Veterans' Affairs Legislation Amendment (Participants in British Nuclear Tests) Bill 2011

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## Glossary

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<td>ADF</td>
<td>Australian Defence Force</td>
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<td>AFP</td>
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<td>APBNTTA</td>
<td><em>Australian Participants in British Nuclear Tests (Treatment) Act 2006</em></td>
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<td>APS</td>
<td>Australian Protective Service</td>
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<td>DVA</td>
<td>Department of Veterans’ Affairs</td>
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<td>DP</td>
<td>Disability Pension</td>
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<td>RC</td>
<td>Repatriation Commission</td>
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<tr>
<td>SRCA</td>
<td><em>Safety Rehabilitation and Compensation Act 1988</em></td>
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<td>SSA</td>
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<td>VEA</td>
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<td>WWP</td>
<td>War Widow’s/er’s Pension</td>
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Veterans' Affairs Legislation Amendment (Participants in British Nuclear Tests) Bill 2011

Date introduced: 22 September 2011

House: House of Representatives

Portfolio: Veterans Affairs

Commencement: Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Veterans’ Affairs Legislation Amendment (Participants in British Nuclear Tests) Bill 2011 (the Bill) amends the Australian Participants in British Nuclear Tests (Treatment) Act 2006 (APBNTAA) and the Veterans’ Entitlements Act 1986 (VEA) to empower the Repatriation Commission (RC) to determine, by legislative instrument, that a person is a ‘nuclear test participant’ or has rendered ‘British nuclear test defence service’ respectively for the purpose of those Acts.

Background

British nuclear tests in the 1950s

From October 1952 to October 1957, British atomic weapons detonation tests were conducted at Monte Bello Islands off the west coast of Western Australia and at Emu Field and Maralinga in South Australia. Background information describing the conduct of the tests, claims for assistance by the test participants and also coverage by the Australian Government for participants up to 2006 is contained in the Bills Digest that refers to the original British nuclear tests treatment legislation.

Australian personnel at the British nuclear tests in Australia

Both Australian and British personnel—military and civilian—were involved in the nuclear tests. Details of the numbers of Australian persons (civilian and military) recorded as present at the British nuclear tests were provided in a press release issued by Bruce Scott, MP, on 29 June 2001. The Nominal Roll of test participants lists:

2. Ibid.

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The above information was released by the then Howard Government in 2001. It is a count of the number of ‘participants’ in the nuclear tests. Obviously, some individuals will have been involved in more than one test. This Bill acknowledges that the number of people on the Nominal Roll may not represent all persons with adverse health impacts resulting from the testing. There may also be other persons with health affects who have not been present at detonation or shortly thereafter. Recognition of this factor has been provided in the past.

Recognition of nuclear test participants

For many years there have been claims of adverse health impacts by the participants in the British nuclear tests. There have also been several different studies in Australia and overseas on the health impacts for participants. See the 2006 Bills Digest for APBNTTA for a background on these claims and studies up to 2006.4

What has frustrated nuclear test participants is that they have, for a long time, felt that governments have not properly or adequately recognised their adverse health outcomes and then provided adequate assistance.5 The nuclear test participants would very much like recognition of their participation in the nuclear tests as ‘qualifying service’ under the VEA. This would provide access to the veterans’ service pension and in particular, access to the veterans’ Gold Card.6 Access to the Gold Card is normally linked to what is defined in the VEA as ‘qualifying service’. Qualifying service generally refers to eligible war service or war-like service.7 Participation in the nuclear tests is not currently recognised as war or war-like service. Accordingly, participants have not qualified for the service pension on that ground and do not have access to the Gold Card.

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3. B Scott (former Minister for Veterans’ Affairs and Minister Assisting the Minister for Defence), Nominal roll completed for atomic test studies, media release, Canberra, 29 June 2001, viewed 29 September 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Author%3Ascott%20Date%3A01%2F06%2F2001%20%3E%3E%2030%2F06%2F2001%20Dataset%3Apressrel;rec=3;resCount=Default
5. This refers to governments in Australia and the United Kingdom.
6. N Xenophon, Major parties continue to neglect Maralinga veterans, media release, Canberra, 12 September 2011, viewed 29 September 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Author%3Axenophon%20Dataset%3Apressrel;rec=2;resCount=Default

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Nuclear test ‘veteran’ or ‘participant’

It is interesting to note that Senator Xenophon’s media release of 12 September 2011, refers to ‘nuclear test veterans’. This is how the nuclear test participants refer to themselves. By contrast, this Government (and former governments) refer to ‘nuclear test participants’. Even the name of this Bill (and previous Bills) refers to ‘participants’ rather than to ‘veterans’. The rationale for this careful separation of ‘participants’ from ‘veterans’ is to ensure that there is no confusion with the class of persons referred to as ‘veteran’, in the VEA. In that Act, ‘veteran’ refers to a service person with ‘qualifying service’, so not all ex-service personal are classified as ‘veterans’. Notwithstanding this VEA classification of a ‘veteran’, the community at large commonly refers to any old, or former, sailor, soldier or airman as a ‘veteran’.

Expansion of coverage by the Australian Government

The initial APBNTTA essentially provided coverage for cancer testing and treatment for all test participants. Since 2006, this coverage has been expanded. Set out below is a brief chronology and description of the expansion of this coverage.

**Veterans’ Affairs Legislation Amendment (International Agreements and Other Measures) Act 2008**

This Act extended the period for which a federal police officer is to be considered a nuclear test participant at Maralinga from 30 April 1965 to 30 June 1988. These police were performing guard duties and the expansion of coverage was in recognition that they may have been exposed to matters causing adverse health outcomes over a longer period than was originally provided for under the APBNTTA of 2006, for participants at the tests.

**Veterans’ Affairs and Other Legislation Amendment (Miscellaneous Measures) Act 2010**

The Maralinga test site was also guarded by officers of the Australian Protective Service (APS) from 1984 to 1988. However, from 20 October 1984 APS officers were not members of the Australian Federal Police (AFP) and were not covered by the *Australian Federal Police Act 1979*. The amendments in this Act described any APS officer performing guard duties at Maralinga from 20 October 1984 to 30 June 1988 as a ‘nuclear test participant’ and they therefore receive the benefit of having any cancer screen testing and treatment paid for under the APBNTTA.

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9. Section 7A of the VEA.

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Veterans’ Affairs Legislation Amendment (2010 Budget Measures) Act 2010

This Act classified the service of nuclear test participants, who were also members of the Australian Defence Force (ADF), as non-warlike or hazardous peacekeeping service under the VEA. Hitherto, nuclear test participation had not been ascribed a service classification in the VEA and, as a result, participants were not provided with assistance under the VEA. Rather, participation in the British nuclear tests was covered by military and civilian workers compensation arrangements. For members of the ADF this is coverage by the Safety Rehabilitation and Compensation Act 1988 (SRCA). The description of nuclear test service for members of the ADF as non-warlike or hazardous peacekeeping service provided them with access to some assistance under the VEA. This was mainly access to the Disability Pension (DP) for illnesses/injuries arising from that service and to War Widow’s/er’s Pension (WWP) for surviving partners, where the death of the service person is attributable to that service. The Explanatory Memorandum accompanying this Bill lists the assistance ex-service personnel can now access under the VEA.

It should be noted that this extension of recognition of non-warlike or hazardous peacekeeping service only referred to those ex-service personnel who were nuclear test participants—and not to the civilian nuclear test personnel. These persons only get access to free cancer screening, testing and treatment under the original APBNTTA for nuclear test participants.

Current coverage

Currently, civilian nuclear test participants get access to free cancer testing and treatment. Ex-service personnel who were nuclear test participants get the same cancer screening and treatment in addition to some assistance under the VEA as outlined above. This mainly refers to the DP and the WWP. Those in receipt of the DP, also have access to a White Card, being coverage for any medical condition that is accepted to arise from the nuclear test participant’s service. The other assistance under the VEA is set out in the Explanatory Memorandum.

Repatriation Commission

This Bill aims to empower the RC to provide for any expansion of APBNTAA and/or VEA coverage for nuclear test participants by way of a legislative instrument. The RC currently has several functions under the VEA. These are to:

- grant pensions and other benefits to veterans, their dependants and other eligible persons

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• provide treatment for veterans, their dependants and other eligible persons
• advise the Minister for Veterans’ Affairs on the operation of the VEA and
• administer the VEA.\textsuperscript{17}

The responsible Minister under the VEA is the Minister for Veterans’ Affairs. The Minister does not have any powers to direct the RC, beyond the power to approve various actions of the RC. The RC is responsible for the general administration of the VEA, with administrative support provided by the Department of Veterans’ Affairs (DVA). In relation to claims for pensions, benefits and treatment under the VEA, the RC is the decision maker. It has responsibility for deciding and reviewing individuals’ entitlements to pensions, benefits and treatment in accordance with the VEA. The RC has no staff of its own but delegates its powers under subsection 213(1) of the VEA to staff in DVA.

Financial Impact

According to the Explanatory Memorandum accompanying the Bill, the amendments contained in the Bill will have no financial impact.\textsuperscript{18} That being the case, it may be that the Government does not consider there will be many extra claims or any of significant cost.

Proposal to use legislative instruments

As explained in the Minister’s second reading speech when presenting the Bill to the Parliament, this Bill proposes to amend the APBNTTA and the VEA to allow future changes to the coverage for nuclear test participants to be determined by the RC, by way of a legislative instrument.\textsuperscript{19} This would be instead of amendments being made by a Bill to be passed by the Parliament. As it is set out in the Bill, any such legislative instrument would be disallowable.\textsuperscript{20}

It is worth noting that while legislative instruments are subject to examination by the Parliament, their scrutiny is less than that which applies to a Bill which must have a second and third reading after being tabled. A legislative instrument is subject to disallowance in the 15 sitting day period after being tabled, but if there is no motion of disallowance, there is no requirement for any debate.\textsuperscript{21}

According to the Minister, the rationale for the Bill is that there may be claims for assistance by nuclear test participants in the future that are not currently covered. Where such claims do occur

\textsuperscript{17} Section 180 of the VEA.
\textsuperscript{18} Explanatory Memorandum, p. ii.
\textsuperscript{21} Ibid.

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and the Government considers they should be covered, the RC can determine the coverage in a legislative instrument.\textsuperscript{22}

**Legislative instruments and the VEA**

Historically, the VEA has made use of legislative instruments, especially for the major policy application and guidelines in respect of the VEA, such as the Guide to the Assessment of Rates of Pensions, commonly referred to as the GARP\textsuperscript{23} and also the Statements of Principles (SoP).\textsuperscript{24}

Generally, both the VEA and also the Social Security Act 1991 (SSA) are statutes which set out qualification for payments and benefits for persons—rather than relying on delegated legislation. There has been a long-standing general practice that the matters describing qualification in the VEA, the SSA and similar legislation should be set out in Bills which have been appropriately scrutinised by and subsequently passed by, the Parliament.

Legislative instruments can be favoured by administrators as they are more easily updated or changed than provisions in an Act, which require amending legislation to be tabled by way of a Bill, to be read three times with the opportunity for debate and to be voted on by the Parliament. However, as said above, legislative instruments require less scrutiny by the Parliament. It may be interesting to see if this Bill sets a precedent for increased use of legislative instruments, rather than provisions in a Bill to amend the VEA, in the context of payments and assistance provided under the VEA in the future.

**Key provisions**

**Australian Participants in British Nuclear Tests (Treatment) Act 2006**

Items 1–4 amend the APBNTAA. Item 2 inserts proposed subsections 5(3C) and 5(3D). Proposed subsection 5(3C) broadens the definition of ‘nuclear test participant’ so that a person will be a ‘nuclear test participant’ if the person satisfies the requirements of a legislative instrument made under subsection 5(3D). Proposed subsection 5(3D) empowers the RC to make a legislative instrument which specifies the requirements of ‘nuclear test participant’.

Item 5 contains an applications provision. Where the RC does make a legislative instrument under proposed subsection 5(3D), it may also approve payment for cancer treatment which took place in a period of up to six months before the date on which the legislative instrument takes effect.

\textsuperscript{22} N Snowdon (Minister for Veterans’ Affairs), ‘Second reading speech: Veterans’ Affairs Legislation Amendment (Participants in British Nuclear Tests) Bill 2011’, op. cit.

\textsuperscript{23} The GARP provides guidelines to be used when assessing a claim for a disability pension and applying various degrees of impairment for different conditions and severity of conditions.

\textsuperscript{24} SoPs are determined by the Repatriation Medical Authority (RMA). SoPs set out the factors which cause certain medical conditions. SoPs determine what factors could cause a medical condition that is the subject of a claim. SoPs are used in determining liability for injuries, diseases and deaths under both the VEA and the Military Rehabilitation and Compensation Act 2004.

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Treatment, as defined in the APBNTAA, also includes testing. **Item 6** is similar to **item 5** in that it is an applications provision which will allow for the reimbursement of travel costs expended in obtaining treatment in a period of up to six months before the date on which the legislative instrument takes effect.

**Veterans’ Entitlements Act 1986**

**Items 7–10** of Schedule 1 to the Bill amend the VEA. In particular, **item 9** inserts proposed subsections 69B(5) and 69B(6) so that the RC can determine, by legislative instrument, the requirements for a person who satisfies the definition of ‘**British nuclear test defence service**’.

**Item 11** is an applications provision which allows for the backdating of the grant of a pension claim in the event that a person is granted a pension under the VEA on the basis of having rendered ‘**British nuclear test defence service**’.

**Concluding comments**

The Government claims the proposed changes to the APBNTAA and to the VEA in the Bill, will allow the RC to expand or alter assistance for nuclear test participants by way of a legislative instrument. The Government claims it will make responses to future claims more flexible and easier. However, it will also mean some reduced level of scrutiny by the Parliament; scrutiny that has not been any impediment or difficulty in the past. If claims are made for assistance and the Government feels these claims warrant a response requiring modification to the APBNTAA (or the VEA), they can make the date of effect retrospective, as is done in this Bill. It is not unusual for a change to a welfare or assistance legislation that is beneficial to be made retrospective.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2479.

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