Foreign Affairs, Defence and Trade Legislation Committee

Provisions of the Military Rehabilitation and Compensation Bill 2003 and the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003

March 2004

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Acronyms

AAT	Administrative Appeals Tribunal
ADF	Australian Defence Force
AFFA	Armed Forces Federation of Australia
ASAS	Australian special Air Service
CFTS	continuous full time service
ESO	ex–service organisation
GARP	Guide to the Assessment of Rates for Veterans Pensions (under the *Veterans' Entitlements Act 1986 (*VEA))
ISS	Income Support Supplement (under VEA)
MCA	*Military Compensation Act 1994*
MCS	Military Compensation Scheme
MRCA	Military Compensation and Rehabilitation Act
MRCB	Military Rehabilitation and Compensation Bill
MRCC	Military Rehabilitation and Compensation Commission
MTAWE	Male total average weekly earnings
MVCS	Motor Vehicle Compensation Scheme
PIG	Permanent Impairment Guide (under SRCA)
RMA	Repatriation Medical Authority (established under VEA)
SIA	Severe Injury Adjustment
SMRC	Specialist Medical Review Council
SoP	Statement of Principles (under the VEA)
SRCA	*Safety Rehabilitation and Compensation Act 198*
SRCC	Safety, Rehabilitation and Compensation Commission

SRDP	Special Rate Disability Pension (safety net)
T&PI	Totally and permanently incapacitated (pension)
VCES	Veterans' Children's Education Scheme (under VEA)
VEA	*Veterans' Entitlements Act 1986*
VETPCA	*Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986*
VRB	Veterans' Review Board
VVRS	Veterans' Vocational Rehabilitation Scheme 1997

Chapter 1

INTRODUCTION

Introduction and referral

1.1 The Military Rehabilitation and Compensation Bill 2003 (the Bill) was introduced into the House of Representatives on 4 December 2003. On the same day it was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for consideration and report by 1 March 2004. This reporting date was subsequently extended to 19 March 2004 and then to 22 March 2004. The subordinate legislation, the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003 (the Consequential Bill) was introduced and referred with the main Bill.

Purpose of the Bill

1.2 The purpose of the Bill is to establish a new military rehabilitation and compensation scheme which will provide rehabilitation, compensation and other entitlements for members of the Australian Defence Force and compensation and other entitlements for their dependants. It will be a self-contained scheme covering all serving military personnel (from the date of its proclamation) and will recognise the different nature of military service compared with civilian employment.

1.3 Legislation which currently serves this purpose will remain in force with respect to services rendered and deaths, injuries or illnesses sustained before the proclamation of the Bill, (the commencement date, anticipated to be 1 July 2004).

1.4 The most important existing legislation is:

- *Veterans' Entitlements Act 1986,*
- *Safety, Rehabilitation and Compensation Act 1988*, and
- *Military Compensation Act 1994.*

1.5 The Bill establishes a new Military Rehabilitation and Compensation Commission which will administer all compensation entitlements under the Military Rehabilitation and Compensation Scheme established by the Bill.

Purpose of the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003

1.6 This Bill (the Consequential Bill) has two main purposes. The first is to prevent anomalies and dual entitlements for people now receiving, or eligible to claim, benefits under the VEA and/or the SRCA who will also be eligible to claim under the new Bill for death or injury sustained after the new Bill takes effect. In such a

situation the Consequential Bill will ensure that any payments under the new Bill are offset by payments received under the VEA and/or the SRCA.

1.7 The second purpose of the Consequential Bill is to amend a number of existing Acts (in addition to those listed above) in so far as they are affected by the Military Rehabilitation and Compensation Bill. These are listed in the Explanatory Memorandum.[1] The most important are:

- *Social Security Act 1991*
- *Income Tax Assessment Act 1997.*

Submissions

1.8 The Committee advertised its inquiry into the Bill in *The Australian* on 17 December 2003. It also advertised on the internet and contacted a number of organisations (on 4 December 2003) alerting them to the inquiry and inviting them to make a submission.

1.9 A list of submissions received is at **Appendix 1.**

Hearings and evidence

1.10 The Committee held three public hearings, as follows:

- Perth, 23 February 2004,
- Melbourne, 24 February 2004, and
- Canberra, 25 February 2004.

1.11 Witnesses who appeared before the Committee at these hearings are listed in **Appendix 2.**

1.12 Copies of the Hansard transcript of the hearings are tabled for the information of the Senate. They are also available through the internet at http://aph.gov.au/hansard.

Acknowledgement

1.13 The Committee wishes to thank all those who assisted with its inquiry.

1 Explanatory Memorandum, Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003, p. 42.

Chapter 2

THE BILL AND CONSEQUENTIAL AMENDMENTS

Introduction

2.1 This chapter describes the background to the decision to introduce a new military rehabilitation and compensation scheme and outlines the main provisions of the Bill and the consequential amendments.

Background

The current position

2.2 At present the legislative provisions governing compensation for serving and former members of the Australian Defence Force (ADF) who suffer death, injury or illness as a result of their service are set out in the Military Compensation Scheme (MCS), which was established through the *Military Compensation Act 1994* (MCA).

2.3 The MCS incorporates elements of a number of different Acts and legislative provisions, the most important of which are:

- *Veterans' Entitlements Act 1986* (VEA),
- *Safety, Rehabilitation and Compensation Act 1988* (SRCA), and
- Defence Determination 2000/1 under the *Defence Act 1903.*

2.4 The MCS also interacts with other legislative provisions relating to, for example, superannuation, taxation and social security.

2.5 The resulting arrangements are exceedingly complex. Some members and former members (and their dependants) have compensation coverage[1] through the SRCA, supplemented by Defence Determination 2000/1; some have coverage through the VEA and some have dual entitlement. Eligibility depends on the type of service, date of death, injury or illness and date of enlistment. For example, for service overseas and for warlike and non-warlike service members are covered by the VEA. For peacetime service they are covered by the SRCA (and by the MCA since 1994). However, in the period 1972-1994 they may have been eligible for compensation under either the VEA or the SRCA or both

2.6 One of the aims of the *Military Compensation Act 1994* was to reduce this complexity by phasing out dual eligibility. Since that date dual eligibility has been

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1 Compensation may include pensions and/or lump sums, health care and ancillary services such as attendant care services

restricted to those who enlisted before 1996 and those who undertake warlike service and non-warlike service. All other compensation is covered by the SRCA.

2.7 The SRCA is basically a workers' compensation arrangement. It applies to all Commonwealth workers and is not particularly relevant to the special needs of military personnel. A second aim of the MCA was to increase the relevance of the SRCA to Defence Force personnel.

The impetus for change

2.8 While the *Military Compensation Act 1994* made some improvements to military compensation arrangements by limiting dual eligibility and increasing the relevance of the SRCA to military personnel, the system remains complex, cumbersome and difficult to understand, both for those making claims and for those assisting them. Many have suggested also that the focus of the MCS on compensation rather than prevention and rehabilitation is at odds with current approaches to workplace injuries in the wider community.

2.9 Attention has been drawn to deficiencies in current arrangements in a number of inquiries and reports. The Department of Defence inquiry into the Black Hawk accident in 1996, for example,[2] revealed the inconsistencies in current arrangements. Members of the ADF injured in the accident, and dependants of those killed, received different entitlements depending upon their date of enlistment (and consequently upon whether they were eligible for compensation under both the VEA and the SRCA or only under the SRCA). The Black Hawk inquiry also drew attention to the inadequacy of compensation for ADF members who were severely injured on peacetime service and for the families of those killed.

2.10 Subsequently the Government introduced additional compensation benefits for these groups through Defence Determination 2000/1 under the *Defence Act 1903*. It also appointed Mr Noel Tanzer AC to conduct an inquiry into the MCS.[3] The Tanzer review recommended the establishment of a new military rehabilitation and compensation scheme covering all types of service.

2.11 The Clarke review, which reported in 2003,[4] had a narrower focus than the Tanzer review but it also recommended a greater emphasis on rehabilitation and suggested that veterans with dual entitlement under the SRCA and the VEA should make a choice between them but should no longer be eligible for both.

2.12 The Government began developing proposals for a new military compensation scheme in 2000. They are based to a significant extent on the recommendations of the Tanzer report. During 2002 the Department of Defence, Department of Veterans' Affairs and the Repatriation Commission conducted consultations with serving

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2 *Black Hawk Board of Inquiry: Documents for Public Release*, Australian Army, 1997

3 *The Review of the Military Compensation Scheme*, Department of Defence, 1999

4 *Report of the Review of Veterans' Entitlements*, Commonwealth of Australia, 2003

members of the ADF and organisations representing ex-servicemen (and women) on proposals for a new scheme.

2.13 In 2003 the Department of Veterans' Affairs produced an exposure draft of a bill to establish a new military rehabilitation and compensation scheme. This draft was also the subject of extensive consultations in mid 2003. Following input from the veteran and Defence Force community the Government modified the exposure draft of the bill. In this modified form the Bill was introduced into the House of Representatives on 4 December 2003 as the Military Rehabilitation and Compensation Bill 2003, together with the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003. These bills form the subject of this inquiry

Main provisions of the Bill

2.14 As noted above, the Bill sets out the arrangements for rehabilitation, compensation and other entitlements (such as access to health care) for military personnel and their dependants with respect to injury, disease or death connected with military service performed from the date of the Bill's proclamation. It also covers reservists, cadets, philanthropic organisations and civilians for whom an association with the ADF can be established. Current and/or former members of the ADF will continue to be covered by the existing legislation for service before 1 July 2004.

2.15 The provisions of the Bill largely parallel those of the VEA and the SRCA although they are more generous for people with high levels of impairment. The Bill also places greater emphasis on rehabilitation than does the VEA.

2.16 The Bill sets out the circumstances in which the Military Rehabilitation and Compensation Commission established in this legislation (the Commission) must accept liability for service injury, disease or death. It may do so only after the claimant (or dependant or legal representative in the case of a deceased person) has lodged a claim and providing the claimant has not contributed to the injury or illness, for example by acting under the influence of drugs or alcohol or by withholding information or providing false information in respect to their previous medical history.

2.17 If these conditions are met then the Commission must establish that the injury, disease or death is related to defence service. If this service is warlike or non-warlike service then the Commission must accept liability unless it can establish *beyond reasonable doubt* that there is no connection between the service and the injury, disease or death. In the case of all other forms of service the less generous standard of proof—*reasonable satisfaction*—applies. In all cases the onus is on the Commission to disprove a claim rather than on the claimant to prove it.[5]

2.18 In making its determinations the Commission must be guided by the Statement of Principles in the VEA. The Statement of Principles sets out all the factors related to

5 Standards of proof are discussed in s 335

defence service that have been found to cause specific injuries, diseases or deaths. When applying the Statement of Principles the Commission must establish a reasonable hypothesis between the injury, disease or death and service, in the case of warlike and non-warlike service. For peacetime service the 'reasonable satisfaction' standard applies. In circumstances where no Statement of Principles applies the Commission may make its own determination.

2.19 The Bill has a strong focus on rehabilitation, participation in which will become a precondition for compensation (although not for treatment). In this respect it mirrors arrangements in the civilian sector (and in the SRCA) to a much greater degree than does the VEA where the emphasis is on compensation rather than rehabilitation. The VEA reflects to a significant degree the community attitudes at the time of the inception of its predecessor legislation, going back to 1916, where rehabilitation was not considered an option for most claimants. Rehabilitation for serving ADF personnel will be the responsibility of the Department of Defence. In other cases it will be the responsibility of the Department of Veterans' Affairs.

2.20 The Bill provides for medical, vocational and psychological rehabilitation and aims, where possible, to return affected personnel to suitable work as soon as practicable. Where this is not possible it aims to maximise the extent of their physical, social and mental recovery, thus reducing the human and economic cost of disability to the individual concerned and to the broader community.

2.21 The Bill provides various forms of monetary compensation for non economic loss (permanent impairment) and economic loss (incapacity payments). In the case of permanent impairment it offers a choice between a lump sum or a weekly payment or a combination of these. Compensation is based on the existing Guide to the Assessment of Rates for Veterans' Pensions (GARP), under the VEA, although payment levels are higher for those with warlike and non–warlike service than for those with peacetime service.

2.22 The level of compensation paid depends both on the degree of impairment and, in the case of lump sum payments, on the age of the recipients, with maximum lump sums payable for males up to age 30 and females up to age 35[6] with impairment levels of 80 points. Payment levels are comparable to those now provided under the VEA and the SRCA although they are greater in this Bill for personnel with high levels of impairment.

2.23 Incapacity payments (for economic loss) are based on earnings at the date of incapacity, for serving members, and date of discharge for non serving members. They receive their full salary for 45 weeks and then 75 per cent of their salary. The salary includes payments and allowances and a loading of $100 per week for non salary benefits such as housing. As their participation in the work force increases, their incapacity payments decrease according to a sliding scale designed to encourage

6 Conversion from a weekly payment to a lump sum will be done using life expectancy tables provided by the Australian Government Actuary.

maximum work force participation. Incapacity payments stop at retirement age, at which time recipients receive a service pension (if eligible), an age pension and/or superannuation, in line with similar provisions for the general work force.

2.24 Incapacity payments are adjusted in line with movements in ADF pay. They are taxed and offset, dollar for dollar, against the government component of Commonwealth superannuation. There is no cap on the level of incapacity payments but the minimum payment is pegged to the federal minimum wage.

2.25 People with high levels of disability (above 50 points) who are unable to work more than 10 hours per week may choose to accept the Special Rate Disability Pension (SRDP), equivalent to the T&PI pension (the Special Rate pension) available under the VEA, rather than weekly incapacity payments. Recipients are eligible for a range of other benefits, such as the Gold Card, and receive the payment until death, after which their dependant spouse becomes eligible for a pension equivalent to the war widow's pension under the VEA, as well as a range of other benefits. [7]

2.26 The SRDP is not taxed. It is offset against the government component of Commonwealth superannuation at the rate of 60 cents in the dollar. It is also offset against any payments for permanent impairment.

2.27 The SRDP is a safety net option for those whose income, if they received incapacity payments, would be lower than the income currently provided to Special Rate (T&PI) pensioners under the VEA.

2.28 ADF personnel will also be eligible for a range of non monetary benefits in certain circumstances. These may include: financial assistance for household and attendant care; motor vehicle modifications; a telephone service and medical aids.

2.29 ADF personnel will also be eligible for treatment for injuries and diseases connected with their Defence Force service provided the Commission has accepted liability. When the personnel remain within the ADF their treatment will normally be provided under Defence Force Regulations. If they leave the service this Bill will ensure that they receive compensation for the costs of treatment, in the case of short term treatment. For ongoing, long term treatment, personnel will be provided with a White Card which will entitle them to treatment for their compensable conditions. Those with high levels of impairment will be provided automatically with a Gold Card entitling them to receive treatment for any injury or disease. This is similar to the provisions of the VEA.

2.30 Widowed partners of ADF personnel (and others covered by the Bill) whose death was related to service (and where the Commission has accepted liability) will be entitled to a range of monetary and non monetary compensation, as will dependent

7 See s 12, 233 and 234 for pension entitlements of the surviving partners of deceased SRDP recipients.

children. These are similar to existing entitlements, but more generous in the case of deaths connected with warlike service.

2.31 The Bill establishes the Military Rehabilitation and Compensation Commission (the Commission) and sets out its functions and membership. It also sets out the procedures for reconsideration and review of Commission decisions. In the case of warlike and non-warlike service claimants may choose to have the Commission reconsider its decision or have it reviewed by the Veterans' Review Board. Final decisions of either of these bodies may be appealed to the Administrative Appeals Tribunal (AAT). For peace time service, review is by the Commission only (with a different delegate from the one who made the original decision) and then the AAT.

2.32 The Bill has been designed to meet the specific needs of ADF personnel and their dependants and to take account of contemporary developments in related areas such as superannuation and social security. It will cover all personnel from the date of its proclamation, regardless of their type of service and thus, over time, reduce the scope for dual eligibility and the resulting complexity of existing arrangements.

Main provisions of the Consequential Bill

2.33 The Consequential Bill will come into effect on the same date as the main Bill. Its transitional provisions are designed to prevent anomalies and dual entitlements in cases in which individuals may be eligible for similar benefits or services under the VEA, the SRCA or the new Bill after its promulgation. The consequential Bill achieves this objective by amending both the VEA and the SRCA. The effect of these amendments will be that a person who is entitled to a benefit or service under the new Bill will no longer be entitled to a similar benefit or service under the VEA or the SRCA.

2.34 The Consequential Bill, for example, ensures that individuals receiving the Special Rate Disability Pension under the new Bill will have that payment offset by any disability pension under the VEA for war service or any compensation for permanent impairment under the SRCA. All future incapacity payments will be made under the new Bill.

2.35 In the same way, the Consequential Bill ensures that certain services now provided under the VEA and the SRCA which will also be provided under the new Bill will be available under only one of the Acts, to prevent double dipping. Such services include:

- attendant care and household services,
- treatment expenses for the same condition, and corresponding travel costs,
- modifications to aids and appliances, and
- treatment under a rehabilitation program.

2.36 The Consequential Bill makes provision for a situation in which an individual has suffered an injury or disease for which liability has been accepted under the VEA or the SRCA but where an aggravation of that injury or disease occurs after

promulgation of the new Bill. In these circumstances the individual concerned will have a choice. He/she can apply for an increase in the disability pension under the VEA to take account of the aggravation in the condition or apply under the new legislation for compensation for the extent of the aggravation.

2.37 Certain guidelines or provisions of the VEA are adopted in the new Bill. The Consequential Bill is the mechanism through which this translation is achieved. The guidelines and provisions include (but are not restricted to):

- Guide to the assessment of rates of veterans' pensions (GARP) (s29 of the VEA)
- The Statement of Principles (s196B of the VEA)
- The Veterans' Children's Education Scheme (Part V11 of the VEA)
- The Treatment Principles (s90 of the VEA).

Amendments to other legislation

2.38 The Consequential Bill amends a range of other Acts dealing with subjects related in some areas to the subject of the new Bill. These include, for example, the *Aged Care Act 1999* and *A New Tax System (Family Assistance) Act 1999*, the benefits of which may be affected in some circumstances by the provisions of the new Bill. Amendments to the *Income Tax Assessment Act 1997* ensure that certain payments under the new Bill will be tax exempt, while amendments to the *Social Security Act 1991* ensure that certain payments under the new Bill preclude entitlement to some payments under that Act.

Chapter 3

DEVELOPMENT, RATIONALE AND SCOPE OF THE BILL

Layout of the report

3.1 The remaining chapters of the report examine the main provisions of the Bill, in broadly the same sequence as they appear in the legislation, indicating the views on each aspect received in the evidence. The report also draws attention to the misconceptions apparent in some of the evidence. These misconceptions appear to have contributed to many of the concerns with the legislation expressed to the Committee during the course of its inquiry.

Development of the Bill

3.2 A range of views was expressed during the inquiry on the process by which the Bill had been developed and refined.

3.3 A number of submissions expressed satisfaction with the way in which the provisions of the Bill had been subject to scrutiny and comment by ex-service organisations (ESOs) and others with an interest in the subject. They were pleased that at least some of their comments on the Exposure Draft of the Bill had been incorporated into the Bill now before the Parliament.

> Generally, Legacy supports the intent of the legislation and wishes to express our appreciation for the opportunity to contribute towards its development. It is evident that note has been taken of most Legacy comments on the exposure draft of the new Military Rehabilitation and Compensation Bill.[1]
>
> The response by the Government to the Draft Bill released on 27 June 2003 and the subsequent amendments contained in the Bill is indicative of their willingness to listen and make changes where necessary.[2]

3.4 This view was disputed in other submissions, which suggested that consultations had been inadequate and rushed, that the views of the ESOs had not been heard and that it was inappropriate to finalise the Bill until the Government had responded to the

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1 *Submission 2*, p.1 (Legacy Coordinating Council)

2 *Submission 11*, p.1 (Armed Forces Federation of Australia)

Clarke Review,[3] which made recommendations on a number of the issues raised in this Bill.

> … the ASASA have concerns at the way this legislation was arrived at and the continued perception that the Veteran Community and possibly, members of the ADF were consulted all the way as this Bill was created. Unfortunately this is not and was not the case right from the beginning of the process.[4]

3.5 A number of witnesses referred in particular to the inadequate consultations with serving members of the ADF, the group directly affected by the legislation.

> The bill has been introduced to address the soldiers that are still serving. I think the committee consisted of one person in uniform, who has since resigned. In the compilation of this bill, have we really addressed and had the defence people in the discussions—the operators down at the front line that put their life on the line and the widows who are going to address it—rather than a group of very eminent public servants telling the Defence Force what is best for their people?[5]

> In the consultation that I had, there were expressions of surprise that current serving members did not seem to be as well represented as the ex–service organisations, such as Vietnam veterans or the RSL. They all, as I said, had a right and a place to be at the table, but we would have liked to have seen some more contemporary organisations or members.[6]

3.6 Department of Defence witnesses explained[7] that they had visited every major military establishment and unit in Australia to present information on the Bill. They acknowledged however that the response had been 'patchy'. They attributed this in part to the complexity of the legislation and in part to the fact that fit young soldiers consider themselves indestructible and are therefore not very interested in issues of compensation, which they cannot envisage themselves ever needing to access.

Rationale and scope of the Bill

3.7 The Bill, as noted, is designed to provide rehabilitation, compensation and other entitlements to all members and former members of the ADF for service–related injuries, diseases and deaths sustained after the date of its promulgation, planned for

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3 The Government's response to the Clarke Review was issued on 2 March 2004.

4 *Submission 10*, Attachment 1, p. 2 (Australian Special Air Service Association).

5 *Committee Hansard*, 23 February 2004, p. 18 (Lt Col Lewis, Australian Special Air Service Association). Please note that all references to Hansard page numbers are to the draft and not the final document.

6 *Committee Hansard*, 24 February, p. 18 (Mr Greg Isolani, Armed Forces Federation of Australia).

7 *Committee Hansard,* 24 February, pp. 22-23 (Mr Mal Pearce, Department of Defence*)*.

1 July 2004. It is very broad in scope, with coverage including cadets, part time reservists, declared members[8] and their dependants.

3.8 The Bill applies to warlike and non-warlike service (as does the VEA) and to peacetime service (as does the SRCA).[9] It thus amalgamates the military and the civilian aspects of the earlier legislation, in recognition of the fact that the boundary between military and civilian deployment is becoming increasingly blurred in the ADF's engagements overseas, a trend that can be expected to continue.

3.9 The more uniform approach is also an acknowledgement of the very different social and community expectations in which the Bill has been developed, as compared with the position in the 1920s when the original military compensation legislation was framed. We now have a comprehensive social security system, almost universal superannuation coverage and much improved salaries and conditions for service members. It is appropriate therefore that the new legislation is cognizant of these changes.

3.10 Despite the changes in the Bill designed to bring together the military and civilian schemes, the legislation continues to acknowledge the special contribution of ADF personnel with combat service, a contribution recognised in previous legislation and supported in the general community. Such recognition is afforded in the new Bill through a series of more generous entitlements for members with warlike and non-warlike service and their dependants as compared with those with peacetime service. Other differentials are also retained, for example in respect to a more favourable standard of proof in the determination of liability, as discussed later in the report. The issue of differential service, which is a central concept in the new Bill, was also the most contentious. It is discussed at length in the following chapter.

3.11 In evidence to the Committee there was a significant divergence of opinion on the unification of the military and civilian aspects of service in the new Bill.

3.12 Some supported it:

> It is the Naval Association's view that overall, the draft legislation provides improved arrangements for coverage of death, disability and rehabilitation benefits for members, former members of the Australian Defence Forces and their dependants. The concept of combining the elements of existing legislation into one piece of legislation will simplify (if ever the word could be used in regard to this legislation) and aid the understanding and implementation of its provisions.[10]

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8 Declared members are usually civilians assisting the ADF. Their status as declared members is established by ministerial determination (of the Minister for Defence).

9 Each of these types of service is established by ministerial determination (of the Minister for Defence) for each deployment, as discussed in the following chapter.

10 *Submission 8*, p. 1 (Naval Association of Australia).

> The MRCB is an ambitious proposal for a stand alone Military Compensation Scheme that is overall a successful fusion of the past and present schemes available to ADF members injured during war like or peacetime service via the *Veterans Entitlements Act* (VEA), the *Defence Act* (DA) and Comsuper Schemes.[11]

3.13 Others opposed it because they considered it downgraded the special position previously accorded to those with warlike and non-warlike service.

> It presents a very civilian orientated and non-war like perception of the realities of Service life. It attempts to equate the risks faced in Service training and Operational circumstances to those faced in civilian life, which is simply not correct. Occupational health and safety have little sway in combat.[12]

> Whilst continuing to give special praise to those it puts in the way of such great danger, the government is in the process of downgrading war service compensation by eliminating its advantages over the peace-time equivalent.[13]

3.14 Some went so far as to recommend the Bill be retitled to replace the term 'compensation', with its civilian connotations, with 'entitlements', to recognise the traditional, special position of ADF personnel.

> We propose that 'Compensation' be replaced by 'Entitlements'. The latter fully describes the Bill's intention beyond rehabilitation, whereas 'Compensation' does not because of the many ancillary provisions, which are not compensation. Further, the word 'Entitlements' links with the Veterans' Entitlements Act (VEA) an Act designed to cover Service personnel. 'Compensation' links with the SRCA, an Act to cover civilians.[14]

> Firstly we consider the proposed Act should be retitled 'The Military and Veterans' Rehabilitation and Compensation Entitlement Act'. In agreeing to this small but significant amendment it would reflect Parliament's acknowledgement of the fact that Australian servicemen, because of what they are required to do, are entitled to a fair and just system of compensation.[15]

Confusion over the scope of the Bill

3.15 As previously noted, the Bill will cover all ADF personnel, cadets, reservists and declared members with respect to service from 1 July 2004. Former members, and

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11 *Submission 11*, p. 1 (Armed Forces Federation of Australia).

12 *Submission 4,* Attachment 1, p. 2 (Australian Federation of Totally and Permanently Incapacitated Ex Servicemen and Women).

13 *Submission 12*, p. 2 (Vietnam Veterans' Federation).

14 *Submission 5*, p. 3 (Australian Veterans and Defence Services Council).

15 *Submission 16*, pp. 2–3 (Regular Defence Force Welfare Association).

continuing members with service before that date will continue to be covered by existing legislation (mainly the VEA and the SRCA) for service undertaken before that date. Where service after 1 July 2004 can be shown to have aggravated a condition acquired in service before that date then the new Bill can provide compensation to the extent of the aggravation, but not for the pre-existing condition.

3.16 The Committee heard from the Australian Nursing Federation about its concern with the s 8 provision of the Bill as it relates to declared members. The Federation is concerned about the position of nurses working in warlike or non–warlike situations when the Minister does not make them declared members, and who will have no right of appeal in the legislation against such a ministerial decision. The Bill perpetuates an existing anomaly, which, they suggest, had an adverse impact on nurses working in Vietnam.

> [Our concern} relates to civilians or non-ADF members who may find themselves in situations of conflict and some time later have injuries or illnesses that require some attention. We are concerned that the proposed legislation will perpetuate the same anomalies that arise in relation to existing civilians. The example that we are concerned about is the SEATO nurses, who served in Vietnam. The main issue is that SEATO nurses—as would be the case for civilians under the proposed legislation—do not have access to any right of review should the minister not make a determination in their favour.[16]

3.17 The provisions in the Bill covering its scope have been widely misunderstood in the community, giving rise to needless anxiety on the part of some former members about their continued eligibility for entitlements, and the additional complexity in establishing their eligibility which they perceive will result from implementation of the legislation.

3.18 The following quotation attests to the confusion and anxiety on this issue in the veteran community:

> A clear and simple statement is required of the impact of the proposed arrangements on current and former members of the Defence Forces. There is already a great deal of complexity and confusion as to which schemes apply to which members depending on such things as their date of enlistment, length of service, type of service and their possible dual eligibility under the existing VEA or MRACS.[17]

16 *Committee Hansard*, 24 February 2004, p. 21 (Ms Debbie Richards, Australian Nursing Federation).

17 *Submission 4*, Attachment 1, p 2 (Australian Federation of Totally and Permanently Incapacitated Ex Servicemen and Women).

Concluding remarks

3.19 The Committee concluded, on the basis of the evidence it received in submissions and at public hearings, that opposition to the **concept** of a unified scheme was strongest among organisations representing the veterans' community while support for the concept was, with some exceptions, strongest among those representing serving members.

3.20 This distinction is perhaps not surprising, since serving members are familiar with the changed nature of recent deployments, compared with those traditionally undertaken by the ADF. They are also the beneficiaries of the more generous service conditions and salaries now in place, especially for warlike and non-warlike service. They are therefore less concerned to see that more generous entitlements (compared with those for peacetime service) are continued after service. Veterans, on the other hand, who did not generally receive significantly more generous benefits on warlike and non-warlike service and certainly did not receive the relatively generous salaries now offered in the ADF but did receive more generous entitlements on retirement from the ADF (compared with those on peacetime service) are anxious to see the distinctions preserved.

3.21 This generational division of opinion was evident in discussions on many aspects of the Bill. It is therefore reassuring to recognise that, overall, support was strongest amongst those whom the Bill is designed to assist—serving members—and weakest amongst those who will not be affected by its provisions—members with service before 1 July 2004.

3.22 Evidence to the inquiry also indicates that clarification on the scope of the Bill is urgently required. It would do much to reduce the high levels of anxiety now being experienced in the veteran community with respect to coverage of the proposed legislation.

Chapter 4

LIABILITY AND CLAIMS

Liability

Provisions of the Bill

4.2 Before service members and their dependants can become eligible for compensation under the Bill the Military Rehabilitation and Compensation Commission (the Commission) must accept liability for the injury, disease or death being claimed and establish that it is service–related. In the case of warlike and non–warlike service the Commission must apply the more beneficial standard of proof 'beyond reasonable doubt' in establishing liability. That is, the Commission must accept liability unless it can prove beyond reasonable doubt that the injury, disease or death is not service–related. For peacetime service (and for injury, disease or death related to treatment provided by the Commonwealth and aggravations to service-related conditions) the 'reasonable satisfaction' test applies.

4.3 In making its determinations the Commission must be guided by the Statement of Principles which has been imported into the new Bill from the Veterans' Entitlements Act (VEA). The Statement of Principles sets out all the factors related to defence service that have been found to cause specific injuries, diseases or death.

The concept of service type

4.4 The Bill establishes three types of service: warlike, non–warlike and peacetime. The difference is important. It influences both the way in which liability is established, as noted above, and a number of important payments and entitlements such as the way in which impairment levels are calculated and the sums available to widowed partners upon the service-related death of a spouse. It also affects the review process for those seeking to appeal a decision of the Commission. Yet the terms are not clearly defined in the Bill, which simply states (in s 6(1)) in respect to each type of service that:

> it is service with the Defence Force that is of a kind determined in writing by the Defence Minister to be warlike [non–warlike or peacetime] service for the purposes of this Act.[1]

4.5 A number of witnesses found this definition unsatisfactory. Their concerns related to lack of specificity in the definitions, the extent of ministerial discretion in determining types of service, the point at which warlike or non-warlike service comes into effect and its coverage.

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1 Military Rehabilitation and Compensation Bill 2003, s6(1), p. 14.

> The types of service—Warlike, Non-Warlike and Peacetime service needs to be defined, particularly given the scope of Terrorist operations and the threat of these operations inside Australia.[2]
>
> I did allude in my opening comments to the fact that the ministerial staff could not define this [type of service]. When the troops deployed to Iraq, we were concerned about what compensation cover they were under, and I was not the only one to raise it. I know that then National President of the RSL, General Phillips, also asked it of Senator [sic] Vale and then Senator Hill's staff. What were their entitlements? Were they on operational service? Were they on warlike service? Were they on non-operational service? They could not define it.[3]

4.6 In fact the terms and the processes involved in declaring whether a particular engagement is warlike, non–warlike or peacetime service have been taken directly from the VEA. The Minister will make his/her determination on types of service on the advice of the service chiefs and the Commander of the Defence Force. They, in turn, will provide the advice on the basis of the following factors:

- The nature of the mission,
- the rules of engagement (whether the forces are to be armed and how they are to engage hostile forces should they encounter them), and
- the likelihood of casualties.[4]

4.7 The issue of differential service types was the most contentious of all the subjects discussed during the inquiry. It was raised in all submissions and by every organisation at public hearings. While there are some similarities with the arguments noted earlier in relation to the case for and against a new, unified Bill, discussion in the evidence focused more specifically on service type.

4.8 A wide range of views was expressed. Some witnesses objected to the distinctions between types of service, saying that they were not warranted, while others believed the differences should be enhanced so that the position of soldiers who had served in combat could be adequately recognised and rewarded. The divergence of opinion was most marked with respect to the differential lump sum death benefit for widowed partners but it also arose in connection with other payments and more generally, reflecting the different philosophical positions of those providing evidence. Again, the difference was largely generational, with organisations representing younger, serving members generally less likely to support maintenance of the distinctions and veterans' organisations supporting existing differentials or, in some cases, advocating additional differentials.

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2 *Submission 9*, p. 3 (Australian Peacekeeper and Peacemaker Veterans Association).

3 *Committee Hansard*, 23 February 2004, p. 20 (Lt Col Lewis, Australian Special Air Service Association).

4 This issue is discussed in *Committee Hansard*, 25 February 2004, p. 22 (Mr Mal Pearce, Department of Defence).

Evidence to the Committee

4.9 The range of views on the general case for and against the maintenance of differential service in the new Bill is summarised below. Views on the impact of differential service on particular payments, specifically for permanent impairment and for lump sum death benefits, are discussed in connection with those payments.

The case for maintenance of differential service

4.10 The organisations supporting general maintenance of the differentials did so on the grounds that war service is unique, has no parallel in peacetime service and has traditionally been accorded higher benefits and recognition, which they were anxious to see maintained.

> …the VVA philosophy is that those with qualifying service are to be accepted as veterans who are first among equals and, consistent with that view, their rights and entitlements should mark them as such by more than just the standard of proof provisions within the bill.[5]

> … [War service] is a unique experience and only those who have been under fire would appreciate what I am talking about. Our members are firmly of the view that this distinction must be maintained at all costs. It has been our policy for a long, long time.[6]

4.11 They disagreed with the suggestion that modern warfare is such as to blur the distinctions and the danger between the extreme training regimes undertaken by some troops, for example the SAS, and combat conditions.

> The essential difference between operations and training is that in training the organisation conducting the training is busting its gut to ensure that the training is safely conducted; there are all kinds of restrictions. Accidents do happen, of course, and the effectiveness of the training cannot be compromised by unrealistic restrictions on its conduct. But, just the same, there are people who have a grave responsibility to ensure that the risks that are incurred in training are controlled risks.[7]

4.12 Nor did they accept that the greatly improved allowances for personnel on warlike service were sufficient recognition of the dangers to which they were exposed.

> We do accept that these days—compared with, say, those soldiers who went to the Vietnam War—soldiers are paid much better and get good up-front allowances. We think those are adequate to cover hard living, being away,

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5 *Committee Hansard*, 24 February, 2004, p. 25 (Mr Brian McKenzie, Vietnam Veterans Association of Australia).

6 *Committee Hansard*, 24 February 2004, p. 26 (Mr Peter McCann, Vietnam Veterans Association of Australia).

7 *Committee Hansard*, 25 February 2004, p. 10 (Brig Kerry Mellor, Regular Defence Force Welfare Association).

> having to obey orders and so on. But they in absolutely no way constitute marketplace danger money.[8]

4.13 They disputed the claim of those who favoured 'like compensation for like injury' and argued that a broken back is a broken back however and wherever it occurred, and that the disability and suffering of the person who sustained it are the same.

> The principle that the Department of Veterans' Affairs and particularly the Department of Defence have been pushing right from the start is that a broken leg is a broken leg is a broken leg; that if somebody jumps out of an aircraft over Williamtown and breaks their back and is unable to work for the rest of his life, that is no different from the SAS parachutist who jumps out over Afghanistan and breaks his back
>
> We claim that there is. We claim that that is wrong, that there is a difference—and I think I have said what the difference is basically. In Afghanistan there is a large and well–armed enemy that want to kill that bloke; they are doing their best to find him and kill him. That is not so at Williamtown.[9]

4.14 Some of the organisations considered that, although the Bill maintains the three different service types it does not go far enough in that respect and, if enacted in its current form, will undermine the status of combat personnel in the future.

> This bill erodes the difference between civilian work and military service and that is what has us upset Military service is unique and it deserves the appropriate recognition and support when injury and death occurs.[10]
>
> The returned soldier is the classic icon of the Australian approach to its relationship with the Defence Force. We recognise that the returned soldier idea has changed almost out of sight in some respects but, just the same, we believe that the instinct of the Australian people for appreciating the nature of the service that these people have given in the face of hostile intent is very deep-seated, often quite spontaneous, and a continuing historical thread in our development. If we do not continue to give that the recognition our organisation believes it deserves, we believe that there will be a gradual blurring and diminishing of the role of the veteran who has faced the foe—to use a colourful term—and that gradually indifference will set in and all military service will be seen to be of a piece.[11]

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8 *Committee Hansard*, 24 February 2004, p. 43 (Mr Graham Walker, Vietnam Veterans' Federation).

9 *Committee Hansard*, 24 February 2004, pp. 43–44 (Mr Graham Walker, Vietnam Veterans' Federation).

10 *Committee Hansard*, 24 February 2004, p. 30 (Col Haynes, Australian Veterans and Defence Services Council).

11 *Committee Hansard*, 25 February, pp. 10–11 (Brig Kerry Mellor, Regular Defence Force Welfare Association).

The case for abolition of differential service

4.15 Those who opposed the continuation of differential service types in the new Bill did so on the grounds that the nature of military service has changed fundamentally and that it is inappropriate to retain a concept developed from traditional military service in a Bill designed to meet the needs of ADF personnel in the twenty first century. All ADF personnel are volunteers. Whether they end up in warlike, non–warlike or peacetime service is beyond their control. They must all be prepared for all forms of service and therefore, it was argued, it is inappropriate to compensate them differently for injuries suffered as a result of service.

> This is a bill for the future Defence Force, reflecting its training environment, its operational environment of the future and the commitments that the Defence Force is now entering into. There is always a danger that we will look back over our shoulders and try to reflect upon the conditions of the past. For example, in the World War 11 period the provisions for servicemen were certainly not very generous and there was almost no such thing as superannuation. Those things have now got to be factored into the way in which the force of the future will operate, and so we believe it does look to the future rather than just reflect on the past.[12]

> …when everyone joins up it is not a matter of: 'I've joined up to stay in Australia,' or 'I've joined up only to go on operations'. It is one in, all in. If you end up overseas on an operation, whether it is fortunately or unfortunately, then that is the luck of the draw.[13]

4.16 They considered that the particular danger of warlike service, which they acknowledged, should be recognised in some other way, as indeed it is now, through special conditions and generous tax free allowances.

> … the federal executive believe that the system should be equal across the board and that the recognition for overseas service is by way of the allowances that are paid. [14]

> Personally, I believe we need to have something to recognise those who have served in an operation against an enemy, but, at the same time, we are all doing the same job.[15]

4.17 They pointed both to the traumatic nature of some peacetime service and to the dangers of training 'at the edge' as undermining the case for lower rates of compensation for peacetime service.

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12 *Committee Hansard*, 25 February 2004, p. 3 (Major Gen William Crews, Returned & Services League of Australia).

13 *Committee Hansard*, 24 February, p. 4 (Mr Ray Brown, Injured Service Persons Association).

14 *Committee Hansard*, 24 February 2004, p. 21 (Mr Greg Isolani, Armed Forces Federation of Australia).

15 *Committee Hansard*, 24 February, p. 4 (Mr Ray Brown, Injured Service Persons Association).

> I would suggest that most peacekeepers have had some very traumatic experiences and been stuck in the middle of battles between factions and may have seen more action than some of the people who are now on war service that served before them.[16]

> In training the risks are very high because we are training for war. We accept that when we train we go out there to train hard, do it properly the first time and, even though we have a higher safety standard in peacetime training, statistics say that we are still going to get a lot of casualties.[17]

4.18 The case for abolition of differential compensation was based on the premise of 'like compensation for like injury', a view typified in the following quotation:

> We believe that the injury is what is important. It will not make it any less traumatic if it happens in peacetime. There are obviously other ways to recognise war service but, when it comes to compensation, it is very disheartening to see someone who has suffered an amputation in Australia getting less than someone who has received the same injury in an overseas operation. That is just unfair. We do not believe it should be any different.[18]

Generational basis of opinion

4.19 Several witnesses commented on the generational basis of the different viewpoints expressed in the evidence. Broadly speaking it is the younger, serving ADF people who most strongly favour the abolition of differential compensation based on service type and the older veterans who support it.

> … from my experience with the ex–service community, the older groups of veterans—and I would not put the Vietnam vets in that, although there are some—predominantly of the Second World War and some of the Korean War, believe that that difference should be there. That is more a societal value—that they went away for a long period of time; a different environment. The modern ones do not. If you talk to any of the young blokes out at Swanbourne, to them there is little difference between what they do in training and what they do on the ground.[19]

> One thing I did note on the ex-service organisations working group for this bill… was the emphasis from a lot of the ESOs about war service and retaining the status quo for the future. If you talk to a lot of the people who are serving, they do not really care about that sort of thing. All they know is

16 *Committee Hansard*, 24 February, 2004, p. 14 (Mr Paul Copeland, Australian Peacekeeper and Peacemaker Veterans Association).

17 *Committee Hansard*, 24 February 2004, p. 2 (Mr Ray Brown, Injured Service Persons Association).

18 *Committee Hansard*, 24 February 2004, pp. 3–4 (Mr Ray Brown, Injured Service Persons Association).

19 *Committee Hansard*, 23 February 2004, pp. 8–9 (Mr James Dalton, Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

> that they have been in uniform, they have served the country and they have gone overseas, whether it is war service or non-operational service or even humanitarian service. They cannot understand why Joe Bloggs, who is standing next to them, who went to war and came back, is going to get extra benefits. That is what we were hoping to see in the new bill, that there would be equilibrium with that service.[20]

4.20 Much of the discussion on retention or abolition of the different types of service related to compensation in general, as noted above. There was little reference to the impact of service type on standards of proof for liability. The divisions were most apparent in relation to compensation for widowed partners of ADF personnel killed in service, and they are discussed later in the report in that context.

Exemptions to liability

4.21 The Bill sets out the conditions in which the Commission is prevented from accepting liability for service-related injury, disease or death. These exclusions relate to:

- serious defaults or wilful acts,
- reasonable counselling about a person's performance,
- false representations,
- travel, and
- the use of tobacco products.

4.22 In the case of some defaults or wilful acts, although the Commission is prevented from accepting liability for injury and disease it may accept liability for death, and for serious and permanent impairment, on the basis that the person who committed the default or wilful act did not intend that it result in death or serious and permanent impairment.

Evidence to the Committee

4.23 Most of the evidence to the inquiry on issues of liability related to the exclusion provisions.

Tobacco

4.24 The exclusion relating to tobacco is very strict. It applies to the use of tobacco from 1 July 2004, an increase in use after that date or a combination of use before and after that date. The Commission must not accept liability where the **only** connection established between a service-related injury, disease or death is the use of tobacco. The fact that tobacco may be one of a number of contributory factors to some

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20 *Committee Hansard*, 24 February 2004, p. 13 (Mr Paul Copeland, Australian Peacekeeper and Peacemaker Veterans Association)

diseases, and that in these circumstances the other factors will still be considered, did not seem to be fully appreciated in the evidence to the Committee.

> A number of disease processes are significantly contributed to by tobacco consumption ie coronary artery disease and respiratory conditions in general. Therefore it is open for the MRCB to reject claims if these medical conditions arise during their service but the person has a history of tobacco use.[21]

> In the VEA, where a veteran dies and smoking after 1 January 1998 is not the **only** cause of death (ie there may have been a number of contributing causes related to service) then the veteran's death can be accepted on the basis of one of the other service related causes. In the draft bill if smoking is one of a number of causes, the death cannot be accepted as war caused. The draft bill is much harsher than the VEA.[22]

4.25 A number of other witnesses also made this point about the tobacco exclusions being much harsher in the new Bill than in the VEA or SRCA[23] and were strongly opposed to it. They did not see the new provisions as reflecting current community norms with respect to tobacco but as a failure to appreciate the role of tobacco in mitigating the particular stresses of service life.

> Tobacco is a legal substance, which has always been and will continue to be a source of comfort in combat operations. Its use should be accepted as grounds for MRCB benefits. The effects of the use of tobacco should not be classified as self inflicted.[24]

Alcohol

4.26 Some confusion was evident also on the exclusion relating to alcohol, with some witnesses again appearing to suggest that more lenient conditions should apply to people in the ADF injured while under the influence of alcohol and failing to appreciate that the exclusion prevails only in cases where it can be shown that alcohol contributed to the accident.

> … the situation with the consumption of alcohol needs clarification. The draft and explanatory material seem to apply a prohibition in all circumstances? It fails to indicate the exceptions that are already accepted or permitted by State and Federal Law relating to the consumption of alcohol.[25]

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21 *Submission 11*, p. 8 (Armed Forces Federation of Australia).

22 *Submission 13*, Attachment 1, p. 6 (Veterans' Support and Advocacy Service).

23 In fact the effects of smoking have not been accepted under the VEA since 1998 and they have never been accepted under the SRCA.

24 *Submission 5*, p. 9 (Australian Veterans and Defence Services Council).

25 *Submission 4*, Attachment 1, p 5 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

> There is no reference or definition as to what constitutes 'being under the influence of alcohol'. We note a delegate of the MRCB need only be 'reasonably satisfied' (Cl 335) to exercise the exclusion. For example, an ADF member who consumes alcohol within (and/or in connection with their service) is on a journey home on their bicycle and sustains an injury may now under the MRCB have the claim rejected on the basis that they are 'under the influence of the alcohol'. We submit this discretion by a MRCB delegate is too wide, ambiguous and prone for determinations to be made denying liability.[26]

Serious breach of discipline

4.27 A number of concerns were raised in connection with the exclusion relating to serious breach of discipline. They pointed to the Bill's failure to define 'serious breach of discipline' and also to the inappropriateness of such an exclusion in a combat situation.

> The Draft does not define Serious Breach of Discipline and it may in fact breach Natural Justice in that Servicemen and women in the field, acting to meet the exigencies of the Service, particularly in combat situations, could be exposed to subsequent serious disciplinary action if their actions are judged, in hindsight, to be in breach of regulations. If in the course of this duty they have suffered injury or illness and MRCS cover is withdrawn or not provided. Would this not be "double" punishment? These particular provisions seem to serve as exemplars of the 'civilianisation' of a system designed to cover Service personnel in the ultimate expression of their profession; combat.[27]

4.28 The Department of Veterans' Affairs considers some of these concerns stem from confusion between an injury sustained undergoing reasonable disciplinary action (for which liability can be accepted) and injury arising from a serious breach of discipline, (for which it cannot).[28]

Self inflicted injury

4.29 Self inflicted injury is excluded under the provisions of the Bill unless it results in serious and permanent impairment or death (on the grounds that the person concerned did not intend such an outcome). Evidence to the Committee pointed out that these provisions were problematic in the case of suicide, which is not uncommon in the target group and which, it was claimed, would prevent the payment of entitlements to surviving dependants, even in cases where it might be suggested that there was a link between the suicide and the person's service.

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26 *Submission 11*, p. 5 (Armed Forces Federation of Australia)

27 *Submission 10*, Attachment 1, p. 3 (Australian Special Air Service Association)

28 See *Committee Hansard*, 25 February 2004, p. 39 (Mr Bill Maxwell, Department of Veterans' Affairs), for clarification of the situation.

> The Explanatory Memorandum for S24 [states] that *'The Bill is not intended to punish dependant persons for the actions of a member or a former member'*. However, it then goes on to say *'It is understood that the injury or disease that results from a wilful act or similar was never intended to result in the death of the person'*. By implication, if a member left a suicide note their widow would not be covered. The tragically high incidence of suicides by veterans is already difficult to prove as being service–related despite the conviction of their families that such is the case. This sentence in the Memorandum would make establishing a link for service–related suicide almost impossible as the event usually involves a wilful act, against counselling and whilst under the influence of alcohol.[29]

4.30 The Department disputes this interpretation, suggesting that the Commission can accept liability in cases where a connection can be established between the suicide and service.[30]

Claims

Provisions of the Bill

4.31 Before the Commission can accept liability for a service–related injury, disease or death it must receive a claim from the person concerned. Claims can be made by current or former members who have suffered a service-related injury or disease, the dependant of a deceased member whose death was service-related or any person who is entitled to compensation.

4.32 On receipt of a claim the Department of Veterans' Affairs must investigate it in order to establish liability and eligibility for compensation. As noted above, it applies the 'beyond reasonable doubt' standard of proof when investigating injury, disease or death sustained in warlike or non-warlike service. In all other circumstances it applies the 'reasonable satisfaction' test. In every case the onus is on the Department to investigate a claim. The claimant has no onus to prove his/her claim. This provision continues the practice enshrined in the VEA.

4.33 When investigating a claim for liability the Commission must refer to the Statement of Principles (SoP). These have been imported into the new Bill from the VEA. They set out all the factors related to defence service that have been found to cause specific injuries, diseases or deaths. When applying the SoP to a specific case the Commission must establish, in the case of warlike or non-warlike service, 'a reasonable hypothesis' between the injury, disease or death and service. In the case of peacetime service and in the determination of all payments and allowances it must establish such a link to its 'reasonable satisfaction'. Where no SoP applies the Commission may make its own determination.

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29 *Submission 2*, p. 3 (Legacy Coordinating Council).

30 See *Committee Hansard*, 25 February 2004, p. 37 (Mr John Douglas, Department of Veterans' Affairs).

Evidence to the Committee

4.34 The inquiry received limited evidence on the procedures in the Bill governing the lodgement of claims for liability and compensation and their acceptance by the Commission. The issues raised are briefly described below.

Derivation of the Statement of Principles (SoP)

4.35 The Returned and Services League supported the concept of the SoP but had some reservations about their derivation.

> Our concern can be attributed to the way in which some SOP have been developed, rather than to the concept of using SOP. We are of the view that a well articulated and developed SOP should offer a more effective basis for claim determination. We intend separately to take up the issue of SOP derivation as this is critical to our acceptance of their being used as a basis of claims under the MRCS.[31]

Impact of SoP on success of claims

4.36 The same submission also pointed to unconfirmed observations that claims were more likely to succeed under the MCRS/SRCA, which has no SoPs, than under the VEA, which does.

> Anecdotal evidence cited by RSL pensions officers and some statistics support a view that claims under MCRS are more likely to succeed than those under the VEA jurisdiction.
>
> …While some comfort is drawn from the fact that claims under the new MRCA will have the beneficial aspects of the VEA in terms of burden of proof, the RSL wishes to register some concern and advise that claims statistics should be monitored.[32]

4.37 The more limited success of claims under the VEA, if this is indeed the position, may be explained by the fact that there is little scope for 'reasonable inference' in the SoP in linking a particular injury, disease or death to service. The Repatriation Medical Authority, established under the VEA, is required to assess such a link in terms of 'sound medical–scientific evidence', a much narrower test than that applied in most other compensation legislation.

4.38 A similar point was made by the Armed Forces Federation of Australia which argued that the SoP are too narrowly defined, at least insofar as they operate in the VEA, and suggested they should be broadened in the new Bill.

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31 *Submission 1*, p. 4 (Returned & Services League of Australia).

32 *Submission 1*, p. 3 (Returned & Services League of Australia).

> The Federation generally accepts the Statement of Principles are to be retained as the standard of proof for determining the acceptance of liability. However there should be flexibility as to how they are applied.
>
> …The Federation suggests an approach whereby, for example, if a persons condition "*substantially conforms to the relevant Statement of Principle"* then the MRCB Delegate should not reject liability on the basis that it does not totally comply with the relevant Statement of Principles.[33]

4.39 If the AFFA suggestion were in fact adopted this might have consequences not anticipated by that Association. This is because, as currently drafted, the SoPs require a link between the service and the condition that 'is not insignificant'. To replace this with a link that 'substantially conforms to' the SoP could in fact dilute the provision rather than strengthening it.

Currency of SoPs

4.40 At least one witness claimed that the SoPs were outdated in some cases and did not reflect current medical understanding and practice. The same witness considered there should be an automatic link between certain diseases and service, as is the case now under the SRCA.

> I have indicated that the current list [of diseases] has evolved over time and should be incorporated into the bill, together with the statement of principles [and] that there should be an automatic acceptance of a condition [as related] to service. If you have suffered from that disease and it was involved in your employment process then you put the onus back on Defence to rebut the causal connection.[34]

4.41 Again, the Department clarified[35] the issue by explaining that the position advocated by AFFA is in fact the one enshrined in the Bill and that, for a range of industrial or occupation–related diseases a claim will succeed unless it can be disproved.

The requirement to advise a service chief

4.42 Some witnesses objected to the requirement for the Commission to advise a person's service chief of any claim before it.

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33 Submission 11, pp. 18–19 (Armed Forces Federation of Australia)

34 *Committee Hansard*, 24 February 2004, pp. 16–17 (Mr Greg Isolani, Armed Forces Federation of Australia)

35 In *Committee Hansard*, 25 February 2004, p. 38 (Mr Bill Maxwell, Department of Veterans' Affairs)

> The requirement to advise the service chief when a serving member has made a claim will act as a disincentive to members who have suffered an injury or disease.[36]

4.43 One witness said that, while he supported the requirement to advise a service chief, he was opposed to the exclusion which prevented the Commission from accepting liability on this basis.

> I do not so much oppose early notification; I oppose the penalty or the potential for the claim to be rejected for the failure to lodge a claim.[37]

4.44 The objection stems from a concern that once the ADF is aware of a person's claim it may affect the career prospects of that individual. However, failure to inform superior officers may also delay efforts to begin rehabilitation, thus reducing its efficacy. It also hampers other efforts to improve occupational health and safety if the responsible officers are not aware of the problems.

4.45 This is an argument for a change of attitude on the part of the Department of Defence to claims by serving personnel rather than a case for omitting this requirement from the legislation.

4.46 That this is an issue of concern to serving members is evident from advice to the Committee, especially in relation to rehabilitation, as discussed more fully in the report's consideration of rehabilitation issues.

Concluding remarks

4.47 Most of the discussion on the issues raised in this chapter related to the definition and impact of the different types of service. A significant divergence of opinion was evident on this, mirroring the position with respect to the unification of the two previous schemes, as already described. Support for abolition of the differentials in compensation based on service type was strongest among younger, serving members of the ADF to whom the Bill will apply. Opposition to it was strongest among veterans' groups. Organisations which represented both groups reported a movement towards abolition as the number of service members increased and the number of ex–members decreased.[38]

4.48 In other respects comments were largely restricted to the provisions relating to the exclusions and to the SoPs, as indicated. At least some of these concerns arise from a misunderstanding of the details of the provisions.

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36 Submission 13, p. 16 (Veterans' Support and Advocacy Service Australia).

37 *Committee Hansard*, 24 February 2004, p. 19 (Mr Greg Isolani, Armed Forces Federation of Australia).

38 See, for example, *Committee Hansard*, 24 February 2004, p. 36 (Col John Haynes, Australian Veterans and Defence Services Council).

Chapter 5

REHABILITATION

Provisions of the Bill

5.1 The Bill has a strong focus on rehabilitation, to which it adopts a holistic approach. It will provide social, vocational and psychological support for rehabilitation, as appropriate, as well as the medical assistance more traditionally associated with the rehabilitation of serving and former ADF personnel.

5.2 The aim of the rehabilitation provisions is to maximise the extent of the psychological, social and medical recovery of those affected and, where possible, return them to suitable work as soon as possible.

5.3 Rehabilitation is the responsibility of a rehabilitation authority. In the case of serving ADF personnel this is the person's service chief. In other cases it is the Commission. The Bill provides for cooperation between the two rehabilitation authorities in cases in which service personnel are likely to be discharged as a result of illness or injury.

5.4 Once the rehabilitation authority has accepted liability for an injury or illness it conducts an assessment of the affected person's capacity to benefit from rehabilitation and establishes the nature of the programs required. It then arranges for those programs to be provided. Failure to attend a rehabilitation assessment or program without sufficient reason may result in suspension of compensation payments.

Support for the rehabilitation provisions

5.5 The emphasis on rehabilitation in the Bill was generally, although not universally, supported.

> There are a number of further advantages…They are…Rehabilitation of members whilst serving and outside of serving of the ADF, potentially providing the member with retention within the ADF, or improved quality of life outside of the ADF.[1]

> The emphasis on rehabilitation is particularly welcomed and the RSL looks forward to working closely with the ADF, DVA and other ESO as the protocols for rehabilitation are further developed.[2]

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1 *Submission 9*, p. 1 (Australian Peacekeeper and Peacemaker Veterans Association).

2 *Submission 1*, p. 1 (Returned & Services League of Australia).

Concerns with the rehabilitation provisions

5.6 However the Committee heard that, despite general support for the rehabilitation provisions, specific concerns remain. These are discussed below.

Failure to include rehabilitation protocols

5.7 One of these concerns was the failure to include in the Bill the protocols which will govern many aspects of rehabilitation in the legislation, making it difficult for people to understand the way in which the rehabilitation provisions will operate.

> There are a range of difficult and important questions that need to be addressed in the process and protocols for any new Rehabilitation scheme. For instance: will the member have a choice of medical practitioner or rehabilitation specialist, what is a reasonable time, at what age or in what medical circumstances will rehabilitation no longer be compulsory and what impact does a members location and family circumstances have on the decision to make them engage in the rehabilitation process. The Rehabilitation provisions in the Draft scheme cannot be supported prior to seeing the finer detail of the process and procedures…[3]

5.8 However, a number of witnesses acknowledged that the working party established to develop the protocols was working well and incorporating advice from the ESOs.

> The process [of protocol development] is working well. It is moving ahead.[4]

> We have had some consultations. We can only hope that, through the government, the department in particular will have a lot more of those. There is a lot of finite detail about rehabilitation that is unknown. I think that is going to have to be addressed in the working party. I am talking about the protocols to implement the thing[5]

Compulsory nature of rehabilitation

5.9 One of the major concerns was the compulsory nature of the rehabilitation to be provided in the legislation, and the fact that a decision to suspend payments (but not treatment) to a person who refuses rehabilitation is not subject to review. Such an approach was considered especially harsh with respect to those with psychological problems.

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3 *Submission 10*, Attachment 1, p. 5 (Australian Special Air Service Association).

4 *Committee Hansard*, 25 February 2004, p. 7 (Mr Ramon De Vere, Returned & Service League of Australia).

5 *Committee Hansard*, 24 February 2004, p. 29 (Mr Brian McKenzie, Vietnam Veterans Association of Australia).

> The thrust of the [rehabilitation] provisions is directed to making rehabilitation compulsory and the MRCB is empowered to suspend compensation payments where a person fails to undergo an assessment or undertake a program without reasonable excuse.
>
> If a person refuses or fails to undergo an examination [for rehabilitation purposes]…payment of compensation will be suspended. My concern is the veteran with psychological problems who is likely to get very agitated and walk out. What protection is contemplated for such veterans?[6]
>
> Compulsion in rehabilitation does not guarantee a successful outcome. The quality of the program, what you do and how you can affect the condition and lives of the veteran are the things that make the outcome. Compelling somebody to go to a system that is broken does not help them at all.[7]

5.10 Some witnesses differentiated between the requirement to undergo rehabilitation **assessment** and the requirement to undertake a rehabilitation **program**. They did not oppose compulsory assessment but, where the assessment indicated quite clearly that a person was unable to undertake rehabilitation or unable to benefit from it, they felt that it was counterproductive to insist that they participate.

> The problem with compulsory rehabilitation is that you have to, in my view, distinguish that from the compulsory assessment…. I do not always agree with the steps, but I understand the carrot and stick approach that needs to be taken when it comes to rehab—for example, the threat of payments being suspended, which exists under this bill and in the current act.[8]
>
> …the RSL has accepted the remarks in the bill in terms of compulsory assessment on the basis that they are talking about compulsion to attend for assessment. It does not seem unreasonable to compel somebody to have their chances tested. It may not necessarily be to return to the work force; it may be for capacity to live a rewarding life. I think the veteran community is a bit divided on this issue, but the RSL does accept compulsory assessment that is balanced and tempered with commonsense particularly for individuals who have psychiatric impairment.
>
> …The RSL has expressed no opinion on whether there should be penalties, but we certainly believe there should be incentives.[9]

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6 *Submission 13*, p. 8 (Veterans' Support and Advocacy Service Australia).

7 *Committee Hansard*, 23 February 2004, p. 12 (Mr James Dalton, Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women).

8 *Committee Hansard*, 24 February 2004, p. 23 (Mr Greg Isolani, Armed Forces Federation of Australia).

9 *Committee Hansard*, 25 February 2004, p. 6 (Mr Ramon De Vere, Returned & Services League of Australia).

5.11 This was not a universal view however. Some witnesses pointed to the significant stress involved in compulsory assessment for those with psychological illnesses. For this reason they also opposed the provision requiring five–yearly reviews.

> I know a little bit about psychological conditions, such as PTSD, and I have severe reservations about compulsory rehabilitation and compulsory reviews. They are very stressful events, and there is no doubt in my mind that they would aggravate an already serious condition. The very thought of it would do harm.[10]

5.12 On the question of suspension of compensation payments the Explanatory Memorandum states:

> Administrative processes will be developed in cooperation with representative organisations of the members, to ensure that this action [suspension of payments] will be only a last step in a series of activities and warnings to the person. This will ensure that the person is provided with maximum opportunities to prevent suspension.[11]

5.13 Presumably therefore these 'administrative processes' will be developed as part of the rehabilitation protocols. However, the failure to provide the protocols and the absence in the Bill of any specific reference to minimising the impact of these provisions has contributed to anxiety among the ESOs on this issue.

5.14 While it is the case that the decision to suspend compensation payments cannot be appealed to the Veterans' Review Board (VRB) or the Administrative Appeals Tribunal (AAT) it is subject to the *Administrative Decisions (Judicial Review) Act 1977* and is appealable to the Federal Court. The Committee acknowledges that this is not a realistic option for most of those likely to be affected, because of its cost, complexity and time consuming nature.

Emphasis on vocational rehabilitation

5.15 Some witnesses claimed that the focus of the rehabilitation provisions was on employment of injured personnel at the earliest opportunity, as a cost saving measure, rather than the adoption of a holistic approach to their recovery.

> The TPI Federation has been a strong supporter of holistic rehabilitation. Rehabilitation programs should focus on medical, social and vocational aspects, in that order. Return to employment should be the last and least

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10 *Committee Hansard*, 23 February 2004, p. 4 (Mr James Bodey, Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

11 *Explanatory Memorandum*, Clause 50 (4), p. 28.

> important consideration. The proposed legislation makes vocational issues the predominant focus. That is wrong.[12]
>
> We also believe that the Military Rehabilitation and Compensation Bill leans too far towards getting people into vocational training and back to work. We certainly applaud that move; however, we have asked for some changes. We would like to see within the act an emphasis on, first of all, the physical and mental rehabilitation of the injured, wounded or ill Defence Force person and a look at vocational training and rehabilitation back into the work force after that.[13]

5.16 However, the Committee is not persuaded by these claims and finds that the Explanatory Memorandum is quite clear and unequivocal on this issue. Its statement of the aims of rehabilitation is as follows:

> The main focus of rehabilitation is on the…
>
> - achievement of physical, social and mental recovery;
> - where possible, return to suitable work at the earliest possible time; and
> - reduction of the human and economic cost of disability to ADF members and former members and the broader community.[14]

5.17 The Explanatory Memorandum goes on to describe the three types of rehabilitation covered by the Bill. They are medical, vocational and psychosocial. The Committee therefore finds no basis for the claim that the rehabilitation provisions have an undue emphasis on employment.

5.18 A related issue expressed in some evidence was the view that the rehabilitation provisions concentrated on getting people back to work at **any** level rather than at a level equivalent to the one in which they were previously employed. The requirement to return people to 'suitable work', as defined in s5 did not, they argued, adequately address these concerns.

> Rehabilitation should by definition take a member back to an approximate equal earning situation to that which he or she enjoyed before their

12 *Committee Hansard*, 23 February 2004, p. 3 (Mr John Ryan, Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women).

13 *Committee Hansard*, 24 February 2004, p. 7 (Mr Paul Copeland, Australian Peacekeeper and Peacemaker Veterans Association).

14 Explanatory Memorandum, Clause 38, p. 24.

> injury/illness (eg an instrument fitter cannot be said to have been rehabilitated if they are only re-employable as a cleaner.[15]
>
> My concern here is the term 'suitable work'. …the draft bill should give some protection to disabled members to ensure they are offered or re-trained for reasonable 'suitable work'.[16]

5.19 The Committee does not read the definition of 'suitable work' in s5 as precluding assistance which will restore a person to a comparable level of work.

5.20 It is anticipated that the further clarification of 'suitable work' will be among the issues addressed in the rehabilitation protocols, development of which will be undertaken in consultation with Ex Service Organisations (ESOs). Many of the concerns raised with the inquiry on these issues therefore may be overcome as a result.

Transitional management of rehabilitation

5.21 The Bill provides that, as is now the case, the Commission will have rehabilitation responsibility for ADF personnel who have been or are likely to be discharged on medical grounds. The Department of Defence will have rehabilitation responsibility for those who are likely to be retained within the ADF. Protocols will govern the relationship between the two departments with respect to transitional management of rehabilitation.

5.22 The Committee heard quite disturbing evidence of the inadequacy of current transitional arrangements, and a plea that they be improved in the new legislation.

> A lot of the young people feel very disappointed in the way they have been treated [by the Department of Defence] in that they have put in 110 per cent in the years when they were serving and all of a sudden they are dumped. That is what it boils down to.[17]
>
> Considering that we are working mainly with people injured in peacetime, we consistently find that transitional management is a big issue…. We have quadriplegics and families who do not know what is happening on a day–to–

15 *Submission 4,* Attachment 1, p. 6 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

16 *Submission 13*, p. 8 (Veterans' Support and Advocacy Service Australia).

17 *Committee Hansard*, 24 February 2004, p. 11 (Mr Paul Copeland, Australian Peacekeeper and Peacemaker Veterans Association).

> day basis, and all of a sudden they are bombarded with information and forced to make decisions without really knowing the total outcome.[18]

Current rehabilitation practices in the Department of Defence

5.23 The concerns expressed about current Department of Defence practices in relation to transitional rehabilitation arrangements were echoed more broadly with respect to the Department's general attitude to rehabilitation, with some witnesses suggesting that however good the legislation might be, it would make no difference if the Department did not change its existing practices and culture.

> I totally agree with it. [The view that Department of Defence rehabilitation practices are unsatisfactory] Defence does not have a good track record. That is not just a personal opinion; I say that based on a number of years of observation and dealing with the area. I think it is interesting to note that there have been literally countless complaints about the failure to deal compassionately with the system.
>
> …This is one of the reasons the RSL is particularly anxious to remain involved with the department during the development of the protocols for rehabilitation. It is all very well to have a bill that lays down the rules and regulations, but we should consider the implementation and administration of those issues. As one of your colleagues said recently, the devil is in the detail.[19]
>
> Defence as the employer will need to undergo a significant transformation in its personnel philosophies to create a proper work environment for a successful rehabilitation program to operate. There have been many reports of service personnel being invalided from the service, with some even committing suicide, because the system does not cope well with physically or psychologically impaired personnel.[20]

5.24 One witness suggested that the service chiefs, who will constitute the rehabilitation authority for ADF personnel from 1 July, seemed largely unaware of the obligations imposed upon them in the new Bill.

> I am concerned that all the protocols that have been developed focus on post–discharge rehabilitation. This bill is quite unique; it provides for the ADF to take responsibility internally to seek rehabilitation when someone is

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18 *Committee Hansard*, 24 February 2004, p. 2 (Mr Ray Brown, Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

19 *Committee Hansard*, 25 February, p. 7 (Mr Ramon de Vere, Returned & Services League of Australia).

20 *Committee Hansard*, 23 February 2004, p. 3 (Mr John Ryan, Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

> injured and is unlikely to be medically discharged as a result of that condition. I am referring to the fact that we have not seen the protocols. As I understand from anecdotal feedback, some of the chiefs and commanding officers are unaware of this new responsibility they will have. That is starting to ring some alarm bells.
>
> …They want this scheme up and running by 1 July. You would think there would be some protocols and understanding internally.[21]

5.25 A number of witnesses expressed the hope that, when the new Bill is enacted, the Department might make greater efforts to retain injured personnel within the ADF or the wider Department or Public Service, possibly in a support or administrative capacity, rather than discarding them, as they claim is current practice, notwithstanding recognition of the fact that this would not always be possible or appropriate.

> We view the service person as an investment. The government and the public have invested a lot of money in these people, in training them and giving them the experience. In most cases, they have a wealth of experience, no matter what level they are at—from an able seaman to a wing commander. They all have something to offer. The thing that we used to keep on hearing when we were in Defence was the most important asset is your troops, is the human resource. But once the human resource is not functioning, they like to discard it. What we would like to see is that they actually retain it.[22]
>
> If the government is serious about rehabilitation, it should be looking to place those people within its own work force. If you are a public servant and cannot perform a function, the first process is to look to redeploy you. As a large employer of staff, the government should look to give veterans or service personnel preferential employment in the areas that they are able to control.[23]

5.26 A Department of Defence witness conceded that past practice left something to be desired, that 'this is an area where we can do a lot better' and suggested that rehabilitation provision for service members would improve once the new legislation

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21 *Committee Hansard*, 24 February 2004, p. 17 (Mr Greg Isolani, Armed Forces Federation of Australia).

22 *Committee Hansard*, 24 February, p. 12 (Mr Paul Copeland, Australian Peacekeeper and Peacemaker Veterans Association).

23 *Committee Hansard*, 23 February 2004, p. 4 (Mr James Dalton, Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

came into effect, although he cautioned that there were limits to the extent to which the Department could redeploy servicemen outside the combat area.[24]

The requirement to advise a service chief

5.27 As noted elsewhere in this report, ADF members are required to notify their service chief of a claim for compensation. They are also required to notify them when they are seeking or undergoing rehabilitation.

5.28 A number of witnesses opposed this provision on the grounds that, once it was aware of a member seeking or undergoing rehabilitation the ADF might treat the injured person less favourably than it might otherwise have done. Witnesses cited lack of promotion, postings or training as examples. They claimed that such discrimination was well established and well documented in the ADF and that it had caused service personnel to disguise their injuries rather than report them.

> There are soldiers right now that I know of that are not going to tell the system that they have injuries, because they know damn well that they will be discharged before their pensionable time. Some of them will be discharged without any rehabilitation. They will be discharged and will not be eligible for certain components of their service because of the injuries that they are hiding. There are a number of soldiers that I know in the services right now who seek and obtain medical treatment, medical support, outside the system, and yet they are entitled to full medical treatment. They do not want the system to find out. That really concerns me, and that is still going on.[25]

5.29 If this is in fact the case the Committee considers (as noted elsewhere) that this is an argument for a change of culture within the Department of Defence rather than for the omission of this provision from the legislation. Given the critical importance of early intervention to the success of rehabilitation it considers that this provision must stand and the Department of Defence should be required to modify past discriminatory practices which might inhibit service members from seeking rehabilitation.

Concluding remarks

5.30 The Committee received no substantial evidence on the provisions in the Bill dealing with the dual rehabilitation authorities which it sets out (that is, the Service Chief for a member of the ADF and the Commission for others). Nor did it receive evidence on the rehabilitation aids and appliances to be provided to eligible individuals undergoing rehabilitation.

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24 See *Committee Hansard*, 25 February 2004, pp. 23–24 (Mr Mal Pearce, Department of Defence) for an elaboration of this point.

25 *Committee Hansard*, 23 February 2004, p. 23 (Mr John Burrows, Australian Special Air Service Association).

5.31 With the exception of the issues discussed above the Committee formed the view that the majority of participants in the inquiry were strongly supportive of the rehabilitation focus of the Bill. Some of the outstanding issues of concern are likely to be addressed in the protocols now being developed. Others, such at the attitude and practice of the Department of Defence in matters of rehabilitation, which cannot be changed by legislation, remain an issue for some inquiry participants.

Chapter 6

COMPENSATION FOR PERMANENT IMPAIRMENT

The nature of the payment

6.1 Permanent impairment payments are compensation for pain and suffering resulting from a service-related illness or injury for which the Commission has accepted liability. They are not intended as income support or replacement. Because they are awarded to those whose pain and suffering is assessed as permanent, the impairment payments are made for life. They are tax free and indexed to the CPI.

6.2 Lump sum payments for permanent impairment are treated as assets for Centrelink purposes, with income from the lump sum (when it is invested) being deemed to have earned a specified level of interest. Exemptions continue to apply with respect to the service pension, for those with eligible service.

6.3 The calculation of the level of payment is linked to the degree of impairment. Payment begins when a person's impairment level is assessed at 10 points and maximum payments are made to those whose impairment level is assessed at 80 points. The Bill permits the combination of impairment payments for different conditions, making it easier for people to reach the impairment point threshold and to obtain higher levels of payment.

6.4 Level of impairment is assessed using the Guide to the assessment of rates of veterans' pensions (GARP), transferred into the new Bill from the VEA. Impairment points based on GARP are combined with a rating for the adverse impact of the impairment on lifestyle and the combination determines a recipient's total number of impairment points, and thus his/her level of payment. The way in which the two ratings are combined has been changed in the new Bill, with less weight given to lifestyle impact.

6.5 Under existing arrangements the GARP is used to determine the level of impairment suffered in warlike and non–warlike service. The American Medical Association guidelines of the SRCA are used to determine levels of impairment for all other forms of service.

6.6 The new Bill uses the GARP for all forms of service. While higher payments will continue to be provided for impairment suffered through warlike and non–warlike service, the new Bill will generally result in higher levels of compensation for people suffering high levels of impairment, regardless of the form of service in which it was sustained. Compensation for lower levels of impairment will generally be comparable with that applying now under the VEA, for warlike and non-warlike service, and under the SRCA for all other forms of service

Choice of payment

6.7 Recipients of permanent impairment payments, (also known as non economic loss payments) will have a choice in the way in which they are paid. They can choose a periodic payment or a lump sum or a combination of each. A choice, once made, cannot be changed under the new legislation. This provision is intended to avoid the problems associated with dual eligibility (for lump sums and periodic payments) under existing legislation.

6.8 Recipients are allowed six months to make this choice and are eligible for financial assistance to cover the cost of financial advice[1] to assist them in doing so.

6.9 The maximum weekly payment for permanent impairment (for those with a minimum of 80 impairment points) is $240.60 per week. The maximum lump sum is $309,000 for males with permanent impairment points of 80 or more and up to age 30. The equivalent for females is age 35. In addition, any dependant of a person with 80 impairment points who is an eligible young person in the terms of the legislation is eligible for additional compensation of $61,800.

Evidence to the Committee

6.10 Evidence to the Committee was quite mixed on this component of the Bill, with some witnesses expressing support and some raising concerns. Many of the concerns result from a misapprehension of the concepts underlying the new legislation, especially with respect to the basis of the calculation of permanent impairment lump sums.

6.11 Each of the main issues raised in evidence to the inquiry on permanent impairment is discussed below.

Changes to payment levels

6.12 Some submissions welcomed the extension of GARP to cover all forms of service and recognised that this might result in improved levels of payment.

> There are a number of advantages [in the Bill]. They are the following ...the use of the VEA Guide to Assessment of Rates of Veterans' Pensions (GARP), in place of the American Medical Association (AMA) doctrine used in the Safety, Compensation and Rehabilitation Act 1988 (SRCA).[2]

6.13 Some claimed, incorrectly, that impairment payments would be lower under the new Bill than under the VEA.

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1 Up to a maximum of $1236.

2 *Submission 9*, p. 1 (Australian Peacekeeper and Peacemaker Veterans Association).

> I believe it is outrageous that the most seriously disabled veterans covered by the draft bill are to be treated far less generously than provided for under the VEA.[3]

6.14 A number of witnesses did not understand the way in which the GARP will be used in the new Bill. Nor did they appreciate that the revised form of GARP to be introduced in the Bill will be limited to calculation of permanent impairment for those with claims relating to service after 1 July 2004. The extent of the confusion is evident in the following quotation, included here as but one example.

> There are concerns that the current GARP and Personal Assessment Guide (MRCS) will be modified and be applied to current and former members under the VEA and MCRS. It is not clear from the explanatory material distributed with the draft Bill whether there will be two versions of the GARP—one for the VEA, MRCS and one for the MRCB—or one covering both schemes.[4]

Calculation of lump sums

6.15 There was little recognition in the evidence of the increased lump sums available to some recipients for permanent impairment. Evidence focused on concerns about the age based nature of the lump sum payment. Again, many of these concerns seemed to result from a failure to understand the actuarial basis of the calculations.

> The Federation is concerned as to how ADF members will accept that their injury is worth either "more" or "less" depending on their age and gender. The use of age and gender based tables to assess lump sum/periodic payment benefits is, in our view, inequitable, contrary to public policy and incomparable to any other Civilian Workers Compensation Schemes.[5]

> The reasons for determining the actuarial mean of males 30/females 35 is not really clear and again seems to emphasize the "civilian systems" approach/emphasis in this document.[6]

Impact of service type

6.16 A number of submissions argued that permanent impairment payments should reflect level of impairment only, and that the nature of the service in which the injury or illness was sustained should be disregarded in the calculations. These witnesses

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3 *Submission 13*, p. 10 (Veterans' Support and Advocacy Service Australia).

4 *Submission 10,* Attachment 1, p. 6 (Australian Special Air Service Association).

5 *Submission 11*, p. 10 (Armed Forces Federation of Australia).

6 *Submission 4,* Attachment 1, p. 8 (Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women).

favoured 'like payment for like injury' and they made this point with respect to a number of payments in the Bill (as discussed elsewhere) and not just to payments for permanent impairment.

> Warlike, non warlike and peacetime injuries will be assessed using the same guides and lifestyle questionnaires yet it is proposed that those with warlike service will receive more for the service related injury.
>
> The ISPA has continually called for equality when it comes to compensating for impairment. Regardless of where a service person sustains their injury/illness/disease the final outcome is the same.[7]
>
> In the bill, we have got to combine the peacetime injury points and the warlike injury points, or the non–warlike, and we have got to go through an equation—God only knows how we are going to do it—and then say, 'Okay, this is how much we are going to get'. Whereas we could make it a lot simpler and just say that, when it comes to the injury, there is no differentiation between warlike and peacetime, this is the scale and this is what the payment will be. I think that is a lot better and a lot less complicated than the proposed system.[8]

6.17 Other witnesses favoured the retention of higher permanent impairment payments for warlike and non-warlike service, in recognition of the special contribution of those who have served in war. This argument reflects the position advanced more broadly throughout the inquiry with respect to all the payments and entitlements in the Bill affected by type of service.

Eligibility for maximum impairment payments

6.18 Recipients become eligible for maximum impairment points when their impairment is assessed at 80 points, but are eligible for lower payments when their impairment reaches 10 points. A number of submissions argued that the 80 point level for maximum payments was too high.

> The 80 point impairment level is now too high, we believe. It will be very difficult to reach. In fact, the guys who know more about this say that a fellow would almost have to be dead to get those 80 impairment points under the new regime. So we think it should be much less. Some organisations say it should be 50; some say it should be 70 points, but it certainly should be reduced.[9]

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7 *Submission 6*, p. 7 (Injured Service Persons Association).

8 *Committee Hansard*, 24 February 2004, p. 5 (Mr Ray Brown, Injured Service Persons Association).

9 *Committee Hansard*, 24 February 2004, p. 33 (Col John Haynes, Australian Veterans and Defence Services Council).

6.19 Some failed to appreciate that the sliding scale would allow significant payments to be made to those with lower levels of impairment.

> Whilst the Federation supports the use of the GARP as an appropriate Guide, it will still exclude a number of people who should be entitled to an increase of their (weekly) lump sum benefit due to having a serious injury notwithstanding that they cannot reach "80 impairment points".[10]

Change to lifestyle weighting

6.20 The new Bill retains the assessment of impairment based on a combination of GARP, which is a predominantly medical assessment, and an assessment of the impact of impairment on lifestyle. However, the new Bill reduces the proportion of the final calculation based on lifestyle effects. This change was not supported in the evidence the Committee received on this issue.

> By giving increased emphasis to impairment—a medical judgement—the process has been made more 'clinical' and, it is no doubt hoped, more objective. No matter how much objectivity eases the decision-maker's task, assessing compensation for injury or disease can never rely wholly on objective factors. In reducing the weight given to lifestyle, the new GARP proposals reduce the claimants' stake in the process of assembling evidence. Inevitably, confidence in the scheme as one in which claimants' interests and their needs are given fair weight will be reduced.[11]

> The Veterans' Entitlement Act lays down a certain balance between objective medical assessment and the claimant's assessment of the effects of the disability on his lifestyle (done in conjunction with his doctor) in gauging the claimant's degree of disability. This is an important combination. There must, of course, be objective medical assessment of any disability, but any given disability can have different effects on different people. It is very important, therefore, to balance these factors in determining a claimant's degree of disability.
>
> …In what we can see only as another example of unnecessary meanness, the new bill shifts this balance so as to reduce the influence of the lifestyle report. In other words, the veterans' participation in the process of assessment has been downgraded.[12]

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10 *Submission 11*, p. 11 (Armed Forces Federation of Australia).

11 *Submission 16,* p. 6 (Regular Defence Force Welfare Association).

12 *Submission 12*, p. 10 (Vietnam Veterans' Federation).

Indexation arrangements

6.21 Permanent impairment payments, like a range of other payments and benefits, are indexed to the CPI. This arrangement was strongly opposed in evidence to the Committee, both with respect to permanent impairment and to the Special Rate Disability Pension (SRDP), to which it also applies. More specific criticism of the CPI indexing arrangements are detailed in the section of the report discussing the SRDP, where opposition to the CPI link was strongest.

Concluding remarks

6.22 The Committee received no substantial evidence on the choice of payment for permanent impairment or the lower threshold for eligibility. As noted, there was limited recognition in the evidence of the higher payments to recipients with severe levels of impairment.

6.23 Payments to the dependants of those receiving permanent impairment payments are discussed later in the report.

Chapter 7

INCAPACITY PAYMENTS

The provisions of the Bill

7.1 Incapacity payments are made to those incapacitated for service or for work. The payments are income for economic loss. They are paid weekly until the age of 60, for recipients eligible for the service pension, or 65, at which time recipients become eligible for the age pension and/or superannuation.

7.2 Incapacity payments for former members of the ADF are based on their regular income at discharge (including any regular allowances)[1] plus a loading of $100 per week to compensate for non salary benefits enjoyed by ADF personnel, such as subsidised housing. They are offset, dollar for dollar, by Commonwealth funded superannuation.

7.3 Discharged ADF personnel receive 100 per cent of their income, plus regular allowances, for 45 weeks from the date of discharge. After this the payment is reduced to 75 per cent of final salary plus allowances. For those whose health and work force participation subsequently improves, a sliding scale of payments will come into operation. Incapacity payments will gradually decline as earned income increases. However, the decrease in incapacity payments will not be as great as is the increase in payments from salary. There is thus a built in incentive for the injured person to increase their work force participation. This is consistent with the emphasis elsewhere in the Bill on returning injured individuals to a level of functioning as close as possible to the level they enjoyed before their injury or disease.

7.4 Incapacity payments are indexed to movements in ADF pay. They are not capped but their minimum level is pegged to the Federal minimum wage. Those eligible for a small incapacity payment (less than $154. 50 per week) and who are still in the work force or eligible for superannuation may choose to commit their incapacity payments to a lump sum but for most recipients there is no such choice.

7.5 Reservists incapacitated for civilian or defence force work are also eligible for incapacity payments. In their case the payment is based on their normal Reserve income, plus allowances, and their normal civilian income, with the proportion of

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1 There was confusion in the evidence about the situation with respect to allowances. The Department of Defence advised (in *Committee Hansard,* 25 February 2004, p. 24) that a military salary for the purpose of calculation of incapacity payments is salary plus service allowance plus additional allowances such as, for example, seagoing allowance. The additional allowances are taken into consideration when it can be shown that the member would have received them but for the injury. Payment of the allowances within the incapacity payment continues for as long as they would have been paid had that person continued in his/her employment in the service.

each determined by the proportion of their time spent in each occupation. The intention is to protect Reservists with high earnings in their civilian occupation whose Reservist income may be much lower, such as doctors. The Reservist component of the incapacity payment will, like that of regular ADF personnel, be indexed to movements in military wages. The civilian component of their income will be tied to an age/cost index. The $100 per week loading is indexed to the CPI.

Acceptance of the provisions

7.6 The Committee received limited evidence in support of the Bill's treatment of incapacity payments. Support related to:

- The more favourable arrangements for calculating incapacity payments for former Reservists,
- The indexing arrangements for incapacity payments,
- The lifting of the cap on incapacity payments,
- The inclusion of ADF allowances and loading for non salary benefits in the calculation of incapacity payments, and
- The starting date for payments, which now excludes any periods of sick leave prior to commencement of payment.

Concerns with incapacity payments

The major concerns are identified below.

Calculation of incapacity payments for former ADF members leaving civilian employment

7.7 Most concern in evidence to the inquiry on incapacity payments focused on the position of former ADF personnel who obtain civilian employment after leaving the ADF and who are subsequently obliged to resign from that employment as a consequence of a service-related injury or illness (for which the Commission has accepted liability). In these circumstances their incapacity payments are calculated on the basis of their final salary and allowances in the ADF, regardless of their salary in civilian life which, it was suggested, might be much higher. In this respect therefore, it was argued, former members of the ADF are disadvantaged compared with part time Reservists who were in civilian employment but are now incapacitated for Reservist service or civilian work, who may have both their military and their civilian earnings considered.

> It is in its provisions for determining incapacity payment to former members of the ADF that the Bill contains what is in our view its most serious flaw. It seems to us that in attempting to graft principles of workers' compensation

> legislation onto the circumstances of employment in the ADF, a serious anomaly has been created.
>
> …So, what has the Bill to say when incapacity for these [civilian] jobs is caused by impairment resulting from injury or disease suffered or contracted during service, for which the Commonwealth has accepted liability, and which leads to inability to earn these incomes? The Bill creates the fiction that the income lost is not the one earned from the civilian job, but the one last earned while a member of the ADF—amazingly, called 'normal weekly earnings.'[2]
>
> The incapacity payments should be keyed to current loss—as seems to be the case with the current members and Reservists—rather than based on a salary that may be many years old and not reflect the ability or earning capacity of the member.[3]

7.8 In the Committee's view it would be quite unrealistic to expect the ADF, as the employer, to guarantee the incomes of its members after they leave its employ. No civilian employer is required to do so, nor should they be. The new Bill is intended to establish a compensation scheme for military service, not an insurance policy against loss of future earnings.

7.9 In the Bill the ADF accepts responsibility for service–related injury or illness and pays incapacity benefits related to the rank of the member at departure from the ADF. The value of that payment is maintained into the future because it is based on the salary of a person at equivalent rank at the time it is claimed.

7.10 As noted in the evidence, the principle involved here is not strictly maintained with respect to Reservists, whose incapacity payments are based on civilian and Reserve service. However, the payment they receive is based on contemporaneous military and civilian salary and not on civilian salary at some unknown future date.

7.11 The Department of Defence advised the Committee during public hearing[4] that its own calculations had shown that the majority of those receiving incapacity payments would in fact be worse off were those payments linked to civilian rather than to past military salary.

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2 *Submission 16*, pp. 3–4 (Regular Defence Force Welfare Association). This submission goes on to suggest that, in its references to this question the Explanatory Memorandum is 'grossly misleading' and 'an unadorned mis–statement of fact'.

3 *Submission 4,* Attachment 1, p. 10 (Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women).

4 *Committee Hansard*, 25 February 2004, pp. 25–26 (Mr Mal Pearce, Department of Defence).

Reasonable expectations

7.12 Incapacity payments are calculated on the basis of the salary and allowances the person was earning at the time they left the service. They do not take into account a person's capacity for, or likelihood of, promotion (except in the case of trainees, where promotion is more or less automatic on completion of training). Such an assessment would, of necessity, be very subjective and difficult to justify. But some witnesses saw the absence of any attempt to include a 'reasonable expectation' component as inequitable and anomalous.

> A Private sailor, soldier or airman invalided at age 21 will have his/her lifetime payment geared to the salary of a Private, even though he/she would most likely have reached a higher rank if uninjured. This is inequitable but not recognised in the Bill. [5]

> RDFWA is disappointed to see that any recognition of a concept of reasonable expectation of advancement in rank in a military career for the purpose of calculating incapacity payments has been specifically excluded from the Bill by S 180. In our view this cannot be an exclusion based on principle, since there are numerous examples in Chapter 4 where postulated increases in ADF or civilian pay are taken into account in calculating incapacity. Treatment of trainees for this purpose under S 189 is an example.[6]

The influence of rank

7.13 Incapacity payments for those unable to work are calculated on the basis of final salary in the ADF plus allowances. Payments will therefore vary significantly from one person to another, reflecting their rank and salary at the time they left the service. This is an entirely different position from the one which has existed until now, where the incapacity payments were basically the same for all ranks, varied only by superannuation and allowances.

7.14 This was not widely discussed in the evidence but, where it was raised, it led to some disquiet.

> …in the past everyone was compensated equally for equal disablement and now we have a division that is based on a rank. As Blue has pointed out, a private soldier who is disabled is going to stay at the bottom of the pile for the rest of his life. He is going to endure financial hardship for the rest of his life. I do not think that is acceptable.[7]

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5 *Submission 5*, pp. 5–6 (Australian Veterans and Defence Services Council).

6 *Submission 16*, pp. 2–3 (Regular Defence Force Welfare Association).

7 *Committee Hansard*, 23 February 2004, p. 3 (Mr James Bodey, Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

Superannuation offsetting

7.15 The Bill stipulates that incapacity payments will be offset, dollar for dollar, against the employer component of Commonwealth superannuation. The rationale for this provision is that the Commonwealth should not duplicate payments for loss of income, a position established in the SRCA since its inception.

7.16 There were significant levels of concern and confusion in the evidence about the superannuation offsetting of incapacity payments. Most witnesses who discussed the issue supported the Bill's provisions with respect to people who leave the service on the grounds of incapacity, cease work, receive an incapacity payment and have it offset against superannuation.

7.17 They opposed the provisions as they relate to people who leave the service healthy, with a superannuation package, obtain civilian work from which are obliged to retire through a service–related injury or illness, and who subsequently have the benefits from the superannuation package offset against incapacity payments. They argue that in the latter case the Bill treats military superannuation for retirement as income maintenance, a proposition which they reject. The claim, and the rebuttal, are similar to those advanced earlier in this chapter with respect to the calculation of incapacity payments for former ADF members leaving civilian employment.

> Once the person has retired from the Defence Force and is in receipt of retirement superannuation, whether he is subsequently employed or not—because the bill does not require that a person actually be in employment in order to get incapacity payments—all he has to do is be incapacitated for work. He becomes incapacitated and then becomes eligible for incapacity payments. These incapacity payments ought not to be offset against retirement superannuation. That is our firm position.[8]

> We do not have an issue with a person who is currently serving, is injured in some way, finds that they cannot continue in the service and receives a separation package which would be offset against the superannuation payments that are made to them. However, we have an issue with a former member—somebody who serves a tour of duty, currently around 20 years or more, and takes their superannuation as an accrued, earned retirement benefit—who goes into employment in civilian life and at some point is affected by a service related injury. We feel that at that stage the retirement benefit has been paid and has nothing to do with the previous service injury. That is the distinction we draw.[9]

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8 *Committee Hansard*, 25 February 2004, p. 14 (Brig Kerry Mellor, Regular Defence Force Welfare Association).

9 *Committee Hansard*, 25 February 2004, p. 4 (Mr Ramon De Vere, Returned & Services League of Australia).

7.18 Further confusion was evident about exactly what constitutes 'Commonwealth superannuation' in the Bill, with some assuming it refers only to military superannuation and others that it applies to all Commonwealth superannuation.[10]

Cessation of payments at 65

7.19 The Bill provides for incapacity payments to cease at 65, at which time recipients become eligible for superannuation and/or the age pension. This was opposed by some witnesses, who were under the misapprehension that the incapacity payments are intended to compensate for pain and loss. As pain and loss continue for life, they argued, then so should the incapacity payments.

> The payment of entitlements for injury in service should be continued for life as they are under the VEA, not stopped at age 65.[11]

> The injury obviously does not cease at 65; it continues. When a person is injured to such an extent that they are unable to work, they have lost all the opportunities through those years to contribute extra to their super for their retirement or to get a second job to boost their income. So, given what they have lost, it should be extended past the age of 65.[12]

Cessation of payments to people in prison

7.20 Incapacity payments are a form of income support, to compensate for economic loss. When recipients are in prison they are supported by the state and income payments are suspended. This is exactly the same position as with other income support payments provided through Centrelink. It is the imprisonment rather than the impairment which causes the loss of income.

7.21 Opposition to the suspension of payments to people in prison was based largely on a misunderstanding of the **purpose** of the payments. As was the case for cessation of payments at 65 discussed above, witnesses saw incapacity payments as compensation for impairment rather than income support and argued that, since impairment continues regardless of circumstances, income payments should do the same.

> The RSL submits that these sections [sections 122 and 208] constitute an additional and unreasonable penalty on the grounds that the incarcerated member does not become impaired as a result of the incarceration. That is,

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10 Section 5 of the Bill defines it as including **all** forms of Commonwealth superannuation.

11 *Committee Hansard*, 24 February 2004, p. 33 (Col John Haynes, Australian Veterans and Defence Services Council).

12 *Committee Hansard*, 24 February, p. 3 (Mr Ray Brown, Injured Service Persons Association).

> the reason for his/her being compensated remains and has no causal connection with the offence for which he/she is incarcerated.[13]

7.22 The compensation for impairment is in fact the permanent impairment payment and this does continue for life.

Concluding remarks

7.23 Since incapacity payments do not, in general, include a lump sum provision and there is no reference to the actuarial calculations which lump sums entail, there was less misunderstanding in the evidence relating to these payments when compared with the evidence on impairment payments and widowed partner payments, and higher levels of acceptance. There are significant improvements in incapacity payments in this Bill compared with existing legislation and these were acknowledged in the evidence, although not discussed in any detail.

13 *Submission 1*, p. 4 (Returned & Services League of Australia).

Chapter 8

THE SAFETY NET (SRDP)

Provisions of the Bill

8.1 The Special Rate Disability Pension (SRDP) or safety net is an alternative form of income support, paid as compensation to those who are unable to work because of a service–related injury or illness for which the Commission has accepted liability. Recipients are generally the most disadvantaged of those eligible for incapacity payments. Eligibility is restricted to those whose level of disability is assessed at 50 points or more and who are unable to work for more than 10 hours per week.

8.2 The SRDP is currently $762.60 per fortnight, which is equivalent to the Totally and Permanently Incapacitated (T&PI) pension (the Special Rate pension) available under the VEA. The SRDP is not taxed but it is offset against the Government component of Commonwealth superannuation at the rate of 60 cents in the dollar. It is also offset, dollar for dollar, against permanent impairment payments because the SRDP itself contains a component for non economic loss. It is indexed to the CPI.[1]

8.3 Recipients are eligible for a range of other benefits such as the Gold Card. Unlike incapacity payments, the SRDP is paid for life. On the death of the recipient their dependent spouse becomes eligible for a pension equivalent to the war widow's pension under the VEA, as well as a range of other benefits. Dependent children are also eligible for entitlements on the death of a supporting parent who was receiving the SRDP at the time of death.

8.4 Eligible individuals are offered a one off choice between incapacity payments and the SRDP. They are allowed 12 months to make this choice and financial advice is available[2] to assist them in doing so.

8.5 The SRDP acts as a safety net (and is often referred to as such) because it is designed for those whose income, if they received incapacity payments, would fall below that currently provided to T&PI pensioners under the VEA. This might be the case, for example, for part time Reservists whose combined civilian and Reservist income was very low in the period immediately preceding their incapacity.

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1 Changed indexing arrangements for the T&PI pension, which will flow on to the SRDP, were announced by the Government on 2 March 2004, in its response to the Clarke Review. Pensions will now be indexed to MTAWE for the above general rate of the Special Rate, with the remainder continuing to be indexed to the CPI.

2 Up to a maximum of $1236.

Support for the SRDP

8.6 Evidence to the inquiry was generally supportive of the **concep**t of the SRDP as a safety net.

> The decision to introduce a 'safety net' payment is a sensible one that offers a measure of financial protection to certain members of the ADF. This safety net payment is the equivalent of the T&PI special rate pension as paid under the VEA.[3]

Concerns with the SRDP

8.7 Significant levels of concern were evident in advice to the Committee on the SRDP. Concern focused on the perceived inadequacy of the **level** of payment and on the way in which it is **indexed**. (This latter concern has in part been addressed in the Government's response to the Clarke Review). Superannuation offsetting was also an issue for some. Again, evidence on the SRDP revealed a significant degree of misunderstanding about some of its key components.

Inadequacy of the payment

8.8 Most evidence on the SRDP considered the level of the payment inadequate. Submissions suggested that an increase in payment level was imperative. Some also suggested that a new rate should not be fixed until the Government had responded to those recommendations of the Clarke Review[4] relating to the T&PI pension, on which the SRDP is based.

> The special Rate Pension under the VEA is a key component of the Bill in terms of the Safety Net. However, as a Safety Net, it is totally inadequate.[5]

> The Safety net is based on the TPI Special Rate [and] until such time as the Clarke Review and the TPI issue is addressed ESOs should not be agreeing to this Safety Net. The TPI Special Rate is deteriorating in real terms and is therefore not a viable mechanism to meet the objective of a proper Safety Net…[6]

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3 *Submission 1*, p. 5 (Returned & Services League of Australia).

4 *Report of the Review of Veterans' Entitlements*, Commonwealth of Australia, 2003. A response to the Review by the Minister for Veterans' Affairs was provided on 2 March 2004. It changed the indexing arrangements for the T&PI pension, as noted, but not the level of the payment.

5 *Submission 3*, p. 3 (Vietnam Veterans Association of Australia).

6 *Submission 4*, p. 4 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

8.9 Reliance on the Clarke Review seems somewhat misplaced in this context since Clarke found that the T&PI had not declined against MTAWE[7] for veterans with eligible service, although for other veterans it had done so because of the offsetting of Centrelink payments, which does not apply in the case of the service pension awarded to veterans with eligible (war) service. He also recognised that Special Rate veterans whose need for care was such as to preclude their spouses from working were at a special disadvantage.

8.10 Clarke was concerned not so much with the adequacy of the Special Rate pension but with the fact that it was not flexible enough to respond to the changing needs of recipients over their lifetime. In this respect it differs from the income of most other people, which is highest while they are in the work force and supporting children but drops when they retire, at which time family responsibilities have diminished. [8]

Inadequacy of indexing arrangements

8.11 Both the SRDP and the permanent impairment payment are indexed to the CPI, as are a number of other entitlements. They differ in this respect from incapacity payments, which are indexed to movements in military wages.

8.12 Opposition to CPI indexing was widespread, both as a general principle and most particularly with reference to the SRDP.

> Indexing the various amounts …by the CPI alone means that these amounts over time will erode in value relative to the Normal Weekly Earnings amounts against which the incapacity payments are calculated. This is inappropriate as well as undesirable and will demand revision of these payments at an early date after the Bill is enacted unless action is taken now to change the indexing method.
>
> For some time the CPI has been recognised as an inflation measure only and not a cost of living index. This… was the reason why the present Government, with full support of the Opposition, legislated in 1997 to change the indexing of Centrelink pensions to the greater of the CPI or 25 per cent of Male Total Average Weekly Earnings (MTAWE)

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7 Male Total Average Weekly Earnings.

8 *Report of the Review of Veterans' Entitlements*, Commonwealth of Australia, 2003, vol 3, chapters 29 and 30, pp. 593–643.

> …The gap between CPI and MTAWE has been constantly widening for the last decade and both the Reserve Bank and other research authorities are saying that this situation will continue for as far ahead as can be forecast.[9]

8.13 Many submissions suggested that indexing the T&PI pension using the CPI had eroded its value in comparison with payments indexed through other mechanisms so that both the T&PI and, by extension, the SRDP, which had never been especially generous, had now become totally inadequate and were set to fall even further behind in the future.

8.14 The RSL believes it is important that the Committee of Inquiry understand that the RSL has for years been arguing that the current TPI pension has been eroded in value, has not been properly indexed, and is inadequate. The RSL position on the TPI pension is summarised as follows, that Government:

- acknowledge that there has been an erosion of the TPI pension over recent years due to inappropriate indexation;
- grant an increase in the pension of not less than $66.00 per fortnight;
- index the TPI pension to the CPI or MTAWE, whichever is the greater; and
- benchmark the TPI pension to MTAWE.[10]

8.15 A number of witnesses pointed to the inequities of a situation in which incapacity payments, which are generally larger than the SRDP, are indexed more favourably, to movements in military wages, while the SRDP is indexed to the CPI, ensuring that the differential between them will increase in the future.

> It is particularly odious that the lowest paid in the military compensation scheme should have their payments decline in real value whilst the pensions of the better paid retain or increase their real value.[11]

8.16 Most evidence favoured indexation of the SRDP to the CPI or MTAWE, whichever is the greater, with adjustments every six months rather than annually, as at present. Some also favoured an immediate increase in the level of the SRDP to compensate for the past erosion in the value of its equivalent, the T&PI pension.

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9 *Submission 8*, p. 1 (Naval Association of Australia). This submission provides a detailed analysis of the shortcomings of existing indexation arrangements and of the case for a move to indexation to the greater of the CPI or movements in MTAWE, adjusted twice yearly.

10 *Submission 1*, p. 5 (Returned & Services League of Australia).

11 *Submission 12*, p. 11 (Vietnam Veterans' Federation).

Offsetting of Commonwealth superannuation

8.17 The SRDP payments are offset 60 cents in the dollar against the government component of Commonwealth superannuation. This is a lower rate than for offsetting of incapacity payments, a differential arising from the fact that the SRDP is not taxed while the incapacity payments are.

8.18 At least some of the opposition to the offsetting of the SRDP against superannuation stems from the incorrect assumption that the SRDP is compensation for non economic loss (impairment) rather than a form of income support for economic loss. (Permanent impairment payments, which fall into the former category, are not offset against superannuation.)

> The Federation is opposed to offsetting of superannuation entitlements against a safety net Special Rte pension because it discriminates against service personnel—especially those with long service and significant superannuation benefits.
>
> …superannuation is at best a form of income support and is properly only offset against other forms of income support like the service pension—not compensation.[12]

8.19 Other misconceptions are also apparent in evidence to the Committee on the SRDP, as noted below.

The question of choice

8.20 Those eligible for the SRDP are not obliged to choose it. If they prefer they can opt for incapacity payments. However, it is anticipated that most who are eligible will choose it because of the range of additional benefits it attracts, both for them and for their dependants.

8.21 Eligible recipients will be offered a choice only once.[13] They cannot change this decision once made. This is an attempt to minimise the confusion and anxiety resulting from existing arrangements under the VEA and the SRCA where dual entitlement exists for some individuals and they choose a lump sum payment under one Act and later convert to receipt of a pension under another Act, with a consequent requirement for offsetting against their pension. Despite this history, some evidence to the Committee suggests a number of veterans' organisations are opposed to a one off choice.

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12 *Submission 4,* p. 3 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

13 With financial assistance for professional advice.

> The draft Bill explanatory material suggests that the safety net is given as a one off choice. Used in this manner it is not a safety net as it cannot act to ensure an adequate compensation payment will continue as there can be no guarantee that military wages will remain adequate. Personnel can choose to have the safety net equivalent but if they choose the military wage option they must be protected from future wage devaluation.[14]

> There is provision there to go to financial advisers et cetera, but we do not believe that is good enough, because you do not know what is going to happen in 10 years time. It is as simple as that.[15]

Payment for life

8.22 The SRDP, unlike incapacity payments, is paid for life. This is not always understood, with some witnesses opposed to what they incorrectly consider the cessation of payments at age 65.

> Under the VEA the Special Rate pension is paid for the whole of life and the safety net arrangements need to be made on the same basis. There is no justification to have the Special Rate paid for life under the VEA and only to age 65 under the MRACS when they are intended to fulfil the same function.[16]

Opposition to the terminology

8.23 A number of witnesses objected to the replacement of the term Totally and Permanently Incapacitated (T&PI) pension by Special Rate Disability Pension, which they saw as further evidence of the Government's intention to dilute the military emphasis of the legislation.

> Military people over many decades have become familiar with and respect the meaning of TPI. This is a well known colloquialism, used since WW1 to describe the "Special Rate". We cannot understand why the drafters of this Bill have sought to change the name. It seems to be change for changes sake. It certainly illustrates the shift to civilian connections, when it would be a simple matter to retain as much connection with the terminology of the VEA and the Repatriation Act as practicable.[17]

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14 *Submission 10*, Attachment 1, p. 8 (Australian Special Air Service Association).

15 *Committee Hansard*, 23 February 2004, p. 3 (Mr John Ryan, Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

16 *Submission 4*, Attachment 1, p. 11 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

17 *Submission 5*, p. 7 (Australian Veterans and Defence Services Council).

8.24 There were practical reasons also for retaining the T&PI term. The term is well understood in the community and T&PI recipients are entitled to a range of State, local government and private sector discounts which, it was suggested, would not be so readily provided to SRDP recipients, partly because the term would not be well recognised but also because it could apply to peacetime as well as warlike and non–warlike service, thus undermining the special status now accorded to T&PI veterans.

Abolition of the SRDP

8.25 There was limited discussion in the evidence of the possibility of abolishing the SRDP altogether and replacing it with a payment based on 75 per cent of MTAWE and indexed to movements in military wages, in the same way as the general incapacity payment in the new Bill.

> The amount [of the Special Rate is inadequate]. The amount of $233.07 is derived directly from the VEA, without receiving the attention it deserves as part of the development of the MRCB. This rate should be set at 75 per cent of MTAWE.[18]

8.26 It was suggested (although again the evidence was limited) that it was inappropriate to base the safety net payment on the T&PI, which is discredited in the veterans' community. Furthermore, the SRDP confuses the distinction between compensation for economic and non economic loss, which the Bill as a whole is at pains to emphasise. It focuses on payments for life, which is again at odds with the focus of the new legislation, on encouraging people to work to the extent to which they are able (notwithstanding recognition of the fact that this will not be possible for many recipients).

8.27 The Department of Veterans' Affairs however indicated at public hearing that its calculations suggested that the large majority of SRDP recipients would be worse off were that payment to be replaced by one based on 75% of MTAWE, particularly if the replacement payment stopped at 65.[19]

Concluding remarks

8.28 The SRDP is one of the most contested aspects of the proposed legislation. Opposition has focussed on the level of the payment and the method by which it is indexed. Although there is an element of misunderstanding in the comments about certain aspects of the SRDP this has not contributed to the opposition to these provisions. The evidence points to a clear appreciation of the level of the payment and the method of its calculation and to strong opposition to both. The Government's

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18 *Submission 5*, p. 6 (Australian Veterans and Defence Services Council).

19 *Committee Hansard*, 25 February 2004, p. 29 (Dr Neil Johnston, Department of Veterans' Affairs).

response to the Clarke Review may address the indexation concerns but will do nothing to overcome concerns with the level of payment. Opposition to this aspect of the SRDP, though not to the concept, can therefore be expected to continue after the introduction of this legislation.

Chapter 9

COMPENSATION FOR DEPENDANTS

The provisions of the Bill

9.1 The Bill provides a range of pensions and benefits to the dependants of deceased members and former members of the ADF. These are generally based on the provisions of the VEA but are more generous in certain circumstances. With two notable exceptions (one based on a misunderstanding) they received widespread support in evidence to the inquiry.

9.2 The major provisions are briefly outlined below, together with views expressed about them in the evidence.

Provisions for wholly dependent partners

9.3 The wholly dependent partner of a deceased member is eligible for a range of benefits if:

- the Commission has accepted that the death was service-related; or
- the deceased partner was eligible for the SRDP at the time of death; or
- the deceased partner was assessed as having an impairment level of 80 points or more at the time of death.

9.4 In these circumstances the wholly dependent partner is eligible for the following benefits:

A weekly pension or a lump sum payment

9.5 The weekly pension is equivalent to the war widow's pension in the VEA, currently $477.80 per fortnight. It is untaxed and paid for life.

9.6 A partner may choose to convert the lifetime equivalent of the pension into a lump sum. Calculations are based on life expectancy tables issued by the Australian Government Actuary. These will ensure that a younger partner, who can be expected to live longer and thus to receive a greater total pension payment over a lifetime compared with an older partner, will receive a larger lump sum than an older partner whose life span can be assumed to be shorter, whose total pension payments will therefore be lower and the conversion of which will result in a smaller lump sum. As an illustration, a widowed partner of 20 will receive a lump sum payment of

$388,000,[1] a widowed partner of 40 will receive a lump sum of $320,000 and a widowed partner of 60 will receive a lump sum payment of $220,000. These lump sum payments are significantly greater, in most cases, than those provided in the existing legislation, where the maximum lump sum payment is $190,000.

9.7 As with similar choices elsewhere in the Bill, partners are allowed six months to make a once only choice and are eligible for paid financial advice to assist them in doing so.

Additional lump sum death benefit

9.8 The size of this benefit varies according to the type of service in which the deceased partner met his/her death. For warlike service, dependent surviving partners are eligible for a maximum payment of $103,000. This payment is also age related, with the maximum payable to surviving partners up to the age of 40.

9.9 In cases of non-warlike and peacetime service the equivalent lump sum is $41,200, with this maximum figure also paid to partners up to the age of 40. This is a departure from other references in the Bill to service type. In every other instance, warlike and non–warlike service are considered jointly. Death benefits are indexed to the CPI.

Superannuation

9.10 All members of the ADF contribute to a military superannuation scheme. The partners of deceased members are entitled to the member's own superannuation contributions, with interest, plus five eighths of the member's superannuation pension.[2]

Permanent impairment and incapacity payments

9.11 Where the deceased member was receiving permanent impairment payments, incapacity payments or the SRDP at the time of death the surviving partner is eligible to continue receiving this for a 12 week period from the date of death. This is equivalent to the bereavement payment available under existing legislation.

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1 These figures are for female widowed partners. The calculations for males are different because of the lower life expectancy of males.

2 This is the position for members of the Military Superannuation and Benefits Scheme, to which most serving members contribute. The arrangements are slightly different for contributors to the Defence Force Retirement and Death Benefit scheme.

Health care benefits

9.12 Widowed partners are entitled to the Gold Card[3] and other health benefits such as a pharmaceutical allowance, as detailed elsewhere in the report.

Funeral benefit

9.13 A surviving dependent partner is eligible for funeral benefits to a maximum of $4,738, a significant increase on the payment available under the VEA.

Views expressed in the evidence

Terminology

9.14 Some concern was expressed in the evidence about the dependency test for wholly dependent partners and eligible young persons. In a departure from previous legislation the concept of 'living with' is introduced (s17). In the view of some, this section has the potential to reward those in short term relationships at the expense of long term married or de facto partners.

> It is considered that this test [the 'living with' test] will be too easy for temporary 'living with' relationships and override the normal rights of a 'spouse' (whether legal or de facto). It is contended that the concept will deprive existing spouses of benefits that they could reasonably expect to receive as compensation for the death of their partner. Instead, Legacy prefers that the well–established tests for a spousal relationship of legal marriage and/or marriage–like relationships (described in Section 11A of the VEA, which is common with the SRC Act) be adopted in this legislation.[4]

9.15 The Department of Veterans' Affairs acknowledged these concerns but considered them misplaced. It suggested that nobody will be worse off in the new Bill and that, in the particular case of two 'living with' spouses, to which Legacy referred, both will be entitled to the full benefits accruing to a wholly dependent spouse. At the Melbourne public hearing[5] Legacy representatives acknowledged that, having clarified the situation with the Department since their submission was written, their concerns had been addressed.

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3 Repatriation Health—for all Conditions.

4 *Submission 2,* p. 1 (Legacy Coordinating Council).

5 *Committee Hansard*, 24 February 2004, pp 39–40.

The weekly or lump sum payment

9.16 This assistance to the partners of deceased members was generally supported. Opposition to the provisions for calculation of the lump sum was, as elsewhere in the evidence, based on a misunderstanding of the actuarial basis of the calculations.

> If the member dies the widow is expected to exist and support the family on an amount that is in average circumstances less than 30 per cent of the family's income prior to the member's death. The younger the widow and the shorter the service of the member the less compensation and financial support the widow will receive and the more desperate will be the circumstances.[6]

> On the issue of age, no amount of money will bring back the deceased or the loved one. However, there has to be some sort of benchmark for a physical and emotional loss. It does not matter how old they are; they have still lost somebody. As a matter of fact, it is probably worse for someone to lose somebody who has been with them for 30 years at the age of 55 than it would be for a 25–year old to lose somebody. The 55–year old has known that person for a very long time and a very big part of their life has just disappeared.[7]

9.17 At least one organisation claimed that the lump sum payment for widowed partners who chose that option in preference to periodic payments was inadequate, although this view was not widely expressed.

> I have no problem with the package [for widowed partners] as such—only with the lump sum payout for the widow, which is the $360,000. That, to me, is too low. I think that should be $500,000. The rest of the package is fine.[8]

9.18 When asked to justify this position in relation to general community standards the witness said that community standards were not his concern, and that he was there to advocate for his members.

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6 *Submission 4,* Attachment 1, p. 14 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

7 *Committee Hansard*, 24 February, p. 9 (Mr Paul Copeland, Australian Peacekeeper and Peacemaker Veterans Association).

8 *Committee Hansard*, 23 February 2004, p. 19 (Mr Eric Giblett, Australian Special Air Service Association).

The additional lump sum death benefit

9.19 There was a high level of support for this benefit, and especially for the significant increase in the payment for warlike service in comparison with the provisions of existing legislation.

9.20 There was however a high degree of opposition to the differential payments for dependants of those killed in warlike service as opposed to other dependants. Witnesses argued that the surviving partner faced equal levels of trauma and adjustment irrespective of the type of service in which the deceased partner had met his/her death.

> The rationale for a significant difference in compensation paid to dependants of deceased members is not accepted. The RSL believes that when a member's death is attributed to service it makes no difference to the surviving partner where or how that death occurred. The surviving partner still faces the same difficulties of coping with children and other issues. The Townsville Blackhawk incident in 1996 tragically highlighted the trauma and suffering of those left behind just as much as if their husbands had been killed on active service.[9]

> … DFA are particularly concerned with the provision to pay additional funds to those members killed on active service. To the bereaved family, the loss of a loved one has the same emotional and financial impact, regardless of where that death occurred. DFA supports Legacy's position to have warlike and non-warlike paid at the same rate.[10]

9.21 The arguments are identical to those advanced in support of equal payments for permanent impairment, regardless of service type, that is, like compensation for like injury. However, support for abolition of the differential was much stronger with respect to the lump sum death benefit than to any other payment.

9.22 Even some of the strongest advocates for the retention of differential compensation payments held a different view with respect to the death benefit for widowed partners.

> Prima facie we would say that the differential should remain but we note one thing in particular; the widows are once removed from the people who are actually doing the fighting. Therefore the strength of the argument for differentiation is reduced. This has caused us a lot of problems because there is conflict between the principles that we would want to lay down and perhaps the idea that the widows are once removed. The last consensus that seemed to be evolving in our organisation was that, if payment is going to

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9 *Submission 1*, p. 5 (Returned & Services League of Australia).

10 *Submission 14,* p. 1 (Defence Families of Australia).

> be at the higher rate, then let them all have it. If however, the widow of the qualified veteran is going to have to suffer—and get less money because you are going to even it out or something—then we would want the distinction maintained. But I think that we would prefer that everybody got the higher amount. The situation is once removed and therefore the argument is weaker.[11]

9.23 The Federation was not alone in suggesting that a uniform payment should be set at the higher level proposed for warlike service in the Bill.

> Death is death to all dependants, and the trauma and grief may not be lessened for the dependants of those who die while training. This is not an argument to adopt the lower level proposed for death due to peacetime training.[12]

9.24 A minority of witnesses strongly supported the differential death benefit, on the grounds that this had traditionally been a form of recognition to those who had died in battle and that such a distinction reflected the very special place accorded to such people in the general community. They saw any attempt to minimise this differential as an attempt to downgrade the special position traditionally accorded to combat soldiers in Australia, dating back to the 1920s. Again, the arguments reflect those referred to earlier in support of retention of the differentials for compensation payments generally.

9.25 The Committee was surprised by the strength of feeling on this issue. While certainly not unanimous, the evidence clearly supported abolition of the differential with respect to the death benefit. The case for retention of the differential was most strongly put by organisations representing predominantly the interests of veterans, thus mirroring the position with respect to differential compensation payments more generally.

Provisions for wholly dependent young persons

9.26 A wholly dependent young person of a deceased member who dies in the circumstances described above in relation to wholly dependent partners is also eligible for a range of benefits. These are listed below.

- A lump sum payment of $61,800
- A weekly payment of $67.98.

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11 *Committee Hansard*, 24 February 2004, p. 46 (Mr Graham Walker, Vietnam Veterans' Federation).

12 *Committee Hansard*, 25 February 2004, p. 2 (Major Gen William Crews, Returned & Services League of Australia).

- Eligibility for the education scheme to be incorporated into the new Bill, based on the Veterans' Children's Education Scheme (VCES) now operating under the VEA.

Provisions for multiple dependants

9.27 Where a member dies with dependent family members who are not wholly dependent partners or wholly dependent young persons within the terms of the legislation then the Bill allows for compensation to be paid to them. A maximum amount of $195,700 can be provided, tax free, for distribution between eligible family members. It is envisaged that the provision will cover, for example, aged parents or young siblings of the deceased member.

Views expressed in the evidence

9.28 The Committee received little evidence on these entitlements beyond a request by some ESOs to be involved in development of the protocols to govern the education scheme and concerns about the definition of wholly dependent eligible young person. These concerns mirror those referred to with respect to wholly dependent partners but were felt to be especially damaging, at least potentially, for eligible young persons in the shared custody of the deceased and the surviving spouse, because of the 'living with' test.

> Similar concerns to those involving 'wholly dependant partners' are felt about the manner in which S17 defines "eligible young persons". For example, the definition appears to exclude an otherwise eligible young person who is subject to equally shared custody with the member on a permanent basis. Similarly, we are also concerned at the implications of the 'living with' requirement which could be subject to even more difficulties in interpretation in the case of children. It would be unacceptable to Legacy for (otherwise dependant) eligible young persons to be excluded from the benefits of this legislation on the basis of their parents' marital status.[13]

9.29 This issue also has since been clarified to Legacy's satisfaction, with the Department of Veterans' Affairs explaining that benefits to eligible young persons are based on dependency and not on custodial status.

Concluding remarks

9.30 Provisions governing the dependants of deceased members are generally equivalent to, or more generous than, provisions in the existing legislation. Thus few concerns were raised about them in the evidence. Most attention, as noted, focused on what was perceived as an unreasonable distinction between widowed partners of those who died in warlike service and other widowed partners. The balance of the evidence

13 *Submission 2*, p. 2 (Legacy Coordinating Council).

is certainly in favour of removing this distinction with respect to the death benefit, although such a view was not universal. As discussed earlier, support for removing the differential for other payments was more muted.

9.31 As with other aspects of the legislation affected by actuarial calculations, clarification of the position is urgently required to correct significant levels of misunderstanding among ESOs, as evidenced in submissions and at public hearings.

Chapter 10

TREATMENT AND OTHER FORMS OF COMPENSATION

Treatment

The provisions of the Bill

10.2 The Bill provides for treatment of injuries and diseases suffered by members and former members of the ADF and by dependants of deceased members.

10.3 In the case of short term conditions for which the Commission has accepted liability, eligible recipients arrange their own treatment and have the costs reimbursed. This arrangement mirrors the provisions in the SRCA. For most serving members of the ADF treatment will be provided under the Defence Force Regulations rather than under this legislation but the Commission may assume responsibility on the advice of a person's service chief in cases where the serving member is likely to be discharged.

10.4 In the case of chronic conditions and long term treatment the Commission is responsible for the provision of treatment, rather than reimbursing the costs of treatment arranged elsewhere. This arrangement mirrors the provisions of the VEA.

10.5 Where a person has been assessed as having a permanent impairment level of 60 points or above, stemming from a single injury or disease, then that person will be issued with a White Card[1] entitling him/her to free treatment for all aspects of that injury or disease.

10.6 Where a person is assessed as having a permanent impairment level of 60 points or above resulting from a range of conditions then he/she is eligible for a Gold Card[2] entitling him/her to treatment for any condition. Those eligible for the SRDP are also entitled to the Gold Card, as are wholly dependent partners and wholly dependent eligible young persons of a deceased member whose death was service related, who was eligible for the SRDP or who was assessed as having an impairment level of 80 points or more.

10.7 Other provisions in the Bill relate to compensation for the costs of travel to obtain treatment and the costs of pharmaceuticals.

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1 The Specific Treatment Entitlement Card (STEC).

2 Repatriation Health—for all Conditions.

Views expressed in the evidence

10.8 The Committee received little evidence on the treatment provisions of the Bill, except for broad references in support of the inclusion of the White Card and the Gold Card in the legislation.

Other forms of compensation

10.9 The Bill provides for a range of other non monetary compensation benefits for members and former members. Each is briefly described below.

Motor Vehicle Compensation Scheme (MVCS)

10.10 The Bill provides that, in cases in which the Commission has accepted liability for an impairment which is such as to prevent a person from driving an ordinary vehicle the Commission may pay for any necessary modifications to such a vehicle. Alternatively, it may purchase or subsidise the purchase of a vehicle which meets the requirements of the person suffering the impairment.

Compensation for household services

10.11 Household services are defined as 'services of a domestic nature … required for the proper running and maintenance of a person's household'. Services include, for example, cooking and house cleaning.

10.12 When a person suffers a service-related impairment for which the Commission has accepted liability that person may be eligible for household services in cases in which he/she can show that most household services were provided by that person before the impairment, and that the person is now unable to undertake these tasks. The presence and capacity of other household members and reasonable expectations as to their contributions are also considered. Maximum compensation is $339.90 per week, indexed to the CPI.

Compensation for attendant care

10.13 Attendant care services are defined as those required 'for the essential and regular personal care' of the recipient. The definition excludes medical care and household services. Maximum compensation for attendant care is $339.90 per week, indexed to the CPI.

Other assistance

10.14 Certain categories of recipients, generally those with severe levels of impairment, may be eligible for a telephone allowance. Those who require medical aids may be eligible for compensation to cover the cost of loss or damage to these aids.

Views expressed in the evidence

10.15 In evidence to the inquiry, concern focused on the compensation for attendant care. Witnesses considered the level of the payment was too low and opposed what they considered was the supposition in the legislation that the care would be provided by the spouse. If the spouse were required to leave the work force to provide the care then the attendant care payment would be too low, in many cases, to replace the income lost. In this situation, it was suggested, families of severely disabled ex–servicemen could be doubly disadvantaged.

> Despite assurances from DVA that financial provision is made for non-qualified carers such as family members, we still believe the allowance is inadequate, particularly when you consider that the family member may have to give up employment to provide care to the disabled veteran.[3]

> There should be some provisions where, if a spouse does give up work to tend to their loved one, there is some remuneration above the attendant care allowance. We could be talking about people who are earning $600 a week when, through no fault of their own, their partner is injured in a military accident. Their income then drops down to $331 a week because they are expected to take care of their partner. There is reduced income into the household, so we believe that there should be more remuneration.[4]

Concluding remarks

10.16 With the exception of the areas highlighted above, the Committee has concluded, on the basis of the evidence it received, that there are no major concerns with the provisions in the Bill governing treatment and other forms of compensation.

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3 *Committee Hansard*, 24 February 2004, p. 33 (Col John Haynes, Australian Veterans and Defence Services Council).

4 *Committee Hansard*, 24 February 2004, p. 5 (Mr Ray Brown, Injured Service Persons Association).

Chapter 11

RECONSIDERATION AND REVIEW

Provisions of the Bill

11.1 The Bill provides for most of the decisions made by the Commission (or by service chiefs with respect to rehabilitation) to be subject to reconsideration and review. Such decisions are called original determinations.

11.2 There are two distinct pathways for reconsideration and review of original determinations. In the case of warlike and non–warlike service a claimant who disputes an original determination can ask that it be reconsidered by the Commission **or** reviewed by the Veterans' Review Board (VRB), but not by both. (If the Commission carries out the review it must be undertaken by a different person from the one who made the original decision. The Commission can revoke, confirm or modify the original decision) The decision of each of these bodies is known as a reviewable determination. If the claimant remains dissatisfied with the reviewable determination he/she can take their case to the Administrative Appeals Tribunal (AAT) for review of the reviewable determination.

11.3 In the case of peacetime service the procedure is similar except that claimants have no access to the VRB. They can appeal an original determination through the Commission and a reviewable determination through the AAT.

11.4 The Commission or a service chief can also initiate reconsideration of an original determination.

11.5 Claimants who are unsuccessful in appealing a decision of the Commission before the Administrative Appeals Tribunal are required to meet the cost of the appeal. Those who are unsuccessful in appealing a decision of the VRB are not.

11.6 Appeals against VRB decisions at the AAT are heard by the Veterans' Appeals Division of the Tribunal, which is also responsible for all veterans' claims under the VEA. Appeals against Commission decisions are heard by the Tribunal's Compensation Division. In appeals before the AAT, claimants can bring new evidence that was not available or not provided at the earlier reviews.

11.7 The Bill thus preserves the current jurisdictional dichotomy in the appeal and review arrangements, with provisions governing warlike and non-warlike service based on the VEA and those governing peacetime service based on the SRCA.

Evidence to the Committee

11.8 The Committee received evidence on a range of issues relating to the review provisions of the Bill. Most was remarkably consistent. The main issues raised are discussed below.

Exemptions to original determinations

11.9 Most decisions in the Bill are subject to review. They are known as original determinations. However, a number of decisions are not subject to review. Evidence to the inquiry suggested significant levels of concern about some of these exclusions, which include decisions with the potential to adversely affect the lives of those to whom they apply, such as the decision to suspend compensation payments in certain limited circumstances.

> … RDFWA considers determinations to suspend the payment of compensation rightly identified in the Bill as actions of last resort—as very serious. It should be absolutely clear in the Bill that there is a right to challenge them, and it should be very clear what action a veteran may take to do so.[1]

> The decisions to suspend payments under the new arrangements are not reviewable by the VRB or AAT and the question needs to be asked why the Government has departed from the usual course. If veterans are to be cut off from their entitlements they are entitled to have those decisions reviewed by an independent body.[2]

Opposition to dual provisions

11.10 Most witnesses opposed the dual provisions in the Bill where review and appeal procedures are governed by type of service. They favoured a unified system with access to the VRB for all claimants, regardless of their type of service.[3]

> The RSL does not support a dual process of appeal and review as proposed in the new Bill. … The RSL view is that all persons who are covered by the new Bill should have access to the Veterans' Review board regardless of the type of service they have experienced. Similarly, all should then have the right to appeal to the AAT and those hearings should be on a "de novo" basis. That is, new evidence (including medical evidence) would be allowed and, if needs be, diagnosis could be changed.[4]

> A lot of our ex–service organisations, especially the RSL, believe that we need to have just one system now and that everyone should come under that

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1 *Submission 16*, p. 6 (Regular Defence Force Welfare Association).

2 *Submission 4,* Attachment 1, p. 6 (Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women).

3 A similar view was expressed in an earlier Senate report on review procedures for veteran and military compensation, *Administrative review of veteran and military compensation and income support*, Senate Finance and Public Administration References Committee, December 2003.

4 *Submission 1,* p. 4 (Returned & Services League of Australia).

> one system. The proposed bill in effect offers three avenues depending on what service you had. We believe you are actually defeating the purpose of trying to make the situation less complex by putting in more choice.[5]

11.11 A number pointed to the anomaly of retaining a dual system in a Bill supposedly designed to bring together the previously distinct military and civilian legislation.

> The proposed two stream system is unacceptable and goes against the intention of a single scheme for all ADF personnel.[6]

Lack of flexibility

11.12 The new Bill stipulates that (unlike the situation in the VEA) a person with warlike or non–warlike service who has lodged an appeal with the VRB is prevented from requesting an internal review by the Commission. Some evidence to the Committee suggested that this was a retrograde step which would slow down the resolution of claims and add to the burden placed upon the VRB.

> Under the Veterans' Entitlement Act, a request may be made for a departmental review of an unfavourable decision (known as a Section 31) at the same time as an appeal has been lodged to the Veterans Review Board. There are very good reasons why this should be so.
>
> Sometimes, after an appeal has been lodged with the Veterans Review Board, and before the hearing, a piece of evidence comes to light persuasive enough to cause the original decision maker to change his or her mind. A quick section 31 review might circumvent a lengthier, more costly hearing at the Veterans' Review Board.[7]
>
> Experience with preparation of cases for presentation to the VRB under the VEA shows that, not infrequently during assembly of a case, evidence comes to hand that makes it highly likely that a S31 review, in the light of the new evidence, would result in granting of the claim. Thus it becomes possible for a case to be withdrawn from the Board's list, and a hearing obviated. This situation can come about under the VEA because the claimant can request a S31 review at any time. RDFWA believes that the Bill should contain a similar provision, making it unambiguously clear that any time before a Board hearing, reconsideration by the Commission, at its

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5 *Committee Hansard*, 24 February pp. 2–3 (Mr Ray Brown, Injured Service Persons Association).

6 *Submission 6*, p. 11 (Injured Service Persons Association).

7 *Submission 12*, pp. 10–11 (Vietnam Veterans' Federation).

> discretion, may occur whether initiated by the Commission itself or at the request of the claimant.[8]

Legal aid provisions

11.13 The Bill retains the existing situation where legal aid is available to claimants before the AAT but not earlier in the process. For claimants with warlike or non-warlike service a merit test will apply to applications for legal aid. For claimants with peacetime service both a merit and a means test will apply. Again, many witnesses opposed the differential with respect to the provision of legal aid.

> Legal aid should be available to all based on merit only.[9]

> Legal aid should be available to all injured members appealing decisions under the MRCB. If not, some other form of financial assistance should be provided.[10]

Extension of right to appeal to Veterans' Appeals Division of Tribunal

11.14 As discussed, appeals against VRB decisions are heard in the Veterans' Appeals Division of the Administrative Appeals Tribunal. Appeals against reviewable determinations of the Commission are heard in the Compensation Division. In line with calls for uniform review provisions, regardless of service type, some evidence supported the hearing of all claims of reviewable determinations before the Veterans' Appeals Division of the Tribunal which, it was claimed, had much greater experience and understanding of the particular needs of the veteran community.

> It is very important that appeals to the AAT continue to be heard by the 'Veterans Division' of that Tribunal. This division includes 'service members' and a great deal of experience and understanding of the unique circumstances that exist within the military environment.[11]

Concluding remarks

11.15 The weight of the evidence received during the inquiry points to support for a unified review procedure rather than a continuation of the dichotomy now existing under the VEA and the SRCA and perpetuated in the new Bill, in direct contradiction to its general focus on bringing the two Acts more closely together.

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8 *Submission 16*, p. 7 (Regular Defence Force Welfare Association).

9 *Submission 1*, p. 4 (Returned & Services League of Australia)

10 *Submission 5*, p. 9 (Australian Veterans and Defence Services Council)

11 *Submission 1*, p. 4 (Returned & Services League of Australia)

Chapter 12

CONCLUSIONS AND RECOMMENDATIONS

12.1 The Committee concludes, on the basis of the evidence it received through submissions and at public hearings, that there is general, although not universal, support for the Bill.

12.2 A number of concerns remain. The Committee finds that some of these stem from a misunderstanding of the legislation. This is particularly the case in relation to the scope of the Bill, the actuarial basis of a number of compensation payments and the distinction between payments for economic and non economic loss. Given the complexity of the legislation the level of misunderstanding is not surprising.

12.3 The Committee acknowledges the efforts of the Department of Veterans' Affairs and the Department of Defence to inform the ESOs and serving personnel of the content and implications of the Bill and to seek their input to its development. Notwithstanding these efforts however, confusion on a number of aspects of the legislation has given rise to needless anxiety in the veteran community and the Committee therefore considers that further efforts should be made to overcome it. This is particularly important for members of the Defence Force, who will be most affected by the legislation.

Recommendation 1

12.4 **The Committee recommends that further efforts be made to explain the implications of the legislation to serving personnel.**

12.5 One of the most contentious aspects of the Bill is the distinction it makes between types of service, distinctions affecting a range of benefits as well as standards of proof and mechanisms for review. Some witnesses opposed the distinctions, saying that they were not warranted and that entitlements should be paid on the basis of 'like compensation for like injury'. Others believed the differences should be maintained so that the unique position of soldiers who had served in combat could be adequately recognised and rewarded.

12.6 This division of opinion was most marked with respect to the differential lump sum death benefit for widowed partners, but it also arose in connection with other payments, reflecting the different philosophical positions of those providing evidence. The difference was largely generational, with organisations representing younger, serving members generally less likely to support maintenance of the distinctions and veterans' organisations supporting existing differentials or, in some cases, advocating additional differentiation. Given that this Bill is designed to assist the former group, a strong case can be made for abolishing the differentials with respect to all forms of compensation, but most especially with respect to the widowed partners' death benefit,

notwithstanding the opposition this may provoke in the short term from some veterans' organisations.

Recommendation 2

12.7 **The Committee recommends that the differential lump sum benefit for widowed partners be abolished and that the amount paid to all wholly dependent partners be calculated at the higher level.**

12.8 A number of the concerns raised in the evidence, notably those relating to the exclusion provisions and to some definitional issues, have been clarified during the course of the inquiry, to the satisfaction of those organisations which raised them.

12.9 Two issues at least, if not addressed before the legislation is enacted, can be expected to be a source of ongoing dispute. One is the level of the SRDP. Although the report finds (for reasons detailed in chapter 8) that concerns about the level of the SRDP are not justified, they are strongly held in the veterans' community and are unlikely to abate after passage of the legislation.

12.10 The second is the dual review process proposed in the legislation, opposition to which was expressed by almost all organisations. They preferred a unified system, better reflecting the Bill's general philosophy of aligning more closely the disparate provisions of the VEA and the SRCA.

Recommendation 3

12.11 **The Committee recommends that the review process be changed to allow for one system of review for all persons making claims under the MRC Bill.**

12.12 The Bill's focus on rehabilitation was strongly supported in the evidence, although concerns remain about its practical implementation. This is especially the case with respect to service personnel whose rehabilitation under existing legislation has been totally inadequate in the view of those providing evidence to the inquiry, The Committee notes the critical importance of the rehabilitation protocols, which are still to be developed, in translating the provisions in the Bill, which it supports, into practical reality.

12.13 The Bill provides equivalent or improved rehabilitation and compensation entitlements compared with the existing legislation. None of its provisions is less beneficial. This was recognised in the evidence, and accounts for the generally high level of support for the legislation.

Recommendation 4

12.14 **The Committee recommends that the Bill be passed.**

Sandy Macdonald
Chair

Appendix 1

Submissions received by the Committee

1	The Returned and Services League of Australia Limited
2	Legacy Coordinating Council Incorporated
3	Vietnam Veterans Association of Australia, National Council
4	Totally and Permanently Incapacitated Ex–Servicemen and Women Limited
5	The Australian Veterans and Defence Services Council
6	Injured Service Persons Association National Inc
7	Mr David Tones
8	The Naval Association of Australia
9	Australian Peacekeeper and Peacemaker Veterans Association
10	Australian Special Air Service Association, National Executive
11	Armed Forces Federation of Australia
12	Vietnam Veterans' Federation
13	Veterans' Support and Advocacy Service Australia Incorporated
14	Defence Families of Australia
15	Police Federation of Australia
16	Regular Defence Force Welfare Association Incorporated
17	Mr George Friend
18	Australian Nursing Federation

Appendix 2

Witnesses who appeared before the Committee

Perth, 23 February 2004

Australian Federation of Totally and Permanently Incapacitated Ex–Servicemen and Women Limited

Mr James Bodey, Federation Director

Mr James Dalton, Vice–Patron

Mr John Ryan, National President

Australian Special Air Service Association

Mr John Burrows, Pension Officer

Mr Norman Johnston, Volunteer Advocate

LtCol (ret'd) David Lewis, National Chairman

Returned and Services League, WA Branch

Mr Damian Dixon, President (Donnybrook)

Mr Eric Giblett, Pension Officer

Mr Milton Kirk, Secretary

Mr Leslie Leverence, Pension Officer and Advocate

Mr Ross O'Connor, State Vice–President, WA Branch

Mr Douglas Rasmussen, Senior Vice–President, WA Branch

Melbourne, 24 February 2004

Armed Forces Federation of Australia, Mr Greg Isolani, Legal Officer

Australian Nursing Federation, Mr Debbie Richards, Research Officer

Australian Peacekeepers and Peacemakers Veterans Association, Mr Paul Copeland, National President

Australian Veterans and Defence Services Council, Colonel John Haynes

Injured Service Persons Association Incorporated, Mr Ray Brown, National President

Legacy National Pensions Committee

Mr Ian Wills, Legatee, Legacy

Mr John Ballard, Member

Vietnam Veterans Association of Australia

Mr Peter Liefman, National Vice–President and National Solicitor

Mr Peter McCann, National Vice–President

Mr Brian Mc Kenzie, National President

Mr Graham Walker, Honorary Research Officer

Canberra, 25 February 2004

Regular Defence Force Welfare Association Inc

Commodore (Rtd) Harold Adams, National President

Brigadier (Rtd) Kerry Mellor, National Vice–President

Air Vice Marshal (Rtd) John Paule, National Secretary

Naval Association of Australia

Commander Peter Cooke–Russell, National President

Mr Gordon Johnson, Member

Department of Defence

Rear Admiral Brian Adams, Head, Defence Personnel Executive

Ms Michelle Glanville, Director, New Military Compensation Scheme

Mr Mal Pearce, Assistant Secretary, General Investigation and Review Branch

Department of Veterans' Affairs

Dr Neil Johnston, Secretary

Mr John Douglas, Director, New Military Rehabilitation and Compensation Scheme

Mr Arthur Edgar, Branch Head, New Military Rehabilitation and Compensation Scheme

Mr Bill Maxwell, Division Head, Compensation and Support

Returned and Services League of Australia

Major General (Rtd) William Crews, National President

Mr Ramon De Vere, Chairman, National Veterans' Affairs Committee

Veterans' Support and Advocacy Service Australia Inc

Mr Garth Gilbert, MRCS Advocate

Mr Gerry Lyall, Mr Peter Thorp.