

Senator FAWCETT: I understand that. We had earlier witnesses who said, 'People within DVA are handcuffed to the legislation.' One approach which I am open to pursuing is how to change the statements of principles to make them more like SRCA, where you are not quite so tightly constrained. So if there is an issue and the public servant says, 'I can't change this,' they have the option to say, 'I think the balance of evidence points to the fact that this condition did arise from the person's service'—as in the case you cited in your submission where it was associated with the onset of the psychological condition, even though the clinical diagnosis occurred at a later date. They could be an avenue whereby they can quickly elevate that for a stamp of approval as opposed to feeling handcuffed. Surely that would be a positive thing.

Mr Briggs: It definitely would be a positive thing. Why is it that the military are the only compensation scheme in this country that use these statements of principles? We acknowledge the unique nature of their service, but if the statements of principles are so good then why isn't any other workers compensation or Comcare using them? It is like they were created as strict rules that must be met rather than, as I said in my submission, being treated only as a guide, that they should not be the be-all and end-all. So many claims are denied because of the strict interpretation of these SoPs. If the minister went back and looked at the SoPs and compared them to the Comcare guides and went with the more beneficial nature of the two, then that would be a good thing. If you wanted to keep the statements of principles then align them more with the Comcare guides; make them more favourable. I just gave the example of the knee injuries under the SoPs and how only 52 per cent in 2009 or so were accepted, whereas it was 92 per cent for the same injuries under Comcare.

Senator FAWCETT: I hear your evidence around the role that Comcare provides in terms of that oversight or providing a head of power that is not DVA. I want to move from the concern about SoPs or even GARP et cetera which to a large extent are to do with MRCC—that is a separate discussion to this bill. If the provisions of SRCA that were relevant at the time an injury was sustained are applied, I am just wondering for this bill, assuming we move through the suicide inquiry to address the SoPs and other things, do you still sustain your opposition to simplifying the legislative basis that affects veterans and actually bringing them under an umbrella whereby the minister can work to have a beneficial outcome for veterans?

Mr Briggs: I do not oppose making it easier and I do not oppose getting rid of the complexities. This is what I foreshadow will happen as part of this process with DRCA. It is in the explanatory memorandum and in the bill

itself. Senator, you are talking about past claims with previous injuries using the SRCA in operation. That is fine. That is one of the nice things about the Henry VIII clause; it allows them to do that. I do not have any drama with that whatsoever. It is what happens next—the power to amend the guide. 'Let's get rid of the Comcare guide and its beneficial nature and bring in all GARP M and the SOPS,' and that is the sting in the tail. It is what is going to happen next. No doubt the minister fully intends to align it all under MRCA and get rid of the Comcare guide. With that goes all the beneficial decisions that were previously decided, such as Fellowes, Robson, Dean, Irwin—all the cases that were beneficial for the members. They are gone now because it is a new act. MRCA is not a heavenly legislated piece of legislation. They are making it impossible with the single pathway for people to actually appeal it, unless you are rich. You go through the Veterans Review Board and there are all the provisions about what happens—you cannot have legal representation in the VRB; you end up in the AAT; you will not recover any legal fees and costs. So there will not be a large pool of decisions challenging MRCA. Again, we have a minister who has regulatory power to do whatever they like in terms of the Comcare guide, and then they have SOPS and then they have the GARP M guide all under their power. That is the dangerous thing. I feel we have this department in shambles.

Senator MOORE: Mr Briggs, in terms of the process, what I am trying to follow up is the interaction with the department. Your submission raises a number of concerns about the bill. Have you had a chance to talk to the department about your concerns?

Mr Briggs: If I write a letter to the department, I am lucky if I get a response to my concerns, as you will see from the suicide inquiry, within three months. I have lost faith in the consultation process. I do not sit on their ESORT so I do not get consulted. This was brought to my attention back in late October when the head of the Repatriation Commission was putting out press releases because there were rumblings amongst the community about what was going to happen with this new bill. It was brought to my attention back in November and I thought, 'What is this new bill? I haven't heard about it.' Immediately, I got on the phone to all my compatriots and said, 'Have you heard about this new DRCA bill?' and they said, 'What are you talking about?' At that time they were worried about the suicide inquiry. They will also worried about the rumblings about the digital readiness bill, and we know all the problems with that that have been raised, and that is in the mix as well. Most of my compatriots have never even heard of it, have not been consulted or anything like that.

To answer your question simply, the department does not really come to me very often. I have to follow the trail and then jump in at the end of things and say, 'Wait a minute. Let's have a look at this. What's this legislation actually doing?' I try to read the good points into it. I am not a constitutional lawyer. I am not a policy drafter. I just pick it to bits and say, 'These are what the repercussions can be.' I have read all the submissions from the various interested parties and that itself creates concern for me because, under the suicide inquiry, you will be aware that there are hundreds and hundreds of submissions. For this one, it was such a short period of time of consultation where they went out to the community. It was like two weeks and 'Can you respond?' It sort of went to sleep over the Christmas break and I thought, 'Yes, let's go back. People are talking about it. Let's see what's going on and try to pull it apart,' and then, all of a sudden, it was passed through the lower house. Thank goodness the Senate did what it often does. It steps in and says, 'Wait a minute. This is not as clear cut as it should seem. Let's have a look at this legislation.'

Senator MOORE: You raise the point about the seeming rush of the process. I will hopefully find out what is in the mind of the department later today, but it would seem to me that their answer would be that they want a commencement date of 1 July, so they want the bill passed and secure. That would seem to me to be their arguments. You point out that, from your perspective, you think it is rushed process.

Mr Briggs: It is an extremely rushed process. You can put a piece of legislation through that really is not needed. SRCA is doing fine. The problems are with MRCA and the SOPs. SRCA does not need to be amended or suddenly brought under the power of one minister. Why does the Senate—and thank you, Senators—have to report on this bill so quickly when in my opinion you have got a more important inquiry going on on suicide and the operation of the DVA? That is the priority. It is not this bill. This bill could be put back on the shelf for three months. Let us all take a deep breath, step back and fix this Henry VIII clause. Let us fix all the problems that are foreshadowed—for example, section 89B has gone; section 142(5), dealing with equity of decisions, has gone and is not replaced; we have the dual eligibility; and there is the issue of ComSuper having to account now to DVA for what it does. How is that a replication of SRCA? SRCA makes no mention of ComSuper having to go to DVA and have their approval to make decisions.

Senator MOORE: Certainly all those questions will be put to the department this afternoon. It seems to me that a lot of the issues that have been raised in some submissions to this inquiry relate to the much wider issue of

the way DVA operates and that the bill has been a hook for people to raise issues about MRCA and other pieces of legislation and the interaction with the department. Is that your view, Mr Briggs?

Mr Briggs: Yes, I agree. I do not know if this is a hook or not. Maybe I am just on my conspiracy theory and it is all part of an overall scheme. You throw in the digital readiness bill and the privacy provisions in that. We do not know what is going on with the digital readiness bill now because it has gone back to privacy impact assessments and the so-called rules and regulations that control it. Do not get me wrong. I agree with the digital readiness bill on its face where it is talking about having computerised programs to deal with, say, reimbursement of medical expenses, transport costs and that kind of minor thing. A computer can approve it and put it through easily. I do not have a drama with that program, but to me it does not spell that out. The digital readiness bill talks about the computer deciding cases and claims itself. It is complex when you have crossover legislation, operational service, peacetime service, wartime service and all these other things. To put it in the control of a computer is very Orwellian—Big Brother is watching you. We have seen the Centrelink debacle. And this is now, 'Let's just throw in another act.' We have got all these little pieces of legislation being thrown into the mix and meanwhile DVA is under investigation but give them more power.

Senator MOORE: You represent a firm that has a lot of work in veterans' affairs. One point you raise in your submission is that the communication between the department and your firm is not strong. You expect that communication would go to the firm when you are dealing with clients, but it is not happening. You spent a bit of time in your submission pointing that out. Is there an agreed relationship between DVA as a body and firms that actually have a professional knowledge of the system in terms of a consultation mechanism? I think I know the answer, but I would like you to put that on the record. We heard today a little about the roundtable process and Senator Lambie asked questions about that. I asked a previous witness questions about the Ginger Group. There seem to be a number of forms of consultation. Is there an agreed consultation or communication link between the department and the professional lawyers who work in the system and represent members who have issues with the system?

Mr Briggs: No—simply, no. I would like there to be that. There are very few firms that are actually interested in military compensation unless you are one of the DVA panel lawyers. If I were referring a client to someone else—say, there was a conflict of interest situation or something—there would probably be only one or two firms in the entire country I would refer someone to. We are a very tiny select group of lawyers who work in this area. This is not, as I have said before, a lucrative area. All of this that I do does not lead to money for saving or—

Senator MOORE: No, it is not—I know.

Mr Briggs: This is because I am passionate about it.

Senator MOORE: But what I am trying to get on the record, Mr Briggs, is how the department gets information and shares information. I just wanted that.

Mr Briggs: I try to write them letters. And I make their responses—

Senator MOORE: And do you wait for your reply?

Mr Briggs: I try to ring. You do not get calls. They treat us as if we are the enemy. So it is very adversarial. As I say, it leads to all these delays of claims. Clients will actually turn on us because of the delays of DVA and the problems of DVA. We have to explain to them that we are trying to keep DVA honest. It is the work that we do that gets the results at the end of the day. But DVA do not come to us and say, 'We're going to bring in the digital readiness bill. How do you feel about this, Brian?' There is no consultation. They just table it to the ESOs and say, 'Here it is. What do you think?'

Senator MOORE: And that, from your perspective, is what constitutes consultation?

Mr Briggs: Consultation would normally involve some involvement in the process where you have the ability to influence the decision or the outcome. In this instance, consultation says, 'We've already drafted this legislation.' And they go to some of these ex-service organisations. They are volunteers; they are not lawyers. They are not trained to take legislation apart. They just sit back and accept what the minister says in the explanatory memorandum. But when you start delving in and peeling off the layers of the onion, all of a sudden you are in tears.

CHAIR: I want to go to your appendix 1 and 2 in relation to communications, if I can, Mr Briggs. I think you wrote on 8 December last year on the issue of communication on behalf of your clients. I am just reading your letter to the department and their response, which I think was on 1 February. Is there a set process by which you, as a law firm, or a client would actually communicate to the department that, in the case of the client, 'We want Mr Briggs and his law firm to represent us,' or, in your case, 'I've been instructed by my client; here's my letter. Please, furnish further communications to me rather than to the client'? Is there such a process in place?

Mr Briggs: That is the initial letter. The moment that we are engaged we send off letters with authorities to act. We notify DVA, we notify Defence, we notify everybody that we are on the record saying, 'Communicate with us.' The problem is: because of the siloed approach, there is no communication between, say, the liability department in DVA and the permanent impairment department. On their computer pages, they do not have: 'Is this person being represented?' They do not have a little 'yes' box. With permanent impairment, we might be acting right from day 1. We submit the claims with all the supporting evidence and everything else. We have all the communications with all of these delegates all the way through. We get liability, and then it goes off to a different department. It might go to incapacity, where they deal with it in priority. Then it will go to permanent impairment, and they will just turn around and say to us, 'We didn't know you were acting,' yet we lodged the claims. This sometimes goes on for years where there are hundreds of communications back and forward but DVA do not communicate between themselves. Their left hand does not know what their right hand is ever doing. They are a dysfunctional department. Their IT systems cannot talk to each other.

CHAIR: That is the very point that I am about to go to—that is, it is the fact that they are operating with an archaic communications platform. This would be just one, but it is an eloquent illustration of it, isn't it? As you say, in any modern IT system there is a box that is ticked which says, 'This client wants all communication referred'—in your case through Slater & Gordon.

Mr Briggs: Exactly.

CHAIR: I am reading now from Mr Sadeik. At the top of his second page he says:

I assure you that the November 2016 processing system changes provide for letters to nominated representatives. However, prior to the completion—

in two years' time—

there will be some need for manual action by staff.

Therein lies 'manual action by staff' on matters that we would have all known for the last 10 to 15 years should have been the subject of an automated process identifying Slater and Gordon, in that case, as the client's representative.

Mr Briggs: Agreed. There is not a week that goes by where I have to have one of my staff pipping a delegate for going directly to our clients. If you have clients with psychological problems who are suicidal and all of a sudden DVA starts sending them decisions—they do not send copies of the medical reports—denying their claims, that ends in tragedy. It is as simple as that. These people just lose the plot. They have lawyers and they are going: 'Wait a minute, why are they talking to me? I've got a lawyer doing it for me.'

CHAIR: From their point of view you could understand their frustration, also having to work with such an archaic system which frustrates them. They cannot get on and do the useful work that is needed to be done because they are bound up, as you say, in communicating silo to silo. Going back to the conversation you had with Senator Fawcett, with regard to the issue of the SOPs could you talk us through what you understand to be the role of the independent Repatriation Medical Authority and the extent, if any, to which DVA may or may not be limited in its dealings vis-a-vis a possible appeal to the independent Repatriation Medical Authority.

Mr Briggs: The Repatriation Medical Authority dictate those factors that are important for the SOPs. So you have the different tests whether it is peace time or war time. They can go back and review SOPs. Recently, for example, they have been looking at those time periods that were put on suicide and attempted suicide, when you supposedly had to have the condition being diagnosed within five years of the traumatic event and everything. So that Repatriation Medical Authority has the power to amend those SOPs and can fix problems. In the past they have done that. They are always reviewing SOPs, which is a good thing, but the strict nature of those SOPs is the issue. As I have kept saying, they should be a guide. They are not recognising the nature of the service; they are just setting out time restraints and lifting restraints and all these little factors and things you have to tick off. If you slip between the cracks, unless that SOP is amended or a policy guideline changes, you are stuck. That is where we end up getting in fights over taking it further down the path. I do not have an influence over the Repatriation Medical Authority as to what they do and how they do it. They do not consult me; I just get the end result when they obviously see a problem that is brought to their attention. With all respect, that is really a question for the Repatriation Medical Authority as to their influence.

CHAIR: Again, on behalf of the committee, thank you for your submission and your appearance today. We are all hopefully going in the same direction. We have to solve the problem. Again, thank you.

BROWN, Mr Luke, Assistant Secretary, Policy Support Branch, Rehabilitation and Support Division, Department of Veterans' Affairs

CAIRNS, Ms Louise, Legislation Liaison Officer, Department of Veterans' Affairs

DOWNEY, Mr Michael, Senior Legislation Officer, Department of Veterans' Affairs

FOREMAN, Mrs Lisa, First Assistant Secretary, Rehabilitation and Support Division, Department of Veterans' Affairs

SPIERS, Ms Carolyn, Principal Legal Adviser, Department of Veterans' Affairs

[11:38]

CHAIR: Good morning. I draw the attention of officers to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised. Copies are available, as you know, from the secretariat. The Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

Thank you very much for your appearance and your submission. Would one of you care to make an opening statement before we go to questions?

Mrs Foreman: Yes. Thank you for the opportunity to contribute to your consideration of the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016. I note the submissions lodged with the committee, including the opposition to the bill contained in some of those submissions. I would like to begin by categorically stating that this bill has been drafted for the benefit of Australian Defence Force members and their families. As noted by the Office of Parliamentary Counsel in its submission to the inquiry, the legal effect of the bill is to create a version of the SRCA that will apply to Defence Force members and to preserve previous versions of the SRCA and instruments made under the SRCA.

If passed by the parliament, the bill will create the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988, also known as the DRCA. The DRCA is being created to give ADF members with service prior to 1 July 2004 access to a military-specific compensation and rehabilitation scheme which is separate from other Commonwealth civilian employees currently covered under the Safety, Rehabilitation and Compensation Act, or the SRCA.

The intention is that the Minister for Veterans' Affairs will have responsibility for all compensation legislation affecting serving and former ADF members. DVA has consulted with both the Department of Defence and ex-service representatives about the bill since the former Minister for Veterans' Affairs, Minister Ronaldson, as he then was, first announced the department's intention to develop a stand-alone act in March 2015.

In broad terms, the bill seeks to do three things: firstly, it creates and makes some technical amendments to the DRCA; secondly, it makes some minor technical amendments to the SRCA; and, thirdly, it makes some consequential technical amendments to other ministers' legislation. The enactment provisions within the bill state that the DRCA will be a replica of the SRCA as it exists at the point in time at which the DRCA commences. It also ensures that all previous versions of the SRCA, and instruments made under the SRCA, are to be applied as if they were previous versions of the DRCA. This is an important and necessary step, as the DRCA will effectively apply to service between 1 December 1988 and 30 June 2004.

Subject to the passage of the bill, part two of schedule 1 would make some necessary amendments to the DRCA so that it works as a stand-alone military compensation act. For example, many definitions are used under SRCA, such as 'administering authority', 'chief executive officer', 'Comcare commission' et cetera, and would be no longer relevant for the administration of Defence-related claims as they relate to the operating functions of Comcare and the Department of Employment, which has primary responsibility for the SRCA.

The amendments contained in schedule 3 of the bill are consequential amendments to existing references to the SRCA in various other acts. Most of the amendments that are made by schedule 3 insert references to the DRCA where it is appropriate, either as a substitute to a reference to the SRCA or in addition to such a reference.

In closing, I would like to take this opportunity to restate the underlying intent of the bill, which is to give ADF members with service prior to 1 July 2004 access to a stand-alone compensation scheme which is separate from civilian employees. The separation of functions will give the Minister for Veterans' Affairs authority for all compensation acts covering ADF members and their families. It will also allow DVA to consult with the veteran

and Defence communities in the future on areas of potential alignment with a military rehabilitation and compensation act, once the stand-alone act commences.

CHAIR: Thank you. Colleagues, I am going to go to Senator Moore first and I can tell you: we have adequate time, so do not rush your questions. Senator Moore.

Senator MOORE: Thank you very much. I have a number of quite specific questions, which I might give to you at the end of the hearing if we have not covered them, because they are quite detailed ones. There are a couple of points I want to get on record. One is: you have heard the evidence, and you have heard that what I have been asking about is the consultation process. In your submission, the department has said that the bill has been around for a long time and that there have been meetings around it. That degree of confidence does not seem to be reinforced in the evidence we have had today. Can you tell us exactly what the consultation process was and whom it was with, how it was done, and how you interacted with the community?

Mrs Foreman: There have been many points of consultation with ex-service organisations. I might start by saying that the first occurred on 24 March 2015, where there was a briefing of ESORT members. The decision to go ahead with the standalone act arose because of a bill being introduced—and which was introduced to parliament—called the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015. That was a bill covering public servants—SRCA—that would have reduced the benefits available to former members of the ADF unless they were excluded from it. We gained authority to exempt members of the Australian Defence Force from the negative aspects of that Comcare bill and to take the positive aspects and to move into a standalone act called the DRCA. That was the first time—

Senator MOORE: So at that time, you briefed members of the—

Mrs Foreman: Yes, we did. We briefed them on 24 March 2015. In fact, on 25 March 2015, the then Minister for Veterans' Affairs, Minister Ronaldson, put out a press release called 'Veterans and ADF members exempt from changes to workers' compensation legislation.' We can provide that media release if that would be helpful.

Senator MOORE: It would be useful.

CHAIR: Thank you.

Mrs Foreman: Then on 26 March 2015, the Secretary of the Department of Veterans' Affairs emailed the ESORT members with an attached information sheet on the proposed amendments to the SRCA. The sheet referred to the planned excision of Part 11 into a standalone act, and the secretary also undertook to provide an update of the progress of the standalone act at the next meeting of ESORT in August 2015. I think we can provide you with a copy of the letter that went to ESORT with the attachment as well.

Senator MOORE: It was on the agenda in August 2015?

Mrs Foreman: It was, but there were some other things that happened in between. There was an article in *Vetaffairs* Volume 31, Autumn 2015 edition, talking about the creation of the standalone act and why it was being pursued. There was then a further briefing of ESORT as part of the budget, because some of the measures from the Comcare bill were in the 2015-16 budget. On budget night, we had a briefing of the ESORT. We briefed them on the intention for them to be excluded from the negative impacts of the Comcare bill and the creation of the standalone—

Senator MOORE: That was in 2016?

Mrs Foreman: 2015.

CHAIR: May 2015.

Senator MOORE: Because they went ahead to August.

Mrs Foreman: That is right.

Senator MOORE: And that has gone backwards; okay.

Mrs Foreman: Sorry, there was a budget briefing in between, which was a special meeting of ESORT. Then in August we did a briefing of the ESORT. I turned up with the then branch manager for the position that Luke Brown is now in, and we talked ESORT through why we were creating a standalone act and what the process of creating the act would be. Then we had the first further briefing of ESORT in October 2016—

Ms Spiers: I think we need to make it clear that the timing of the legislation was askew, with the short autumn sitting because of the call of the federal election.

Senator MOORE: Sure, and other things were put on hold.

Ms Spiers: We were travelling along on the expectation that the Comcare bill would be going through, and at the time of that, when the bill would be introduced, we would be able to talk to the client group broadly about what has become the DRCA. Then of course we had the federal election, which changed a few events there.

Mrs Foreman: In October 2016, one of the senior members of our department sent an email to ESORT members about the bill. We then had a number of meetings: on 10 November 2016, on 24 November 2016, on 2 December 2016, and, most recently, on 3 March 2017.

Senator MOORE: So the October/November meetings were alluded to in evidence?

Mrs Foreman: Yes.

Senator MOORE: By that stage, you had a draft bill, is that right? Up until the autumn sittings of parliament in 2016, you were talking in theory around what was going to happen and why. By the time you had the meetings in October 2016, you had a draft bill. Is that right?

Ms Spiers: Looking at the timescale, you are quite right: we probably had a draft bill around that time, on 24 October 2016, but I do not recall that that would have been pre-introduction of the legislation, and I do not recall that we had approval to do a release of the bill at that consultation process—

Senator MOORE: I will come back with the question; that is fine.

Ms Spiers: because the bill was then introduced on 9 November 2016.

Senator MOORE: Thank you.

CHAIR: I have asked Senator Moore to pause for a moment. Senator Fawcett has a time constraint, having to leave, so I will go to Senator Fawcett and then back to Senator Moore and Senator Lambie.

Senator FAWCETT: Thank you very much for your submission, particularly, outlining the clauses that guarantee the conditions of SRCA to members. I have two questions. One is about the operation of the Henry VIII clause, in terms of disclosure to the parliament of whenever that is exercised. There has been some discussion around whether or not that would form a disallowable instrument or whether or not there could be some other form of disclosure made so there is parliamentary scrutiny.

Concern has been raised regarding the direction DRCA will take the veteran community. The concern is it will move away from the discretion that is currently allowed under SRCA, as a consequence of the oversight by Comcare, to the approach where the SOPs, which, as you would be aware, have been heavily criticised for their inflexibility and the inability of the system, in a timely way, to recognise where the intent has been largely met but, by the prescriptive letter of law, a delegate is unable to approve it. Could you comment on whether or not this bill is materially going to send any veteran down that path?

Secondly—and this may be more a subject of our other inquiry—is there any action to look at the ability of the minister to exercise a Henry VIII type power as a solution to give departmental officials an avenue to seek a more common sense outcome than what they are currently constrained to with the SOPs?

Ms Spiers: Senator, I will tackle your first question. Assuming the DRCA is passed and the minister finds circumstances where he wishes to exercise the Henry VIII clause—and it is only where there has been a non-beneficial application of the DRCA to the client group, not to the Commonwealth at all—he must approach the Governor-General to make regulations to correct that issue, to give the beneficiality back to the client group. On the passage of those—

Senator FAWCETT: Could you clarify client group—would that also act for an individual case?

Ms Spiers: Sorry, you are correct. It could be a cohort, it could be all of the veteran community or it could be a specific member. It is not specific, in that sense. On the assumption that the Governor-General makes the regulations on the recommendation of government, which the Governor-General is open to do, those regulations become disallowable and must be brought before both houses of parliament and sit for 15 sitting days of parliament before they come into operation. There is more than adequate time, I believe, for any discussion, in terms of the parliament, about the effect of those.

While the notification that the minister is going to attempt to use the Henry VIII clause is not something he has to notify the parliament of—that is not the nature of it—in essence, the effect of exercising the Henry VIII clause becomes a matter that comes before parliament, with the regulation being subject to disallowance in both houses.

Senator FAWCETT: There have been a number of comments this morning around that. One comment, in particular, identified that perception is a real issue here and that, regardless of what may be in the legislation or the intent, if the perception is there the ESO community would find it very hard to lend their support.

What has DVA done to highlight to the broader ESO community, whether on your website or through letters sent out, the operation of the Henry VIII, particularly the disallowable instrument aspect of it—which means that the power is not unfettered but is brought before the parliament and can be debated and voted on by the parliament, so there are checks and balances in that—has any attempt been made to convey that as well as the fact that it can only be used to the benefit of individuals or groups of veterans as opposed to the case that was put to us by a previous witness? His fear was that it would be used to decrease standards to the lowest common denominator. Has any attempt been made to convey those facts?

Ms Spiers: I might have a crack at that, Senator. The first issue is that we have given some evidence about the level of consultation with the ESORT, the Ex-Service Organisation Round Table. As a result of that, we prepared one-page summaries—this is on both the bills that are currently before parliament. Those one-page summaries were for the benefit of the ESORT members going back to their constituencies to explain the operation of how the DRCA works. There were specific questions by one ex-service rep on ESORT about specific issues, and we have gone back with details on those.

Senator FAWCETT: You would be aware, for example, that there are emails amongst the vast network of ESOs, and most members of parliament are copied in on much of that traffic. What I do not see, when an email circulates saying, 'We're concerned about this,' is something on the DTA website that pops up within 24 hours that says: 'Here are the facts. This is what is actually not only intended but written in law, and here are the protections to make sure that concern is addressed.'

Ms Spiers: I suppose the answer is that we are not as agile as that on our Facebook site, which I think is the site you are referring to.

Mrs Foreman: I am not aware of any commentary on our Facebook site about the Henry VIII clause. I will go back and check that. But, other than the mention of it in these submissions, that was the first time—

Senator FAWCETT: With the Henry VIII, as most people have said, they have only read the legislation; in fact, most have only read the EM. In some cases, witnesses have said they have only read Slater and Gordon's submission, which in itself is an issue, because you are not tackling the facts of what it says. That is why I think it is incumbent on DVA, if we are going to bring stakeholders into this space with us to see the benefits and address any concerns about possible downsides, that the facts are out there.

Mrs Foreman: We will take that on notice and make sure that we do put some of those facts up on our website, amongst other things.

Senator FAWCETT: Thank you. And, if you do not receive those regular emails, I am sure my staff will be very happy to pass them on!

CHAIR: We can assist you.

Senator FAWCETT: And the second part of my question?

Mrs Foreman: The second question was whether this bill, in any way, would insert statements of principles into the DRCA; is that right?

Senator FAWCETT: With regard to the status quo, the evidence provided to the committee was that there is a level of discretion. A couple of cases were given where someone had a psychiatric condition, and they also had issues with grinding their teeth from stress. The reasonable position is that they would have occurred together, but the technical working of the SOPs said that, once the clinical diagnosis was made, that was the starting line, and because the dental condition had existed previously it was not allowed. They are saying that under CERCA it would be allowed, because the delegate can go, 'Well, that makes sense,' but under a SOP it would not. The concern was raised that we are heading towards a world driven by SOPs. Therefore, I am asking you: is there any intent, or work being done within DVA, to (a) make sure that that degradation in standard of proof does not occur, and (b) determine whether we can use vehicles like the Henry VIII clause to provide an avenue for DVA to look at individual cases and override the rigidity of the SOPs?

Ms Spiers: We have heard evidence that the statements of principles are rigid, out of date—all sorts of comments—and I want to put into evidence a couple of points. SOPs came into existence in 1994 in the Veterans' Entitlements Act. They were a result of parliament agreeing that there should be a separate, independent, specialist repatriation medical authority. There are seven members of that authority. They have changed since 1994, but they have kept the combination of skills in that group. They are bound under the legislation to look at sound medical and scientific evidence that links SOPs factors and service to a particular condition. They are agile in the sense that SOPs are changed regularly by the Repatriation Medical Authority. The reason for their introduction was that, at the time, we had some full Federal Court decisions and High Court decisions that, unfortunately, led to circumstances where it was trading specialists' opinions at 20 paces. The veteran would have

a specialist saying, 'This condition is related to service,' and the department would have a specialist saying the alternative. The court came to the conclusion that it was very hard to actually say what sort of specialist was the best sort of specialist to do these sorts of issues.

As I said, that was the genesis of statements of principle. They do apply for VEA cases and MRCA cases and are used in a beneficial way that the delegate can see that the person's service under SRCA meets the SOP factor. They can be used in a beneficial way but cannot be used to exclude people under the SRCA. The benefit of SOPs, in my view, is that, once you have a medical diagnosis and you can look at any one of those factors being satisfied, you do not have to gather any more evidence in terms of the causal connection between service. Often, on the SRCA side you will need a diagnosis of the condition. You will then have to have that specialist say how that condition is related to service, and someone has to form the view that that is a link between service. You might say that that introduces discretion, but it also introduces potential inequities, because you will have one specialist prepared to say X while another one says, 'No, that's not the case.' The SOPs provide an even playing field for all claims to be determined in a similar way, so that is the benefit of statements of principle.

Senator FAWCETT: I understand that. I recognise the frustration in the veteran community though. A family spoke to me about their son just recently. He was a fit young man who had never had issues with shin splints. He went off to Kapooka to do recruit training, got shin splints, was cared for very well by the military but basically could not continue his training. And yet, as I look at the SOPs, that would not be recognised as linked to his training. Common sense says that a fit young man who never suffered from it went to Kapooka and got it. So I recognise there are situations where the application of the SOPs seems a little inflexible compared to the pub test, which is a nice, popular thing in the context of much discussion these days. I do not think it would pass the pub test.

Ms Spiers: It is hard to tell with the particular case you are referring to, but I think that with things like shin splints there are load weight elements of it as well.

Senator FAWCETT: Yes, there are about three different elements to it.

Mr Brown: From memory, there is a running factor in the shin splints SOP as well. This might also interest you. For the accept rates at the primary determination level I have a few financial years worth of data here. For the 2015-16 financial year, we had a 60 people cent accept rate for initial liability claims under the SRCA at the primary determination level. That compares to an accept rate of 71.4 per cent under the MRCA or 62.2 per cent under the VEA. For the 2014-15 financial year, for the SRCA, initial liability claims at the primary determination level was 54 per cent, under the MRCA it was 78 per cent and under the VEA it was 64 per cent. So, for at least the last two financial years, which is what I have got here today, our accept rates under the two acts that use statements of principles were higher than the act that does not use the statements of principles.

Senator MOORE: That is one of the difficulties of coming new into this area. It is like I need an interpreter to go through the process. That is diametrically opposed to the data we received in evidence today.

Senator LAMBIE: To add to that: the AAT does not say that either, does it? You are losing cases at a more rapid rate at the AAT right across the board. You might want to bring the truth out in the open.

Ms Spiers: I think Mr Brown's figures came from our annual reports, so that is our source of information that we will rely on in terms of primary-level claims. I do have some data about AAT success rates which does not quite marry with some of the data which was introduced earlier today. For instance, in the half-year to December 2016—31 December 2016—of the 82 VEA matters that were at the AAT, 67 were in the favour of the commission.

That is a broad way of looking at it. It could mean the claim was withdrawn or settled in some way or that there was a decision made in favour. It is a very broad stat. Similarly, with the SRCA and MRCA matters that were dealt with at the AAT for the same period, of the 38 cases that were examined 30 of them were in favour of the commission and not the applicant. I would also like to add that with both of those stats that I have given you, it was not the commission appealing to the AAT, it was the applicant appealing to the AAT. If I look at a full-year stat there are similar sorts of results. I am happy to table that information, if it assists.

CHAIR: It would be valuable.

Senator MOORE: It would be very useful. That will then all go up on the website, and people can compare the data.

CHAIR: Correct.

Senator LAMBIE: Do we have that for the Veterans' Review Board—both for the dual pathway and the single pathway that you have had operating? If I can have the numbers for that for the last two years that would be great.

Ms Spiers: I cannot give you the information for single-appeal pathway for two years, because it came into existence 1 January 2017. It only applies to appeals lodged after 1 January 2017, so I do not think there is a lot of data yet.

Senator LAMBIE: Maybe you can tell me how many appeals you have had so far to the VRB, because that would be great.

CHAIR: I will get onto that if I can when I come to your questions. Senator Fawcett, anything else?

Senator FAWCETT: Can you complete that answer?

Mrs Foreman: There was one question in there about whether this bill would effectively mean that SOPs would be inserted into the DRCA. I want the committee to be really clear about this: the only thing that this bill does is remove policy responsibility for part XI of the SRCA to the Minister for Veterans' Affairs. Veterans' entitlements are in no way affected. Any changes, such as the introduction of SOPs, would need to go to parliament and would need to be done via either amendment to the legislation or regulation. So SOPs would be an amendment to the legislation.

Ms Spiers: When you read the bill it is the road map for how to amend a copy of the SRCA for the purposes of the DRCA. You cannot necessarily visualise what the new DRCA would look like. I can provide the committee with a departmental version of what we think the DRCA will look like, so you can see what provisions are there and what is not there. If it is of any assistance, I am happy to provide that to you.

CHAIR: Yes. Thank you.

Senator MOORE: I want to establish this issue around consultation. We were up to 16 November, when the bill was tabled in the House. At that time, there had been meetings previously with the—what is the term?

Mrs Foreman: The ex-service organisation round table, ESORT.

Senator MOORE: There had been meetings with ESORT and a range of individual meetings with other groups. If I can find out who they were: you said it was not just ESORT that you met with. When was the actual bill available for these people to see?

Ms Spiers: It was after the bill was introduced on 9 November 2016.

Senator MOORE: So it was only after then that they saw a piece of legislation?

Ms Spiers: Correct. We talked about it in generality before that.

Senator MOORE: What we heard from a couple of organisations this morning is that they do not have the knowledge or the ability to really dissect a piece of legislation, and that just by giving them the bill they do not understand all the implications. Seemingly, there are a number of particular questions around how this bill operates with the other bills and with the other forms of compensation processes and whether this is a step towards making them all go into one, which is a separate issue in my opinion but it is all of concern.

The Henry VIII stuff seems to have generated a huge amount of discussion. I do know that the Henry VIII clause has been the subject of a number of whole conferences, with the people who love legislation and get together. Senator Fawcett went some way to this with his questions, but at those discussions in November—and everyone agrees people did see the bill—were there concerns raised, or was information provided, by the department to explain to people how the Henry VIII clause operates?

Ms Spiers: I took people through how the Henry VIII clause operated.

Senator MOORE: You did work through it with them.

Ms Spiers: It is really a secondary protection. The bill is a non-money bill, so there is no cost in implementing it. The whole purpose was to pick up a copy of the SRCA at a point in time and duplicate it for the ADF and then, in essence, remove all references to Comcare in that bill because Comcare is then responsible only to public servants and does not have a responsibility to the ADF. Having said that, there are a couple of things that we explained. All the case law that has been built up—and there was discussion earlier today by Mr Briggs about the case law around SRCA—still applies to DRCA, on the assumption that it is enacted. Everything that was with SRCA beforehand—the assessment tool, non-SOPs and all of the causality elements that are currently in SRCA for the military—will apply to DRCA in the military.

The minister has not been shy in saying in the explanatory memorandum and in the second reading speech that the benefit of this is that once the minister has policy control of the three compensation pieces of legislation—

because SRCA will no longer apply; it will be DRCA, VA and MRCA in the new regime—that will give him opportunities to start examining streamlining, simplification and alignment of legislation. So he has made that commitment. I am pretty sure it is in the second reading speech.

Senator MOORE: It is.

Ms Spiers: But this bill does not do any of that. All it does is basically separate ADF and civilians.

Senator MOORE: But it is within that context, and certainly the evidence that we have heard is that there is a lot going on in the department at the moment. A lot of people who are involved in discussion of this bill are involved with the complex suicide in the military process, which is generating a lot of concern, and also the other piece of legislation that we have already had a committee hearing around, which is the digital bill, with the little sting in the tail of the exchange of information stuff. We had all that discussion when you were here before. The view from the evidence we have had is that there has been a lot happening and that people have not really had an opportunity to fully understand if or how they all fit together.

I just wanted to clarify the Henry VIII stuff. The evidence today—and I hope that we can get the *Hansard* fairly quickly on this process—is that it has only been recently that concerns have been raised regarding what possible impact the Henry VIII clause would have. I always love to see Stephen Argument's stuff, because he is the guru in this place. The evidence today is that it is only now that people are getting worried about it and they feel as though they are now being rushed. Has the department heard those concerns and are you aware of this feeling amongst people with whom you deal very regularly?

Ms Spiers: I accept what we have heard today in evidence and that people have some uncertainty. When Mrs Foreman and I looked at this legislation initially last year, we saw this as a very non-controversial piece of legislation. As we have explained to the veteran community, it is designed to, in essence, remove the immediate Comcare elements of the SRCA for the purposes of the ADF. So we did not expect to see the level of concern and anxiety. We have heard that today, so we will of course look at what further consultation we need to have with the veteran community to assure them.

Senator MOORE: And this degree of concern has not been raised with you between the time you had those discussions and today?

Ms Spiers: It is fair to say that when we have had ESO consultations—and we have read into *Hansard* a number of references to those—we have had delegates who have attended on behalf of the actual members. So often we have had an issue raised at, say, a secondary meeting that was resolved at the first meeting and we have had to go over the same ground with a different person there. But my sense at the end of that consultation process—and we have four or five meetings, though I do not have the exact number of the meeting that we had—was that there was an understand in the veteran community about the operation of the legislation and there was not a concern. I have heard today that, following reading Mr Brigg's submission, there are some ex-service community representatives who now have concerns. So we will have to work with them through those issues.

Senator MOORE: I also asked Mr Briggs about his interaction in particular and also that of professionals generally who work in this space with people who are working through the various processes of compensation with DVA. I asked whether the interaction was formalised between the department and them. I was not saying that there needed to be individual consultation with one particular legal firm. What is the standard process of DVA's communication model when people have concerns about issues? You will have heard his evidence. It was very clear that when he raises issues he does not feel that he gets either an immediate or, indeed, a respectful reply. He talked about it taking months to get a reply to his issues. I did ask him in particular about whether he had raised issues about this legislation with the department and he had not, but that was within a context, which was also put by other witnesses, that there was no confidence that the department would effectively respond to people when they raised issues.

I do not want to ask you an opinion. I am being very careful not to ask you an opinion, but an amount of discontent has been put on record today about DVA's processes. Also, from my understanding of other committees, although I have not yet been involved with them in this particular area, there does seem to be a genuine disconnect in terms of the efforts you have outlined—and thank you very much; that was very useful—where the department has had a distinct model for putting information out there and then, at the time of decision, there is a feeling within the very groups with whom you work, your client group, that they have not had a fair and equal exchange.

Ms Spiers: I think it is fair to say that we will take that message back to the secretary and the senior executive in terms of the efforts to consult and respond to correspondence to try and alleviate those sorts of issues in the future.

Senator KAKOSCHKE-MOORE: Thank you to the department for your evidence and for your submission. I want to go to a point that was raised by a couple of witnesses this morning. It seems that a particular section that currently exists in the SRCA has not been picked up in the new DRCA. I understand it was section 89B that related to equity and outcomes. Can you confirm if that is correct?

Ms Spiers: Section 89B of the Safety, Rehabilitation Compensation Act reads as follows:

The Commission—

and in this sense it is the Safety, Rehabilitation and Compensation Commission—

has the following functions, in addition to its other functions under this Act:

(a) to ensure that, as far as practicable, there is equity of outcomes resulting from administrative practices and procedures used by Comcare and a licensee in the performance of their respective functions;

(b) to advise the Minister—

and that is the Minister for Employment—

about anything relating to the operation of this Act or to the Commission's functions and powers—

that is the Safety, Rehabilitation and Compensation Commission—

(c) such other functions as are conferred on the Commission by any other Act.

That section has not been duplicated into the new version of the DRCA, because it is a specific function of the Safety, Rehabilitation and Compensation Commission and, in terms of the words I have just read out, there is an equity of outcome resulting from admin practices and procedures used by Comcare and a licensee in the performance of their respective functions. So it is aimed to try and make sure that all of the licensees—and these would be entities like Australia Post and Telstra—act in accordance or consistently with the same sorts of answers that Comcare gets.

The whole purpose, as Mrs Foreman indicated at the beginning of this, or the reason why we are looking at excising the military from SRCA is that we did not actually want the then Comcare bill that was being proposed to apply to the military. So it has not been duplicated and that is because, under the DRCA, the Military Rehabilitation and Compensation Commission is to be responsible for the administration purely of the ADF DRCA.

Senator KAKOSCHKE-MOORE: Is there a reason why that section was not modified to remove reference to Comcare and rather insert reference to the Military Rehabilitation and Compensation Commission?

Ms Spiers: Sorry, I missed that question, but I have just been prompted to refer to a particular clause in the DRCA. Section 142, which is the functions of the Military Rehabilitation and Compensation Commission, says:

(1) The functions of the MRCC include:

(a) determining defence-related claims under this Act accurately and quickly; and

(b) arranging the payment of compensation, and the provision of rehabilitation or treatment (including treatment provided under the MRCA or the *Veterans' Entitlements Act 1986*), as a result of the making of defence-related claims; and

… … …

(2) In performing the functions referred to in paragraph (1)(a), the MRCC:

(a) is to be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities; and

(b) is not required to conduct a hearing; and

(c) is not bound by the rules of evidence.

Senator KAKOSCHKE-MOORE: So, to a certain extent, that section has been picked up. It has just been modified and put into a new section to make it more relevant to this particular act.

Ms Spiers: That is correct.

Senator KAKOSCHKE-MOORE: All right. That comes as a relief. Two of the witnesses this morning, Mr Thornton and Ms McCabe, had some questions that they put to the committee in relation to what, ultimately, the long-term aim of harmonisation within DVA is as it relates to the three acts and maybe to the processes that are in place. I do not know if you are in a position to comment on what some of these long-term harmonisation aims are?

Ms Spiers: Certainly. I am at pains to say we have not commenced the consultation with the veteran community because I have not yet formally consulted with Mrs Foreman and her policy people. I have had some preliminary discussions in my branch, where we are looking at: what are the sorts of things where we could look at harmonisation, streamlining and simplification? We have put together some ideas. They are obviously not

conclusive, but the first step in any potential changes to legislation is to look at the range of issues that could be covered off—issues of cost and equity.

One of the key issues—and I think this was raised in the suicide inquiry as well—is why DVA does not have one act. It is not possible to have one act, and I think we might have addressed that during the hearing, but I am happy to go over that point if that helps. Because we cannot have one act, what we are aiming to do is, where appropriate and possible, to look at options of streamlining and alignment.

They will be issues that we put to the policy people to look at policy implications—because I am looking at that purely from a legislative-roadmap point of view—and then, consequential to Mrs Foreman's team looking at the policy issues, there would be an opportunity to start the consultation process with the veteran community, obviously after having a discussion with the minister about which were his preferred options.

So it really is early days. I know, at various forums, people have said, 'This could mean GARP, SOPs, all sorts of things.' Well, of course, in a legislative sense it can mean that, but, to get from an idea into legislation, there is clearly a lot of work with the costings and looking at the very complicated transitional provisions that would have to apply. Because you are looking at people that are currently assessed using the current permanent impairment guide and the current model, for instance under SRCA, how would you then translate that if you went to one guide? And I am only suggesting that to the committee as an example. As I said, those initial discussions are still to be had with the policy area.

Senator KAKOSCHKE-MOORE: A couple of witnesses raised an example this morning to do with hearing aids, and the inference was that public servants would be treated more favourably in terms of access to hearing aids than veterans would be under these changes. Are you familiar with the hearing aids example, and can you provide some comment on that?

Mr Brown: I think the conversation today about hearing aids and hearing loss needs to be untangled a bit. I think we were touching on three separate processes. The first process is around initial liability and how hearing loss is treated under the three acts that we administer. Under the MRCA and the VEA, as you understand, we use the statements of principles to assess claims for hearing loss. We have very high accept rates under those two acts for hearing loss, to the point where the commission has actually been able to apply a streamlining policy arrangement to claims for hearing loss where basically if the condition has been diagnosed since a neural hearing loss, we can accept that claim without any further investigation. That is not possible under the SRCA because the SRCA does not use the statements of principles.

The second issue that I think was touched on was around the assessment of permanent impairment payments and how hearing loss is assessed for permanent impairment compensation. Under the MRCA and the VEA we use GAR to assess the impairment resulting from hearing loss, and under the VEA and the MRCA we can include any subsequent natural deterioration in that hearing loss and pay compensation for that deterioration. Under the SRCA the general rule, which has been agreed with Comcare, is that any deterioration post-discharge cannot be compensated for in the form of permanent impairment payments. In relation to treatment, since December 2013 all SRCA clients with DVA have been provided with white cards and their hearing aids have been provided under the white card regime. This will not change with the introduction of the DRCA, so our current arrangements in relation to the provision of hearing aids under the white card regime will stay the same under the DRCA.

Senator KAKOSCHKE-MOORE: Is there a difference between the type of hearing aid you can access using a White Card if you are a veteran and the type of hearing aid you could access if you were a public servant?

Ms Spiers: We are probably not the people at the table who are best to answer this question. The particular issue that was raised today by some of the witnesses, and what you are seeking to clarify from us, was a matter that Ms Campion has discussed at Senate estimates a couple of times from the department. We would be able to provide some material for you, but we have probably exhausted our ability to explain the differences at the moment.

CHAIR: Sure, and you have heard the evidence of 500 people, so perhaps you could pick that up.

Senator KAKOSCHKE-MOORE: If you could provide that clarification on notice, that would be great.

Senator LAMBIE: Before I get into the bigger questions, I would like you to take this question on notice, because I am sick and tired of hearing about this 'we can't have one pathway; we can't have one act', because I think it is rubbish. I would like to know who you have consulted with; what expertise you have brought in to come up with that answer; how much time you have spent with these people; and when this has been done over the years. If you can provide that to the committee, I am sure we would appreciate that. Thank you.

My first question to you is: who at the Department of Veterans' Affairs or the minister's office drafted this DRCA legislation?

Ms Spiers: Neither the minister's office nor the department drafted the legislation. It was the Office of Parliamentary Counsel. The government drafted the draft legislation.

Senator LAMBIE: When you go to them you have to give them some idea of what you want done.

Ms Spiers: Correct.

Senator LAMBIE: So who was involved in that process beforehand?

Ms Spiers: What is provided to the Office of Parliamentary Counsel is known as 'drafting instructions'. My branch is responsible for drafting those instructions in consultation with the policy arm of the department. It is a standard process; I think that that model exists in nearly every agency.

Senator LAMBIE: Can I please see all those draft notes? Could you please pass those to the committee?

CHAIR: I will ask the witnesses to take that on notice. They will probably need to get some direction as to whether they can pass those drafting notes on.

Ms Spiers: Correct.

Senator LAMBIE: As it exists today under the SRCA, the MRCC is required to carry out its functions as if it were being done by Comcare. That is in section 69 in subsection 142.1(d), which are both being repealed and not replaced in the DRCA. Were any feasibility studies conducted by DVA on the unintended consequences to veterans in repealing these sections?

Mrs Foreman: Can you read the section out again, please, Senator.

CHAIR: Section 69 was one; what was the other one?

Senator LAMBIE: It was section 69, subsection 142.1(d).

Ms Spiers: Could you just give us a moment to find that, please? Sorry, I am told that section 69 is in the part of the CRCA that relates to the express functions of the Safety, Rehabilitation and Compensation Commission, so therefore it would not be included in a bill where the MRCA is the responsible commission. I missed the other one?

Senator LAMBIE: It was 142(1)(d).

Mr Brown: That is being repealed, because that is basically the provision that allows the SRCC to set administrative practices and policies that the MRCC must apply. That would not be applicable under a standalone DRCA.

Ms Spiers: Sorry, can we clarify? New ones will not be applicable under DRCA. The reality is that when and if DRCA is passed and becomes an act we will have all the policies and procedures that underpin CRCA, which the department has developed based on the Comcare work. From day one, that is what we will be applying because DRCA is all about administering the military aspects of CRCA as it was when it was part of CRCA. It is only if there is legislative change post DRCA that you would be looking at any possible changes there. But from day one after royal assent to DRCA it would be business as usual for any clients that have CRCA coverage. They would then have DRCA coverage. And if by virtue of looking at any aspects of that administration there is an adverse impact on an individual, or a cohort or all of them then that is when the minister would be advised to exercise the Henry VIII clause to correct whatever that adverse impact is.

CHAIR: In favour of the veteran or the client?

Ms Spiers: Correct.

CHAIR: Only in favour of the veteran or the client?

Ms Spiers: Correct—that is right.

Senator LAMBIE: Sorry, I will come back to the initial question: were there any feasibility studies conducted by DVA on the unintended consequences? Have you done feasibility studies on the unintended consequences of the DRCA?

Mrs Foreman: In doing the transition—in moving from CRCA to DRCA—we and OPC have done this to the best of our ability: to contain all the existing rights that veterans have under the CRCA. But if in any way there has been an error or something has been left out, the Henry VIII clause says that we are able to fix that in a way that is beneficial to the veteran.

Senator LAMBIE: Yes, but I am asking you what you have done proactively. What have you done already? Have you done a feasibility study, okay, on the unintended consequences from this DRCA? What studies have you done for the unintended consequences? It is not perfect, you would have to admit that. What studies have you done to lessen the impacts of the unintended consequences? That is what I am asking you.

Mrs Foreman: The role of having the Office of Parliamentary Counsel actually draft the legislation—

Ms Spiers: I have just had advice here that when we had the draft legislation put together, the Australian Government Solicitor suggested including the Henry VIII clause to address any potential unintended consequences. I am not sure how we would undertake a feasibility study in a theoretical sense.

Senator LAMBIE: Okay. Can I just use an example here? An example of an unintended consequence is a veteran not being able to rely upon past precedent or practices related to the functions of the MRCC and the DVA as they related to the processing of veterans' claims.

Mrs Foreman: Senator, could you—

Senator LAMBIE: What I am saying is that an example of an unintended consequence is a veteran not being able to rely upon past precedents—precedents that have already been set in the courts—or practices related to the functions of the MRCC and DVA as they relate to the processing of veterans' claims.

Mrs Foreman: We understand.

Ms Spiers: The evidence that I have just given to the committee is that the whole intention from day one of the DRCA is that all the case law that applies to the CRCA at that point in time—so, Canute, Fellowes, Robson—continues to apply to the DRCA. Quite rightly, over time the civilian legislation and AAT or Federal Court cases might go in a different direction. But from day one everything is aligned, as it should be, and we will be applying Canute, Fellowes and Robson as we do today. We will do that post the implementation of DRCA.

All policies and procedures that applied in a point in time—as I have said before, all of our policies have been underpinned by the work we have from Comcare—that is the alignment issue for CRCA. That is the issue that will apply to us with DRCA from day one.

CHAIR: So for the concern expressed by Mr Briggs, when he raised this very question, you are telling us that precedent flows over to the new legislation?

Ms Spiers: Correct.

CHAIR: There is no loss of precedent and there is no loss of privilege or anything enjoyed at the moment under CRCA. It is there under DRCA as it related to military personnel.

Ms Spiers: Correct, yes.

Senator LAMBIE: Do you actually have that in writing, in very plain and simple terms, that those precedents will stick from the past?

Ms Spiers: In relation to who?

Senator LAMBIE: Where does—

Senator MOORE: It is not in the act.

Senator LAMBIE: It is not in the act.

Senator MOORE: If CRCA becomes DRCA the particular issue about legal precedent and how that would operate is not in the act. It could be understood, but in terms of concerns that have been raised it—

Senator LAMBIE: These are the unintended consequences when you do not get it right.

Ms Spiers: The wording, if not exactly the same, is made clear in the explanatory memorandum and in the second reading speech: the operation of the provision is meant to be the same. So if on the day after the DRCA is passed we are in the Federal Court on a matter, then the court is examining the case law that underpins the wording of that section. Now, there will not be any case law in DRCA terms, because it is day one and it has not had time to mature. But the case law for that is all sitting in the CRCA side of business. Can I be clear: I think that Mr Briggs indicated that the case law is only coming from the Comcare side of business. Canute is a Comcare decision but Fellowes is actually an MRCC decision. So we do have MRCC decisions that apply to the operation of CRCA at the moment. So that will happen.

Over time, and as you would all know, when you make changes to legislation courts will interpret legislation differently. But at day one it is the same—the precedents are the same.

Senator MOORE: I think we are seeking a confirmation, just to say that any applicable case law that has been operating under CRCA will continue to be the operational case law. It would just be—

Ms Spiers: Correct.

Senator MOORE: that confirmation on record.

Ms Spiers: Correct, yes. And I am sure that if the committee needed some confirmation from the Military Rehabilitation Compensation Commission or the minister, both would provide that.

CHAIR: I will consult with committee members, but I think such an assurance would probably be of value to them.

Senator MOORE: To the evidence, yes.

Senator LAMBIE: That would be good. I have one more question about some case law. This bothers me. This one, again, is about consultation and sharing it with the veterans—making sure that word gets out there. You have a very big database. There has been a recent ComSuper ruling about what the ComSuper is when you get it for injuries and what it is not. Are you aware of that case?

Ms Spiers: I am aware of a ComSuper case that has caused concern in the veteran community, but it is not an issue that relates directly to how DVA operates its payments. As I understand the case, it is a ComSuper case about the splitting of ComSuper for the purposes of a family law case.

Senator LAMBIE: Yes.

Ms Spiers: That is correct. So it is not a matter for Veterans' Affairs to handle—

Senator LAMBIE: Actually, I believe that it is. I believe that DVA needs to come in and I will tell you why: it is because it is actually part of your compensation. It is a compensation matter. This person is actually getting it for compensation. Therefore, it should not be included in the income. It is compensation. Something needs to be done. This is a very big case that is happening out there, and there are more to come. If you do not want to deal with it now, which is fine—

Ms Spiers: With respect, I think this is an issue you should take up with the Attorney-General's Department—

Senator LAMBIE: I will do that, thank you.

Ms Spiers: Because it is not a piece of legislation that the Minister for Veterans' Affairs administers. The Attorney-General does.

Senator MOORE: There are a couple of quite specific things about clauses. Rather than going into it here, I will give them to you. A couple of them relate to what could happen to MRCA in the future. We have actually established that that is a wider issue for a later piece of legislation. But getting back to Henry VIII, it was determined that the whole provision of that is to ensure that no client is worse off, which is the intent and has been put forward very clearly by the minister. Who makes the determination about whether or not a client is worse off?

Ms Spiers: Ultimately, it is advice we would give to the minister, based on the circumstance that has been raised—so, whether we detect it or the individual detects it. If post-DRCA someone comes to us and says, 'Under DRCA this is what is happening to me and it is less than I would have got under SRCA, and it is the result of the operation of the legislation,' we have the capacity then to advise the minister of that issue and then go through that sequence of regulation-making to correct it.

Senator MOORE: So the issue is identified either by the department itself or by a claimant—

Ms Spiers: Or an individual, or the ex-service community.

CHAIR: Or an advocate.

Ms Spiers: We would take that sort of information from any source, yes.

Senator MOORE: And then the final determination is by who?

Ms Spiers: Obviously, we seek Australian Government Solicitor advice on that and the minister would have to be satisfied of that issue. The distinction I would like to make here is that if someone does not like the outcome of the decision under DRCA that might actually be the merits of the case, which is different to the operation of the act being prohibitive or detrimental. I would make that distinction here.

Senator MOORE: There was a question raised—I don't think it was a question Senator Kakoschke-Moore asked—by Mr Thornton in his submission. It is on page 3 of his submission and it refers to subsections 5(10C) and 5(10D):

> … it would nevertheless be prudent for the Senate Committee to seek clarification and enquire into why these sub-sections are to be repealed and excluded from the DRCA, as they are extant within current SRCA legislation.

That was a particular question I said I would ask of the department. If you need to give it more consideration could we get that on notice and then it would be public and Mr Thornton would have his answer.

Ms Spiers: We have material here but I think it is going to take me a little while to figure out what the answer is.

Senator MOORE: I understand. I have a couple of other questions about subclauses that I will give to you. If we could get them on notice that would be useful. They are just in terms of the technical elements that have been raised as questions. I am just checking with Senator Lambie to see if she has any more of them.

Senator LAMBIE: No. Do we get the opportunity in the next 24 hours to put questions on notice?

CHAIR: Yes.

Senator LAMBIE: I just have to go and get my head around it.

Senator MOORE: And it is very difficult because of the time zone.

CHAIR: I would alert my colleagues to the fact that I will be requiring answers to questions on notice by Friday the 17th. In fairness to the officers, if you do have any questions please get them on notice as soon as possible.

Senator MOORE: I will give you these questions straight away.

CHAIR: Thank you for your appearance today. I have just alerted you to 2 pm Friday the 17th for responses to answers. I thank Hansard, the secretariat and my colleagues.

Committee adjourned at 12:44