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into Defence and Veteran Suicide

MILITARY COMPENSATION LAW IN AUSTRALIA: 2004-2021

Research Paper

August 2022

The Royal Commission into Defence and Veteran Suicide was established by Letters Patent on 8 July 2021. An amendment to the Letters Patent was subsequently issued on 10 April 2022.

Mr Nick Kaldas APM, the Hon James Douglas QC and Dr Peggy Brown AO have been appointed as Royal Commissioners. They are required to provide an interim report by 11 August 2022, and a final report by 17 June 2024.

The Royal Commission intends to release consultation, research and background papers. This research paper has been prepared by Mr Peter Sutherland for the information of Commissioners and the public. The views expressed in this paper are not necessarily the views of the Commissioners.

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MILITARY COMPENSATION LAW IN AUSTRALIA: 2004-2021

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MILITARY COMPENSATION LAW IN AUSTRALIA: 2004-2021

1. INTRODUCTION

This paper discusses developments in military compensation law in Australia from 2004, when a new military compensation scheme was established by the *Military Rehabilitation and Compensation Act 2004* (Cth) (MRCA), until 2021, a time when the future of military compensation in Australia hangs in the balance. Context is provided by a discussion in the first section of the paper of the background to these developments from Federation to 2004.

Recent years have seen an upswell in community dissatisfaction with existing military compensation arrangements, prompted to a large extent by the complexity of the legislative arrangements, major service delivery issues, and a growing recognition that military compensation needs a more holistic, 'wellbeing' approach if it is to meet the needs of veterans and their families.

The paper follows from, and builds upon, 'The History of Military Compensation Law in Australia', a paper presented to the 2004 Veterans' Law Conference convened by the Veterans' Review Board in July 2004. The paper was subsequently published in (2006) 50 *AIAL Forum* 59. The 2004 paper outlined the development of military compensation in Australia on a chronological basis from Federation to 2004. The development proceeded in two distinct paths:

- veterans' entitlements for ADF members who had active service overseas through many Repatriation Acts and their consolidation, on a no policy change basis, in the *Veterans' Entitlements' Act 1986* (Cth) (VEA); and
- compensation for members of the ADF who were injured in peacetime service, which essentially was delivered through the workers compensation legislation for Commonwealth Government employees: the *Commonwealth Employees' Compensation Act 1930* (Cth) (1930 Act) from 1949; the *Compensation (Commonwealth Government Employees) Act 1971* (Cth) (1971 Act) from September 1971; and the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRCA) from December 1988.

These distinct paths became intertwined in 1972 when the *Repatriation Act 1920* (Cth) was opened to members who only had peacetime service. The dual entitlement, which was activated by individual choice, led to increased complexity in the overall provision of compensation and to widespread concerns about entitlements. The concerns arose, in particular, when off-setting between the two schemes occurred.

Dual entitlements were theoretically closed for peacetime service by the *Military Compensation Act 1994* (Cth) (MCA) which modified the SRCA to create a 'Military Compensation Scheme'. Legacy complexities continued, and even expanded, because almost every change to military compensation resulted in the creation of 'grandfathered' entitlements for closed groups of recipients.

The *Military Rehabilitation and Compensation Act 2004*, which commenced on 1 July 2004, was intended to create a single military compensation scheme for injuries sustained in both active service and peacetime service on and after 1 July 2004. MRCA has achieved a single set of compensation entitlements going forward from 2004 in most cases. The objective, however, has been compromised by the fact that the previous two schemes (and the more than six Acts involved¹ continue to apply in complex ways to injuries sustained before 1 July 2004. The predecessor legislation may still apply to new

¹ Including the *Veterans' Entitlements Act 1986* (Cth), *Commonwealth Employees' Compensation Act 1930* (Cth); *Compensation (Commonwealth Government Employees) Act 1971* (Cth), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth), *Defence Act 1903* (Cth), and the *Military Compensation Act 1994* (Cth).

claims, aggravations and recurrences that manifest decades after the original injury.

This paper summarises the position to 2004 and then outlines the developments in military compensation, on a chronological basis, from 2004 to 2021. The discussion also attempts to chart a narrative of why and how these developments occurred, and how they fit within, and arise from, the operational deployments of the ADF since the end of the Vietnam War in the late-1970s.

The Current Picture

At the time of writing, military compensation in Australia is provided through three overlapping and, in some areas very different, schemes: the *Military Rehabilitation and Compensation Act 2004*, which commenced on 1 July 2004; the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) (DRCA); and the *Veterans' Entitlements Act 1986*. The DRCA was a mirror of the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) which was enacted on 12 October 2017, but came into effect on 1 December 1988 when the SRCA first commenced.

The bi-partisan policy underpinning legislation for veterans is to deal generously with those who have served on the nation's behalf and to whom the nation is indebted: Toose Report 1975 vol 1, ch 2); *Bushell v Repatriation Commission* [1992] HCA 47 at [2] (Toohey J); *Roncevich v Repatriation Commission* [2005] HCA 40 at [51], [53]-[54]; *Kowalski v Repatriation Commission* [2011] FCAFC 43 at [36]; *Forrester v Repatriation Commission* [2013] FCA 898 at [19]. This approach is evident notably in the 'reasonable hypothesis' standard of proof provision for operational service. That standard applies to applications for disability pension under the VEA pt II and pt IV and to applications under the MRCA (s 335). This policy of generosity can make radical change in the system very difficult, as individual veterans have particular entitlements which may be affected by change, and their expectation is that any change will maintain those entitlements or, preferably, enhance them. This expectation has resulted in, and is likely to continue to result in, an increase in scheme complexity, not the simplification sought by the proponents of legislative change.

These issues are discussed in the final part of the paper 'Whither Military Compensation?'. This final part is personal opinion, and offers opinions to stimulate thinking and debate, not to establish factual certainty.

Sources for material in the paper are recorded in 'Sources and References'. However, much of the material is drawn, without specific acknowledgement, from three books co-written by the author of the paper: *Veterans' Entitlements and Military Compensation Law* (Creyke and Sutherland, 3rd edn, 2016); *Annotated Safety, Rehabilitation and Compensation Act 1988* (Sutherland with Anforth, 11th edn, 2018); and ch 25 'Military Compensation, Superannuation and Insurance' in *Military Law in Australia* (Creyke, Stephens and Sutherland, 2019). References to the article 'The History of Military Compensation Law in Australia' (Sutherland, 2006) are also not specifically acknowledged.

2. THE DEVELOPMENT OF MILITARY COMPENSATION IN AUSTRALIA: 1901-2004

Operational Deployments: From the Second Boer War to Vietnam

The deployments undertaken by Australian military forces since Federation have, not surprisingly, had a major effect on the development of our military compensation system. Features of this system, which now seem almost inexplicable, can sometimes be traced to responses to a particular deployment, albeit with a timelag of a decade or more.

Australians fought in the second Boer War in South Africa (1899-1902), in State contingents and in a Commonwealth contingent. The members of the State contingents were compensated by the Imperial Government, and the NSW and Victorian Governments paid disability pensions to some members under State legislation. The

Commonwealth did not make adequate compensation provision for the 4,000 men who participated in the Commonwealth contingent, and attempted to exclude liability in documents signed at the time of enlistment. (Skerman 1961, 3)

World War I

Following the Second Boer War, the Commonwealth made provision for compensation for death or incapacity 'on active service or on duty' in ss 57 and 124(1)(t) of the *Defence Act 1903* (Cth) and s 44 of the *Naval Defence Act 1910* (Cth). However there was little further consideration of military compensation until after the outbreak of World War I (WWI), when the *War Pensions Act 1914* (Cth) provided for compensation for death, injury or disease incurred as a result of active service outside Australia. The scheme of this Act was later enhanced by the *Australian Soldiers' Repatriation Fund Act 1916* (Cth) and the *Australian Soldiers' Repatriation Act 1917* (Cth), and was finally consolidated into the *Australian Soldiers' Repatriation Act 1920* (Cth). This Act, later renamed as the *Repatriation Act 1920* (Cth), continued as the principal legislative basis for compensation for war service until its repeal and substitution by the VEA in 1986. Compensation for injuries in peacetime service was provided under the Defence Act and was aligned with the entitlements of Commonwealth Government employees.

World War II

Following the outbreak of World War II (WW2) in 1939 and the enlistment of the Second AIF, the *Australian Soldiers' Repatriation Act 1940* (Cth) applied the Repatriation Act to servicemen and servicewomen engaged in WW2. The Act provided for grant of pensions to members of the Forces with active service outside Australia where incapacity or death resulted from any occurrence happening during the period from enlistment until discharge. For members who only had home service, compensation entitlement arose only where incapacity or death was directly attributable to Defence service.

Provision was made for Australian mariners in the *Seaman's War Pensions and Allowances Act 1940* (Cth). Indigenous inhabitants of Papua New Guinea who served in the ADF in WW2 do not receive veterans' benefits under the VEA, and are covered by a separate compensation and treatment scheme under the *Papua New Guinea (Members of the Forces Benefits) Act 1957* (Cth) and the *Papua New Guinea (Members of the Forces Benefits) Regulation 2016* (Cth).

The history of veterans' law during WW2, and its aftermath, is discussed in the *Toose Report 1975* vol 1 at 34-39.

Demobilisation and the occupation of Japan

Demobilisation of the Australian WW2 Armed Forces was, to all intents and purposes, completed by February 1947, however a number of members had been enlisted or re-engaged for short terms of further service to become part of the British Commonwealth Occupation Forces (BCOF) in Japan. Because of the difficulties in setting an immediate and arbitrary cut-off date for the cessation of war-based entitlements, and in order to clarify discharge entitlements and arrangements, the *Interim Forces Benefits Act 1947* (Cth) was enacted and provided for general compensatory benefits to members who continued to serve in the period 1947-49. (Skerman 1961, 79-80) Section 6 of the Interim Forces Benefits Act provided for war pensions under the Repatriation Act for male members of the Interim Forces and their dependants, and s 7 provided war pensions for female members of the Interim Forces and their dependants.

Members of the BCOF received veterans' entitlements on the basis that they had operational service, but were denied 'qualifying service' (and thus a Gold Card) (Sutherland, 2011) until passage of the *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017* (Cth).

Korea and South East Asia

Australian military forces served in the Korean War and were covered by the entitlements for active service in the Repatriation Acts and associated legislation. The subsequent period of engagement in South East Asia, including the Malayan Emergency (1948-1960), the Indonesian Confrontation, the Second Malay Emergency (1968-1989) and 'anti-communist' military operations in Thailand, was broadly covered by the Repatriation Acts until 1986, but this depended on characterisation of service as active service in a unit allotted for duty in the area of engagement. ADF members whose service was determined not to be active service were covered by provisions in the VEA from 1986 for peacekeeping service or, if they served only in Australia, by the peacetime compensation legislation for Commonwealth employees, the 1930 Act (1949-1971) and the 1971 Act. While this legislative framework arguably provided adequate compensation coverage for injured ADF members, it lacked some of the special entitlements associated with active service under the veterans' entitlements system, such as the special rate pension for life and the favorable standard of proof for war veterans, and was regarded by some as failing to acknowledge the unique nature of military service.

Many anomalies occurred in relation to what actions were identified as, and who was determined to have, active service, and these anomalies were discussed (among other issues) by successive reviews between 1974 and 2004, including for example the Toose Report (1975), the Baume Report (1994), the Tanzer Review (1998), the *Review of service entitlement anomalies in respect of South-East Asian service 1955-75* (Mohr Report 2000) and the Clarke Review Report (2003). The *Mohr Report* was partly implemented by the *Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Act 1997* (Cth). The Clarke Review Report, in particular, concentrated on anomalies arising from service in the ADF, and in vol 2 considered issues arising from WW2, the BCOF, British atomic tests, counter-terrorism operations, POWs, war widow/ers, civilians, and Commonwealth veterans. Its recommendations were substantially implemented by the *Veterans' Entitlements (Clarke Review) Act 2004* (Cth). Issues arising from injuries related to the British Nuclear Tests in Australia were addressed by the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* (Cth).

South Vietnam

Australia's military commitment in South Vietnam commenced in 1962 with a small group of 30 military advisors. The commitment increased to a peak of 7,672 military personnel in the late 1960s, and all Australian troops had been withdrawn by 1972. The Australian force in South Vietnam included National Service conscripts as well as ADF permanent force members, and this heightened community opposition in Australia to the military commitment. Conscription was ceased by the incoming Whitlam Labor Government in December 1972 and formally terminated by the *National Service Termination Act 1973* (Cth).

Approximately 60,000 Australians served in the Vietnam War: 521 were killed and more than 3,000 were wounded. (Wikipedia 2022) The number of military personnel with service in the Vietnam War had a significant effect on military compensation in Australia, not just because of the number of military personnel with war-caused injuries, but also because of significant failures in the follow-up compensation, health, rehabilitation and vocational support for Vietnam veterans and their families. For more than a decade, the repatriation system as a whole (law, administration and advocacy support) failed properly to respond and adjust to special features of the engagement in South Vietnam. Arguably the repatriation system was geared to the needs of WW1, WW2 and Korean veterans, and did not understand the particular mental stresses of warfare in South Vietnam and the effects of widespread exposure to Agent Orange and other noxious chemicals. Unfair legacies of the community opposition to conscription and to the war also played a part in this systemic failure. These failures had a marked effect on the complexity of the military compensation scheme and on the reintegration of Vietnam veterans into

Australian society.

The Whitlam Labor Government introduced dual entitlement to VEA and Commonwealth employees' compensation for all ADF members with three years of service, with effect from 7 December 1972, as a measure to improve ADF retention rates. The *Compensation (Australian Government Employees) Act 1973* (Cth) provided for an election by ADF members not to receive compensation under the 1971 Act (s 98A) and for measures to prevent and recover double payments under the Repatriation Act and the 1971 Act (s 52(4)(da) and s 98). The creation of dual entitlement greatly increased the legislative complexity of the military compensation scheme. Access to dual entitlement was partly closed in 1994 by the MCA, but was not fully removed until 1 July 2004, when coverage of new injuries (but not existing injuries and aggravations) was placed under the newly enacted MRCA scheme

Veterans' Entitlements Act 1986

The *Veterans' Entitlements Act 1986* (VEA), which commenced on 26 May 1986, is the principal legislation which governs entitlements to pension or compensation for a service-related injury, disease or death occurring in operational service prior to 1 July 2004. The VEA is a successor to the *Repatriation Act 1920* (Cth) which provided repatriation benefits for Australian veterans of WW1 and WW2. The VEA also incorporated and repealed the *Interim Forces Benefits Act 1947* (Cth), the *Repatriation (Far East Strategic Reserve) Act 1956* (Cth), the *Repatriation (Special Overseas Service) Act 1962* (Cth) and the *Repatriation (Torres Strait Islanders) Act 1962* (Cth).

For injuries incurred between 7 December 1972 and 7 April 1994, full-time members of the ADF who had only peacetime service (for three years or more) were entitled to opt for coverage under the VEA or under the SRCA. A substantial proportion of members with a dual entitlement opted for VEA coverage, at least in part because of encouragement by ESO advocates who were more familiar with the VEA than the SRCA scheme.

The VEA's large existing client base includes WW1 widows, and veterans and widows from WW2, the BCOF, Korea, Malaya/Malaysia, the Indonesian Confrontation, South Vietnam, the Gulf War, Timor Leste, Afghanistan (before 2004) and various peacekeeping commitments. The VEA also covers veterans who had full-time, peacetime service between 7 December 1972 and 7 April 1994 and who elected to claim under the VEA rather than the SRCA scheme. The vast majority of veterans with a VEA entitlement are already clients of the Department of Veterans' Affairs (DVA). Only a small number of veterans would now be discharging and entering directly into the VEA scheme. These veterans will have served in the Gulf War, Timor Leste, and/or Afghanistan, or may have enlisted into peacetime service before 1994.

DVA (2021a) reported in Annexure H to its Background Paper to the Royal Commission that there were 181,052 VEA pensioners (including age pensioners administered by DVA), comprising 80,904 disability pensioners, 45,619 war widow/ers and 85,348 service pensioners, and 225,599 DVA health card holders. This suggests that the total number of DVA VEA clients is upwards of 250,000. These numbers have dropped significantly in recent years as the WW2 veteran cohort reach the end of their lives; some of those deceased veterans will have been replaced as DVA clients by their widows.

The VEA is a pension-based scheme, which does not offer any opportunities for lump-sum compensation, for example for permanent impairments. The fact that the scheme is entirely pension-based arises from its origins in the WW1 repatriation system. At that time, the number of injured returned veterans and widows, relative to the Australian population as a whole, was very high and it is doubtful that the Australian economy could have afforded lump-sum payments, except at a nominal level. That would have been unacceptable to a community which was very supportive of returned veterans. The Depression put strains on the level of support for WW1 veterans. Nevertheless, there was sufficient public support for the introduction of the service pension in 1935, which seems to have been a response to the 'burnt out digger syndrome' (Toose Report 1975 vol 1,

385).

VEA veterans' entitlements

The key features of the VEA compensation scheme ('veterans' entitlements') are:

- Initial liability: Initial liability is determined under s 8 VEA 'War-caused death', which focuses on whether the death of a veteran is war-caused, and under s 9 'War-cause injuries or diseases', which focuses on whether a veteran's injuries or diseases are war-caused. In general, a death, injury or disease is taken to have been war-caused if:
 - the death, injury or disease 'resulted from an occurrence that happened while the veteran was rendering operational service' (s 8(1)(a), s 9(1)(a)). This essentially requires a temporal, not a causal, link between the occurrence and the condition;
 - the death, injury or disease 'arose out of, or was attributable to, any eligible war service' (s 8(1)(b), s 9(1)(b)). This requires a causal link;
 - the death, injury or disease resulted from an accident while travelling during a period of eligible service (s 8(1)(c), s 9(1)(c));
 - the death, injury or disease would not have happened 'but for' the veteran rendering eligible service or changes in the veteran's environment consequent upon eligible service (s 8(1)(d), s 9(1)(d) and s 9(2)); or
 - the death, injury or disease was 'contributed to in a material degree by, or was aggravated by' an injury or disease contracted or suffered before or during eligible war service: s 8(1)(e), s 9(1)(e).

The two sections also share common exclusion provisions such as injury resulting from 'serious or wilful default' or a 'serious breach of discipline'. The MRCA has a different set of exclusions.

Issues of medical/scientific causation in relation to a particular injury or death are determined by Statements of Principles (SOPs), which are discussed below. If there is no SOP covering the claimed condition, the causal link is determined on the available evidence in accordance with the relevant standard of proof: the 'reasonable hypothesis' standard for operational service; or the 'reasonable satisfaction' standard for eligible service.

- Disability pension (pts II and IV): The disability pension compensates veterans, war widow(er)s, and dependants for incapacities arising from war-caused injuries, diseases or death of a veteran: VEA s 13. The pension is not means-tested, and is payable fortnightly for life unless the payment is granted on a temporary basis under s 25. Disability pension is payable at three principal rates: the general rate (s 22); the intermediate rate (s 23); and the special rate (the Totally and Permanently Incapacitated -TPI - rate) (s 24). The intermediate and special rate pensions are related to war-caused incapacity (ss 23, 24), are not taxable, and the special rate is approximately at the same level as the National Minimum Wage.
- Medical treatment compensation (pt V) is provided at the discretion of the Repatriation Commission (s 84) through treatment cards (s 85): Gold Cards for treatment for all conditions, and White Cards for treatment for specified conditions. Services covered by these cards are set out in legislative instruments including the *Treatment Principles* (Cth) (as amended) made under s 90 and the *2013 Repatriation Pharmaceutical Benefits Scheme 2013* (Cth) (as amended) made under s 91. Veterans originally were treated in Repatriation Hospitals in all of the capital cities, however these hospitals were transferred to the State Government health systems in about 1992. Veterans now access public and private hospitals with the costs paid by DVA (see the *Veterans'*

Entitlements (Provision of Treatment) Amendment Act 1992 (Cth) and the *Repatriation Private Patient Principles* (Cth) made under s 90A).

- Allowances (pt VI) are paid to veterans in receipt of a disability pension including clothing allowance (s 97), attendant allowance (s 98), bereavement payment (ss 98A, 98B), funeral benefits (ss 98B, 99, 100), the vehicle assistance scheme (s 105), and travelling expenses (s 110).
- Widow(er) pension and payments to dependants: widow(er) pension is paid to the spouse of a deceased veteran where their death or injury was due to war service (s 13(1)), or the veteran was a POW or in receipt of special rate pension or extreme disablement adjustment (EDA). Dependent children of certain deceased veterans are eligible for support until age 16 (or age 25 if in full-time study).
- Veteran payment (pt IIIAA) is an interim payment payable to a person making a claim for a mental injury or disease under the MRCA or the DRCA, or to their partner. Additional arrangements for the payment are set out in a legislative instrument *Veterans' Entitlements (Veteran Payment) Instrument 2018* (Cth).
- GARP: The *Guide to Assessment of Rates of Veterans' Pensions* (GARP) sets out criteria by reference to which the incapacity of a veteran resulting from war-caused injury or disease is assessed, and tables and information by means of which the extent of incapacity are expressed as a percentage of incapacity, not exceeding 100 per cent. Under the GARP, 'medical impairment' has two components: physical loss of, or disturbance to, any body part or system; and resultant functional loss. Lifestyle effects are dealt with in GARP ch 22. The current instrument is GARP V made under the *Guide to the Assessment of Rates of Veterans' Pensions (No. 2) 2016* (Cth).

Service pension

Parts III-III E of the VEA provides for the service pension, an income support payment which is paid to eligible veterans under all three major military compensation schemes. The age service pension is very similar to the social security age pension (*Social Security Act 1991* pt 2.2) in its legislative framework, including the applicable income and assets tests, the pension bonus scheme, and associated payments such as the clean energy payments. The invalidity service pension has a similar role to the social security disability support pension (*Social Security Act 1991* (Cth) pt 2.3) however its eligibility criteria (VEA s 37) are different, requiring 'permanent incapacity for work', which is determined under the *Veterans' Entitlements (Invalidity Service Pension - Permanent Incapacity for Work) Determination 2013* (Cth) and the GARP, or is deemed if the veteran is receiving or is eligible for a special rate pension under the VEA or the MRCA. The age service pension is payable at age 60 for men and for women born after 1 January 1954 (VEA ss 5QA, 36(1)(c)), compared to age 65 (rising to age 67) for social security age pensioners.

The service-related eligibility criteria for service pension are complex, but essentially is based on operational service overseas where the veteran 'incurred danger from hostile forces of the enemy' ('qualifying service' VEA s 7A, *Repatriation Commission v Thompson* [1988] FCA 212).

Veteran payment

The veteran payment is an interim payment under VEA pt IIIAA which is payable to a person making a claim for a mental injury or disease under the MRCA or the DRCA, or to their partner. Additional arrangements for the payment are set out in a legislative instrument *Veterans' Entitlements (Veteran Payment) Instrument 2018* (Cth).

Statements of Principles

The Statements of Principles (SOPs) scheme commenced in 1994 and SOPs apply under both the VEA and the MRCA. The purpose of each SOP is to determine whether a

particular disease, injury or death is related to military service, based on sound medical-scientific evidence. The SOPs state the factors which ‘must’ or ‘must as a minimum’ exist to cause a particular kind of disease, injury or death. If a condition does not meet the factors required in the relevant SOP, liability for compensation for that condition is denied.

An independent statutory authority, the Repatriation Medical Authority (RMA), comprising five eminent medical experts, determines SOPs, which take the form of legislative instruments made under s 196B in pt XIA of the VEA. Challenges to the RMA’s determinations can be made to another expert independent body, the Specialist Medical Review Council (SMRC): VEA ss196V, 196W; VEA pts XIA, XIB.

Progressively, SOPs have been made for most claimed conditions, which are usually identified by an International Classification of Disease (ICD) code, or by reference to the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-5). The RMA website has an index of, and sets out the full text of, all current and revoked SOPs. Definitions of terms or commonly used expressions such as ‘experiencing a stressor’ or ‘inability to obtain appropriate clinical management’ are included in the SOPs and these too are regularly updated. The AAT has reviewed a considerable number of SOPs and a jurisprudence about their interpretation has emerged.²

Many SOPs have been updated multiple times. Under the VEA, the decision-maker is required to choose the version of a SOP which is most beneficial to the claimant: *Repatriation Commission v Keeley* [2000] FCA 532 and *Repatriation Commission v Gorton* [2001] FCA 1194. Section 341 of the MRCA reversed the effect of these cases, requiring application of the current SOP by primary and review decision-makers when applying the SOPs in MRCA cases.

Satisfaction of the standards of proof is established by meeting the factors in the SOPs, which differ according to whether the ‘reasonable hypothesis’, or the ‘reasonable satisfaction’, standard of proof applies: VEA ss 120A, 120B; MRCA ss 338, 339. The principal case on the interpretation of SOPs is *Repatriation Commission v Deledio* [1998] FCA 391. Where a SOP applies to a claimed condition, the decision-makers and the Tribunal are required to apply that SOP. Evidence which contradicts a SOP, or which proposes that a causal link may be raised by some factor not identified in the SOP, cannot alter the operation of the SOP (*Repatriation Commission v Gosewincel* [1999] FCA 1273).

Workers Compensation for Commonwealth Employees

Compensation for injury, disease and death in peacetime service in the ADF for injuries incurred between 3 January 1949 and 1 July 2004 was paid under the schemes covering Commonwealth Government employees: the *Commonwealth Employees’ Compensation Act 1930* (1930 Act) (3 January 1949 – 31 August 1971); *Compensation (Commonwealth Government Employees) Act 1971* (1971 Act) (1 September 1971 – 30 November 1988); and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) (1 December 1988 – 30 June 2004). Coverage continued under the SRCA until 11 October 2017 for injuries incurred before 1 July 2004. On 12 October 2017, an entirely new Act, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) (DRCA), was reenacted as a mirror of the SRCA and has replaced that Act in its entirety in respect of ADF members, veterans and their families.

1930 Act

Coverage of peacetime service for ADF members was moved from the *Defence Act 1903* to the *Commonwealth Employees’ Compensation Act 1930* by the *Commonwealth Employees Compensation Act 1948* (Cth), commencing on 3 January 1949. This coverage did not include cadets, for whom act-of-grace compensation arrangements continued to apply, and the *Repatriation Act 1920* (Cth) applied to active service overseas. One important issue arising from the application of the 1930 Act to military

² See, for example, Creyke and Sutherland (2016), pp 731-775.

personnel was the legal test applied to link the injury suffered with the employment of the member. Under the Repatriation Act, coverage was continuous – any injury sustained during the period of war service (with some exclusions relating to self-inflicted wounds and dereliction of duty) was compensable. However, under civilian workers compensation legislation such as the 1930 Act, an injury was required to arise ‘out of’ or ‘in the course of’ the employment – the first requiring a causal link with employment and the second a temporal link with the activity of employment. It was argued that Defence personnel are always on duty because of the special nature of Defence service, however this was not accepted by the High Court in *Commonwealth of Australia v Wright* [1956] HCA 79.

1971 Act

The *Compensation (Commonwealth Government Employees) Act 1971* (Cth) repealed and substituted the 1930 Act providing a new workers compensation scheme for Commonwealth employees, including ADF members on peacetime service. The substantive provisions of the Act commenced on 1 September 1971. For the first time, cadets were included in the coverage of the Commonwealth scheme by virtue of r 11 of the *Compensation (Commonwealth Government Employees) Regulations 1971* (Cth) which also commenced on 1 September 1971. The 1971 Act provided an enhanced benefit structure, including a wider coverage of disease than the 1930 Act. The notice and claims provisions of the 1971 Act were reasonably similar to those in the 1930 Act and required a notice of injury to be given within strict time limits. These strict provisions about notice of injury and form of claim continue to be relevant because a number of new claims for injury from the 1960s, 1970s and 1980s continue to be received by DVA in the present day. The notice and claim provisions were significantly relaxed by amendments commencing on 1 July 1986 by the *Social Security Legislation Amendment Act 1986* (Cth).

Common law actions for damages

Both the 1930 Act and the 1971 Act permitted common law actions for damages by ADF members against the Commonwealth, but this was closed by s 44 of the SRCA in respect of injuries suffered after 1 December 1988. Common law action for injuries suffered before 1 December 1988 could still be commenced after that date (*Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6), although an extension of statutory limitation periods would be required in many cases (*Commonwealth of Australia v Mewett* [1997] HCA 29). Common law actions by ADF members and former members are now relevant mostly in respect of latent diseases such as asbestosis. The large number of common law actions in respect of the *HMAS Voyager* disaster on 10 February 1964 now appear to be finalised.

1988 Act

On 1 December 1988, the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth) (CERC Act) repealed the 1971 Act and established a new Commonwealth compensation scheme which covered Commonwealth Government employees, several Commonwealth statutory authorities, and the ADF. The CERC Act, which in 1992 was renamed as the *Safety, Rehabilitation and Compensation Act 1988* (SRCA), made some significant changes to the previous 1971 Act compensation scheme, including:

- an enhanced focus on rehabilitation and return to work;
- expanded lump-sum benefits for permanent impairments with impairment determined by an approved Guide modelled on the *American Guides to the Evaluation of Permanent Impairment*, which were also the source documents for the VEA's GARP;
- restricted access to common law actions for damages;
- introduction of premium and contribution arrangements.

The SRCA did not include any significant measures applying only to the ADF, however several features of the Act were of particular relevance to the Military Compensation and

Rehabilitation Service (MCRS) which administered the Act (as a delegate of Comcare) in respect of ADF personnel:

- compensation for incapacity and for medical treatment became relevant only when the member was discharged from the ADF. At the time of discharge, members tended to make their first claim for compensation for injuries accrued during service life, leading to very long time periods between injuries and claims; and
- compensation for permanent impairment under SRCA ss 24 and 27 formed a much higher proportion of compensation expenditure for military personnel than for civilian employees of the Commonwealth, because of the inherent rigours of military training and the consequent high incidence of back and limb injuries. This high cost of compensation for permanent impairment was exacerbated by the decision of the Full Federal Court in *Schlenert v Australian and Overseas Telecommunications Corporation* [1994] FCA 120, where the Court (by majority) held that employees who suffered permanent impairment before the commencement of the SRCA on 1 December 1988 nevertheless were entitled to compensation for non-economic loss under s 27 of the Act, even though no such entitlement existed under the 1930 or 1971 Acts. The effect of *Schlenert* was finally reversed, in relation to applications for non-economic loss (NEL) made on or after 7 December 2000, by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2002* (Cth).

Where a person is in receipt of compensation for an injury under the SRCA, VEA s 74 requires that the amount of any VEA pension received in respect of the injury is set off against the SRCA payment; see *Repatriation Commission v McDermid* [2016] FCAFC 179.

The SRCA was modified by the *Military Compensation Act 1994* (Cth) (MCA), which commenced on 7 April 1994. The 1994 Military Compensation Scheme was created by the MCA and included additional benefits provided by instruments made under the *Defence Act 1903* (Cth); see the discussion below.

Dual entitlement for peacetime service

On 7 December 1972, the *Repatriation Act 1920* was extended to peacetime military service, subject to a three year qualifying period of service. This was an attempt to retain former National Servicemen in an all-volunteer force. Coverage under the 1971 Act was retained as well, but the benefits under one Act were offset against the benefits payable under the other. (Tanzer 1999) The problems and additional costs inherent in a system of dual entitlements was discussed in the *Report of the Black Hawk Inquiry* at [69]-[78] (Department of Defence 1997). Dual entitlement for peacetime service was ended on 7 April 1994 by the *Military Compensation Act 1994* (Cth), which established a new Military Compensation Scheme.

Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988

The DRCA scheme was established by the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth), which commenced on 12 October 1988, but was applied back to the commencement of the SRCA on 1 December 1988; see the discussion of DRCA later in this paper. DRCA has a large existing client base, mostly drawn from ADF members with peacetime service only, whose date of injury was between 3 January 1949 and 30 June 2004. DVA is still receiving a high rate of claims under the DRCA from former members of the ADF, including new claims for injuries said to have occurred in national service, recruit training or general service in the 1960s, 1970s and 1980s. The DRCA military compensation scheme is discussed in detail in pt 5 of this paper.

The 1994 Military Compensation Scheme

The *Military Compensation Act 1994* (Cth) (MCA), which commenced on 7 April 1994, closed off future access to dual entitlements under the VEA and the SRCA, except for members who had operational service. The MCA also made other changes to the application of the SRCA to ADF members, including:

- extension of cover to holders of honorary rank, members of philanthropic organisations providing services to the ADF, and discharged members involved in approved post-discharge resettlement training;
- cover for the unintended consequences of medical treatment provided to ADF members at Commonwealth expense (SRCA s 6A);

The SRCA military compensation arrangements after 7 April 1994 were described as the 'Military Compensation Scheme', and continued until the commencement of the MRCA on 1 July 2004.

The Second Reading Speech for the Bill commented on the continuing choice between the MCA and the VEA schemes for members with 'operational service':

The Government also recognises that the Military Compensation Scheme will be attractive to the non-peacetime categories of operational, peacekeeping and hazardous service, even though it was conceived primarily for Defence Force members rendering peacetime service. Because of its significant lump sum and rehabilitation benefits, which are not available under the Veterans' Entitlements Act, there will be situations where the provisions of the Military Compensation Scheme would be more appropriate to an individual's personal circumstances than those of the Veterans' Entitlements Act. That is not to say that the latter is in any way inadequate - the point is that its emphasis is on medical care and pensions rather than the lump sum and rehabilitation benefits available under compensation legislation. (*Hansard*, HR, 15 December 1993, p 4092)

These comments illustrate how reform of military compensation law can very easily increase the complexity of the overall legislative scheme.

Additional compensation under the Defence Act 1903

An important element of the Military Compensation Scheme was the provision of additional benefits for severely injured members of the ADF and for the families of members killed in compensable circumstances. These additional benefits were originally paid under *Defence Determination 1998/3*, made under the *Defence Act 1903*. After 6 January 2000 they were paid under Chapter 10, Part 5 of *Defence Determination 2000/1*, and after 1 July 2016 they were paid under pt 2 ch 11 'ADF-related compensation' of *Defence Determination 2016/19*. The additional benefits paid under *Defence Determination 2000/1* comprised:

- Additional death benefit (ADB) payable to a surviving spouse and dependent children if 'as a result of an injury suffered, the member died, or dies, on or after 10 June 1997' ([10.5.5]);
- Severe injury adjustment (SIA) payable to a member who suffered a 'severe injury' (as defined in 10.5.2) on or after 10 June 1997, and who had a degree of permanent impairment of not less than 80 per cent ([10.5.8]-10.5.11]; and
- reimbursement of the cost of financial advice ([10.5.23]).

This additional compensation continues to form part of the overall DRCA compensation scheme and is paid in respect of injuries after 10 June 1997 and before 1 July 2004.

Establishment of the MRCA Scheme: 1994-2004

Inquiry into Military Compensation Arrangements for the ADF (the Black Hawk Inquiry)

The move to a new military compensation scheme, which would rationalise the existing, complex VEA and SRCA schemes, was proposed by the *Inquiry into Military Compensation Arrangements for the Australia Defence Force* (Department of Defence 1997). This Inquiry was prompted, in particular, by the Black Hawk Helicopter crash of 12 June 1996 which focused attention on the levels of compensation for the dependants of those killed, as well as for the severely injured. The casualties of this accident, and their families, received very different forms and levels of compensation, based on their date of enlistment, type of service and superannuation choices.

The Inquiry was called by the Minister for Defence Industry, Science and Personnel and was undertaken by a six-person Steering Committee and a four person Working Group (from Defence, DVA and the ADF). The Steering Committee comprised Mr Paddy Gourley (FAS, Human Resources and Management Division, Department of Defence), AVM Frank Cox (Assistant Chief of the Defence Force Personnel, HQ ADF), Ms Dianne Hawgood replaced by Tom Fisher (AS, Standards Policy Branch, Department of Industrial Relations), Ms Meryl Stanton (CEO, Comcare), Mr Peter Reece (Division Head, Compensation and Support Division, DVA) and Mr Keith Henry (AS, Public Sector Employment Framework Branch, Department of Finance). The Steering Committee consulted with ex-service organisations (ESOs) and received public submissions. It reported in March 1997.

The Committee reported on options for change and made recommendations for specific improvements to the current military compensation system such as a severe injury adjustment, improved attendant and household care arrangements, use of a treatment card system for the military compensation scheme similar to the VEA cards, increased death benefits, payment for financial advice, access to the Veterans' Childrens Education Scheme and the Vietnam Veterans' Counselling Service, and a bereavement payment. The Committee considered that the current compensation arrangements were 'overly complex, and do not reflect the needs of the ADF for a military compensation system which provides a single system for all members, compensation to a like degree for similar injuries and an integrated system for safety, rehabilitation and compensation.' ([288]) The Committee therefore recommended:

- Having a single Act for compensation for peacetime service which covered only military personnel on a prospective basis, with coverage under the existing Military Compensation Scheme 'grandfathered'; and
- Coverage would still be provided under the VEA for those who were already entitled to it and for those who served on deployments overseas in the future. ([289]).

The Steering Committee made some recommendations about administrative issues, in particular that 'there must be greater coordination between the ADF, military compensation, DVA and Comsuper to ensure ADF members are aware of their entitlements and that, as far as possible, an income stream is in place once a medical discharge occurs'. ([290]) This problem and the recommendation has an uncanny resonance twenty five years later!

The Review of the Military Compensation Scheme (Tanzer Review)

The Review of the Military Compensation Scheme (the Tanzer Review) was conducted by Mr Noel Tanzer AC, assisted by a Steering Committee comprising representatives from the ADF; the Departments of Defence; Veterans' Affairs; Employment, Workplace Relations and Small Business; Finance and Administration; Family and Community Services; and Comcare. The aim of the Review was 'to develop options for a single, self-contained military compensation scheme (for peacetime service) which covers only

military personnel and recognises the different nature of military service from civilian employment.’ ([2]) The Review issued a Discussion Paper in December 1998 and reported in 1999.

The Review of the Military Compensation Scheme: A Discussion Paper on Issues and Options published in December 1998 generally outlined various options, noting advantages and disadvantages and views of participant agencies, but did not form conclusions, confirming its purpose as a Discussion Paper. The Discussion Paper did express a view on the value of a new scheme:

39. A new military specific scheme, based on well established principles and taking an integrated approach to prevention, rehabilitation and compensation will better allow for:

- A more comprehensive and visible Defence approach to the overall management of the function;
- Greater opportunity for arrangements to be better focussed and more specifically tailored to the needs of the Defence Organisation, consistent with government personnel management and industrial relations policy; and
- Less diffuse and clearer accountability for results than at present.

The issues canvassed in the Discussion Paper comprised:

- There were four broad options for a new scheme: 1. Status quo; 2. An SRCA derivative; 3. A VEA derivative; and 4. A new MCS. ([47]-[57])
- Financial recognition of risk in ADF employment through pay and allowances, or through the payment of additional compensation for those who become injured or ill while undertaking more hazardous activities. ([58]-[71])
- Choice between lump sums and periodic payments. (72)-[92])
- The relationship between the military superannuation schemes and military compensation. ([93]-[100])
- WHS coverage for the ADF ([101]-[126]), rejecting options for coverage under State legislation and no legislative obligations for the ADF ([104]).
- Coverage of Reservists, cadets, honorary ranks and philanthropic representatives. ([127]-[145])
- Dual eligibility ([146]-[158], commenting that dual eligibility as it currently existed needed to be addressed ([155]) and that, if the Government declared access to the VEA for overseas military service, it was essential that there be a once only choice between the new scheme and the VEA to avoid continuing dual eligibility ([158]).
- Standard of proof ([159]-[162]), which it considered to be ‘a legitimate mechanism to positively discriminate between peacetime service and operational service of a warlike or non-warlike nature’ ([161]).
- Dispute resolution ([163]-[173]); Regulatory arrangements. ([174]-[180]); and Administration ([181]-[193]).
- Options for market-testing the claims management function. ([194]-[208])

Many of these issues canvassed in the Tanzer Review Discussion Paper are still in discussion and contention today.

The Report of the Tanzer Review, *The Review of the Military Compensation Scheme*, in 1999 endorsed a move towards a new military rehabilitation and compensation scheme (Option 4 in the Discussion Paper):

The Proposed Scheme

6. After analysing the current arrangements, and following extensive consultation, the Review concludes that it would be inappropriate to attempt to amend the current schemes. Neither the SRCA nor the VEA individually provides a totally acceptable solution. Rather the Review considers that there should be a new scheme set up under its own Act of Parliament. There is widespread support for a new

scheme but there are differences of opinion on the most appropriate legislative vehicle. The new scheme would be built from best practice principles and essential attributes of a model modern compensation scheme and would recognise the distinctive nature of military service. It would also take an holistic approach to injured personnel by integrating the safety, rehabilitation, resettlement and compensation elements.

7. The Review recommends that this new scheme should be a comprehensive one incorporating a military specific occupational health and safety component. The merging of the safety and compensation functions in this way makes an unequivocal statement about the importance of taking an integrated, modern approach to this whole area of operational support. This will remove the ADF from the operation of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. The Safety, Rehabilitation and Compensation Commission (SRCC) is unconvinced by the arguments advanced by the Review in favour of this separation. From the Review's point of view, this integrated approach to prevention and compensation is essential to the achievement of the objectives of the new scheme.

8. The SRCA appropriately forms the backbone of the benefits structure of the new scheme. However, it should also include the additional compensation which is currently payable under the Defence Act Determination and certain aspects of the VEA such as the medical assessment system, health care cards and the more beneficial standard of proof for warlike and non-warlike service.

9. The new scheme should apply to all those groups who were covered by the Military Compensation Act 1994. Thus the new scheme should cover the Permanent Force, the Reserves, former members of the ADF undergoing resettlement training, members of the Australian Services Cadet Scheme, and certain philanthropic organisations and holders of honorary rank. The benefits should apply equally to all groups on the principle of like compensation for like injury. However, in the case of self employed specialist Reserves who are deployed on overseas operations, the Review recommends that income support compensation needs to recognise their actual earning capacity. The specialists perform an essential role and their continuing recruitment is in jeopardy if more satisfactory arrangements are not put in place.

The Tanzer Review initially resulted in a move to co-location of Military Compensation and Rehabilitation Service (MCRS) and DVA offices, followed later by the transfer of the MCRS from the Department of Defence to the Department of Veterans' Affairs. The recommendations of the Tanzer Review for a new compensation scheme for Defence Force personnel injured in service (including non-warlike and warlike service) were taken up in the Military Rehabilitation and Compensation Bill 2003, which was enacted as the *Military Rehabilitation and Compensation Act 2004* (Cth), discussed below in pt 3.

Establishing the MRCA: Compromises and problems

The *Tanzer Review* provided the impetus for the creation of a new stand-alone military compensation scheme which commenced on 1 July 2004: the *Military Rehabilitation and Compensation Act 2004* (Cth) (MRCA). In the Second Reading Speech for the Military Rehabilitation and Compensation Bill 2003 on 4 December 2003, the Minister for Veterans' Affairs, Mrs Danna Vale, described the consultation process leading to the Act:

An exposure draft of the bill was published in June this year. Subsequent consultation with the veteran and Defence Force communities has been important in developing the legislation.

Several changes resulted from the consultation process, among them:

- inclusion of a further choice of part lump sum and part periodic payments for permanent impairment;
- extension of time allowed to choose between a lump sum and weekly payments from three to six months; and
- eligibility for the special rate disability pension safety net payment for those who are unable to work more than 10 hours per week – this encourages some part-time work for eligible members.

The inclusion of the Special Rate Disability Pension (SRDP) during the consultation process illustrates how the MRCA was made more complex, as legislation and in administration, by the influence of stakeholder groups. In this case, an option for a VEA-like pension for life was included as an available form of financial compensation, contrasting with the SRCA-like basis of the MRCA provisions for permanent impairment and incapacity compensation.

Other, unpublicised, compromises were undoubtedly made between the DVA and stakeholder groups to achieve passage of the legislation. One possible example of this is the additional amount of \$100 per week (indexed) added to normal earnings for calculation of incapacity compensation, discussed in pt 9 of this paper.

Nevertheless, the achievement of a new Act, with comprehensive coverage of injuries sustained in ADF service on and after 1 July 2004, was a considerable achievement. It did not, however, go further and address the complexity of the legislative framework covering injuries sustained before 1 July 2004.

3. MILITARY REHABILITATION AND COMPENSATION ACT 2004

The *Military Rehabilitation and Compensation Act 2004* (Cth) (MRCA) received Royal Assent on 27 April 2004 and ss 1 and 2 and ss 360 to 385 (ch 9) commenced on that date. The remaining provisions of the Act commenced on 1 July 2004, which was the substantive date of commencement of the Military Rehabilitation and Compensation Scheme. The *Military Rehabilitation and Compensation Regulations 2004* (Cth), which were made under s 440 (and s 439) in pt 7, commenced on 1 July 2004, together with the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (Cth) (C&T Act), discussed below.

Acceptance of liability under the MRCA

Section 23 MRCA provides the framework for acceptance of liability for service injuries and diseases and was based on the VEA. For liability to be accepted under s 23, the following requirements must be satisfied:

- The person's injury or disease is a service injury or disease under s 27, that is, the injury or disease must satisfy one of the causal links with service;
- None of the exclusions in ch 1 pt 4 applies: serious default or wilful act; serious breach of discipline; self-inflicted injuries; false representations; use of tobacco products; and injury or disease which is a result of reasonable counselling or failure to obtain a benefit; and
- A claim has been made under s 319 in ch 7.

Section 24 MRCA provides a similar framework for service deaths.

Section 30 provides that an injury, disease or death is a service injury, disease or death if:

- (a) it is related to defence service in the ways mentioned in ss 27 or 28 (for example the injury resulted from an 'occurrence' that happened while the member was rendering defence service); or
- (b) it resulted from certain treatment provided by the Commonwealth: s 29; or
- (c) it is an aggravation of, or a material contribution to, a sign or symptom of the injury or disease related to defence service.

A key element in determination of initial liability under the MRCA is whether the service is 'warlike service', 'non-warlike service' or 'peacetime service' (collectively 'defence service'), as defined in s 6(1) of the MRCA. Warlike and non-warlike service attracts the more beneficial 'reasonable hypothesis' standard of proof in s 335. The service which is warlike service is set out in item 1 of Schedule 1 to the *Military Rehabilitation and Compensation (Warlike Service) Determination 2019* (Cth) (as amended) and nonwarlike service is in item 1 of Schedule 1 to the *Military Rehabilitation and Compensation (Non-warlike Service) Determination 2019* (Cth) (as amended). These two determinations replace earlier determinations with similar purposes.

Most initial liability issues are common to the MRCA and the VEA, including the causal link with service, the relevant standards of proof and the use of Statements of Principles to

assist determination of liability for compensation. There is a well developed jurisprudence on DVA liability issues³ which generally is applicable to the equivalent MRCA provisions.

Compensation entitlements under the MRCA

A member who has an accepted service injury or disease is entitled to compensation under the MRCA, which may include: financial compensation for permanent impairment (ch 4 pt 2) and incapacity for work (ch 4 pts 3-5); financial compensation to dependants in respect of a service death (ch 5); rehabilitation, aids and appliances and vocational programs (ch 3); medical treatment (ch 6); and a range of other benefits and allowances. Severely injured members covered by the MRCA have a once-only election to receive a Special Rate Disability Pension (SRDP) for life (which is similar to the VEA TPI special rate pension), instead of compensation for impairment and incapacity for work (ch 4 pt 6).

The provisions in MRCA for compensation for permanent impairment and incapacity for work are very detailed and the amount of payment depends on many factors including age, whether the member has warlike or non-warlike service, the degree of permanent impairment, the level of incapacity for work, the member's 'normal earnings', superannuation payable, and whether the member was in the Permanent Force, a Reservist or a cadet.

Medical treatment under the MRCA

Entitlement to medical treatment is determined under the *MRCA Treatment Principles* (Cth) (2013, as amended) which comprise Part 1 – Introduction (including application of the MRCA Private Patient Principles); Part 2 – Entitlement to treatment; Part 3 – MRCC approval for treatment; Part 4 – Medical practitioner services; Part 5 – Dental treatment; Part 6 – Pharmaceutical benefits (which incorporates the MRCA Pharmaceutical Benefits Scheme); Part 6A – Coordinated Veterans' Care Program; Part 7 – Treatment generally from other health providers; Part 9 – Treatment of entitled persons at hospitals and institutions; Part 10 – Residential care, home care and transition care co-payment; Part 11 – The provision of rehabilitation appliances; Part 12 – Other treatment matters (such as ambulance transport, an option for care through the Medicare program, and recovery of overpayments made to any person or body); and Schedule 1 – Dates for incorporated documents (which incorporates 29 other documents such as Schedules of Fees and Notes for health service providers).

Treatment is provided through Gold Cards (treatment for all conditions) and White Cards (treatment for specified conditions), in a similar manner to the VEA.

Review of MRCA decisions

The MRCA initially incorporated two separate appeal paths, one similar to the VEA review system (review by the Veterans' Review Board (VRB) under s 352, and then review by the Administrative Appeal Tribunal (AAT)), and the other similar to the SRCA review system (internal reconsideration under s 349, and then AAT review). Different arrangements applied to each appeal path in relation to time limits, representation and legal costs. A appeal from the decision of the AAT lay to the Federal Court on matters of law, or by way of judicial review.

A single path for MRCA review, through internal review, the VRB and the AAT, was created by sch 24 to the *Budget Savings (Omnibus) Act 2016* (Cth) on 1 January 2017.

³ See, for example, Creyke and Sutherland (2016), pp 133-167

MRCA Regulations

The *Military Rehabilitation and Compensation Regulations 2004* (Cth) provided for matters prescribed in the MRCA including:

- Part 2: Matters relating to cadets (ss 116, 175, 196(3), 439(1));
- Part 3: Matters relating to declared members (ss 116, 175, 196(3));
- Part 4: Review by the Board of original determinations (s 353) - reg 18 applies and modifies provisions of the *Veterans' Entitlements Regulations 1986*;
- Part 5: Indexation of certain pay and earnings (ss 182, 183);
- Part 6: Miscellaneous – Provision of information by the MRCC (s 409(2));
- Schedule 1: Modifications of Chapter 2 MRCA in relation to cadets – modifying ss 32(5), 34(4) and 35(5) thus removing certain exclusions from liability in respect of cadets.

The current regulations are the *Military Rehabilitation and Compensation Regulations 2020* (Cth) which are similar to the 2004 regulations but include Part 3A 'Employment support to former members' and Part 7 'Application and transitional matters'.

Transitional provisions for the MRCA

The *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (Cth) (C&T Act) commenced on 27 April 2004 (ss 1-3) and its substantive provisions commenced on 1 July 2004 'At the same time as section 3 of the MRCA commences'. This Act provided for consequential amendments and transitional provisions for the MRCA, and continues to play an important role in the interactions between the MRCA, the VEA and the DRCA.

Section 7(1) C&T Act provided that the MRCA applied to an injury sustained, disease contracted or a death that occurred on or after 1 July 2004, and which related to defence service rendered on or after that date, even if the injury, disease or death also related to defence service rendered before that date. Section 7(1) is mirrored in ss 9A(1) and 70A(1) of the VEA and s 4AA of the DRCA.

Unlike the VEA, which applies to service in the ADF during particular periods of time, the definitions of 'defence service' and 'peacetime service' in s 6 of the MRCA indicate that the MRCA potentially applied to service in the Defence Force at any time. However, ss 7 and 8 of the C&T Act placed limits on the application of the MRCA by specifying the circumstances in which the MRCA applied. While, generally, the C&T Act provided that the MRCA applies to claims based on service rendered on or after 1 July 2004, service rendered before 1 July 2004 can also give rise to liability under the MRCA provided that service rendered on or after that date also contributed to the claimed injury, disease or death. For this reason, the Minister declared certain service rendered before, on and after 1 July 2004, to be 'warlike service' or 'non-warlike service' for the purposes of the MRCA. All other service before, on, and after 1 July 2004 is 'peacetime service'. The effect of s 7(1) was considered by the Tribunal in *Re Anderson and Military Rehabilitation and Compensation Commission* [2013] AATA 360.

Section 13 of the C&T Act provided that impairments points from all injuries or diseases that are, or had been, determined as war-caused or defence-caused under the VEA, or injuries under the SRCA (collectively called 'old injuries or diseases'), were to be brought across into the calculation of impairment from injuries and diseases for which liability had been accepted under the MRCA. Section 13 expressly authorised the inclusion in the Guide to Determining Impairment and Compensation (GARP-M) (ch 25) of a method for offsetting compensation paid under the VEA or the SRCA for previous injuries: *James v Military Rehabilitation and Compensation Commission* [2010] FCAFC 95. The original methodology adopted to calculate this transfer caused considerable community concern, and was identified as an anomaly by some members of the MRCA Review. The amendments which

corrected this anomaly are discussed in pt 4 of this paper.

Section 15 of the C&T Act provided that, if a person would be entitled to a particular benefit under the VEA or SRCA for which there was an equivalent benefit under the MRCA, the person was only entitled to the benefit under the MRCA. Section 15(6) prevented the grant, payment or provision of a benefit under the VEA or SRCA in that circumstance. A table to s 15(1) set out equivalent provisions in the three Acts.

Amendments to the MRCA: 2004-2022

The following Acts have made significant amendments to the MRCA since 1 July 2004:

- *Veterans' Affairs Legislation Amendment (Statements of Principles and Other Measures) Act 2007* (Cth): Schedule 3 to this Act corrected errors and anomalies in the MRCA identified by the Department.
- *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007*: Schedule 1 amended ss 267 and 404 to increase the maximum amount of funeral compensation to \$9000 (indexed) or a higher prescribed amount. Item 40 applied it to death on or after 13 April 2007. This increased amount maintained parity between MRCA and SCRA.
- *Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Act 2008* (Cth): Schedule 3 made various amendments to the MRCA to correct errors and improve operation of the Act.
- *Veterans' Affairs Legislation Amendment (Military Compensation Review and Other Measures) Act 2013* (Cth): This Act made extensive amendments to the MRCA and the VEA to implement the 2011 *Report of the Review of Military Compensation Arrangements* (MRCA Review Report), including enhanced rehabilitation and transition management, changes to compensation for permanent impairment and changes in MRCA/VEA/SRCA transitional arrangements; see the discussion of the MRCA Review in pt 4 below.
- *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014* (Cth): Schedule 4 made consequential amendments to ch 8 of the MRCA as part of measures to enhance the operation of the VRB, including providing for alternative dispute resolution (ADR) and case management powers. Schedule 1, by amendment to ss 85(2) and 88A(1) of the VEA, extended non-liability mental health care to certain MRCA veterans; see the discussion of the *Veterans' Affairs (Peacetime Service Eligibility for Non-Liability Health Care) Instrument 2014* (Cth) below.
- *Military Rehabilitation and Compensation Amendment Act 2014* (Cth): Correction of an anomaly in permanent impairment compensation identified by the MRCA Review; see the discussion of the MRCA Review in pt 4 below.
- *Veterans' Affairs Legislation Amendment (2015 Budget Measures) Act 2015* (Cth): Schedule 2 proposed amendments to create a single appeal path for the review of original determinations made under the MRCA, which was recommended by the MRCA Review. This Schedule did not pass the Senate because the amendments would have had the additional effect of removing the award of costs to successful applicants to the AAT. A single path for MRCA review, through internal review, the VRB and the AAT, was created by sch 24 to the *Budget Savings (Omnibus) Act 2016* (Cth) on 1 January 2017.
- *Veterans' Affairs Legislation Amendment (Budget and Other Measures) Act 2016* (Cth): Schedule 1, which commenced on 1 January 2017, provided for payment of interim incapacity payments at 100% of normal earnings (NE) while a members' superannuation benefits were being determined, avoiding hardship during delays in receipt of information from the Department of Defence and the Commonwealth Superannuation Corporation (CSC). Schedule 3, which

commenced on 8 December 2016, aligned the cut-off age for incapacity payments to the increased 'pension age' of 67, as defined in the *Social Security Act 1991* (Cth).

- *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017* (Cth): Schedule 3, which commenced at the same time as the DRCA on 12 October 2017, inserted instrument-making powers into the MRCA and DRCA, which enabled the MRCC to determine a class of persons eligible to participate in an early access to rehabilitation pilot program.
- *Veterans' Affairs Legislation Amendment (Omnibus) Act 2017* (Cth): Schedule 5 made amendments which allowed the MRCC to disclose information to the Commonwealth Superannuation Corporation (CSC).
- *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Act 2018* (Cth): Schedule 1 inserted ch 5A "Family support"; sch 3 inserted s 287A providing for a Coordinated Veterans' Care mental health pilot; sch 4 introduced a scheme for catastrophic injury or disease similar to an equivalent scheme in the DRCA and the SRCA.
- *Veterans' Affairs Legislation Amendment (Omnibus) Act 2018* (Cth): Schedule 1 provided that the CDF could make a MRCA claim, streamlining claim processes and improving access to the MRCA scheme. Schedule 2 aligned the power to obtain information under DRCA, MRCA and the VEA when determining claims.
- *Military Rehabilitation and Compensation Amendment (Single Treatment Pathway) Act 2019* (Cth): Schedule 1 replaced two existing treatment pathways with single treatment pathway aligned with the VEA and DRCA, removing the necessity for reimbursement of some medical expenses.
- *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Act 2020* (Cth): Schedule 1 established a new Commissioner position on the MRCC and the Repatriation Commission to represent the perspectives of families of veterans. Schedule 2 introduced measures to support transition to civilian work including renaming of ch 5A to 'Family and employment support' and insertion of new pt 2 'Employment support to new members' in ch 5A, which authorized regulations to provide for assistance or benefits to former members to assist them to transition into civilian work (s 268D).

The MRCA was last amended on 18 February 2022 by the *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Act 2022* (Cth). Item 70 in pt 12 of sch 1 amended s 355 to modify s 30 of the AAT Act to provide that a claimant under the MRCA is automatically made a party to an AAT review where the Chief of Defence Force (CDF) or the Military Rehabilitation and Compensation Commission (MRCC) applies to the Administrative Appeals Tribunal (AAT) for review of a decision of the Veterans' Review Board (VRB).

MRCA legislative instruments

Some of the detail of MRCA compensation provision is set out in legislative instruments, made under enabling sections in the Act. Significant improvements to the MRCA scheme have also been made through legislative instruments:

- *Veterans' Affairs (Peacetime Service Eligibility for Non-Liability Health Care) Instrument 2014* (Cth), which commenced on 1 July 2014, implemented non-liability mental health care for all persons who had had three years effective full-time service in the ADF or who had been discharged on the ground of invalidity or physical or mental incapacity (with certain exceptions). This instrument extended non-liability mental health care to SRCA and MRCA personnel who previously were not eligible as they had only peacetime service.

- *Military Rehabilitation and Compensation (Accelerated Access to Rehabilitation) Determination 2017* (Cth), which commenced on 12 October 2017 when the DRCA commenced, provided for the MRCC to determine a class of persons under s 43(3)(c) of the MRCA who would be eligible for early access to rehabilitation services after a claim for liability under the MRCA had been made and before that claim had been determined. Section 6 specified 25 medical conditions which gave rise to the entitlement to early access to rehabilitation. The *Military Rehabilitation and Compensation (Accelerated Access to Rehabilitation) Amendment Determination 2018* (Cth) added s 8 to the original instrument; this provided early access to rehabilitation for a person in receipt of a veteran payment under the VEA.
- *Military Rehabilitation and Compensation (Family Support) Instrument 2018* (Cth), which commenced on 1 May 2018, made provision for the MRCC to grant child care services, counselling and household services to members who had rendered warlike service after 1 July 2004 to certain family members nominated by that member under s 9, and to partners of members and former members whose death was by suicide or was a service death. The instrument was made under s 268B, which was inserted by the Veteran Centric Reforms No 1 Act, discussed above.

Australian Participants in British Nuclear Tests

The diseases suffered by Australian military and civilian personnel who were exposed to radiation in the British nuclear tests in Australia between 1952 and 1963 were a source of contention in relation to compensation entitlements. The areas of direct exposure were Monte Bello Islands, Emu Field and Maralinga. Non-liability treatment entitlements for cancer were established by the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* (Cth). The Act was preceded by a SRCA-like administrative scheme which provided compensation coverage to civilians, including pastoralists and Aborigines who were at the test sites. The test participants also had access to a Special Administrative Scheme and an Act of Grace Scheme, both administered by the Department of Science, Education and Training. (Explanatory Memorandum, i).

The *Treatment Principles (Australian Participants in British Nuclear Tests 2006* (Cth) and the *Veterans' Affairs (Modified Repatriation Patient Private Patient – Australian Participants in British Nuclear Tests) Instrument 2015* (Cth) were made under the Act.

4. THE REVIEW OF MILITARY COMPENSATION ARRANGEMENTS: 2011

The Minister for Veterans' Affairs announced a Review of Military Compensation Arrangements on 8 April 2009. The terms of reference for the Review focused on the operation to date of the *Military Rehabilitation and Compensation Act 2004* (Cth), but also called for a review of the legislative schemes that governed military compensation prior to the MRCA and any anomalies that existed; the level of medical and financial care provided to members of the ADF injured during peacetime service; the implications of a compassionate payment scheme for the families of deceased ADF members; and the suitability of access to military compensation schemes for members of the Australian Federal Police (AFP).

The Review was conducted by a six-member Steering Committee comprising the chair of the MRCC and DVA Secretary (Ian Campbell PSM) as Chair; the Head of People Capabilities, People Strategies & Policy Group, Department of Defence (Major General Craig Orme AM CSC); the General Manager, Social Policy Division, Fiscal Group, The Treasury (Peta Furnell); First Assistant Secretary, Budget Group, Department of Finance and Deregulation (Joan Ross, and later Jenny Chynoweth); Group Manager, Safety and Entitlements Group, Department of Education, Employment and Workplace Relations (DEEWR) (Michelle Baxter); and an Independent Legal Member (Peter Sutherland⁴,

⁴ The author of this paper.

Visiting Fellow, Australian National University College of Law). Two members of the Prime Ministerial Advisory Council on Ex-service Matters, Ken Kipping AM and Frank Benfield, participated in the Review as official observers.

The Steering Committee was assisted by a project team who prepared detailed research briefings on each issue considered by the Committee. This research was included (in part, not in its entirety) in the specific, issue-based chapters in vol 2 of the MRCA Review Report and provided very useful background information on military compensation law in Australia at that time.

The Steering Committee received 68 submissions, consulted directly with the Ex-Service Organisation Round Table, visited ADF bases throughout Australia, and conducted public meetings in each capital city and Townsville. The Steering Committee report in February 2011 comprised vol 1 'Overview' and vol 2 'Detailed Analysis', which described the various issues considered, and stated conclusions, with recommendations to the Government.

The Review concluded that the broad policy principles underpinning military compensation arrangements were accepted by the defence and veteran communities and that they were sound (such as an increased focus on vocational and non-vocational rehabilitation, while ensuring an appropriate level of compensation for both economic and non-economic loss), and identified some areas for improvement. (Chair's introduction, [8]).

The Review confirmed the need to recognize the unique nature of military service through compensation arrangements that were specific to the ADF. This consideration led to the recommendation that the MRCA should not be extended to include members of the AFP who had been deployed on high-risk overseas missions.

The Review supported the overall effectiveness of the MRCA scheme, including the use of the SOPs to resolve causation issues when determining initial liability (in alignment with the VEA), and a stronger focus of the scheme on vocational, medical and psychosocial rehabilitation than existed under the VEA. The Review recommended improved transition arrangements, and that the existing two review pathways be refined to a single review pathway of internal review, VRB review and AAT review, with active case management at all stages.

The Review discussed a number of significant concerns about incapacity payments under ch 4 of the MRCA, including whether the incapacity benefit structure and the level of incapacity payments might act as an impediment to return to work, particularly in respect of members with long-term incapacity after discharge. In the end, the Review did not make specific recommendations addressing these concerns; instead it recommended formation of a cross-agency working group to conduct more detailed analysis of existing MRCA incapacity payment provisions and to provide advice to the MRCC on the issues raised (vol 2, Rec 10.2).

The main issues discussed in vol 2 of the Review Report were:

- Part 2: Operation of the Military Rehabilitation and Compensation Act;
- Part 3: Legislative schemes governing military compensation before the MRCA, and any anomalies that exist;
- Part 4: Medical and financial care provided to ADF personnel injured during peace-time service;
- Part 5: Implications of an ADF compassionate payment scheme for non-dependents;
- Part 6: Suitability of access to military compensation schemes for members of the Australian Federal Police who have been deployed overseas; and
- Part 7: Miscellaneous issues including death and disability insurance, reconsideration of certain recommendations of the Clarke Review, and access

to military compensation schemes for specified civilians who support the ADF.

The Review Committee disagreed on a number of recommendations with the ADF, DVA and the Independent Legal members preferring different courses of action than those proposed by the Treasury, Finance and DEEWR members:

- *Permanent impairment compensation:* The Review agreed that the current differential for warlike and non-warlike service, as opposed to peacetime service, be maintained (Rec 8.1). However, Recommendation 8.2(a) by the ADF, DVA and the Independent members was that the Government consider a model that revised the existing differential by having a standard 10 per cent permanent impairment differential for 71 or more impairment points (and for death benefits). The Treasury, Finance and DEEWR members supported Recommendation 8.2(b) for not altering the existing arrangements, noting the issues associated with removing the existing differential, and the range of views in the broader veteran community.
- *Death benefit provisions:* Recommendations 9.4(a) and 9.4(b) applied a similar approach to death benefits.
- *Permanent impairment claims that crossed multiple Acts:* Recommendation 22.2(a) by the ADF, DVA and Independent members was that the MRCC be asked to review the current method of calculation of transitional permanent impairment claims, noting the argument that it produced unintended consequences. Recommendation 22.2(b) was that the current method be retained, noting that the outcomes under the existing method were intended and appropriate. The Government adopted Recommendation 22.2(a) (see the discussion of the *Military Rehabilitation and Compensation Amendment Act 2014* below) and the alternative method of calculation proposed in an Appendix to ch 22 of the MRCA Review Report.
- *Non-liability mental health treatment for members with peacetime service after 1 July 2004:* Recommendation 25.1(a) supported the extension of non-liability mental health treatment to members, including Reservists, who had only peacetime service. The Treasury, Finance and DEEWR Committee members proposed gathering further evidence on the issue (Rec 25.1(b)).

Implementation of the MRCA Review

The Government Response to the MRCA Review was made by the Hon Warren Snowden MP, Minister for Veterans' Affairs and Minister for Defence Science and Personnel in May 2012. The Minister stated:

The Government has allocated \$17.4 million over four years to implement the package responding to the Review.

The Government's response comprises an additional \$39.6 million of expenditure over four years. The initiative to issue Repatriation Health Cards to SRCA clients, with long term treatment needs, will generate savings for the Government of \$22.2 million over four years through more efficient procedures and use of the DVA fee schedules.

The Government has carefully considered the comprehensive report. It has sought advice from the Military Rehabilitation and Compensation Commission and the Repatriation Commission, which examined the recommendations in depth. The Government also sought feedback on the report and there was considerable discussion at both the departmental and ministerial level with ex-service organisations, other agencies and their Ministers.

Outcomes

The Government will implement 96 recommendations flowing from the 108 recommendations. It has accepted 94 recommendations, either in full, or with modification/enhancement, rejected 11, and deferred its decision on three. Of the 11 rejected, two were replaced with favourable outcomes, four were alternatives presented in the report, and the other five were rejected for various reasons.

Of the 96 recommendations accepted or replaced with favourable outcomes – 53 will result in improvements, 21 require future monitoring and/or further review work and 22 will retain the status quo.

In addition, the Government has agreed to address an anomaly that was identified from an observation in the report, but that was not addressed with a recommendation.

Main Initiatives

The major elements of the Government's response are:

- changing the methodology used to calculate permanent impairment compensation across multiple Acts – the Government has accepted the outcome of a further review by the Military Rehabilitation and Compensation Commission that concluded that the alternative methodology proposed in the report should be adopted. This will include revisiting all calculations involving this methodology made since 1 July 2004 (cost of \$33.7m - see note 1);
- streamlining access to treatment – Repatriation Health Cards - for specific conditions (white cards) will be issued to beneficiaries under the SRCA with long-term treatment needs. Use of the cards will attract the DVA fee schedules and card holders will be paid a supplement (formerly known as the pharmaceutical allowance) (saving of \$22.2m - see note 1);
- increasing the amount of compensation that may be paid for financial advice in relation to certain choices under the MRCA, and extension of the compensation to also cover legal advice utilized in making those choices (cost of \$0.24m - see note 1);
- improving other benefits for families of current and former ADF members:
- increased flexibility for future wholly dependent partners in the way they receive compensation following the death of an ADF member or former member by allowing them to convert part of their periodic compensation to a lump sum, rather than the existing choice between an ongoing periodic payment or converting the whole amount to an age-based lump sum (cost of \$0.58m - see note 1); and
- a one-off increase to the rate of pension payable to eligible dependent children following the death of an ADF member or former member, to realign it with a similar payment made under the SRCA (cost of \$0.66m - see note 1);
- improving benefits for current and former members of the ADF, including payment of compensation based on stabilisation of each condition, providing earlier compensation for those with multiple conditions (cost of \$0.68m - see note 1); and
- simplifying access to rehabilitation and compensation benefits for current and former members of the ADF, including:
- reviewing rehabilitation arrangements to ensure that the health and well-being of ADF injured members and former members of the ADF is maximised; and
- improving education, training and information for current and former members of the ADF and their representatives.

The Government did not accept Recommendation 25.1(a) to extend non-liability health care for certain psychiatric conditions to those with peacetime service after 1 July 2004, including Reservists. Instead, it accepted the alternative recommendation (25.1(b)), by Finance, the Treasury and DEEWR, for Defence and DVA to undertake further work to establish the benefit of, and need for, such care and the most appropriate mechanism for its delivery. The case for non-liability mental health care was significantly informed by a suicide study by Professor David Dunt 'which drew particular attention to members' needs around the period of transition to discharge and did not limit consideration to those who had operational service.' (vol 2, Chapter 25 Summary) In the light of developments five years later, the rejection of Recommendation 25.1(a) appears to have been an opportunity lost.

The Government Response to the MRCA Review was implemented by the *Veterans' Affairs Legislation Amendment (Military Compensation Review and Other Measures) Act 2013* (Cth). The significant amendments to the MRCA made by this Act included:

- Enhanced rehabilitation and transition management (sch 1, 1.7.2013).
- Changes to compensation for permanent impairment, including recalculation of the amount of payment in transitional cases (sch 2, 1.7.2013).
- Expanded options for lump sum compensation for wholly dependent partners of deceased members (sch 3, 1.7.2013).

- A one-off increase to the rate of weekly compensation for dependent children (sch 4, 1.7.2013).
- Increased amounts of compensation for financial advice and legal advice (sch 5, 1.7.2013).
- Expanded eligibility for Special Rate Disability Pension (SRDP) (sch 6, 1.7.2013).
- Amendments to the superannuation provisions so that they applied equally to both serving and former members (sch 7, 1.7.2013).
- Providing the VRB with an explicit power to remit a matter to the MRCC (sch 8, 1.7.2013);
- Increasing the membership of the MRCC (sch 9, 28.6.2013).
- Requiring aggravations of VEA conditions to be determined under the VEA (sch 10, 1.7.2013);
- Providing Repatriation Health Cards – For Specific Conditions (White Cards) to Pt XI defence-related claimants under the SRCA (sch 11, 10.12.2013).
- Defining members undergoing career transition, personnel holding honorary ranks and authorised representatives of philanthropic organisations as ‘members’, ensuring coverage by the scheme (sch 12, 1.7.2013).
- Clarifying the appropriation of costs for certain aged care services between the *Aged Care Act 1997* (Cth) and the VEA/MRCA (sch 13, 26.7.2013).
- Clarifying the administrative arrangements for payment of pensions, compensation and other benefits under the MRCA and the VEA (sch 15, 28.6.2013).

The *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (Cth) was amended to require all claims for conditions accepted under the VEA, and aggravated by defence service after 1 July 2004, to be determined under the VEA, rather than offering a choice between the VEA and MRCA (sch 10, 1.7.2013).

The amending Act also made significant amendments to the VEA:

- Expanded options for lump sum compensation for wholly dependent partners of deceased members (sch 3, 1.7.2013).
- Requiring aggravations of VEA conditions to be determined under the VEA (sch 10, 1.7.2013).
- Providing White Cards to Pt XI defence-related claimants under the SRCA (sch 11, 10.12.2013);
- Clarifying the appropriation of costs for certain aged care services between the *Aged Care Act 1997* and the VEA/MRCA (sch 13, 26.7.2013).
- Extending the entitlement for travelling expenses to the partner of certain eligible persons, an amendment unrelated to the MRCA Review (sch 14, 28.6.2013).
- Clarifying the administrative arrangements for payment of pensions, compensation and other benefits under the MRCA and VEA (sch 15, 28.6.2013).
- Clarifying which MRCA payments were excluded income under the *Social Security Act 1991* and providing for recovery of MRCA overpayments from a veterans’ VEA payments (sch 16, 28.6.2013).

The amending Act made several consequential amendments to the SRCA:

- Amendments to Part XI in respect of rehabilitation and transition management (sch 1, 1.7.2013).
- Amendments to ss 16(1), 140, 142(1)(b) and 160, and insertion of new Division 2A (ss 144A-144C), which provided Repatriation Health Cards – For Specific Conditions (White Cards) to Pt XI defence-related claimants under the SRCA (sch 11, 10.12.2013).

The *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014* expanded mental health services for veterans and members of the Defence Force and their families, and made improvements to the VRB and veterans' services and administration. The Act primarily amended the VEA, however sch 4 made consequential amendments to ch 8 of the MRCA, which enhanced the operation of the VRB, including alternative dispute resolution (ADR) and case management powers (Rec 17.3). Item 49 applied the amendments to applications for review made on or after the commencement day on 28 July 2014.

The *Military Rehabilitation and Compensation Amendment Act 2014* (Cth) corrected an anomaly identified by the ADF and DVA representatives and the Independent Legal Member in Review Recommendation 22.2(a). Schedule 1 inserted s 347A into pt 3 ch 8 of the MRCA. This authorised the MRCC to undertake an own motion review of permanent impairment compensation made under ch 25 of the *Impairment Guide* in force before 1 July 2013, using the Guide in force when the review was conducted. Item 3 was an application provision authorising retrospective review of entitlements. The *GARP M (Transitional Impairment Methodology and Interim Permanent Impairment Lifestyle Methodology) Amendment Determination 2013* (Cth) specified the new methodology. The Commission could make a determination increasing compensation, but not reducing it (*Guide to Determining Impairment and Compensation 2015* (Cth) (GARP M)). This measure appears to have been successful because the wide public concern expressed about the methodology for calculating permanent impairment compensation in transitional cases before and during the Review has not re-emerged.

The MRCA Review recommended that civilians required to support the ADF should have MRCA coverage in certain circumstances, for example war artists and entertainers (Recommendation 30.2). The Government decided that it was more appropriate to provide this coverage under the SRCA. This was implemented, from 17 December 2015, by the *Military Rehabilitation and Compensation (Members – War Artists and Entertainers – Service End Date) Amendment Determination 2015* (Cth) and the *Safety, Rehabilitation and Compensation (Definition of Employee – War Artists and Entertainers) Notice 2015* (Cth).

5. CREATION OF THE DRCA: 2017

Compensation for injury, disease and death in peacetime service in the ADF between 3 January 1949 and 1 July 2004 was paid under the SRCA, the scheme covering Commonwealth Government employees and employees of certain licensed corporations, and its predecessor Acts, the 1930 Act and the 1971 Act. On 12 October 2017, an entirely new Act, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) (DRCA), was enacted as a mirror of the SRCA and replaced that Act in its entirety in respect of ADF members and ex-members. The Military Rehabilitation and Compensation Commission (MRCC) was given general oversight of the DRCA scheme. Whilst the DRCA applies only to injuries suffered before 1 July 2004, DVA is still receiving a substantial number of claims under the DRCA from former members of the ADF, including new claims for injuries said to have occurred in national service, recruit training or general service in the 1960s, 1970s and 1980s.

The DRCA was enacted by items 1 and 2 in Schedule 1 to the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017* (Cth) (2017 Amending Act), which commenced on 12 October 2017. Item 1 created an entirely new Act (No 156 of 1988) in similar form to the *Safety, Rehabilitation and Compensation Act 1988* (at 12

October 2017), and item 2 saved all previous versions of the Act and legislative instruments made under the SRCA.

The Explanatory Memorandum for the 2017 Amending Act included some background to the measure:

The amendments made by the Bill will create the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (the DRCA), which will be a re-enacted version of the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA) that is modified to apply only to members of the Defence Force and their dependants.

As a consequence the Bill will also amend the SRCA to remove cover for members of the Defence Force and their dependants from that Act.

The DRCA will apply in relation to an injury, disease, death, loss or damage that relates to certain employment in the Defence Force that occurred before the commencement of the *Military Rehabilitation and Compensation Act 2004* (Military Rehabilitation and Compensation Act) on 1 July 2004.

The DRCA will provide Defence Force members with access to a “military specific” compensation and rehabilitation scheme and will enable the Military Rehabilitation and Compensation Commission (MRCC) to bring the newly enacted DRCA into closer alignment with the Military Rehabilitation and Compensation Act as part of future amendments to these Acts. (p 2)

The progression towards integration of the three main military compensation schemes under DVA responsibility was discussed in the Explanatory Memorandum:

Pensions, compensation, rehabilitation, treatment and other benefits for veterans, members of the Defence Force and their dependants are currently provided under three separate Acts, the Veterans’ Entitlements Act, the Military Rehabilitation and Compensation Act, and the SRC Act.

In broad terms, the SRC Act provides compensation, rehabilitation and treatment for defence-related injuries or diseases or deaths attributable to defence service rendered between 1988 and 2004.

Injuries, diseases or deaths related to war and defence service rendered outside this period are covered by the Military Rehabilitation and Compensation Act and the Veterans’ Entitlements Act. Certain periods of war and peace-time service have dual coverage under both the SRC Act and the Veterans’ Entitlements Act.

When the Military Rehabilitation and Compensation Act took effect in relation to defence service on or after 1 July 2004 (or for a continuous period that began before and concluded on or after 1 July 2004), responsibility for determining and managing defence-related claims under the SRC Act, was given to the MRCC from Comcare by virtue of the addition of Part XI to the SRC Act.

The modifications made by Part XI of the SRC Act, which was inserted by the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act, will, as amended by this Bill, continue to operate in the SRC Act and provide the legislative authority for the MRCC in its ongoing responsibility for defence-related claims.

The implementation of the proposed DRC Act will provide for a complete separation of the legislative framework for defence-related claims from the Comcare Scheme under the SRC Act and will provide the Minister for Veterans’ Affairs with the responsibility for all three of the separate compensation Acts that cover Defence Force members.

It will also be a significant step in the broader reform being undertaken by the Department to significantly improve services for veterans and their families in the re-engineering of the Department’s business processes. To enable this veteran-centric reform to occur, it is essential that policy responsibility for all of the relevant legislation sits with the Minister for Veterans’ Affairs.

The enactment of the DRC Act will also allow for consultation in the future between the Department and the veteran and Defence communities on areas of potential alignment with the *Military Rehabilitation and Compensation Act 2004* once the DRC Act commences.

Application and transitional provisions for the DRCA

Division 2 of Part 2 to the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (2017 Amending Act) contained application and transitional provisions for the DRCA scheme, including s 63 (Instruments under SRCA), s 64 (Claims, applications, requests and other processes begun under SRCA), s 65 (Payments of compensation made under SRCA) and s 68 (a power to make transitional rules by legislative instrument).

Section 63 in Schedule 1 to the 2017 Amending Act provided that instruments made under the SRCA were taken to be made under or for the purposes of the 'corresponding provision' in the DRCA. Thus the *Safety, Rehabilitation and Compensation Regulations 2002* (Cth), which provided for matters prescribed under the SRCA, was continued in force under item 63 as a DRCA instrument until it was replaced by the *Safety, Rehabilitation and Compensation (Defence-related Claims) Regulations 2019* (Cth) on 14 August 2019.

DRCA instruments came under the policy control of the MRCC and DRCA on 12 October 2017, but there was no immediate rush to remake the existing instruments, including for example the SRCA Approved Guide, which in pt 2 of edition 2.1 contained permanent impairment tables specific to ADF members. In the following years, new instruments have been made as necessary (see for example the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Catastrophic Injury) Rules 2018* (Cth), which were made for the purposes of new s 29A which provided additional household services and attendant care for members with catastrophic injuries) and existing 'remade' instruments have been amended where considered necessary. This amendment practice is illustrated by the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021* (Cth) which added a new Schedule 3 'Specified diseases relating to firefighters' on 20 September 2021 to the DRCA version of the *Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017* (Cth), to recognise the risks faced by ADF firefighters who served at RAAF Base Point Cook between 1 January 1957 and 31 December 1986.

Amendment of the DRCA since 2017: Moving toward alignment with the MRCA

Following the commencement of DRCA, the MRCC and DVA have policy control of the DRCA which has put them into a position to amend the DRCA, and make new legislative instruments, independently of the work health and safety, rehabilitation and compensation area of the Attorney-General's Department, which has responsibility for SRCA policy. It is expected that this will, over time, bring the DRCA, the MRCA and the VEA into closer alignment.

Part 3 of DRCA provides for rehabilitation. Sections 36, 37, 39 and 40 were amended by the *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017* (Cth) to enable the MRCC to determine a class of persons eligible to participate in early access to rehabilitation and to provide for non-liability rehabilitation in the DRCA. The *Safety, Rehabilitation and Compensation (Defence-related Claims) (Accelerated Access to Rehabilitation) Determination 2018* (Cth) was made under ss 36(1B) and 37(1B) and commenced on 1 May 2018. Section 6 of the instrument determined that a claimant for veteran payment was a declared class.

The *Veterans' Affairs Legislation Amendment (Omnibus) Act 2017* (Cth), with effect from 1 December 2017, inserted s 40A 'Scheme may provide for payments to employers' into pt III DRCA. This provided a 'statutory basis for the MRCC to determine a scheme, to be approved by the Minister, to ensure that certain rehabilitation assistance, including payments to employers under an Employer Incentive Scheme in respect of suitable employment, can be provided similar to the scheme provided under the Military Rehabilitation and Compensation Act.' (Explanatory memorandum, p 18).

Schedule 6 to the *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Act 2018* (Cth) made extensive technical amendments to the DRCA such as replacing redundant references to Comcare and other bodies and repealing provisions not related to providing compensation and rehabilitation to current and former ADF members and other persons eligible under the DRCA. Item 331 in sch 6 reinserted s 43 into the SRCA to ensure that peacekeepers would not experience any disadvantage in the creation of DRCA.

Schedule 1 to the *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms*

No. 2) *Act 2018* (Cth) on 1 November 2018 amended the DRCA (and also the MRCA), inserting ss 19(3A)-(3AD) to provide all former ADF members with incapacity payments at 100 per cent of their normal weekly earnings where they are studying full-time as part of their approved DVA rehabilitation plan. This was intended to reduce financial barriers to rehabilitation.

Item 21 in sch 2 to the *Treatment Benefits (Special Access) (Consequential Amendments and Transitional Provisions) Act 2019* (Cth) amended s 144A in pt XI on 6 April 2019 to provide that compensation for medical treatment under DRCA was not provided where a person was eligible for treatment under the *Treatment Benefits (Special Access) Act 2019* (Cth). This Act introduced a new scheme to provide medical treatment through a Gold Card for members of Australian Civilian Medical Teams (CSMTs) that provided medical aid, training and treatment to local Vietnamese people during the Vietnam War.

The DRCA was last amended on 1 February 2020 by item 56 in sch 1 to the *Services Australia Governance Amendment Act 2020* (Cth), which amended s 151A 'Giving information' in pt XI to substitute a reference to Services Australia for a reference to Centrelink.

DRCA legislative instruments

New legislative instruments made under the DRCA since 12 October 2017 have included:

- The *Safety, Rehabilitation and Compensation (Defence-related Claims) (Full-time Study) Instrument 2018* (Cth), which commenced on 1 November 2018, determined circumstances of undertaking full-time study for the purposes of s 19(3AB). This subsection was introduced by the *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No.2) Act 2018*, discussed above.
- The *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Rate per Kilometre) Notice 2020* (Cth) which revoked the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Rate per Kilometre) Notice 2019* (Cth), and specified a rate of 68 cents per kilometre under s 16(6) for travel for medical treatment.
- The *Safety, Rehabilitation and Compensation (Defence-related Claims) (Weekly Interest on the Lump Sum) Notice 2021* (Cth) set an interest rate of 1.01 per cent per annum on 1 July 2021 for the purposes of s 21(5), which relates to the amount of interest deemed to accrue on the superannuation lump sums of retired ADF members in receipt of incapacity payments. The previous instrument was the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Weekly Interest on the Lump Sum) Notice 2020* (Cth).

The Cost of the DRCA Scheme

The financial cost of the DRCA scheme reflects its progressive replacement by the MRCA from 1 July 2004. New claims will continue for decades as pre-2004 members discharge from the ADF, new injuries and aggravations of injuries are identified by existing and new claimants, permanent impairment compensation is sought for fresh impairments, and medical and other compensation claims arise from an aging population of veterans. The 2020 Australian Government Actuary (AGA) Report estimates that DRCA incapacity compensation will total \$97.7m in 2020 and \$95.0m in 2029 (in nominal dollars). This reflects an eventual reduction in the client base and a significant shift from short-term incapacity payments (\$23.5m to \$7.5m) to long-term incapacity payments (\$67.7m to \$45.5m), and claims incurred but not reported (ICBR) (\$6.5m to \$42.0m). The direct cost of DRCA permanent impairment and NEL payments commenced a very sharp increase in 2016 (at approximately \$40m) and is projected to peak in 2022 at about \$180.0m, falling to about \$120m in 2028 (Figure 9.5).

At March 2021, DVA had 57,506 DRCA clients, with 909 open rehabilitation cases and

4039 clients on White treatment cards. Expenditure in 2019-20 was \$291.1m on compensation and support and \$42.6m on health. (DVA 2021a, Annexure H)

The future path of DRCA compensation costs will be significantly affected by likely policy decisions to move DRCA closer to, or into, the MRCA scheme, as proposed by the Productivity Commission (2019), and discussed elsewhere in this paper. This effect is already demonstrated by DRCA medical compensation costs which have been affected by a drift of DRCA expenditure to MRCA treatment cards ([12.2.17], 2020 AGA Report). The overall effect of this likely policy and legislative shift from DRCA to MRCA will probably be to increase overall MRCA compensation costs by more than the savings in DRCA expenditures.

6. THE CONSTANT BATTLE: 2017

The Senate Foreign Affairs, Defence and Trade References Committee established an inquiry into veterans' issues as a result of a motion on 1 September 2016, moved by Senator Lambie also on behalf of Senators Xenophon, Hinch and Culleton. The Committee was to report by 30 March 2017 (later extended to 15 August 2017) on:

- a. the reasons why Australian veterans are committing suicide at such high rates;
- b. previous reviews of military compensation arrangements and their failings;
- c. the Repatriation Medical Authority's Statements of Principles, claims administration time limits, claims for detriment caused by defective administration, authorised medical treatment, level of compensation payments, including defence abuse, as contained in all military compensation arrangements;
- d. to investigate the progress of reforms within DVA;
- e. the administration of claims by DVA and the legislative or other constraints on effective rehabilitation and compensation for veterans; and
- f. any other related matters.

The inquiry received 458 submissions, with many taken as name withheld or taken as confidential by the Committee. The Committee held five public hearings and issued its report 'The Constant Battle: Suicide by Veterans' in August 2017 (The Constant Battle). The title of the Report reflected:

... the problematic nature of the issue of suicide by veterans and ex-service personnel. For modern veterans, it is likely that suicide and self-harm will cause more deaths and injuries for their contemporaries than overseas operational service. Some affected veterans characterised their post-service life as being the most difficult and challenging period of their lives. The effort to prevent suicide by veterans is a series of hidden personal conflicts, cloaked by stigma, unreliable information and the inherent reluctance of members of the defence community to request assistance. Unfortunately, the effort to address suicide in the veteran community is likely to be a struggle that has no end-point. (Chair's foreword, p xvii)

The Committee examined the framework of military compensation arrangements and their administration 'through the lens of the issue of suicide by veterans', which highlighted 'the burden of legislative complexity and administrative hurdles on veterans who are often seeking support at a vulnerable period of their lives'. The Committee's consideration was informed by a number of previous parliamentary inquiries touching on aspects of the terms of reference including:

- Senate Foreign Affairs Defence and Trade Legislation Committee, *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016 [provisions]* (tabled February 2017);
- Senate Foreign Affairs Defence and Trade References Committee, *Mental health of Australian Defence Force members and veterans* (tabled March 2016);
- Senate Foreign Affairs Defence and Trade Legislation Committee, *Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015— Schedule 2* (tabled September 2015);
- Senate Foreign Affairs Defence and Trade References Committee, *Processes to support victims of abuse in Defence* (tabled October 2014);
- Joint Standing Committee on Foreign Affairs, Defence and Trade, *Care of ADF Personnel Wounded and Injured on Operations* (tabled June 2013); and

- Senate Foreign Affairs Defence and Trade References Committee, *Report of the DLA Piper Review and the government's response* (tabled June 2013). ([1.8])

1.9 In particular, the Australian Government provided a response to the Committee's inquiry on the *Mental health of Australian Defence Force members and veterans* in September 2016. (p 3)

The Report had the following structure:

- Chapter 1 – Introduction;
- Chapter 2 - Background;
- Chapter 3 - Suicide by veterans;
- Chapter 4 – The legislative framework;
- Chapter 5 – Administration issues;
- Chapter 6 – Transition issues;
- Chapter 7 – Other related matters.

The Constant Battle Report – Recommendations

The Constant Battle Report made recommendations for the short term, the medium term, and the longer term:

Short term: Streamlining administration; Staff training; Improving engagement; Targeted programs based on new research; Increasing access to the mental health community; Addressing issues in transition; Accessing the benefits of alternative therapies for veterans with mental health conditions, including companion and assistance animals.

Medium term: National suicide register; Independent study into the mental health impacts of the claims process; Reassessment by DVA of its use of medico-legal firms for medical assessment; Further supporting veteran employment; Support for partners of veterans; Funding to support the Veterans and Veterans Families Counselling Service to create and maintain a public database of services available to veterans; and an Independent review of the representation of veterans before the VRB.

Longer term: Addressing legal and administrative complexity, including a review by the Productivity Commission of these issues and in particular the utilisation of Statements of Principles in the determination of compensation claims; and Establishment of a Bureau of Veterans' Advocates within Government to supplement and support the current system of voluntary advocates. The committee expressed support for the work being done by DVA to transform the client experience for veterans. (pp xxi-xxvi)

The Constant Battle Report – Suicide prevention

Chapter 3 of The Constant Battle Report discussed the level of suicidality in the ADF, concluding that the number of suicide attempts in the ADF was not significantly higher than in the general community and that the number of reported deaths by suicide were lower than in the general population, when matched for age and sex. There also did not appear to be any clear association with operational deployment. The picture was different for suicidality in the ex-service population where rates were higher, particularly for ex-serving men aged 18-24, who were two times more likely to die from suicide than Australian men of the same age. A 2017 study by the Australian Institute of Health and Welfare (AIHW) identified several risk groups among ex-serving men:

- suicide rates for ex-serving men aged 18–49 were between 3 and 4 times as high as for men aged 50–84;
- those who were discharged involuntarily (suicide rates were 2.4 times as high as for those discharged for voluntary reasons), particularly if the discharge was for medical reasons (3.6 times as high as for those discharged for voluntary reasons);
- those who left the ADF after less than 1 year of service (2.4 times as high as for those who had served for 10 years or more); and

- all ranks other than commissioned officers (2.8 times as high as for commissioned officers). (pp 16-17)

After a detailed discussion of issues and views presented by in submissions, the Report made five recommendations in relation to suicide prevention in the ADF and the ex-service community:

Recommendation 1

3.97 The committee recommends, that in the context of recent Australian Institute of Health and Welfare findings concerning veterans at risk of suicide, the Australian Government:

- develop and implement specific suicide prevention programs targeted at those veterans identified in at-risk groups; and
- expand the DVA Reconnects Project to proactively contact veterans in these identified in at-risk groups.

Recommendation 2

3.99 The committee recommends that the Australian Government commission an independent study into the mental health impacts of compensation claim assessment processes on veterans engaging with the Department of Veterans' Affairs and the Commonwealth Superannuation Corporation. The results of this research should be utilised to improve compensation claim processes.

Recommendation 3

3.102 The committee recommends that the Australian Government establish a National Veteran Suicide Register to be maintained by the Australian Institute of Health and Welfare.

Recommendation 4

3.104 The committee recommends that the Australian Government review the enhancement of veteran-specific online training programs intended for mental health professionals. In particular:

- requirements for providers to undertake training;
- the introduction of incentives for undertaking online training and demonstrating outcomes in clinical practice.

Recommendation 5

3.106 The committee recommends that Defence and the Department of Veterans' Affairs align arrangements for the provision of professional mental health care.

The Constant Battle Report – Reform of the legislative framework

Chapter 4 of The Constant Battle Report discussed previous reviews of military compensation arrangements, including the 1994 Baume Report, the 1999 Tanzer Review, the 2003 Clarke Review, the 2009 Dunt Review, and the 2011 MRCA Review. The committee referred to the DVA submission to the Senate inquiry which set out the conclusion of the MRCA Review that reducing the amount of military compensation legislation would be highly desirable, but noted the Review's caveat:

However, the Steering Committee also confirmed that consolidating entitlements into one Act would require the resolution of several complex, sensitive and potentially controversial issues.

Apart from the different entitlements under the three Acts, other reasons why there is no simple, singular approach to address or fix the current complexities include:

- there are accrued rights issues in changing entitlements once they have been accrued through periods of service;
- complex transitional arrangements would be needed to protect existing entitlements and ensure no detriment to individuals; and
- uniform compensation benefits could be seen as inconsistent with the nature of military service, and would imply, or could be interpreted to mean, that all military service is the same.

Given the complexity of these legislative issues, the MRCA Review recommended that DVA concentrate on continuing to simplify the claims process for potential claimants. ([413], p 48)

The Report discussed: Recent proposed legislative reform, including the Bill for the DRCA; Key issues concerning compensation arrangements, including benefit levels and the relative generosity of the schemes; Complexity and inconsistency; Non-liability health care, which received significant positive feedback during the inquiry; and Support for a review, including review of the RMA and the Statements of Principles. The recommendation of the Committee was:

Recommendation 6

4.85 The committee recommends that the Australian Government make a reference to the Productivity Commission to simplify the legislative framework of compensation and rehabilitation for service members and veterans. In particular, this review should examine the utilisation of Statements of Principle in the determination of compensation claims. The report of this systemic review should be completed within 18 months and tabled in the Parliament.

The Constant Battle Report – Administration issues

Chapter 5 of The Constant Battle Report gave extensive consideration to administration issues, including: the Department of Veterans' Affairs; Progress of reform following a 2013 Capability Review by the Australian Public Service Commission and the institution of Veteran Centric Reform; IT investment in DVA; and Common issues raised such as administrative and staffing issues, delays in claim determination, medical assessments by contracted practitioners, incorrect payments, communication issues, and adversarial approaches to claims. The Report concluded:

5.94 Amongst the agencies of the Commonwealth Government, DVA is one of the oldest and most stable departments. However, the overall impression the committee received during the inquiry was that DVA administrative capabilities have been gradually run down over a significant period. Reduced levels of staffing, the impact of the efficiency dividend and a lack of investment in efficient ICT has had an increasingly negative impact on the administration of claims by veterans. Over time piecemeal reform in the portfolio has often resulted in additional complexity rather than streamlining administration. At the same time, a gradually changing client base of veterans has imposed additional stresses on the workload of DVA.

5.95 The evidence to the inquiry indicates some urgent areas for administrative reform identified by Professor Dunt in 2009 and by the APSC Capability Review in November 2013 have not been adequately addressed. In this context, recent appropriations by the Australian Government to support major transformative change are welcome. Important administrative reform is starting to occur, but the pace does not reflect the importance of the outcomes for veterans and their families.

5.96 Perhaps the most concerning evidence the committee received related to veterans who gave up their claims in frustration before they had even received a final determination due to their adverse experiences in the administration of their claims. A number of veterans (and partners of veterans) explained that they would not speak or engage with DVA staff again due their negative experiences.

5.97 Recent improvements by DVA highlight the potential of further reform to administrative processes. The committee recognises that this transformation process will require time and substantial resourcing. Accordingly, the committee urges the Australian Government to continue funding future appropriations to ensure the next stages of the DVA reform program are undertaken in a timely manner.

5.98 In particular, the committee reaffirms its recommendation that DVA be adequately funded to achieve full digitisation of its records and modernisation of its ICT systems by 2020, including the introduction of a single coherent system to process and manage claims. (pp 96-97)

The Constant Battle Report – Transition issues

Chapter 6 of The Constant Battle Report discussed transition from the ADF to civilian life. The 2017-18 Budget estimated there were 59,194 permanent ADF personnel. Of these serving members approximately 5,500 discharged and returned to civilian life each year. While most of these members transitioned voluntarily, some were separated for medical reasons (900-1,000 each year) or were recruits who did not complete initial training (around 600-700 each year). Others separated for a range of other reasons which could include redundancy, reaching compulsory age retirement, disciplinary reasons, and administrative discharge. (p 101)

The Transition chapter covered: Key recent reforms, including the Transition Taskforce and an Early Engagement Model; Gaps in support; Continuity of care; Further extending non-liability health care, which received almost universal praise from stakeholders; Social connectedness; Employment and rehabilitation support; and Family and carer support. The Report concluded:

6.93 Appropriate transition support for veterans can be critical to success in life after service. The committee supports the NMHC recommendation that 'transition should enable 'all departing personnel to leave with dignity, hope and some certainty about their future, regardless of the circumstances of their discharge'. In this context, the committee welcomes the significant reform work which Defence, DVA

and CSC are undertaking to improve the transition process for veterans through the Transition Taskforce.

6.94 In the view of the committee, the Transition Taskforce is an appropriate avenue to address concerns regarding the experience of transition which were raised by submitters to the inquiry. Worrying gaps in support were identified in submissions for veterans after discharge. Some veterans highlighted significant barriers to finding employment which were service related. These included lack of recognition of skills and training gained while in uniform and a reluctance of employers and their insurers to employ veterans with service related conditions.

Government Response - The Constant Battle Report

The Government Response to The Constant Battle Report was tabled on 24 October 2017 by the Minister for Veterans' Affairs, The Hon Dan Tehan MP. He stated that the Government had agreed to all of the recommendations made by the Committee, and announced a package of \$31.0m for 'new programs that will deliver better support for veterans and their families' including: a new Veteran Payment; Extended Support for Veterans' Families; GP Health Assessments for the First Five Years Post Discharge; a Case Management Pilot; and a scoping study to professional veterans' advocacy.

The Response discussed the review by DVA, Defence and the Veterans and Veterans Families Counselling Service into the death by suicide of Rifleman Jesse Bird and committed to address the shortfalls identified by this investigation.

The Response reported decisions to establish an inquiry by the Productivity Commission and to task the Australian National Audit Office to conduct a review into the efficiency of veterans' service delivery by DVA. Other recommendations which would be implemented included:

- The Departments align the provision of mental health care;
- The Career Transition Assistance Scheme include an option for external work experience for veterans;
- ADF members are provided DVA White Cards on discharge; and
- A two-track program be developed for ADF members leaving Defence.

Other reports on suicide prevention and reform of administration

There have been a number of significant reports in the past five years taking up the important themes discussed in The Constant Battle Report, particularly in relation to suicide prevention and improvement in the administration of military compensation in Australia. An analysis of each of them is beyond the scope of this Paper however, as a whole, they form part of a strong movement for reform. The key inquiry processes in this reform are the 2019 Productivity Commission Report, *A Better Way to Support Veterans*, and the 2021-23 Royal Commission into Defence and Veteran Suicide, which are discussed in detail in pt 7 and pt 8 of this paper.

Other reports include:

- *Improving the Transition Experience*, Transition Taskforce, 2018.
- *Efficiency of Veterans' Service Delivery by the Department of Veterans' Affairs*, Australian National Audit Office, 2018.
- *Veterans' Advocacy and Support Services Scoping Study*, Robert Cornall AO, 2018.
- *Independent Review of the Implementation of the Recommendations of the Joint Inquiry into the Management of Jesse Bird's Case*, Robin Creyke AO, 2019.
- *Independent Review into the TPI Payment*, David Tune AO PSM, 2019.
- *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019*, Australian Government Actuary, 2020.
- *Serving and ex-serving Australian Defence Force members who have served since*

1985: suicide monitoring 2001 to 2019, Australian Institute of Health and Welfare, 2021.

- *Preliminary Interim Report*, Interim National Commissioner for Defence and Veteran Suicide Prevention, 2021.
- *Review of Australian Defence Force Remuneration*, Barry Nunn AO RFD ED, 2021 (Nunn Review).
- *The Department of Veterans' Affairs communication with veterans making claims for compensation*, Commonwealth Ombudsman, No 1 of 2022.

The Interim National Commissioner for Defence and Veteran Suicide Prevention (Boss Report, 2021) expressed similar concerns to those expressed in The Constant Battle Report about the complexity of DVA processes:

4.57. This is exemplified in the coronial investigation into the death of Private Jesse Bird, where Coroner Jacqui Hawkins found consistent themes emerging in the evidence regarding the complexities of the DVA process, including that:

- (a) Jesse felt he was being treated as a number rather than as a person
- (b) his claims paperwork would not be registered, or would be lost or rejected, which resulted in having to recommence the process
- (c) there was a lack of adequate and personalised communication
- (d) there were different legal and medical requirements for each stage of the claims process, which were not clearly understood
- (e) that the claims process was a very complex system, in part as it was based on 3 separate pieces of legislation.

The Commonwealth Ombudsman (2022) identified some opportunities for improvement in DVA communication with veterans making claims for compensation. The Ombudsman made eight recommendations aimed at strengthening the accessibility and transparency of information available to veterans and the internal guidance available to support DVA's decision makers:

1. Publish timeliness standards;
2. Direct veterans to published timeliness standards;
3. Review information on DVA website
4. Update information required in acknowledgment letters;
5. Publish information about general claim process;
6. Develop guidance to assist decision-makers communicating with veterans with unallocated claims;
7. develop policy about frequency and mode of contact expected with veterans;
8. Communicate consequences of not providing information.

DVA accepted the recommendations and advised that they could all be implemented in 2022. (p 22)

Counsel Assisting the Royal Commission into Defence and Veteran Suicide, Peter Gray QC (2022), in his Opening Address to Hearing Block 2, emphasised that delay in claims processing was an important adverse factor affecting the health, including mental health, of claimant veterans (at [24]-[39]). This and a number of other issues relating to DVA administration clearly are an area of major concern for the Royal Commission.

DVA administration of compensation entitlements has implications for the cost of benefit programs, quite separately from the adverse impacts of delay and poor communication on clients' mental health and financial security. In relation to death claims, the liability estimate in the 2020 Australian Government Actuary Report at 30 June 2019 was \$314.8m, significantly higher than the estimate in 2018 of \$140.1m ([15.2.1]). The Report commented on a link between non-liability mental health care and claim numbers:

- 15.1.5 ... In addition, changes to straight through processing for mental health conditions related to operational service could mean posthumous mental health diagnoses become easier to determine for

suicide cases. Anecdotal evidence from the DVA policy area suggests that the broader suite of services provided by Service Coordination within DVA could have been proactively seeking out potential death payment claimants. All these factors could have led to the sustained high levels of death payments seen in 2017-18 and 2018-19 financial years.

7. A BETTER WAY TO SUPPORT VETERANS: 2019

In March 2018, the Government issued Terms of Reference (ToR) for an inquiry by the Productivity Commission into the system of compensation and rehabilitation for veterans (serving and ex-serving ADF members). The 'Background' in the ToR referred to the recently released report of the Senate Foreign Affairs, Defence and Trade References Committee into Suicide by Veterans and ExService Personnel, *The Constant Battle: Suicide by Veterans* (The Constant Battle), which documented the complexity in the overall legislative framework for compensation and rehabilitation for veterans. The Government asked for 'a comprehensive examination of how the current compensation and rehabilitation system operates and should operate into the future'. The Commission was asked to undertake appropriate public consultation, including holding hearings (including in regional Australia), inviting public submissions and releasing a draft report to the public.

The Inquiry was undertaken by Commissioner Richard Spencer and Commissioner Robert Fitzgerald (later Special Advisor). The Commission conducted an initial round of consultations and then published a Draft Report in December 2018. This Draft Report was subject to a further round of consultations, directed to its preliminary recommendations. The Commission's Final Report, *A Better Way to Support Veterans*, was submitted to the Treasurer on 27 June 2019.

Final Report - Key Points

The Final Report of the Productivity Commission contained a statement of 'Key Points':

Key Points

Despite some recent improvements to the veterans' compensation and rehabilitation system, it is not fit-for-purpose — it requires fundamental reform. It is out-of-date and is not working in the best interest of veterans and their families, or the Australian community.

In 2017-18, the Department of Veterans' Affairs (DVA) spent \$13.2 billion supporting about 166 000 veterans and 117 000 dependants (about \$47 000 per client). And while the veteran support system is more generous overall than other workers' compensation schemes, this does not mean it is an effective system.

The system fails to focus on the lifetime wellbeing of veterans. It is overly complex (legislatively and administratively), difficult to navigate, inequitable, and it is poorly administered (which places unwarranted stress on claimants). Some supports are not wellness-focused, some are not well targeted and others are archaic, dating back to the 1920s.

The institutional and policy split between Defence and DVA also embeds perverse incentives, inefficient administration and poor accountability, and results in policy and implementation gaps.

A future veteran support system needs to have a focus on the lifetime wellbeing of veterans. It should be redesigned based on the best practice features of contemporary workers' compensation and social insurance schemes, while recognising the special characteristics of military service. This will change the incentives in the system so more attention is paid to the prevention of injury and illness, to rehabilitation and to transition support.

The split in responsibility between Defence and DVA for the lifetime wellbeing of veterans also needs to be addressed. While the first-best option is for responsibility for veteran policy to be transferred to the Department of Defence, given a lack of trust and confidence by veterans in Defence to exercise this policy role, and strong opposition to the change, this is not realistic or feasible at this stage.

New governance, funding and cross-agency arrangements are required to address the problems with the current system.

- A single Minister responsible for Defence Personnel and Veterans is needed to ensure policy making for serving and ex-serving personnel is integrated.
- An advisory council to the Minister should be established to provide advice on the lifetime wellbeing of veterans.

- A new independent statutory agency — the Veteran Services Commission (VSC) — should be created to administer and oversee the performance of the veteran support system.
- An annual premium to fund the expected costs of future claims should be levied on Defence.
- A ‘whole-of-life’ veteran policy under the direction of the Minister for Defence Personnel and Veterans needs to be developed by DVA, Defence and the VSC. This should include more rigorous cross-agency planning processes (including external expertise).
- Responsibility for preparing serving veterans for, and assisting them with, their transition to civilian life should be centralised in a new Joint Transition Authority within Defence.

DVA’s Veteran Centric Reform program has some good objectives and is showing some signs of success. It should be closely monitored to ensure it is rolled out successfully and adjustments should be made, where necessary, to accommodate the proposed reforms.

The current system should be simplified by: continuing to make it easier for clients to access; rationalising benefits; harmonising across the Acts (including a single pathway for reviews of decisions, a single test for liability and common assessment processes); and moving to two compensation and rehabilitation schemes by July 2025.

- Scheme 1 should largely cover an older cohort of veterans with operational service, based on a modified *Veterans’ Entitlements Act 1986*. Scheme 2 should cover all other veterans, based on a modified *Military Rehabilitation and Compensation Act 2004*, and over time will become the dominant scheme.

Veterans’ organisations play an important role in the system. DVA could better leverage this support network by commissioning services from them, including for veterans’ hubs. Engaging with these organisations when there is no peak body is not easy for government. Should a national peak body be established that represents the broad interests of veterans, the Australian Government should consider funding it.

The Gold Card runs counter to a number of the key principles that should underlie a future scheme — it is *not* wellness-focused or needs based. It can also be inefficient (by encouraging over-servicing). It should be more tightly targeted and not be extended to any new categories of recipients. An independent review of DVA’s fee-setting arrangements for health services is also required.

The way treatments and supports are commissioned and provided to veterans and their families also needs to change. The VSC would more proactively engage with veterans and their families (taking a person-centred approach, tailoring treatments and supports) and have greater oversight of providers than under current arrangements. This approach will require more extensive use of data and a greater focus on outcomes.

Expanding non-liability coverage to mental health care was a positive step. However, a new Veteran Mental Health Strategy that takes a lifetime approach is urgently needed. Suicide prevention should be a focus of the Strategy, informed by ongoing research and evaluation.

Families of veterans have access to a number of support services provided by DVA, including access to Open Arms counselling services, respite care, and the Family Support Package. Eligibility for the Family Support Package should be extended. The VSC would have close engagement with families, providing them with more individualised support. Further research is needed to better understand the mental health impacts of service life on families and how they can be best supported. (pp 2-3)

Reform of military compensation legislation

The Productivity Commission made a telling observation on the history of the military compensation system:

History explains, in part, why we have the system we have today. Some features of the system can be traced back to World War I and its after effects - a time when life expectancy, the economic position of women, service members’ pay and motivations for enlisting, and the extent of the mainstream health and welfare system, were very different to what they are today. Since then, governments have added new features, often in an ad hoc manner and/or in response to particular incidents or pressure from veterans’ groups. While a number of the original rationales for elements of the scheme have faded, a political desire to avoid reducing entitlements has meant that governments have not taken opportunities to remove duplication and redundancy. (p 11)

The Commission discussed at length the complexity of the various military compensation schemes and proposed legislative reforms which commenced with improvement and harmonisation of the existing schemes and worked towards a simpler overall legislative structure. The emphasis of the Commission was on practical, equitable reforms to the

legislation such as simplifying the range of payments available (for example, Recs 14.1, 14.4 and 14.9), removing the MRCA SRDP (Rec 14.7), more closely aligning the DRCA and the MRCA (Rec 13.1), closing off superannuation invalidity pensions (Rec 13.3), improving rehabilitation for invalidity payment recipients (Rec 13.4), and creating a single review path. The Commission suggested that the process of incremental reform might ultimately lead to the creation of two legislative schemes.

RECOMMENDATION 19.1 **TWO SCHEMES FOR VETERAN SUPPORT**

By 2025, the Australian Government should create two schemes for veteran support — the current *Veterans' Entitlements Act 1986* (VEA) with some modifications ('scheme 1') and a modified *Military Rehabilitation and Compensation Act 2004* (MRCA) that incorporates the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) ('scheme 2').

Eligibility for the schemes should be modified so that:

- veterans who only have a current or accepted VEA claim for liability at the implementation date will have all their future claims processed under scheme 1. Veterans on the VEA special rate of disability pension would also have their future claims covered by scheme 1
- veterans who only have a current or accepted MRCA and/or DRCA claim (or who do not have a current or accepted liability claim under the VEA) at the implementation date will have their future claims covered under scheme 2. Other veterans on MRCA or DRCA incapacity payments would have their future claims covered by scheme 2
- remaining veterans with benefits under the VEA and one (or two) of the other Acts would have their coverage determined by the scheme that is the predominant source of their current benefits at the implementation date. If this is unclear, the veteran would be able to choose which scheme they would be covered by at the time of their next claim.

Veterans who would be covered under scheme 1 and are under 55 years of age at the implementation date should be given the option to switch their current benefits and future claims to scheme 2.

Dependants of deceased veterans would receive benefits under the scheme that the relevant veteran was covered by. If the veteran did not have an existing or successful claim under the VEA at the implementation date, the dependants would be covered by scheme 2.

Veterans who would currently have their claims covered by the pre-1988 Commonwealth workers' compensation schemes should remain covered by those arrangements through the modified MRCA legislation. (p 78)

Government Responses to the Productivity Commission Report

The Commonwealth Government published an Interim Government Response to the Report of the Productivity Commission in October 2020. The Hon. Darren Chester, Minister for Veterans' Affairs and Minister for Defence Personnel, welcomed the Report and acknowledged the many submissions from veterans, their families, and ex-service and other organisations. The Minister stated that there was a case for major reform:

The Government believes that major reforms, particularly of the legislative framework and involving entitlements for veterans and their families, must be carefully assessed and incrementally implemented.

The Productivity Commission recognised that Australia needs its own unique and dedicated veteran support system. The Government agrees with the Productivity Commission's view that the system needs to move from a predominant focus on the illness or impairment of veterans, to a model that supports the lifetime wellbeing of serving and ex-serving members and their families, a shift that has been underway for several years.

The Government's approach to reform of the veteran support system, in particular in relation to legislation, will be evolutionary and we will pursue sensible elements of the Commission's legislative harmonisation plan over time.

The Productivity Commission recognised the efforts made so far with the transformation activities in the Department of Veterans' Affairs (DVA), and in the efforts made by Defence to trial injury prevention measures for those serving, to share information with DVA early, and to engage with the families of serving personnel. The Commission supported the continuation of these initiatives, including Veteran Centric Reform (VCR) in DVA, through to completion.

The Government reiterates its commitment to VCR as the primary vehicle for reform and has funded the first four years of this crucial transformation program. ...

The Government has agreed to the Commission's recommendation to establish a Joint Transition

Authority led by Defence that will improve the integration, synchronisation and assurance across Government of the transition of ADF members to civilian life. The JTA will take a whole of system approach to transition to better support transitioning ADF members and their families. ...

In making these commitments, the Government acknowledges and recognises the unique nature and importance of military service, which is fundamental to the delivery of comprehensive care, benefits and support services to Australia's veterans and their families. In return for their service, the best possible system is owed to all of Australia's current and future military veterans and their families. (pp 2-3)

The Interim Government Response noted that the Productivity Commission's proposed changes were intended to improve the experience of veterans and their families engaging with the system, and to support improvements in their long-term wellbeing. 'However, some of the Commission's solutions risk substantial disruption and the loss of some gains already made. The Government believes that major reform of the system, particularly the legislative framework and entitlements of veterans and their families, should be carefully considered and incrementally implemented. Any such legislative reform would need to be the subject of considerable consultation and collaboration with the Defence and ex-service communities.' (p 4)

The Interim Government Response, at p 5, outlined some 2020-21 Budget initiatives in response to the Report, which also encompassed the Government's response to the Independent Review into the Totally and Permanently Incapacitated (TPI) payment conducted by Mr David Tune AO PSM in 2019. Announced expenditure items included: fee increases for mental health, social worker and community nursing providers (Rec 16.3); the expansion of Open Arms – Veterans & Families Counselling services (Rec 17.2); expanded eligibility for the Coordinated Veterans' Care Program to White Card holders with chronic mental health conditions (Rec 16.1); veteran employment initiatives to increase support and opportunities for civilian employment, including a focus on self-employment; additional resources for DVA; creation of a Joint Transition Authority; and additional rent assistance to TPI Pension and other Disability Pension recipients who also receive an income support payment and pay private rent.

The Interim Government Response also outlined a number of measures in response to Recommendations, which had already been actioned or were underway, including: development of a four-year Veteran Mental Health and Wellbeing Strategy and National Action Plan (Rec 17.4); improved public reporting on ADF rehabilitation (Rec 6.1); training for DVA staff focussed on service delivery to vulnerable people and in particular those experiencing the impact of trauma (Rec 9.2); increasing awareness of DVA mental health services through implementation of the *Veteran Mental Health and Wellbeing Strategy and National Action Plan 2020-2023* which prioritises communicating and engaging with veterans, families and the community about available mental health and wellbeing support and services (Rec 17.1); linking the Defence work health and safety database (*Sentinel*) with the future Defence e-health system (Rec 5.1); shifting to a wellbeing model that supports veterans to achieve greater independence for themselves and their families, and implementing a network of six Veteran Wellbeing Centres across Australia (Rec 12.6); and including a question regarding Australian Defence Force service in the next Census.

In response to Recommendation 11.2 (Levy a Defence premium), the Government stated that DVA and Defence are 'developing an alternative approach examining data sharing needs, designing complementary wellbeing frameworks and preparing to create a data sharing and analytics solution where DVA and Defence data will be shared to provide insights into current and future veteran support system issues.' The Government agreed to publish annual notional premium estimates (Rec 5.3).

The Boss Report (2021) commented on the Interim Government Response:

4.18 The Australian Government, in its interim response to the Productivity Commission, stated that its 'approach to reform of the veteran support system, in particular in relation to legislation, will be evolutionary and we will pursue sensible elements of the Commission's legislative harmonisation plan over time. The Australian Government also stated its 'commitment to *Veteran Centric Reform* [VCR] as the primary vehicle for reform' and that it 'has funded the first four years of this crucial transformation program'.

Update to the Government Response

In 2021, DVA published an 'Update to Government Response' which included a detailed table of the progress on responses to recommendations in the Productivity Commission Report; it commented:

The remaining recommendations primarily relate to structural and legislative reform, including harmonisation of entitlements across the existing three veteran Acts.

Through engagement with defence force personnel, veterans, their families and ex-service organisations, it is clear that there are still considerable differences on the best approach to this legislative reform.

The Government will continue to consult with the veteran community to reduce the complexity of the legislative framework.

The Government recognises that the most recent legislation, the *Military Rehabilitation and Compensation Act 2004*, will be the primary veterans' legislation going forward and there will be a "long tail" of the two earlier Acts, the *Veterans' Entitlements Act 1986* and the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

The Government will finalise any outstanding matters from the Productivity Commission report at the completion of the Royal Commission into Defence and Veteran Suicide.

The Departments of Defence and Veterans' Affairs will continue to progress administrative recommendations that improve operations between the Departments and deliver better outcomes for veterans. (p 1)

A substantial number of recommendations were described as 'Pending further consideration' and 'subject to a legislation reform roadmap that will be developed. The legislative reform will be carefully considered and require broad consultation with the veteran community.' These included: Harmonise the initial liability process (Rec 8.1); Abolish the Special Medical Review Council (Rec 8.3); Move MRCA to a single standard of proof (Rec 8.4); Single review pathway (Rec 10.2); Review of ongoing role of the Veterans' Review Board (Rec 10.4); Fund Legal Assistance at the AAT (Rec 12.5); Harmonise the DRCA with the MRCA (Rec 13.1); Remove the MRCA Special Rate Disability Pension (Rec 14.7); and Two schemes for veteran support (Rec 19.1).

In relation to Recommendation 11.1 to establish a Veteran Services Commission, the Update advised that this was pending further consideration, however the 'Government is committed to a standalone DVA'.

Eligibility for Gold Cards

The Commission took an assertive position in relation to eligibility for Gold Cards, recommending that the Card should be removed for all persons other than veterans with severe service-related impairments (Rec 16.4) This would, in future, adversely affect all dependents, veterans over 70 with qualifying service, service pensioners who met the means test, and veterans on the service pension who were also receiving a disability pension above the general rate, or who had between 30 and 60 MRCA impairment points. The Commission recommended that all current Gold Card holders should retain their eligibility, and that financial compensation should be paid to dependants who lost eligibility for the Gold Card. Eligibility for the Gold Card should not be extended to any new categories of veterans, dependants or other civilians who were not currently eligible for a Gold Card (Rec 16.5).

In the Interim Government Response to the Commission's Report, the Minister stated that Recommendations 16.4 and 16.5 would not be implemented:

There are some recommendations that the Government has decided not to implement. In response to strongly expressed veteran community concerns regarding the Productivity Commission's recommendations to change Gold Card eligibility, the Government is providing assurance to current serving ADF personnel, veterans and their families that those proposals will not be taken forward. (p 2)

The careful caveats to Recommendations 16.4 and 16.5, and the non-acceptance of the recommendations by the Government, illustrate the difficulties in reforming any existing entitlements, even if the equitable and conceptual bases for the entitlements are underwhelming.

ADF Superannuation

The compensation entitlements of ADF members must be considered together with their superannuation entitlements, which in many cases are provided by Government-funded schemes with only a partial contribution by the ADF member.

The Productivity Commission provided the following brief summary of the Australian military superannuation schemes in its 2018 Draft Report:

Serving Australian Defence Force (ADF) members receive government-funded invalidity and death insurance through military superannuation schemes. ADF members can receive superannuation benefits from one of three funds.

- The *Defence Force Retirement and Death Benefits scheme* — this scheme commenced in 1972, and was closed to new members in 1991. It is a defined benefits scheme that provides a lifetime pension for members who have served a set number of years - usually 20 years.
- The *Military Superannuation and Benefits Scheme* commenced in 1991 and was closed to new members in 2016. It includes both employee contributions and a defined benefit component (where a pension is provided based on years of service and salary).
- *ADF Super* which commenced in 2016. It is an accumulation-based superannuation scheme.

Under these schemes, the medical state (which could be not being able to meet the fitness requirements) resulting in discharge does not need to be related to service for veterans to receive invalidity pensions. And a member's death does not need to be related to service for their dependants to receive a payment. Death benefits are offered as a lump sum while the invalidity pensions are offered only as a pension that is proportional to the claimant's pre-injury military salary. The insurance components of the three schemes are broadly similar.

About 21,000 veterans or dependants were receiving a pension under one of these schemes due to invalidity at the end of June 2017 (dependants can receive a reversionary invalidity pension upon the death of a veteran receiving an invalidity pension). An additional 48,000 veterans were receiving a defined benefit pension due to age. (Box 3.2, p 122)

Current ADF superannuation arrangements

From 1 July 2016, all new ADF members are covered by the ADF superannuation arrangement established by the *Australian Defence Force Superannuation Act 2015* (Cth) and the *Australian Defence Force Cover Act 2015* (Cth). Under the new arrangement, ADF members have a choice of superannuation funds and the employer contribution rate is 16.4 per cent per annum. The ADF superannuation arrangement is underpinned by a death and invalidity insurance scheme called *ADF Cover*. *ADF Cover* benefits are consistent with those provided by the Military Superannuation and Benefits Scheme (MSBS).

The *ADF Super* scheme was established by a Trust Deed executed by the Minister of Defence under pt 2 of the *Australian Defence Force Superannuation Act 2015*. The scheme is administered by the Commonwealth Superannuation Corporation (CSC), which administers the two predecessor military superannuation schemes (the MSBS and Defence Force Retirement and Death Benefits (DFRDB) scheme) and also administers other Commonwealth superannuation schemes such as Commonwealth Superannuation Scheme (CSS), the Public Sector Superannuation scheme (PSS) and the Public Sector Superannuation accumulation plan (PSSap). *ADF Super* is the default fund for ADF members, however members may elect to join another superannuation fund, and to transfer between complying funds at any time.

Members may make personal contributions to their superannuation fund, but they are not required to do so. They may also make salary sacrifice contributions in line with relevant superannuation and taxation legislation.

Superannuation offsetting

Under current arrangements, veterans who are medically discharged from service due to a service-related condition can receive two sources of income-replacement compensation: incapacity payments or above general rate pensions under the VEA, DRCA and MRCA;

and invalidity pensions through military superannuation.

Under the MRCA and DRCA superannuation rules (MRCA s 89A, pt 3 div 7; DRCA ss 20, 21, 21A), the amount of invalidity superannuation paid to the veteran is deducted (offset) from the member's compensation and only the balance is paid as incapacity compensation. If the amount of compensation worked out under the superannuation rules is nil or a negative amount, no compensation is paid in that week (MRCA s 116E). These rules often result in the veteran losing most or all of their incapacity payment, which is perceived as very unfair by the veteran community. Veterans receiving a defined benefit superannuation pension or lump sum under the DFRDB or the MSBS can also be subject to the offsetting of this payment against incapacity payments under the MRCA and the DRCA.

Any part of a superannuation benefit which is attributable to a member's own contributions is not taken into account. Policy rules determine what proportion of a defined benefit scheme (including DFRDB and MSBS) is taken to be government-funded and what proportion is taken to be member contributions.

The offsetting arrangements between superannuation payments and military compensation are poorly understood and cause 'angst and confusion' amongst the veteran community (Productivity Commission 2018, p 504).

The Productivity Commission in its 2018 Interim Report concluded that superannuation offsetting was not unfair and should be retained. In its 2019 Final Report, the Commission noted that offsetting arrangements were in place to prevent the Australian Government from paying two sources of income replacement to the same person. If offsetting was not in place, a person could receive income replacement far in excess of their previous income. It concluded that offsetting arrangements should remain between government-funded superannuation and the veteran compensation schemes (Finding 13.1).

Future developments in military superannuation

Military superannuation currently has a complex set of interactions with military compensation which results in very different outcomes for retired ADF members depending on which of the three superannuation schemes they are in. The MRCA Review (2011) recommended that the Government explore options to streamline the administration of veteran compensation and invalidity and death pensions, noting:

The legislative and administrative responsibilities of both ComSuper and DVA are unique and complex and there are interactions between the benefits paid by both agencies. This consideration, across government, provides the mechanism to scope opportunities for streamlining the administration of superannuation and compensation invalidity and death benefits by aligning legislative definitions and consolidating service delivery.

The Productivity Commission Final Report (2019) noted there had been some progress in this, although the administration of compensation and superannuation invalidity pensions remained separated (vol 2, p 614). The Commission supported work towards 'a single front door' to serve as an intermediate step before complete integration of the two systems, and legislative change to improve information-sharing.

In its 2019 Final Report, the Productivity Commission discussed concerns that the military superannuation arrangements may not incentivise work, as a veteran on the highest level of superannuation invalidity pension (Class A) who returned to work could end up significantly worse off financially because of a review of their pension level. The Commission discussed the complexity of these interactions, finally recommending:

Recommendation 13.3 Replace Invalidity Pensions with Incapacity Payments

The Australian Government should close off access to invalidity pensions under the *Australian Defence Force Cover Act 2015* (ADF Cover Act) for new applicants (existing recipients would not be affected). Medically discharged veterans (who joined on or after 1 January 2016) should have access to incapacity payments under the *Military Rehabilitation and Compensation Act 2004* if the condition leading to their medical discharge caused their incapacity.

The death benefits for dependants under ADF Cover should remain the same but the Australian Government should amend the eligibility for reversionary pensions so that dependants of medically discharged veterans who were in receipt of incapacity payments are now also eligible for a reversionary incapacity payment.

These reforms would not affect current recipients of invalidity pensions.

The Productivity Commission discussed in its Final Report the fact that military superannuation does not currently support rehabilitation. It recommended legislative amendments to the *Military Superannuation and Benefits Act 1991* (Cth) to include a requirement for veterans to attend rehabilitation to obtain invalidity pensions, if deemed appropriate after an assessment of the veteran. This would align with the approach taken to incapacity payments under the MRCA (vol 2, pp 624-620).

In its Final Report, the Productivity Commission did not call for a broader reconsideration of the additional insurance arrangements offered through military superannuation. However, it recommended that further reviews and reforms of military remuneration arrangements should consider whether serving personnel might prefer lower superannuation invalidity pensions as a trade-off for better pay and conditions (vol 2, p 631).

The interactions between military superannuation and military compensation add to the overall complexity of the systems affecting injured ADF members, veterans and their dependants.

8. THE ROYAL COMMISSION INTO DEFENCE AND VETERAN SUICIDE

On 8 July 2021, the Governor-General signed Letters Patent for the Royal Commission into Defence and Veterans Suicide addressed to Royal Commissioners, Mr Naguib Kaldas APM (Chair), The Honourable James Sholto Douglas QC, and Dr Peggy Brown AO. The Royal Commission was directed to provide an interim report by 11 August 2022 and a final report by 15 June 2023.

The Preamble to the Letters Patent gave a context to the establishment of the Royal Commission:

RECOGNISING the unique nature of military service, and the ongoing impact such service may have on the physical and mental health of defence members and veterans.

AND that as a community Australians value the contribution and sacrifice made by defence members and veterans in their service, and the sacrifice of their families.

AND that every death by suicide is a tragic event, and that there is an overrepresentation of defence and veteran deaths by suicide in Australia, and that this overrepresentation should be acknowledged and understood to ensure that learnings are made and to prevent future deaths by suicide.

AND the critical role played by, and broad concept of, families, carers, friends and others as the support network for defence members and veterans.

AND that government and non-government organisations including the Australian Defence Force (the ADF), the Department of Veterans' Affairs, ex-service organisations and the health care system provide important services (including mental health support services) and support for defence members, veterans and their families that are beneficial to wellbeing and whole-of-life care.

AND that Australia as a nation must take action to examine and expose all systemic issues and risk factors related to suicide, and implement actions to address the systemic issues and risk factors exposed.

AND that hearing from defence members, veterans, their families and others about their individual experiences will be a central contribution to your inquiry and these experiences can inform best-practice, strategies and reforms and can assist in prevention and healing.

AND all Australian Governments have expressed their support for, and undertaken to cooperate with, your inquiry.

AND that your independent inquiry, including its findings and recommendations, will provide a foundation for the future work of the National Commissioner for Defence and Veteran Suicide Prevention.

The Royal Commission was required to inquire into the following matters:

- a) systemic issues and any common themes among defence and veteran deaths by suicide, or defence members and veterans who have other lived experience of suicide behaviour or risk factors

- (including attempted or contemplated suicide, feelings of suicide or poor mental health outcomes);
- b) a systemic analysis of the contributing risk factors relevant to defence and veteran death by suicide, including the possible contribution of pre-service, service (including training and deployments), transition, separation and post-service issues, such as the following:
 - (i) the manner or time in which the defence member or veteran was recruited to the ADF;
 - (ii) the relevance, if any, of the particular branch, service or posting history, or the rank of the defence member or veteran;
 - (iii) the manner or time in which the defence member or veteran transitioned from the ADF or transitioned between service categories;
 - (iv) the availability, accessibility, timeliness and quality of health, wellbeing and support services (including mental health support services) to the defence member or veteran, and the effectiveness of such services;
 - (v) the manner and extent to which information about the defence member or veteran is held by and shared within and between different government entities;
 - (vi) the reporting and recording of information, relevant to the mental and physical health of defence members and veterans, at enlistment and during and after service;
- c) the impact of culture within the ADF, the Department of Defence and the Department of Veterans' Affairs on defence members' and veterans' physical and mental wellbeing;
- d) the role of non-government organisations, including ex-service organisations, in providing relevant services and support for defence members, veterans, their families and others;
- e) protective and rehabilitative factors for defence members and veterans who have lived experience of suicide behaviour or risk factors;
- f) any systemic issues in the current availability and effectiveness of support services for, and in the engagement with, families and others:
 - (i) affected by a defence and veteran death by suicide; or
 - (ii) who have supported a defence member or veteran with lived experience of suicide behaviour or risk factors;
- g) any systemic issues in the nature of defence members' and veterans' engagement with the Department of Defence, the Department of Veterans' Affairs or other Commonwealth, State or Territory government entities (including those acting on behalf of those entities) about support services, claims or entitlements relevant to defence and veteran deaths by suicide or relevant to defence members and veterans who have other lived experience of suicide behaviour or risk factors, including any systemic issues in engaging with multiple government entities;
- h) the legislative and policy frameworks, administered by the Department of Defence, the Department of Veterans' Affairs and other Commonwealth, State or Territory government entities, relating to the support services, claims and entitlements referred to in paragraph (g);
- i) any systemic risk factors contributing to defence and veteran death by suicide, including the following:
 - (i) defence members' and veterans' social or family contexts;
 - (ii) housing or employment issues for defence members and veterans;
 - (iii) defence members' and veterans' economic and financial circumstances;
- j) any matter reasonably incidental to a matter referred to in paragraphs (a) to (i) or that you believe is reasonably relevant to your inquiry.

The Royal Commission also was directed to have regard to:

- k) the findings and recommendations of previous relevant reports and inquiries (including relevant coronial inquiries, the Productivity Commission *A Better Way to Support Veterans* inquiry (2019), and other relevant Royal Commissions and commissions of inquiry), including any assessment of the adequacy and extent of implementation of those recommendations;
- l) the work of, and any relevant information and data provided to you by, the interim National Commissioner for Defence and Veteran Suicide Prevention or the National Commissioner for Defence and Veteran Suicide Prevention;
- m) the support available to members of the defence forces of other countries and veterans of such defence forces, particularly in Canada, New Zealand, the United Kingdom, and the United States of America;
- n) ways in which government and non-government organisations and the community could:
 - (i) address systemic risk factors relevant to defence and veteran death by suicide; and
 - (ii) better protect and support vulnerable defence members and veterans;

- o) desirable support services for, and engagement with, families and others affected by defence and veteran death by suicide or who have supported a defence member or veteran with lived experience of suicide behaviour or risk factors;
- p) opportunities to promote understanding of suicide behaviour and risk factors, and protective factors, within the ADF and veteran communities, and the broader Australian community.

Matters (k) and (l) give a particular emphasis to the Productivity Commission Final Report (2019), discussed above in pt 7, and to the work of the interim National Commissioner for Defence and Veteran Suicide Prevention.

For public information, introductory background papers were prepared by the Department of Defence and the Department of Veterans' Affairs (with Annexures). The Annexures to the DVA *Initial Background Paper* (2021a) include succinct graphical representations of the 'Lessons of History' of military compensation and the ADF (A, p 1) and the 'DVA Legislative Framework and Evolution' (B, p 2). Attachment H (p 12) contains an informative summary of DVA client numbers, rates of payments and client profiles. The Defence *Introductory Defence Briefing* (2021) contains information on the composition of the ADF, which currently comprises 100,000 permanent and Reserve service members (pp 10-11 and Annexure B).

The Royal Commission commenced its work with a call for submissions from the public, receiving a very substantial response of public and private submissions from individuals (totalling 1,365 at 4 April 2022). Public hearings commenced in Brisbane in November 2021 and continued in Sydney in February 2022, including appearance before the Commission by officers of the Department of Veterans' Affairs and the ADF staff.

The Chair of the Royal Commission, Nick Kaldas APM, described the intended process of the Commission at the Ceremonial Hearing on 26 November 2021:

The Royal Commission will travel across Australia. We will hold Public Hearings and Private Sessions in various capital cities and regional centres, and we will convene many Roundtable discussions – engaging with people with lived experience, Member and Veteran Support and Advocacy Organisations, academics, experts, researchers, and government officials.

We also intend to consult with veterans, families, experts and institutions on proposed recommendations. Our terms of reference acknowledge that consultation can inform best-practice strategies and reforms, and can contribute to harm prevention and to healing.

We understand that we must address any issues identified comprehensively. Our recommendations must be based on research and evidence – and it is critical that any recommendation we make can be implemented on the ground.

We recognise that we are asking people to share their deeply personal stories – once again – and that this will be difficult for many. We know that some may be disappointed by previous experiences.

At all times, this Royal Commission will strive to seek and hear evidence in a trauma-informed way. We will do everything we can to avoid further harm.

We will provide choice about how and when you engage with us, how we communicate, and the support networks available to assist you in telling *your* story. Counsel Assisting will explain these processes in more detail.

Your stories are powerful and will be critical to the success of this inquiry.

In Hearing Block 2, Counsel assisting the Royal Commission, Peter Gray QC, identified three 'foundational matters' for the Commission and outlined proposed lines of inquiry directed to the ADF and DVA:

4. There are three foundational matters:

- Ensuring that the Royal Commission's work is based on a deep understanding at a general level of both suicide and suicide prevention.
- Adopting an overarching objective focussing on the lifelong wellbeing of ADF members, to give direction to the work of supporting serving and former ADF members and their families and preventing suicide.
- Identifying the available relevant data, and key gaps in its collection, and analysis. Data could be of great importance in identifying the extent and nature of the problems contributing to veteran suicide, enabling analysis to formulate and achieve improvements over time, and regularly

checking progress toward improvements and refining direction when needed. It might, depending on the way it is collected and monitored, also identify real time opportunities for interventions to help individuals in need. (Gray 2022)

9. WHITHER MILITARY COMPENSATION?

‘War and Peace’: The Operational Environment Facing the ADF

Past deployments of the ADF have shaped military compensation in Australia: the legislative framework; entitlements; government administration and services; advocacy frameworks; and overall financial liabilities.

It is possible to draw sensible conclusions about some of these effects, and to strive for a more coherent system overall. Ultimately, however, the legislative framework and cost of military compensation in Australia will be shaped by our strategic environment (in the era of terrorism, the Invasion of Ukraine, and the growing geo-political importance of China). One thing that policy makers can achieve is to increase Government and community awareness of the cost of military compensation, and to factor this cost (and desirable early remedial interventions) into our national decisions to deploy the ADF. Perhaps this is a cogent argument for some form of notional premium for the ADF, an issue which was considered by the Productivity Commission and which is currently in substantial contention.

The 2020 AGA Report made a relevant observation on the link between ADF deployments and consequent compensation liabilities:

3.1.3 One factor that is likely to have influenced recent experience is the relatively high level of deployments on warlike operations.

3.1.4 When ADF units were deployed in East Timor in 1999, it marked the start of a period of relatively intense activity for the ADF, which subsequently saw forces deployed in Iraq, Afghanistan and the Solomon Islands. Overall, more than 50,000 people have been deployed on warlike/non-warlike service over the period. This may have created a large pool of people who may have a higher probability of making a successful claim and, where they do make a claim, may be eligible for higher benefits.

3.1.5 The availability of deployment opportunities has almost certainly altered the pattern of discharges over the last decade and a half. Both DVA and Defence have advised that discharge rates fall when there are opportunities for deployment. This is because there is both a very strong financial incentive (in the form of substantial tax free allowances) and because it is an opportunity for Defence personnel to make use of their training.

The 2020 AGA Report also noted that compensation liabilities may be affected by new or unusual conditions in the operational environment:

3.1.8 Exposure to hazards that may not have been recognised as dangerous at the time is a further factor in the operational environment. Asbestos is an obvious example that has impacted on DRCA expenditure. It is possible that currently unrecognised hazards will be identified in future and give rise to claims.

One example of a deployment raising novel compensation issues is Operation BUSHFIRE ASSIST 2019-2020 in January 2020, where up to 3,000 Australian Army Reservists were called up to assist with firefighting and infrastructure support in the bushfires in South Eastern New South Wales and North Eastern Victoria. It is likely that these Reservists and civilian volunteers were exposed to unusually high level of airborne contaminants and, at least in the case of the Reservists, many were not trained or properly equipped to cope with the hazardous circumstances encountered. Other peacetime operations of this nature have included:

- Operation COVID-19 ASSIST: ADF members who undertook a support role to the NSW Police Force during the Sydney lock-down in 2021 received an additional allowance under pt 12 of *Defence Determination 2016/19, Conditions of service*. Item 1 in sch 1 to the *Defence Determination, Conditions of service Amendment (Operation COVID-19 ASSIST allowance) Determination 2022 (No. 5)* identified a risk of exposure to disease in the operation:

This Part provides an allowance to members who are force assigned to Operation COVID-19 ASSIST in Australia, recognising the increased risk of exposure to the COVID-19 virus and the disruption to usual working patterns, the uncertainty and duration of the commitment, and additional unique pressures faced while duties are being undertaken by members during the operation.

- Operation TONGA ASSIST 2022: *HMAS Adelaide* sailed to Tonga in February 2022 on a relief mission following the Hunga Tonga volcanic eruption and tsunami. At least 23 cases of Covid were recorded among the crew. Given most of these cases were contracted during the voyage of the naval vessel to Tonga, compensation entitlements are likely to arise from this deployment. The unanswered question is how many and how severe.

These deployments, and others such as the commitment of ADF members on the ground in the South East Queensland and NSW floods in February/March 2022, suggest that the ADF may increasingly be called upon to provide support in civil emergencies. This role is not necessarily covered by their current training and, if it continues and expands, may skew training away from the key role of the ADF – the military defence of Australia. A bifurcated focus for the ADF could have significant implications for military compensation, particularly if ADF training, materiel and WHS does not adapt to this new role.

While the impact on military compensation of this developing new civilian role for the ADF is uncertain, it is, at least, estimable and quantifiable. The impact on military compensation of major new ADF deployments overseas is, at best, a 'known unknown'.

Unravelling Legislative Complexity

The legislative provisions governing military compensation in Australia, as this paper illustrates, are undoubtedly complex. The complexity arises from the manner in which compensation schemes emerged from, and were affected by, the various deployments of the ADF overseas, and from the overall legislative approach that this is beneficial legislation in which no veteran should be worse off because of amendment to the legislation or reform of any element of the various schemes. Many reviews have commented on the legislative complexity over the years, but each of the developments discussed in this paper has compounded the problem.

The current military compensation schemes

The complexity is demonstrated by features of the main legislative frameworks:

- There are three distinct legislative schemes – the VEA, the DRCA and the MRCA. The VEA was established, and has remained, as a pension-based scheme with no access to lump sums, and provides medical treatment through treatment cards. It covers active service by ADF members in overseas deployments and, after 1972, some veterans with peacetime service only. The DRCA was created from the three compensation schemes covering Commonwealth employees – the 1930 Act, the 1971 Act and the SRCA. The DRCA has a conventional workers compensation framework; namely incapacity payments until age 67; lump sum payments for permanent impairment; a focus on rehabilitation and return to work; and (previously) compensation for medical treatment by reimbursement of treatment costs incurred by the member. It primarily covers peacetime service by ADF members, but some veterans have a dual entitlement with the VEA. The MRCA is an amalgam of the VEA and the DRCA, which covers all injuries suffered by ADF members after 1 July 2004. The MRCA follows the VEA in its provisions for determination of initial liability (causal contribution, use of Statements of Principles and two standards of proof). It is similar to the DRCA in its adoption of a compensation model with incapacity payments, compensation for permanent impairment and a focus on rehabilitation, and in the general structure of the scheme. The MRCA includes an irrevocable election to receive a VEA-style special rate pension rather than compensation payments.
- The three main schemes relate to each other in very complex ways, including dual

entitlements under each of the schemes for many ADF members, amendments and transitional provisions which maintain 'grandfathered' entitlements, and lack of legal certainty as to which scheme applies in many cases.

- Amendments to resolve anomalies often lead to further perceived anomalies and reactive legislative responses to further pressures by interest groups.
- Attempts at alignment between the schemes have on occasions been modestly successful, however alignment is sometimes achieved by adopting an approach in which the most favourable element of each scheme is adopted, even though the relevant entitlements are not comparable due to fundamental differences between the schemes.

While there are three main legislative schemes within the military compensation framework, as discussed above, there are in fact at least nine pieces of Commonwealth legislation with overlapping application to ADF members, including the:

- *Veterans' Entitlements Act 1986*, which successfully consolidated many previous Repatriation Acts in 1986, and covers injuries and disease suffered in active service since WW1, and peacetime service between 7 December 1972 and 7 April 1994.
- *Commonwealth Employees' Compensation Act 1930*, which covered injuries in peacetime injuries between 3 January 1949 and 31 August 1971, and which has been continued in effect by pt X of the DRCA.
- *Compensation (Commonwealth Government Employees) Act 1971*, which covered peacetime injuries between 1 September 1971 and 30 November 1988, and which has been continued in effect by pt X DRCA.
- *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, which replaced the *Safety, Rehabilitation and Compensation Act 1988* on 12 October 2017, with retrospective effect from 1 December 1988. The DRCA covers peacetime injuries between 1 December 1988 and 30 June 2004, and operational service from 7 April 1994 to 30 June 2004.
- *Military Compensation Act 1994*, which established the 'Military Compensation Scheme' by modification of the SRCA/DRCA, and applies to injuries to ADF personnel between 7 April 1994 and 30 June 2004.
- *Defence Act 1903*: Defence Determinations made under the Defence Act provide additional compensation for death and severe injuries to ADF members covered by the DRCA/SRCA, from 7 April 1994. The Defence Act also provides a basis for ex-gratia compensation payments to injured ADF members in special circumstances, including veterans (and dependants) who were injured in peacetime service before 1949.
- *Military Rehabilitation and Compensation Act 2004* and the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*, which establish a military compensation scheme for injuries suffered in ADF service on and from 1 July 2004.
- *Australian Participants in British Nuclear Tests (Treatment) Act 2006*, which provided medical treatment for diseases suffered by Australian military and civilian personnel who were exposed to radiation in the British nuclear tests in Australia between 1952 and 1963.
- *Treatment Benefits (Special Access) Act 2019*, which provided medical treatment for members of Australian Civilian Surgical and Medical Teams (CSMTs) that provided medical aid, training and treatment to local Vietnamese people during the Vietnam War.

This list does not include the three main military superannuation schemes, discussed

above in pt 7, which also interact with military compensation and which involve off-setting arrangements between compensation and superannuation entitlements.

One way to unravel this complexity might be by careful legislative change, towards a unified scheme that has a clear conceptual basis. Another way might be to scrap the present, complex, intertwined legislative schemes and create a single new compensation Act for all veterans, which is simple in structure and expression, and which meets veterans' expectations.

Hidden jurisprudence

The interactions between all of this legislation are legally complex and, in many cases, are not clear even to lawyers, let alone ESO lay advocates. There are Federal Court and AAT cases which give guidance on many such issues, however much still remains uncertain because many cases which might test the legislation are resolved by the VRB, or are settled during the AAT review process. The reasoning in such cases is not made public, but hopefully informs future DVA decision-making. There is, however, no opportunity for the legal profession or ESO advocates to gain this knowledge, except through the imperfect mechanism of the 'bush telegraph'.

One example of this hidden jurisprudence is the fact that a veteran who is in receipt of VEA entitlements is able to make a claim under DRCA for the same injury and, if the claim is successful, DRCA benefits will be paid and offset against VEA entitlements. When a claim of this nature was made several years ago (by a legally represented veteran), DVA did not oppose it and apparently similar claims are now routinely accepted by DVA. This development in military compensation legal practice remains unpublicised.

One new Act?

In my experience, many ESOs are frustrated with the complexity of the current schemes and their interactions. They are attracted by the one new Act approach, but have no clear idea how this could be achieved and what should be done about the enormous legacy of accrued rights and individual entitlements.

The *Preliminary Interim Report* by Commissioner Boss, the Interim National Commissioner for Defence and Veteran Suicide Prevention (Boss Report, 2021) essentially suggested a new Act approach, but its focus was on how to achieve a wellbeing model, rather than how to implement radical legislative change, as the following recommendation illustrates:

Recommendation 4.1

The Australian Government should fundamentally reconsider the purpose of the Department of Veterans' Affairs (DVA) rehabilitation and compensation legislative framework. The current framework, which is premised on a compensation model, should be replaced with a wellbeing model, which incorporates concepts of social insurance more aligned with the National Disability Insurance Scheme. This model should include safety net access to payments.

The Report's suggestion for a move from a compensation model to a wellbeing model, which incorporates concepts of social insurance as illustrated by the NDIS, is, in my opinion, not practicable:

- The social insurance model of the NDIS was created out of a disparate range of disability services where disabled Australians had very few rights or legal entitlements (apart from discrimination law). The services they previously received were not legal entitlements; they were simply an unfair and inadequate collection of discretionary government services and charitable provision. The NDIS started from (almost) a clean slate and did not engage a client base of more than one million Australian veterans, each of whom has an existing legal right to compensation payments, treatment cards, rehabilitation services (for example), and many of whom may, under the existing systems, have the right to make claims for additional entitlements for up to another 60 years.
- Even though the NDIS is in its early days, tensions are already emerging

around the costs of the scheme, the quality and sensitivity of its administration, and problems in its review processes. Similar problems may quickly beset a veterans' social insurance scheme.

In my opinion, a wellbeing approach is not fundamentally inconsistent with a compensation model. A compensation model can deliver high quality health and financial benefits. However, this can be difficult to achieve due to factors such as the cost of the benefits under the scheme, resentment by clients who are refused assistance because they do not meet liability or severity of injury criteria, administrative shortcomings, and accessibility problems.

Two legislative schemes – The Productivity Commission approach

The Productivity Commission (2019) proposed a conceptual basis for a reformed military compensation system: maintaining the VEA for its existing client base until that cohort reaches end-of-life (scheme 1); improving the MRCA legislation and bringing the DRCA into alignment with the MRCA over time (scheme 2); and recommendations how to transition existing scheme members into the two new schemes, which would commence in 2025. See Recommendation 19.1, discussed above in pt 7.

This is an approach which I think may be achievable. It would, however, definitely face major challenges such as costs (discussed below), maintaining reasonable equity while withstanding pressure by interest groups for 'more' and 'no one should be worse off', and drafting legislative amendments which navigate the shoals of accrued rights and withstand the impact of determined litigation. The long-term viability of our military compensation arrangements are likely to depend on successfully steering such a course.

Improving Scheme 2 (the MRCA) - Incapacity provisions

One area for early legislative attention is the incapacity compensation provisions in MRCA ch 4, pts 3, 4 and 5. These provisions are greatly 'overdrafted', taking 90 pages and more than 110 sections to provide entitlement to compensation for incapacity. This must be contrasted with the 18 pages and 17 sections covering incapacity payments in the SRCA, upon which the MRCA provisions were based. The major drafting problems are length and unnecessary complexity, which occurred because the MRCA sections attempted to legislate what was essentially detailed policy created by the Military Compensation and Rehabilitation Service within Defence for the administration of incapacity entitlements (particularly in relation to Reservists). These provisions in MRCA could have repetition removed, and be refined to express essential principles rather than exhaustively legislate processing steps.

A further issue arising in relation to MRCA incapacity payments is that the level of payment is too generous after 45 weeks of incapacity (in my opinion, which I expressed in the MRCA Review deliberations). This probably is a disincentive to return to work by injured members after discharge from the ADF, an outcome which is fundamental to the future wellbeing of those members who still have capacity for paid employment. One contributor to this problem is the additional amount added to incapacity payments under MRCA ss 104(1), 109(1), 141(1), 144(1), 164(1) and 168(1), which was set at \$100 per week in 2004 and now is \$171.20 per week. The conceptual basis for this payment was compensation for the loss of non-pay-related allowances, however, in MRCA, the Service Allowance is added to normal earnings for calculation of incapacity compensation for full-time members, and this allowance is intended to compensate for the rigours of service life. I suspect that the additional amount was one of the compromises between DVA and stakeholders to get the new 2004 Act 'over the line'. Perhaps the removal of this additional payment could be compensated by introducing superannuation guarantee payments on top of incapacity payments, to ensure that seriously injured members have superannuation savings when their incapacity benefits cease at pension age.

Improving Scheme 2 (the MRCA) – Review of decisions

A right of appeal in veterans' legislation has existed since 1915, and the first external appeal tribunals were established in 1929. From the 1930s, a three-tier system existed for some 40 years: (i) Repatriation Boards; (ii) the Repatriation Commission; and (iii) appeal tribunals for entitlement and assessment. Following the Toose Report in 1975, the Repatriation Review Tribunal was established, with a right of further review by the AAT. In 1985, the Repatriation Review Tribunal was replaced by the VRB. (MRCA Review, 2011, pp 222-223) An entirely different review system emerged for the SRCA: reconsideration by a more senior internal review officer within the determining authority; and a right of merits review by the AAT.

Initially the MRCA offered both appeal paths (possibly reflecting the compromises necessary to achieve the MRCA), however a single review path was recommended by the MRCA Review in 2011 and was finally implemented in 2017: (i) internal review on own motion by the MRCC or the CDF (s 347), but no right for a claimant to require internal review; (ii) merits review by the VRB, including an enhanced case management and ADR process; and (iii) AAT merits review, which includes case management and settlement processes before a formal hearing process.

The DRCA continues to provide the review process which has been in operation since the commencement of the SRCA: (i) reconsideration of decisions by a person other than the original decision-maker (s 62); (ii) merits review by the AAT (s 64), with the applicant able to receive legal costs if the application for review is successful (s 67); and (iii) an appeal from the AAT to the Federal Court on matters of law or by judicial review.

Over the life of the MRCA, there have been surprisingly few concluded decisions by the AAT on that Act: 20 between 2007 and 2011; 27 between 2012 and 2016; and 30 between 2017 and 2021. This can be contrasted with the SRCA/DRCA, where the MCRS and later the MRCC have been very active and assertive litigants in the AAT in the compensation jurisdiction. The number of concluded AAT decisions on the DRCA has, however, significantly reduced in the past two years, numbering 11 in 2020 and 7 in 2021. This is probably because of a higher rate of settlement at the VRB and the AAT, and a less litigious approach by the MRCC.

There are many sensitivities in relation to review of military compensation decisions, including the role and operation of the VRB, how to support informed advocacy, the existence of different review arrangements for each of the main schemes, and the alleged adversarial approach taken by DVA. It is beyond the scope of this paper to attempt to resolve these contradictory currents, however several observations are apposite:

- If the Productivity Commission's proposal for a two scheme solution to legislative complexity is adopted, it may be desirable to accept that the review arrangements for each scheme could be different.
- It may be preferable to continue the review arrangements for Scheme 1 (the VEA) more or less as is, adopting any improvements that have wide support by stakeholders.
- The review arrangements for Scheme 2 (an improved MRCA, including DRCA) should be developed with a view to best practice, but taking into account unique features of military compensation and the history of review in that jurisdiction. In my opinion, this would involve: (i) an internal review of the original decision which is conducted expeditiously, and which provides (inter alia) the basis for written submissions by the MRCC to the VRB; (ii) review by the VRB, building upon its strengths and improving upon its current weaknesses; and (iii) merits review by the AAT, with a mechanism for support of informed advocacy funded by the Commonwealth Government (perhaps through the community legal centre/legal aid area of the Attorney-General's Department, rather than directly from DVA).
- The recent reduction in the number of AAT reviews going to a final hearing suggests

that the DVA (through the Repatriation Commission and the MRCC) is adopting a less litigious approach to review of military compensation decisions. It is important, however, that test cases and claims that have no merit continue to be taken by the DVA to the AAT. Without this, there is no accessible jurisprudence and a consequent lessening of accountability. An appropriate balance needs to be struck between each individual's understandable desire for a positive outcome of their application for review, and the overall integrity of the scheme, which relies on a fair application of known rules to the whole of the veteran community. Any adversarial attitudes by the Department's advocates should be addressed by reinforcing a positive, veteran centric culture, and by ensuring that those advocates are well trained and well supported. This would be in line with the Model Litigant Policy (Cth) under the *Legal Services Direction 2017* (Cth) App B. In my opinion, it is also necessary to avoid briefing out AAT matters to private lawyers in a 'panel' system. In whatever manner these firms are briefed, it is in the nature of their business to 'win', and to value, justify and price their work in that cultural framework. This is the opposite of what the DVA should be seeking to achieve. Briefing to external firms may be necessary in appeals to the Federal Court, because of the specialist skills required in that field of litigation.

Scheme 1 (the VEA) – Reducing the longevity of this residual scheme

As discussed above in pt 7, the Productivity Commission (2019) recommended that the VEA be continued in effect as a stand-alone military compensation scheme (Scheme 1) for existing members of the scheme. It commented on the basis for maintaining Scheme 1 and how to offer choice to join Scheme 2:

As noted earlier, scheme 2 is the scheme better suited for the modern veteran, and it would be desirable to transfer veterans to this scheme where there would be no detriment to the veteran.

There are unlikely to be benefits from switching older veterans to scheme 2. It is expected that these veterans will be better off on the lifetime pension provided by scheme 1, and are unlikely to benefit from the rehabilitation focus of scheme 2. Veterans older than 55 years of age when the change is implemented who have been allocated to scheme 1 should have all their future claims processed under this scheme, with no option to switch.

However, younger veterans *may* be better off with the rehabilitation and income replacement focus of scheme 2. Veterans 55 years of age or younger at the implementation date should be given the option to switch to scheme 2 prior to, or at the time of, their next claim. If they elect to switch, the current benefits they are receiving would be recalculated based on scheme 2, and all future claims would go through scheme 2. They would receive support to help them make this decision, but the decision would be irrevocable.

Most veterans receiving benefits under the VEA will be over 55 at the implementation date. About 4000 veterans receiving a VEA disability pension in December 2017 will be under 55 in 2025, and this is expected to decline over time. Offering financial advice and processing requests to switch schemes for this group should therefore be manageable. (p 830)

Under this scenario, Scheme 1 will continue in effect until at least the 2080s because it will cover the widow/ers of VEA special rate pensioners, who may not yet have been born. This is illustrated by the pension scheme for United States Civil War veterans, which lost its last pensioner in 2020 when Irene Triplett died. She was the daughter of a Civil War veteran who married at 80 in 1924, and she lived until 90 years of age. She was receiving a pension of \$US73.30 a month from the US Federal Department of Veterans' Affairs at the time of her death. The last remaining widow of a Civil War veteran is believed to have died in 2021, having married a 93-year-old veteran in 1936 at the age of 17. She did not ever seek a pension under the US Government scheme. The VEA may not show the same extreme longevity as the US Civil War scheme, but it will last for at least 60 more years if not curtailed.

In order to achieve an earlier closure of Scheme 1, two actions could be considered:

- Moving the younger cohort of VEA veterans to Scheme 2 on a compulsory basis, rather than an optional election basis; and
- From the date of the amending legislation, closing access to VEA pension entitlements

and treatment entitlements for widows and widowers who were not married to, or in a domestic partnership with, the veteran at the time of the compensable injury (or possibly the date of grant of TPI pension).

These options may affect accrued rights and would affect expectations of future entitlements. However, there probably would not be an acquisition of property in Constitutional terms, and the changes could be found to be legally valid as an alteration to statutory entitlements. I would argue that the movement of the younger cohort into Scheme 2 could be beneficial for many of them, particularly if the transfer was well constructed, with more 'carrots' than 'sticks'. In addition, an earlier closure of Scheme 1 would reduce overall complexity in the military compensation system, and should reduce the frictions that arise when particular groups in the community have differing sets of entitlements, without a clear and equitable basis for that differentiation.

Service Delivery for ADF Members, Veterans and Their Families

DVA administration

The consensus of reports since 2017 is that DVA has fallen short in its administration of the military compensation system. I think that this must be balanced against the failures of the ADF in transition management and in WHS (for example the entrenched culture of bullying, and difficulties in addressing sexual harassment), the delays by the CSC in meeting its superannuation determination obligations, and the disinclination of the Department of Finance to fund necessary reforms in DVA administration, including a long overdue replacement of its claims processing information technology (IT).

It seems to me that a pathway out of these problems is emerging, and that it is important to pursue these administrative reforms with vigour, and in consultation with the ex-service community and other stakeholders. In turn, ex-service organisations need to be demanding of change, but realistic about the fact that DVA has a responsibility to be fair and to act in the broader community interest, which at times is not necessarily compatible with the personal interests of individual veterans.

In particular, I believe that the two major paths to administrative reform are improved transition from ADF to civilian life, and expeditious claims processing. This would provide a solid foundation for other, Veteran Centric, reforms and should contribute to prevention of suicide by ADF members and ex-serving members.

Veteran Centric Reform

The 2020 Australian Government Actuary Report commented positively on one DVA initiative, the Veterans' Employment Program:

8.1.3 DVA has recently undertaken a major review of veterans' services with a focus on investments that might be expected to yield longer term savings. One area that received particular attention was incapacity payments and the very low rates of exit relative to other compensation schemes. The 2018-19 Budget included funding for the Veterans' Employment Program, which includes a number of elements designed to increase veterans' workforce participation, including rehabilitation and enhanced employment opportunities.

Veteran Centric Reform (VCR), initiated by DVA, attracted an interesting comment in the AGA Report 2020 on its effect on the rate of permanent impairment claims:

10.1.8 The administrative changes made within DVA have increased the accessibility of services and benefits to the veteran community and policy initiatives such as Veteran Centric Reform have encouraged veterans to claim early for DVA benefits and increased awareness of these benefits amongst existing ADF members and the veteran population. This may have a short term effect in bringing forward claimants who may otherwise have claimed for a benefit in later years and captured existing veterans who may have faced barriers to claiming in previous years. The exact impact of these changes will not be known for a number of years and there is currently not enough data to help determine what the magnitude or length of the impact could be.

The VCR also received an endorsement by the Commonwealth Ombudsman (2022) in Report 01/2022:

DVA has been implementing a Veteran Centric Reform (VCR) program since 2017 to deliver on the Government's vision for improved service delivery, person-centred design, and digital transformation. One of the main initiatives under the VCR program is to improve services for veterans and their families through better claims processing. Good communication with veterans is essential to this initiative. In particular, good communication through the provision of clear and regular information to veterans throughout the claim process can help to manage veterans' expectations and reduce feelings of uncertainty, anxiety or frustration while waiting for their claim to be assessed. ...

Our investigation did not identify any significant concerns about DVA's policy and procedural framework for managing communication with veterans during the claim process. We observed that DVA's policy and procedural framework is relatively mature, and DVA is progressing several positive initiatives to further improve its approach to service delivery, including better communication with veterans throughout the claim process.

We acknowledge that DVA is currently implementing some initiatives as part of the VCR program and this is likely to further improve DVA's approach to communicating with veterans. ... (p 1)

I certainly concur with the strong community support for Veteran Centric Reform identified by the Senate Committee in *The Constant Battle Report*.

Transition management

Progress has been made in relation to one important matter, transition from the ADF into civilian life, which was the subject of considerable discussion and recommendations by the 2011 MRCA Review (ch 7, recs 7.1-7.11), the 2017 *The Constant Battle Report* (ch 6, recs 14-19), the 2019 Productivity Commission Final Report (ch 7, recs 7.1-7.3), and the 2021 Boss Report (ch 7). The Joint Transition Authority (JTA) was established in October 2020. It sits within the Department of Defence and works in partnership with the DVA and the CSC. The JTA conducted a JTA Consultation Forum in September 2021 and is working on a Transition Strategy for publication in the first quarter of 2022. The early priorities of the JTA are: collection, analysis and sharing of transition data; collection and analysis of insights in a JTA Insights Register; development of a single ADF Transition Manual to unify the approach to transition across the three Services; a review of Separation Health Examination (SHE) procedures; operational improvements in transition in each Service, for example with the Royal Australian Navy (RAN) to improve the process for personnel transition while posted to operational units at sea; and identification of, and prioritisation of support for vulnerable transitioning members. (Department of Defence, 2021a)

There is little doubt that improved transition arrangements will have a positive impact on the military compensation system generally.

A Financial Time Bomb?

The financing of veterans' entitlements and military compensation in Australia has features which lead to some opaqueness in the cost of the system to the Australian community. These include:

- Appropriations for the costs of compensation are built into the entitling legislation. This means that scheme administrators cannot control or modify benefit expenditures except through legislative change which reduces either the quantum of individual benefit levels or the number of veterans who can access an entitlement.
- Necessarily, reductions in benefit levels or reduction in access are politically difficult as financial support for veterans has wide and non-partisan community support. When changes to legislation are considered, the political reality is that the change will often be achieved only if a guarantee is given that no individual will be worse off. This approach mitigates against a reduction in expenditures, even if the measure has a strong justification.
- The administrative cost of benefit delivery through the DVA and Defence is subject to annual Budget processes. The outcomes of these processes can be

very arbitrary, usually focused on the administrative cost and not the increased cost of benefits which may occur because of inadequate administration. Arguably, an example of this was the repeated failure of DVA Budget bids after 2010 for the costs of a new, integrated claims processing IT system, until the furore surrounding The Constant Battle Report highlighted the human and financial cost of delays and inadequacies in claims processing.

- The financial cost to the community of veterans' entitlements and military compensation is poorly recorded and poorly understood. In particular, it is very difficult to establish the financial linkage between ADF actions (for example deployments, and cultural failures such as bullying) and the ultimate long-term cost to the Australian community of those actions. This has been one impetus for the consideration of a 'notional premium' for ADF employment in successive reviews, including the 2011 MRCA Review and the 2019 Productivity Commission Final Report *A Better Way to Support Veterans*.

The 2020 Report by the Australian Government Actuary, *The Costs of Military Compensation as at 30 June 2019*, is an informative window into the costs of the military compensation system, and a frightening prospect of future cost escalation is indicated by the analysis.

The AGA Report considered only military compensation (DRCA and MRCA) and did not consider veterans' entitlements under the VEA. At present, the costs of veterans' entitlements are high, particularly in respect of age-related health costs; however this veterans' group is essentially closed and largely comprises widows from all conflicts up to Vietnam and a rapidly decreasing group of WW2 and Korean War veterans. The future of cost pressures in veterans' entitlements are more uncertain for two other groups of veterans: those who served in Vietnam and now are almost all past pension age; and veterans who served in conflicts prior to 1 July 2004 (for example peacekeeping, the First Gulf War and Timor Leste) and have a dual entitlement under the VEA and the DRCA.

The AGA Report at Tables 19.8 and 19.9 sets out estimates of a notional military compensation premium for 2019-20 for the ADF of \$2,333.6m⁵ (compared with a notional premium of \$1,448m at the previous valuation). This premium amount translates to a notional insurance premium of 37.2 per cent of ADF salaries: 56.5 per cent for the Army, 21.5 per cent for the Navy, and 16.7 per cent for the RAAF.

An upward trend in military compensation liabilities is marked. The AGA Report at Table 1.2 estimated an outstanding claims liability at 30 June 2019 of \$19,689.1m compared with an estimated liability at 30 June 2018 of \$14,426.8m in the previous actuarial report.⁶ This increase was partly due to changed assumptions and partly due to increased compensation costs. The Report also observed, at [10.2.1], that MRCA permanent impairment claims increased more than ninefold over the past six years, and doubled year on year from 2017 to 2019 (from \$200m to \$750m), driven by both an increase in the average size of claim payments and the number of claimants.

Throughout the whole of the AGA Report there is a story of increasing compensation costs in recent years. The military compensation cost escalation picture between 2004 and 2010 was relatively reassuring as the MRCA showed a relatively low level of take-up,

⁵ This premium estimate is affected by the exclusion of Defence liabilities for the Additional Death Benefit, the Severe Injury Adjustment and common law claims. It is also understated because other uncertainties, including for example the near impossibility of ascertaining the potential liability arising from the provisions in MRCA that entitle all veterans who have rendered warlike service on or after 1 July 2004 to a Gold Card at age 70. This liability will commence in around 10 years, but significant numbers are unlikely for another 30 years or so ([12.1.10]).

⁶ This estimate of total liabilities does not include the liability in relation to additional benefits payable on death and severe injury under the *Defence Act 2003* as these cost are borne by Defence and not by DVA; see [1.2.2]. This has the effect of understating the DRCA liability, but does not affect the MRCA liability as these enhanced benefit levels are incorporated into the MRCA. The Report also notes, at [2.4.3], that the estimates do not include liabilities arising from common law claims against Defence, which include asbestos liabilities and common law actions by surviving spouses of common law plaintiffs, who were themselves barred from actions for damages by s 44 SRCA and s 388 MRCA.

particularly in the first few years of the new scheme. However, this is now changing, and both DRCA and MRCA benefit costs are increasing rapidly in both incapacity payments and compensation for permanent impairment. The Report discusses causes of this increase:

1.5.4 While the increase of \$4.4bn in the estimate of the liability as at 30 June 2019 is substantial, it is my best estimate having regard to current experience; that is, I have not been intentionally conservative. The increase in the liability has been primarily driven by:

- An increase in the number of medical recipients
- An increase in the utilisation and average cost of medical benefits
- An increase in the number of claimants in incapacity
- An increase in the number of claimants and average size of benefits for permanent impairment

The AGA Report makes a sobering comment on future trends:

2.2.1 Figure 2.1 shows total outlays on the MCS since 1996-97. Prior to 2004, expenditure had grown at a steady but moderate pace, averaging around 5 per cent per annum. The introduction of MRCA from 1 July 2004 led to a significant disruption in experience with an initial drop in outlays followed by a return to growth. Experience from 2012 accelerated at a much higher rate than had been seen previously in the scheme. From 2012 to 2019, outlays increased at a rate of 25% per annum with an even more significant shift in experience over the last 4 years. Growth from 2015 to 2019 has been extremely rapid, increasing year on year to a 61% increase from 2018 to 2019.

2.2.2 There are a number of possible interpretations of this data. An earlier view was that the growth from 2011 to 2015 was, in part, compensating for the very low growth in the years after the introduction of MRCA. However the more rapid increase in recent years challenges this view. Whilst there are differences in the benefits provided under MRCA, there has also been changes in the environment in which the schemes operate, including changing attitudes and modifications to DVA administrative practices. It now seems more likely that the most recent experience is part of the schemes transition to a “new normal” that could be expected to persist indefinitely into the future. This latter interpretation would imply that the behaviour of MRCA claimants is fundamentally different from that observed for DRCA claimants prior to the scheme’s closure. This ‘new normal’ that we have seen in recent experience is still changing year on year and currently far from a stable, mature state. As such, there is considerable uncertainty when interpreting this experience for long term future projections.

2.2.3 Continued increases in recent experience has led us to believe that we are not dealing with a temporary anomaly but rather a genuine shift in experience that needs to be taken into account in setting valuation assumptions. The change from a regime where claims could be made under either the DRCA or the VEA to one where all claims must come through the MRCA is likely to be playing some part, but so is the introduction of the single claim process, the availability of online claim facilities and the increasing involvement of ex-service organisations in supporting veterans’ claims under DRCA and MRCA. The deviation of experience from pre-DRCA closure has persisted into the most recent year and has exhibited the highest difference seen to date.

DVA claims processing delay is a relevant factor in the cashflow projections for DRCA and MRCA, discussed in relation to Figure 1.3 of the AGA Report:

1.4.2 The cashflows have increased from the previous valuation, most noticeably from 2020-21 onwards. This step change is due to additional growth projected to account for the current rate of lodged permanent impairment claims and the existing backlog of unprocessed claims. It is important to note that there is substantial uncertainty as to the timing and magnitude of this impact as it is partially subject to processing constraints where funding decisions are outside of DVA’s control. However, the current rate of processing appears unsustainable if experience in permanent impairment continues at its current pace with a continuing build-up of the existing backlog of unprocessed claims.

A financial time bomb is ticking!

Putting It All Together: Final Personal Observations

As the history of military compensation in Australia shows, reviews and reports are thick on the ground. However, the legacy of these appears to be increased legislative complexity, increased benefit costs, and service delivery which has not met the expectations of ESO stakeholders. My personal observations about how to move on from here are set out in this final section of the paper.

Legislative reform

I consider that the two scheme approach proposed by the Productivity Commission offers a reasonable chance of achieving substantial legislative reform, although undoubtedly the process will be highly contested and painful for all involved.

In my opinion, an approach of consolidating the whole system into a single Act (whether an entirely new Act, or some development of the MRCA) is unlikely to succeed because:

- the VEA is conceptually different to the MRCA/DRCA;
- there are a very large number of elderly veterans who are embedded in the VEA system, and are unlikely to cope well with significant change; and
- an entirely new legislative framework could not disassociate itself from accrued rights, entitlements and expectations within twenty years (or more).

A wellbeing approach

There is an undoubted need for a shift towards a wellbeing approach to military compensation. This would require informed policy proposals, and practical, hard-headed reform of ADF transition and DVA service delivery. The Royal Commission into Defence and Veteran Suicide may be able to play a lead role in mapping a path for this transformation.

Scheme administration

The Constant Battle report showed the depth of community concern about the administration of military compensation in Australia, and the significant impact of poor administrative practices on the rate of suicide of young ex-ADF members. The report, and a number of other recent reports on scheme administration, have mapped out a path for administrative reform. The challenge is to implement these reforms, with a focus on the wellbeing of veterans and their families. The reforms must extend beyond DVA to the ADF, the CSC, and other military compensation stakeholders.

Previous reports such as the MRCA Review outlined the need for reform in transition, rehabilitation and claims management, however the pace of change has been slower than necessary. Much of this undoubtedly can be sheeted home to the DVA, which has the primary responsibility for implementation. However it appears that DVA has been subjected to substantial attrition over the past 10 years through application of the Efficiency Dividend, and through difficulties in achieving Budget bids for necessary administrative reforms (including the need to relace its outdated claims management IT). Real improvement in the situation of veterans will not be achieved without an appropriate level of investment in the DVA, and in military compensation administration generally.

Scheme costs

The cost of the VEA is very high, particularly in respect of medical treatment costs which reflect the large number of Gold Cards on issue and the increasing cost of what are, essentially, age-related diseases. This, however, may not be of great concern as the future path of VEA costs is relatively predictable, and those costs will decline in future years as the WW2, Korea and Vietnam cohorts reach end-of-life. It may be desirable to move later veteran cohorts (such as Timor Leste, peacekeepers and the First Gulf War) out of the VEA into a reformed MRCA, but this may be less for cost reasons and more for improved rehabilitation and return to work outcomes, and the opportunity to close down the VEA earlier than 2080 (or later). If the VEA was reopened in the face of a major international conflict involving hundreds of thousands of ADF members (as has been mooted by some policy makers), cost projections would change significantly.

The increasing cost of the MRCA scheme is very worrying, and is likely to impact on choices for reform of the military compensation system. If, for example, military compensation were to move away from a causal threshold for acceptance of liability for

compensation, and simply introduce a scheme of medical treatment and financial support for all veterans according to personal need, the long-term financial cost to the Australian community could become unsupportable, and community pressure for significant restrictions on benefits and services could emerge. This problem would be compounded if the definition of a 'veteran' was widely drawn, for example as a person with one day of service in the Permanent Forces.

The cost of the DRCA, which is discussed in pt 5 above, will become merged with those of the MRCA if Scheme 2 is implemented.

The best hope for containment of scheme costs may rest with the following actions:

- Early intervention during ADF service, well structured transition, a focus on rehabilitation and return to work, and a wellbeing approach. Non-liability health services immediately after discharge, and interim financial support until claim determination would assist positive outcomes.
- Improved WHS in the ADF, in particular in respect of systemic problems of culture and bullying, and suicide prevention.
- An improved understanding of the compensation cost drivers in ADF activities. A notional premium for the ADF might be helpful to this understanding.
- Improved scheme administration by DVA, including in particular the removal of delays in claim processing, improved communication with members, veterans and their families, and a supportive approach by the Department of Finance in relation to scheme administration costs.
- Reduction in legislative complexity, while maintaining the liability-based framework of military compensation.

Conclusion

The military compensation scheme is facing a crisis of confidence. To address this, I consider that there has to be a measured, careful approach to legislative reform, and a thorough and rapid reform of scheme administration and service delivery to ADF members, veterans and their families.

An attempt to address the crisis of confidence by radical legislative change is fraught with danger. A veteran-centric, wellbeing approach by the ADF and DVA to address community concerns about problems in military compensation has better prospects of success.

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Acronyms and Abbreviations

1930 Act	<i>Commonwealth Employees' Compensation Act 1930</i>
1971 Act	<i>Compensation (Commonwealth Government Employees) Act 1971</i>
1988 Act	<i>Safety, Rehabilitation and Compensation Act 1988</i>
AAT	Administrative Appeals Tribunal
ADB	Additional death benefit
ADF	Australian Defence Force
ADR	Alternative dispute resolution
AGA	Australian Government Actuary
AIAL	Australian Institute of Administrative Law
ANAO	Australian National Audit Office
AS	Assistant Secretary
BCOF	British Commonwealth Occupation Force
C&T Act	<i>Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004</i>
CDDA	Compensation for Detriment Caused by Defective Administration
CDF	Chief of Defence Force
CEO	Chief Executive Officer

CERC Act	<i>Commonwealth Employees' Rehabilitation and Compensation Act 1988</i>
CFTS	Continuous full time service
CLR	Commonwealth Law Reports
CSMTs	Civilian Surgical and Medical Teams
CSC	Commonwealth Superannuation Corporation
Cth	Commonwealth
DEEWR	Department of Education, Employment and Workplace Relations
DFRDB	Defence Force Retirement and Death Benefits
DRCA	<i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</i>
DVA	Department of Veterans' Affairs
EDA	Extreme Disablement Adjustment
ESO	Ex-service organisation
FAS	First Assistant Secretary
FCA	Federal Court of Australia
FCAFC	Full Court of the Federal Court of Australia
GARP	Guide to Assessment of Rates of Veterans' Pensions
GARP-M	Guide to Determining Impairment and Compensation (MRCA)
Gold Card	DVA Health Card – for All Conditions
HCA	High Court of Australia
ICBR	Incurred but not reported
IT	Information technology
JTA	Joint Transition Authority
MCA	<i>Military Compensation Act 1994</i>
MCRS	Military Compensation and Rehabilitation Service
MRCA	<i>Military Rehabilitation and Compensation Act 2004 (Cth)</i>
MRCC	Military Rehabilitation and Compensation Commission
MSBS	Military Superannuation and Benefits Scheme
NDIS	National Disability Insurance Scheme
NE	Normal earnings
NEL	Non-economic loss
PI	Permanent impairment
PSSapp	Public Sector Superannuation accumulation plan
PTSD	Post-traumatic stress disorder
RAN	Royal Australian Navy
Rec	Recommendation
RMA	Repatriation Medical Authority
RTW	Return to work
SHE	Separation Medical Examination
SIA	Severe injury adjustment
SMRC	Specialist Medical Review Council

SOPs	Statements of Principles
SRCA	<i>Safety, Rehabilitation and Compensation Act 1988</i>
SRDP	Special Rate Disability Pension
ToR	Terms of Reference
TPI	Totally and permanently incapacitated
VCR	Veteran Centric Reform
VEA	<i>Veterans' Entitlements' Act 1986</i>
VRB	Veterans' Review Board
VSC	Veteran Services Commission
VVCS	Veterans and Veterans Families Counselling Service
White Card	DVA Health Card – for Specific Conditions
WHS	Work health and safety
WW1	World War I
WW2	World War II