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7<sup>th</sup> July 2011

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### **Response to the 2011 Report of the Review of Military Compensation Arrangements**

Attached is our response to the above Review. Thank you for allowing the Alliance an extension of time to submit its response.

We are grateful for the work of the Review Committee and commend our comments for consideration in formulating the Government's response to the Report.

Yours sincerely,

Colonel David K Jamison. AM (Retd)  
Authorised Spokesman  
Alliance of Defence Service Organisations

#### Attachment:

ADSO Response to the *Report of the 2011 Review of Military Compensation Arrangements*

CC:  
The Honourable Warren Snowdon, MP  
Minister for Veterans' Affairs  
Suite M-1-49 Parliament House  
CANBERRA ACT 2600



## ALLIANCE OF DEFENCE SERVICE ORGANISATIONS

7 July 2011

# ***Response To the 2011 Report of the Review of Military Compensation Arrangements***

## **Introduction**

1. This response has been prepared by DFWA in consultation with its members and member associations of the Alliance of Ex-Service Organisations (ADSO).
2. After some introductory remarks, the response will discuss some general matters, followed by list of the report's recommendations which we:
  - support, but with comment,
  - support without further comment, and
  - do not support.

## **Background**

3. Before the Review Committee began its work, DFWA and other members of ADSO made submissions setting forth their views on matters of concern in the content and application of the Military Rehabilitation and Compensation Act (MRCA). Some of these views have been presented in various forms and fora ever since the days of the ESO working party, of which we were a member, and which helped to frame the original Act. We are pleased to note that many of the concerns we put forward are now no more. Others, it must be said, persist and the review has seen fit either to reject them or to ignore them.
4. This is not to say that we are generally disappointed with the outcome of the Committee's work. Taken as a whole, we see no reason to qualify our expression of general satisfaction with the MRCS, made in our submission to the Committee. We are pleased to be able to extend it to the Committee's report.
5. Concerns remain. They are with both the Act and its administration, and the way these have been dealt with in the report.

## **General Comments**

### **Unique Nature of Military Service (UNMS)**

6. It is pleasing to see that the Committee acknowledged the unique nature of military service, and we support the recommendations of Chapter 4. We do not agree that the reasons for military service's uniqueness, set out in para 4.9 accurately identify it. We argue that the sole basis for UNMS is the entrustment to the State of the inalienable right to life, liberty and security of the person of the individual citizen, which military service necessarily entails.
7. The reasons set out in para 4.9 are certainly applicable to military service, and to that extent are valid; but they are not unique. Separately or together, they can apply to other callings where danger is encountered, mobility is demanded, high levels of fitness are required and discipline is strict.
8. Having set out its recognition of UNMS, however the report repeatedly reasons as if military service is NOT unique, by making comparisons between MRCS and Workers' Compensation regimes, and using those comparisons explicitly and implicitly to arrive at conclusions. This tendency is most apparent in Chapters 10 and 12.

### **Reasonable Expectation**

9. The Committee rejected the concept of "Reasonable Expectation" as an element in calculating incapacity payments, largely on the grounds that it would be impossible to make any judgement on what those expectations would be in any particular case. We suspect that the Committee's view might have been influenced by its encounter with the question of allowances in the nature of pay and the severe difficulty this entails when applied to incapacity payments.
10. ADSO disagrees with the Committee's position on this matter. We contend that not only can reasonable expectations be postulated in general in a vocation such as service in the ADF – where requirements for career advancement through the junior ranks of both Officers and Other Ranks is, for most, a structured process, and is comparatively predictable for those who comply with the requirements – but that it is amenable to calculation in an individual case without undue difficulty.
11. The Committee accepts in para 10.25 that, as the MRCA now stands, in calculating NE in relation to pay-related allowances "... it is necessary to make a judgement (or rely on someone else's judgement) about whether the former member would have been posted to a particular unit or ship, or would have continued to be posted to a particular unit or ship, but for the injury". It further states in para 10.35 that "... it is difficult to see how and argument premised on "reasonable expectations" could be justified from a public policy viewpoint, as it would involve speculation and subjectivity. The present test is an objective one and depends entirely on the position at the date of injury; that is, what actually is known." The inconsistency between these two statements is obvious.
12. In para 10.36 and 10.39 the Committee poses a number of questions about the practicality of quantifying "reasonable expectations" for the purpose of including it in legislation. These questions are thinly disguised "straw men". We have never suggested that the

concept of reasonable expectations is universally applicable. It is only in the region of junior rank advancement, and of those individuals who have demonstrated the capacity (through reporting) and the will (through application for and/or attendance at qualifying courses) to secure advancement, that the concept can be applied. We have suggested in the past that for officers the rank of Major (equivalent) and for Other Ranks that of Sergeant are the points at which the limit of the principle are reached. It is conceded that incapacity payments for recruits and others not yet at the point of being fully “basically trained”, whether, and to what extent the concept can be applied might pose difficulties. In the light of the fact that these members are already automatically advanced to Private (equivalent) Pay level 3 for incapacity payment purposes (an acceptance of the principle of “reasonable expectations”), at least points to the fact that any such difficulties are not insurmountable.

13. The arguments put forward in para 10.37 and 10.38 are not worthy of comment, as being absurd (10.37) and inconsistent with the Committee's acceptance of UNMS (10.38)

### **Reserves**

14. There is much in the report to improve the position of members of the Reserve forces under MRCA. This is unreservedly welcomed by DFWA. The circumstances of Reserve service are more subject to variation, and more peculiar to the individual than those of service in the permanent forces, and the report, as a whole, does not, in our view, reflect this. An example of this is the report's treatment of self-employed reservists in the health professions. Though the treatment of this class of Reservist is good in itself, and we support it, it gives no indication that there might be individual reservists in other professions for whom similar circumstances apply. It is hard to suggest how this might be corrected, but in principle, the variability of individual Reservists' circumstances demand considerable flexibility in applying MRCA.

### **Superannuation Offsetting**

15. We reject unequivocally the Committee's position on offsetting incapacity payments for Commonwealth - funded superannuation retirement benefits. The relevant section of the report, Chapter 12, contains much factual recording of past and present positions upholding offsetting, but very little analysis of the reasons for these positions, and rejects the almost universal opposition of ESO without explanation
16. The closest the report comes to a foundation for its rejection of arguments opposing offsetting, is in 12.26, where it asserts that offsetting is “more accurately described” as “being to prevent the Australian Government paying two income sources to the same person” This, it seems, is a Principle. If it is an accurate statement of the case, then it fails to distinguish between incapacity payments as compensation for loss due to injury or illness, and payment of benefits under a bargain made between the Australian Government and the individual in return for service, before any question of injury has arisen, and which has been faithfully kept by the individual in rendering the required service. And, if it is a Principle, it is not adhered to in the case of the VEA.
17. We contend that incapacity payments, particularly payments in the form of the SRDP, are not an “income source” but compensation for loss. The removal of the offsetting provisions would therefore not violate the Committee's “Principle.”

## **Rehabilitation**

18. ADSO member organisations have long been of the view that the rehabilitation provisions of the MRCA are too narrow and are ungenerous to permanently incapacitated former members of the ADF, especially in the area of Education and Vocational Training. The underlying principle of the rehabilitation provisions seems to be that of, as far as is humanly possible, “putting Humpty-Dumpty together again”. If all the King’s horses and all the King’s men cannot do that, then the individual is compensated with money. Rehabilitation is therefore provided to restore as much of the person as existed at the time of injury or illness as is possible, but no more.
19. We believe that, in suitable cases, there is an opportunity for advancement of the interests of a permanently incapacitated individual that is to the wider benefit of the nation, even if it means achievement beyond the point he would probably have reached had he not been injured.
20. Providing educational opportunities for those who have the potential to benefit from them and are willing to do so, beyond what is already provided for in the Act, would in our view, be a solid demonstration of the truly beneficial nature of the legislation, and would be a tangible expression of the gratitude due to all incapacitated servicemen and women.

## **Legal Representation before the AAT**

21. Chapter 17 of the report makes recommendations relating to review of MRCC decisions, but does not examine the situation of claimants seeking review at the AAT. It is normal practice for the Commission to use the legal resources of DVA in preparing a case, and to be represented at the AAT by legal professionals who might be either Departmental lawyers or legal practitioners hired for the purpose. The ADF member or former member who seeks review at the AAT is at a disadvantage either because he/she not able to secure legal aid at all, or is in receipt of legal aid at a rate that cannot match that paid by DVA for the sometimes formidable legal teams assembled by them. For what is declared by the Committee to be beneficial legislation, many of those seeking review are in a severely disadvantaged position when it comes to pursuing their case to the AAT.
22. Recommendation 17.1 There would be benefit to the veteran if the proposed s31 internal review process with its subsequent decision was a reviewable determination that could provide a gateway to go to the AAT. The benefit of this would produce a more efficient process rather than requiring all appeals to go to the VRB. We also believe that s359 of the MRCA should be repealed so that legal costs become payable as they otherwise would be under s 357 to s358 of the MRCA if the VRB decision is set aside or a decision is made that is more favourable to the Veteran.

## **Compensation for Illness and Injury of Dependents**

23. We are disappointed that the Committee chose not to consider inclusion of the dependants of members of the ADF who accompany the member overseas on posting, for Service reasons, in the military compensation arrangements. Members on long-term schooling, representational and attachment postings are accompanied by their families at Commonwealth expense, principally for Service reasons. In doing so, families in some circumstances are exposed to risks to their health and safety that are not encountered in the

Australian environment. There is no avenue at present by which either the member or the members of his family can be compensated if this risk results in permanent disability for a family member. We have made submissions on this anomaly on several occasions in the past, including to the Committee, without either acknowledgement or consideration of the arguments raised.

## **Recommendations Supported, With Comment.**

24. Recommendation 5.2 We are not convinced that the SOP regime and the notion of temporal connection to service are necessarily incompatible. Illness and injury “arising out of service” ought not to preclude there being a causal connection. In some cases, causal connection might have to be presumed from the available evidence, provided the presumption is conformable to the sound scientific-medical evidence on which SOP are based
25. Recommendation 5.3 We support this recommendation, while emphasizing the position of Reservists, who are required to maintain high levels of physical fitness, but who serve in units where there are no ADF Physical Training Instructors, and/or where time for any training is limited, and physical training competes with core regimental training for the available time. Inevitably, the Reservist has to maintain fitness both within the unit and within the civilian community through sport, fitness centre training and private effort. The review recommended should take full account of any particular conditions applying to Reserve service.
26. Recommendation 6.3 This recommendation is supported subject to the general comments on rehabilitation made above. We agree with those who contend that rehabilitation should be limited only by capacity of the individual, as an eloquent token of both the debt owed to the incapacitated service person, and an unequivocal testimony of the beneficial character of the Act. We also view the position of Reservists injured on deployment and requiring rehabilitation as worthy of emphasis. Their cases should be dealt with quickly, and where feasible, they should be maintained on full-time service conditions until the nature and extent of their claims can be assessed. Those who develop a condition after they have reverted to part-time conditions of service require special consideration.
27. Recommendation 7.7 More emphasis needs to be placed on accreditation, currency and identification of TIP trained pension officers. We believe that training should be offered to ESO, and the Defence Organisation should allow access to ADF bases and offices for ESO with trained pension officers.
28. Recommendations 8.2 and 9.4 In the Australian context there is a tendency, evident in the report, to regard the types of service rendered by the ADF in geographical, rather than qualitative terms. We believe that the criterion for recognition of death, wounds or sickness arising out of service is a matter of **how** it happened, not **where**. Engagement of an enemy on the battlefield is the highest form of service, and, by extension, operations of a warlike, and hazardous service of a non-warlike, nature deserve (and are given) special recognition, no matter where they occur. We urge the acceptance of recommendation 8.2(a) and 9.4(a) by the Government.

29. Recommendation 9.7 In supporting this recommendation, we take the view that the overriding consideration should be the degree of financial dependency, rather than the supposed status of the relationship between the member and the person concerned.
30. Recommendation 10.1 While we support this recommendation as being, for the moment, the only realistic outcome the Committee could commit itself to, we do not resile from the position we have outlined above, on the matter of “reasonable expectation”.
31. Recommendation 10.2 This recommendation mentions in its final point, the practicality and implications of re-defining NE for self-employed reservists deployed on CFTS. We strongly support the cross-agency’s examining this, but urge its adopting the widest possible view of the circumstances of Reserve Service and pursue the greatest possible flexibility in framing a fair NE regime for Reservists, not excluding some consideration of the notion of “reasonable expectation”
32. Recommendation 18.4 The recommended extra member of the MRCC is supported. The member should come from the ADF, and should be a Reservist.
33. Recommendation 19.1 Offsetting is a contentious matter, and is poorly understood – not only among ESO and their members. Though we are for the present able to support this recommendation, we suggest that a mechanism for review of offsetting determinations might usefully be put in place, and might go some distance towards a better understanding of the positions of both sides of the question.
34. Recommendation 22.1 The education campaign recommended should include clear warnings to claimants that impairment from previously accepted conditions is also under review, and the outcome of a successful claim might be unexpected and unwelcome. (See Annex A on Chapter 22 recommendations)
35. Recommendation 23.1 Where there are differences in benefits payable under various schemes, we believe the payments should be made at the same rate. For example, the fortnightly payments for eligible young persons where there are additional benefits payable under the MRCA, than the SRCA or VEA, the standard should be the most beneficial under the compensation schemes.

## **Recommendations Supported Without Comment.**

4.1, 4.2, 4.3

5.4

6.1, 6.2, 6.4, 6.5, 6.6, 6.7, 6.8

7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.8, 7.9, 7.10, 7.11.

8.1, 8.3, 8.4, 8.5, 8.6, 8.7, 8.8, 8.9.

9.1, 9.2, 9.3, 9.5, 9.6, 9.8.

11.1, 11.2, 11.3,

12.1, 12.2, 12.4, 12.5.

13.1, 13.3.

14.1, 14.2, 14.3.

15.1, 15.2, 15.3, 15.4, 15.5, 15.6.

16.1, 16.2, 16.3, 16.4, 16.5, 16.6.

17.2, 17.3, 17.4, 17.5.

18.1, 18.2, 18.3.  
19.2,19.3.  
20.1,20.2.  
21.1.  
22.2(a)  
24.1, 24.2, 24.3.  
25.1(a).  
26.1, 26.2.  
27.1.  
28.1, 28.2.  
29.2.  
30.1, 30.2.

### **Recommendations Not Supported, With Comment**

36. Recommendation 17.1 While appreciating the desirability of simplifying the review process, ADSO cannot at this stage support this recommendation. The matter is, as the report makes clear, a complex of competing advantages, and in our view the potential for unexpected consequences of simplifying the existing system is high.

To give two examples:

- a) we would be very wary of any tendency to 'legalise' the VRB that might result from instituting a mediation phase into their review process (para 17.119 mentions possible DVA representation at VRB hearings, raising similar concerns of greatly dissimilar access to resources as has already been addressed in relation to the AAT); and
- b) in principle, we are cautious of any proposal to limit options for review before there has been a more deliberate consideration possible consequences.

### **Recommendations Not Supported, Without Comment**

8.2(b)  
9.4(b)  
12.3  
22.2(b)  
25.1(b)

## **Chapter 22 of the Report of the Review of Military Compensation Arrangements February 2011**

### **Comments**

1. The comments below refer to chapter 22 “Permanent Impairment Claims that Cross Multiple Acts”, and in particular recommendation 22.2. In the comments that follow, the members of the Committee representing DVA, Defence and Mr. Sutherland are referred to as Members “A”, and those representing Finance, Treasury and DEEWR as Members “B”.
2. It is seen that an “unexpected outcome “ of an application under MRCA for a condition that is accepted as compensable may produce a benefit that is lower than expected. Or even a nil benefit. This follows the use of the whole of person impairment assessment methodology, which the Committee has agreed is sound. The processed are described briefly in paras 22.37 and 22.38. The committee also agrees that a form of offsetting of the benefits from VEA or SRCA is sound policy (para 22.56)
3. Committee members”A” suggest that the method should be changed because the second reading speech indicated that “the MRCB (A) should have no impact on current veterans or war widows who are receiving benefits under the VEA.....etc “(para 22.59). Such a parliamentary comment should not imply that any such benefits will remain constant, They might increase or decrease if an application for increase (AFI) in pension is received under the VEA.
4. Indeed, if a veteran submits an AFI and is found to have a lower number of impairment points, it is theoretically possible for his pension to be decreased. However, should that be the possible outcome, a Pension Officer might suggest that the AFI not be submitted, Or, if submitted, a beneficent delegate of the Commission might suggest that the application be withdrawn.
5. Examples A and B in the chapter may be compared with the above. In each case, a previously accepted condition (apparently stabilized and producing permanent impairment) has improved over time. In example B an AFI under the VEA would have resulted in a reduction in pension. In example A no such AFI would be submitted for a SRCA condition, as the lump sum had produced an equivalent to a pension for life.
6. Members “A” have proposed an alternative method for calculating permanent impairment from page 307 onward. In example C, a VEA condition had worsened over time, and if the revised method is used, the MRCA compensation would be reduced considerably. However, (page 313) the claimant could then lodge and AFI under the VEA. There would be considerable benefit in including in the application form for a MRCA condition an automatic AFI for the previously accepted VEA condition. This would overcome the theoretical consideration that a MRCA decision includes re-assessment of a VEA condition, using different methodologies (GARP. The differences in assessment of

impairment in the various editions of GARP are trivial and might become indistinguishable in the future, particularly if the methodology approaches that in other compensation jurisdictions using the Permanent Impairment Guide (PIG)

7. In effect, the suggestion above - that a MRCA claim should include an AFI for VEA conditions - what actually happens in the current methodology, in a surrogate form; the true effect of which is almost always obscured from the claimant, until an unfavourable outcome is confronted.
8. The “unexpected outcomes” in examples A and B, which do not appear anomalous, are nevertheless puzzling, and seen by many as unfair. But they have resulted from the improvement in a previously accepted and apparently stable, permanent condition. If the applicant had not made a MRCA claim, he might have gone on receiving benefits that, arguably, he is not entitled to. He might, on the other hand, have fallen into the hands of medical practitioners with different approaches to the assessment of impairment.
9. The alternative methodology would appear to have produced a more reasonable outcome in examples A and B. It would not require a separate AFI in either case, nor its SRCA equivalent. But there remain two problems in these examples. First, in effect each (as in the current model) has reviewed previously accepted conditions using changed methodologies and/or different liability provision. Second, in example A the claimant will receive compensation reduced only by \$11.25 per week, yet he would already receive \$36.27 per week for life in the form of the SRCA lump sum. He is therefore, in a sense, “double dipping”. In example B the alternative method has produced a net MRCA compensation, which might appear reasonable, but it allows the VEA disability pension to remain the same despite the reduction in impairment from that condition. That would appear to be an anomaly.

### **Conclusion**

10. The so-called “anomaly” of low or nil outcomes of a successful claim are seen to have occurred in situations where a previously compensated condition has improved. The individual appears to have been overcompensated, and this has been detected because a claim has been lodged and investigated under MRCA. If it is now a problem, it should not seem to have arisen out as an unintended consequence of any provision in the VEA or SRCA, or, for that matter of the MRCA. Younger members who make claims under the MRCA, having received compensation under the VEA or SRCA, need to be aware that “permanent impairment” might not always mean “permanent”. Any education campaign, as recommended (22.1), needs to include a warning that impairment from previously accepted conditions will also be subject to review as a consequence of the claim.