REVIEW OF MILITARY COMPENSATION ARRANGEMENTS
SUBMISSION BY DEFENCE FORCE WELFARE ASSOCIATION (DFWA)

Introduction

1. This submission has been prepared in consultation with our State Branches, and with other organizations in the Ex-Service Community. It represents the views of the Association, embracing both those arising from its own experience and those which include matters of common concern within the ESO Community.

2. DFWA has consistently supported the concept of a single compensation regime for serving members of the ADF and veterans. The aim of the architects of *Military Rehabilitation and Compensation Act* (MRCA) to incorporate the best features of the two major parliamentary Acts governing military compensation in existence before its introduction - *Veterans' Entitlement Act* 1986 (VEA), *Safety Rehabilitation and Compensation Act* 1988 (SRCA) – has, in our view, largely been achieved.

3. This is not to say that the Military Rehabilitation and Compensation Scheme (MRCS) is perfect, either in precept or in practice. There are significant shortcomings and anomalies in the legislation, and significant deficiencies in the way the legislation has been applied in the five years since the scheme was introduced.

4. DFWA appreciates the opportunity provided by the present review to put its views, not for the first time, in the case of some of them. Our submission will outline where in our view, the MRCA has failed to deliver what were to be new and enhanced benefits compared to the pre-existing schemes.

Broad Considerations

5. DFWA believes there are several broad areas in which MRCS is failing either to achieve its full potential or to deliver substantive justice to claimants. They are:

   - Insufficient information is being given to potential claimants when their medical status is under review, and it becomes likely, or even possible, that they face medical downgrading or discharge.

   - Though similar in many respects, the VEA and the MRCA seem to be perceived in two widely different perspectives both by claimants and by delegates of the Repatriation Commission on the one hand and the Military Rehabilitation and Compensation Commission (MRCC) on the other. The VEA has, over time, won a good deal of trust among actual and potential beneficiaries as legislation that is basically fair, without having compromised its beneficial character. This perception has been reinforced by policies and attitudes within DVA that freely acknowledge the purpose and intention of the VEA as beneficial legislation.

   - Perceptions of the MRCA as beneficial legislation seem to be almost wholly absent. Most claimants are either serving members at the time claims are lodged, or are recently discharged members who laid the groundwork for their claims while still

serving, and are undergoing rehabilitation programmes under the direction of the MRCC. Claims seem to be determined and decisions administered in a climate that holds entitlements as benefits to be won by a struggle with the provisions of the Act, rather than as true entitlements for eligible claimants sanctioned and supported by the provisions of the Act. Claimants who come to DFWA for advice seem to assume that success of their claim depends on a their winning an adversarial encounter.

- It is extremely difficult to point to specific reasons for this perceptual difference. Both Acts provide for a reverse burden of proof, and they have similar mechanisms for the determination of claims. Nonetheless, DFWA firmly believes that the difference does exist, and that it influences claimants and decision makers alike to the overall detriment of claimants' interests.

- We believe that there is an anomaly in the MRCA that sometimes puts claimants at a disadvantage in pursuit of their claims. There are several provisions in the Act that require claimants to take action within a certain time. For example, an election for lump sum rather than periodic payments must be made within six months (S78); information or a document required by the MRCC must be produced within 28 days (S330), and so on. There is no action required of the MRCC that is subject to any time limit. The Commission is not required to determine claims within a certain time, to conduct reconsiderations within a certain time, or in any way to expedite the finalisation of claims. This is not to suggest that delays are being deliberately manufactured by those responsible for determination or administration of claims, but we do suggest that the absence of time limits placed on the Commission is a disincentive to efficiency, and to the removal of cumbersome administrative procedures.

- There is no provision in the MRCS for the payment of compensation in respect of families who accompany ADF members principally for Service reasons and who contract illnesses not encountered in Australia, or who suffer injury or death as a result of the position they hold as a member of the family of an ADF member. DFWA has raised this matter several times in the past, and we believe it is in the interests of the ADF as a whole and of the members concerned that there be action taken to address it.

- MRCA in its treatment of incapacity payments for service illness or injury takes no account of the "reasonable expectations" of an injured member by way of posting, promotion or payment of allowances. Actual average weekly earnings at the time of injury only are taken into account. In our view this approach is inconsistent with the realities of service in the ADF. It maintains a fiction that potential loss is not real loss. In some cases this is quite true, as the potential is too remote or too weak reasonably to be taken into account. But there are cases where the potential is both strong and proximate, and would have been realized but for the injury. The Act ought to recognize the reality of "reasonable expectation", just as it is recognized in civil law and in other compensation legislation, notably the SRCA.

Specific Issues

6. There are a number of specific matters on which DFWA would like to express a view.

SOP

7. We believe that the SOP regime imported into the MRCA is generally satisfactory and serves the interests of claimants reasonably well. SOP are becoming more numerous and more complex. We believe there is merit in the suggestion made by others that a principle of "substantial compliance" with a particular factor in an SOP, as distinct from strict conformity, should be established. The effect of such a principle we believe would be not only to improve the quality of the justice of claims determined under the Act, but would appropriately reinforce its beneficial character.

8. In addition, where there the RMA gives notice pursuant to s.196G of the VEA advising that it is carrying out its own investigation, we submit that a claim for a disease or condition subject to this investigation should be allowed to proceed with the MRCC delegate able to make a determination whether to accept liability or not to lessen the probability and impact of significant delays before the RMA makes a determination and to ensure the veteran's right to have claims determined quickly and efficiently.

Legal Costs

9. Under both the VEA and the MRCA, claimants who take their case for review to the AAT are at a substantial disadvantage when it comes to legal costs. An appellant to the AAT from the VRB in deciding whether to take his case to the Tribunal might be said to have a choice, in that it has already been subjected to two levels of review, with results unfavourable to his cause. The decision to go to the AAT therefore could be presumed to carry a degree of risk, and in some cases that risk could properly be seen to be borne by the appellant. For appellants pursuing cases under the VEA there are avenues of access to legal aid, but aid is not easily obtained, and in the majority of cases involving injury or illness not sustained as a result of operational service, is almost impossible.

10. An appellant from an internal reconsideration by the MRCC directly to the AAT is in a somewhat different position. There has been only one level of review, conducted internally by the Commission, and once he elects to go to the AAT, there is no further scope either for internal reconsideration, or for involvement of the VRB. He immediately incurs considerable personal cost if he decides to be represented at the Tribunal by legal counsel.

11. It seems to be the policy of the Department of Veterans' Affairs that all matters that go to hearing at the AAT on application from an ADF member or veteran are defended. The defence is usually presented by a team of counsel either from within the Department's own legal branch or from a legal firm engaged for the case. The resources available to the Department to obtain legal advice and to engage legal counsel are, when compared to those available to an individual veteran – even one who has access to legal aide, unlimited.

12. DFWA supports the suggestion that Veterans seeking review of decisions of the MRCC at the AAT should be entitled to be represented by counsel at Commonwealth expense.

Offsetting of Payments for New Injuries against Disability Pension for Old Injuries

13. The method of assessing lump sum payments for new injuries since 2004 by applying offsets for disability payments being received in relation to old injuries accepted under the VEA or SRCA is a particularly objectionable aspect of the MRC(CT) Act. It is almost impossible for an ordinary person to comprehend the reasoning behind it, or the justice in its application. The scheme should be altered to remove the use of S13 of the MRC(CT) Act for this purpose.

Rehabilitation – Tertiary Education

14. DFWA has long held the view that rehabilitation programmes available under the MRCA should include opportunities for tertiary training for those who show aptitude for it. At present the Act allows only for education or re-training to the level held before the injury or illness. Accepting that this arrangement meets the literal requirement for "rehabilitation" we nevertheless believe that an opportunity is being lost. A provision allowing tertiary education as part of a rehabilitation programme would have the potential to improve substantially the usefulness of the scheme to members and ex-members of the ADF, to reinforce its standing as being beneficial legislation, and to be a long term good for the nation.

15. The education provisions of the MRCA should be reviewed with a view to allowing sufficient flexibility to offer tertiary education in suitable cases.

Normal Weekly Earnings – Members of ADF Reserves

16. Some Reservists are being disadvantaged by the exclusion of bonuses from the calculation of Normal Weekly Earnings for the purpose of Incapacity Payments made under the MRCA. For many in the Reserves, commissions and bonuses are the principal elements of their remuneration structure. They are in fact to a large extent their "Normal Weekly Earnings" The Act should be amended to allow for bonuses to be considered in calculation of NWE in cases where they form an integral part of the indiviual's pay structure.

Superannuation Offsetting

17. S204 of the MRCA allows for reduction of the amount of Special Rate Disability Pension in relation to any pension or lump sum received from a Commonwealth Superannuation Fund as a result of voluntary or compulsory retirement from work. There is no mention in S204 of any relationship of the retirement to the disability for which the SRDP is being paid

18. DFWA strongly believes that retirement superannuation schemes and military compensation schemes are established for distinct purposes. An integral part Commonwealth superannuation schemes is the requirement for members to contribute

part of their salary towards the final benefit. There is thus something of a partnership between the Commonwealth and the individual member for a specific purpose. In our view as long as both parties fulfill their obligations under the "partnership" the entitlements of the member should be paid in full at retirement.

19. The SRDP also has a specific purpose. It is paid in respect of permanent disabilities incurred in service to the Commonwealth. It is entirely compensatory in nature. It is a tangible fulfillment of obligations placed on the Commonwealth by the Act itself. It can in no way be seen as a payment for parallel circumstances relating to retirement superannuation, and should not be offset. The Act should be amended to remove S204(5)

Identification of Beneficiaries under MRCA

20. Members and ex-members of the ADF who have been compensated for injury or illness under the MRCA sometimes have difficulty in receiving benefits provided by State or Local Governments because they do not have a card which identifies them as "Veterans" The treatment cards, commonly referred to as the "Gold" or "White" Cards issued to Disability Pensioners under the VEA are often the means of demonstrating entitlement to travel concessions and other assistance provided by State instrumentalities. There should be a similar card available to those in receipt of compensation under the MRCA for service injuries and/or illness.

Consumption of Alcohol

21. S32 of the MRCA prevents the Commission from accepting liability for an injury or contraction of a disease if the injury was sustained or the disease contracted as a result of a serious default or a willful act. S32(2) describes circumstances in which alcohol is consumed, and an injury or disease resulted from the person's being under the influence of alcohol as demonstrating a serious default or willful act.

22. There is no definition in S5 as to what "being under the influence of alcohol" means for the purposes of the Act, nor is it clear that there is an agreed meaning of the term to be found elsewhere, which could be applied to this section. We think that the language of S32(2) is unnecessarily loose, and has the potential to place in the hands of a delegate of the Commission too wide a discretion.

23. Consumption of Alcohol is not of itself a serious default, though it must be conceded it is in almost every case a willful act. In these times it is customary in industry and on the road, when an incident occurs resulting in injury to any person, to subject those involved, including the injured person to a screening test for the presence of alcohol. There is a threshold level, which amounts to an objective standard, which if exceeded, is prima facie evidence of an offence, and a blood analysis may be demanded.

24. It is suggested that a similar approach be adopted in relation to the MRCA. S32(2)(b) should be amended to remove the phrase "being under the influence of alcohol" and replace it with words specifying an amount of alcohol to be permitted before a serious default is established. The following thresholds are suggested in this context:

- For any incident while actually performing work while on duty, but not involving the use of a motor vehicle - 0.02
- For any incident involving use of a motor vehicle – 0.05
- In all other circumstances – 0.08

Death Benefits -Time for Election to Accept Lump Sum or Periodic Payments

25. S236 of MRCA requires that a partner of a deceased member notify the Commission within six months of receiving notice of compensation to be paid (S235) whether he/she wishes to accept the payment as a lump sum, or as periodic payments. Loss of a partner, especially at a young age places the survivor in a very stressful situation. Pressure for decisions arises at precisely the time when the capacity to make them may be impaired by extreme emotional turbulence, and the ability to make well – considered judgements may be at a low ebb. Whether to accept payment of compensation as a lump sum or as an income stream is, for persons who may have responsibility for a young family, one of the more far – reaching choices he or she might have to make.

26. DFWA believes that the time limit of six months for some bereaved partners could unnecessarily militate against the quality of the decision, since once made, it cannot be unmade. A time limit of twelve or even eighteen months would be a better period in which consider the implications and make a wise choice.

Definition of a Dependant under MRCA

27. The community at large and members of the ADF expect that a partner would be recognised by the Australian Government if they are legally married to a member of the ADF or in a recognised de facto relationship with the member. They would expect this recognition to apply to partners of members or former members of the ADF for compensation purposes if the member's death is service-related. This was so under the Veterans' Entitlements Act but the enactment of the MRCA in 2004 introduces a different concept. A dependant (which includes a partner or eligible young person – child) is defined as a person who: is wholly or partly dependent on the member or who would be wholly or partly dependent on the member but for an incapacity of the member that resulted from an injury or disease. "Dependent" means dependent for economic support.

28. In modern society it is common for both partners to be members of the workforce, with their own careers. In the military environment, it is not uncommon for the partners of serving members to be other serving members. Proving 'economic dependence' is not an easy concept. Common tests involve joint ownership of property, such as the family home which can be a difficulty in the military where the purchase of a family home is often delayed due to frequent moves. Another test is joint bank accounts but

these are not so common now for a number of reasons including the relatively higher risk of family breakdown. Nevertheless, this is the requirement under MRCA.

29. The concept of "economic dependence" is not the sole basis for recognition of de facto relationships. It is accepted that recognition involves taking regard to all the circumstances of the relationship. The emphasis on financial aspects in defining a dependant in the MRCA when compared with the VEA is considered unduly restrictive and the definition should be widened to include the concepts of "wife", "husband" or "partner" as provided for in other Commonwealth legislation.

Summary

30. DFWA believes that MRCA has been operating reasonably well, and that it has in part succeeded in combining the best features of the two principal predecessor Acts, the VEA and the SRCA. Notwithstanding this, the Act still contains significant shortcomings and anomalies, some of which we have attempted to address in this submission.

31. Our principal concerns relate to:

- The low level of awareness among claimants and potential claimants of their entitlements and of the workings of the Commission in processing and determining claims.
- The Failure of the Act to achieve recognition and trust as beneficial legislation.
- The lack of incentive in the Act for the Commission to process and determine claims in an expeditious manner.
- The substantial disadvantage claimants face when it comes to legal costs when their case is taken for review to the AAT.
- The absence of any provision for compensation for death or injury to family members accompanying members overseas for Service reasons, and
- The absence of any concept of Reasonable Expectation when calculating incapacity payments for permanent injury.

Support for Other Submissions

32. This Association has examined the submissions from the following entities and is supportive of them:

    a. Legacy Coordinating Council;
    b. Returned and Services League of Australia; and
    c. KCI Lawyers prepared by Mr Greg Isolani, Honorary Legal Adviser to DFWA Victoria Branch.