

4 Unique nature of military service

Chapter summary

The Committee confirms the unique nature of military service and the requirement for a military-specific compensation scheme that recognises that military service is different from civilian employment. The Committee concluded that compensation arrangements separate from the civilian compensation arrangements should be continued.

Military compensation arrangements exist within the broader context of civilian occupational health and safety laws and systems, including workers' compensation legislation. While the *Military Rehabilitation and Compensation Act 2004* needs to always have regard to the special features of military service, at the same time, the Act should be informed by community standards. The Committee recommends that the Military Rehabilitation and Compensation Commission should review Australian workers' and international military compensation arrangements at least every five years to ensure that the MRCA remains contemporary.

Introduction

4.1 This chapter provides an overview of the unique nature of military service and where the *Military Rehabilitation and Compensation Act 2004* (MRCA) sits in the landscape of compensation legislation in Australia.

4.2 The chapter makes some comparisons between the MRCA and the other major piece of Commonwealth compensation legislation, the *Safety, Rehabilitation and Compensation Act 1988* (SRCA), and provides a brief overview of some recent developments in relation to the SRCA that the Committee was aware of at the time of drafting the report.

4.3 Lastly, the chapter briefly discusses Safe Work Australia (SWA) and Heads of Workers' Compensation Authorities (HWCA), and moves towards harmonisation across workers' compensation jurisdictions.

Background

4.4 The MRCA was developed to solve the overly complex state of military compensation at the time.

4.5 The MRCA is different in a number of aspects to workers' compensation legislation, such as the SRCA. The MRCA is military compensation, not workers' or veterans' compensation.

4.6 The MRCA seeks to take account of the expansive role of the Australian Defence Force (ADF), with respect to peacetime service, and warlike and non-warlike service. It covers a range of occupational categories and reflects some aspects of the long-standing repatriation system, including important case law. The MRCA maintains the tradition of providing military personnel with more beneficial compensation, in recognition that their primary role is to defend Australia.

4.7 Incorporating elements of the *Veterans' Entitlements Act 1986* (VEA) was influenced by veterans' organisations wishing to ensure certain provisions were maintained because they were more beneficial or more appropriate forms of compensation for military personnel. Although outnumbered by the SRCA elements, these VEA elements have an important influence on the legislation. Appendix E provides a schematic comparison of the three Acts.

Unique nature of military service and the Military Rehabilitation and Compensation Act

4.8 The Review did not receive any submissions that questioned the need for a separate piece of legislation providing compensation for military service, or argued that military service should be compensated under the same legislation as Commonwealth public servants. The existence of statutory compensation legislation designed specifically to meet the needs of military service appears to be implicitly accepted. Nevertheless, the Committee briefly considered this issue.

4.9 From the outset, the Committee noted that military service is unique for the following reasons:

- military personnel are required to perform a range of activities, many of which involve high risk, particularly those undertaken during operational service where ADF members may engage in combat against enemy forces or face risks from dissident elements;
- ADF members are liable to be relocated within Australia and to other parts of the world, often at short notice;¹
- the nature of the work performed by military personnel, including the requirement to be deployable, means ADF members need to maintain a level of fitness beyond that required of most types of civilian employment; and
- military personnel are subject to an extensive disciplinary code with significant punitive measures in cases of breach.

4.10 The unique nature of military service is recognised by a number of Australian Government arrangements that are specific to the ADF. For example, the establishment of the Defence Force Remuneration Tribunal is recognition of the ADF's unique industrial circumstances. Military-specific superannuation schemes provide further recognition by the Australian Government of the ADF's special circumstances.

4.11 The Committee concluded that, due to the unique nature of military service, compensation arrangements separate from the civilian compensation arrangements should be continued.

Maintaining the contemporary nature of the Military Rehabilitation and Compensation Act

4.12 Workers' compensation in Australia is constantly changing and developing. Recently, workers' compensation legislation in Victoria, South Australia, Tasmania, and

¹ J Reich, J Hearps, A Cohn, J Temple, & P MacDonald, *Defence personnel environment scan 2025*, 2006, p. 48.

the Australian Capital Territory has been the subject of reviews of various degrees and scope. Various state governments have made frequent and complex amendments to schemes in recent years. One of the challenges governments will face in the future will be to ensure that the MRCA remains contemporary in this changing workers' compensation environment.

4.13 The Committee believes that a formulaic approach to maintaining the contemporary nature of the MRCA should be avoided. Governments need the flexibility to respond to circumstances as they arise, subject to their particular priorities and programs.

4.14 This is especially important in the case of military compensation because a significant part of the Australian Government's future MRCA liabilities depend on the degree to which the ADF is required to engage in overseas operations, and the nature and extent of those operations.

4.15 While recognising the unique demands made of ADF members, military service and its underlying framework of conditions do not exist in isolation from the broader community. The Committee believes that the ADF is part of the community it is entrusted to defend.

4.16 Military compensation arrangements exist within the broader context of civilian occupational health and safety laws, including workers' compensation. It is necessary for the ADF to have reference to community standards.

4.17 In practical terms, this means the MRCA's financial benefits and its associated policies and processes need to always have regard to the special circumstances and features of military service. This may extend to taking account of Australia's strategic circumstances and the nature of the conflicts in which the ADF is required to participate.

4.18 At the same time, it is necessary to maintain awareness of community standards by monitoring and considering the implications of developments in relevant legislation, such as the SRCA and state and territory workers' compensation schemes.

4.19 The Committee noted that, while it is the responsibility of the Australian Government to ensure that the MRCA remains contemporary, the Military Rehabilitation and Compensation Commission (MRCC) has an ongoing role in monitoring the performance of the MRCA, developments in Australian workers' compensation jurisdictions and international military compensation arrangements, and in providing advice to government.²

4.20 The Committee is of the view that the MRCC should review the MRCA every five years to maintain its contemporary nature in comparison to Australian workers' compensation jurisdictions and international military compensation arrangements, and in light of changes in the nature of ADF service.

² Section 354 of the MRCA.

Comparisons between the Military Rehabilitation and Compensation Act and the Safety, Rehabilitation and Compensation Act

4.21 While military service is different from civilian employment, parts of it are comparable. For example, for peacetime service, the ADF is regulated by all aspects of the *Occupational Health and Safety Act 1991* (OHS Act). Consequently, it is required to comply with the Commonwealth's occupational health and safety regulator, Comcare.

4.22 Military and civilian employees of the Commonwealth have the same employer and often occupy the same workplaces. In view of this, and the related histories of the MRCA and the SRCA, comparisons will inevitably be made.

4.23 The argument that comparisons between the MRCA and the SRCA should only be made on a total package basis is attractive. But the nature of some of the key financial benefits, such as death benefits, and permanent impairment and incapacity payments, make benefit-by-benefit comparisons difficult to avoid.

4.24 Key financial benefits, such as death benefits, permanent impairment compensation and incapacity payments stand out as salient measures of the overall generosity of the respective schemes. Such benefits, and others, are regularly compared across the various workers' compensation jurisdictions.³

4.25 Comparisons between the MRCA and the SRCA will be made throughout this report, despite the different features of the two Acts. Such comparisons will focus on key financial benefits, as comparisons at a broader level may be confusing for many stakeholders or commentators.

Recent developments in the Commonwealth workers' compensation jurisdiction

4.26 At the time of preparing this report, the Committee was aware of the following developments in relation to the SRCA and took these developments into account during its deliberations.

Amendments to death benefits under the Safety, Rehabilitation and Compensation Act

4.27 The following changes to the SRCA came into effect on 13 April 2007:

- the required connection between work and eligibility for workers' compensation was strengthened, particularly in relation to disease and psychological claims, so that only significant contribution by work is accepted;
- workers' compensation coverage was removed for journeys between residence and usual place of employment and from recess breaks away from the place of employment where there is a lack of employer control over activity; and
- claimants who are no longer employed by the Commonwealth (or a licensee) can now have their capacity to work outside Commonwealth (or licensee) employment taken into account when calculating incapacity benefits.

³ See, for example, the Safe Work Australia website (<http://www.safeworkaustralia.gov.au>), which publishes *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*.

4.28 A number of other amendments that were beneficial to employees were also made, such as an increase to funeral benefits to \$9,000.00 (\$10,138.75 as at 1 July 2010) and an increase to weekly benefits paid to retired employees.

4.29 On 3 June 2009, the following amendments to death benefit payments under the SRCA came into effect retrospectively for deaths occurring on or after 13 May 2008:

- an increase in the lump sum death benefits payable under the SRCA to dependants of deceased persons from \$219,023.62 to \$400,000.00 (\$442,177.76 as at 1 July 2010);
- an increase in the periodic payments payable under the SRCA to dependent children from \$72.98 to \$110.00 (\$121.60 as at 1 July 2010); and
- indexation of dependant death payments by the Wage Price Index (WPI) instead of the Consumer Price Index (CPI).

Review of the Comcare Scheme and policy review of the Permanent Impairment Guide

4.30 Commencing in January 2008, the Department of Education, Employment and Workplace Relations (DEEWR) reviewed self-insurance arrangements under the SRCA and the OHS Act. Feedback on the assessment and payment of compensation under the permanent impairment compensation provisions of the SRCA led to a recommendation that Comcare review its permanent impairment arrangements.

4.31 In response to that recommendation, Comcare issued an options paper⁴ in August 2009, as part of its review examining the adequacy of the *Guide to the assessment of the degree of permanent impairment*, second edition, 2005 (PIG) and legislative framework of the SRCA to deliver fair and equitable compensation for permanent impairment and non-economic loss. The terms of reference of the review concentrated on the public policy issues associated with the assessment and payment of compensation for permanent impairment. In preparing the options paper, Comcare considered 11 submissions, including several from ex-service organisations (ESOs), on an issues paper released on 1 April 2009.

4.32 Similar issues have been raised by ESOs in the context of the current Review of Military Compensation Arrangements. There are 15 issues in the Comcare option paper where a preferred option has been expressed. These have been summarised in Table 4.1.

4.33 The Comcare review was limited to Part 1 of PIG, as used by Comcare, premium-paying agencies and licensees under the SRCA. For defence-related claims, DVA uses Part 2 of PIG, which is the same as the 1st edition published in 1989. Part 2 was retained from the 1st edition for claims relating to ADF service, as ESOs believed that the new Part 1 in the 2nd edition would be less generous, and this is borne out by data supplied to the Review of Self-insurance Arrangements under the Comcare scheme.⁵ Though Part 2 itself is not subject to review, any legislative changes in response to Comcare's preferred options may impact on the application of Part 2, requiring amendment or even replacement by another guide.

4.34 Comcare is currently considering the issues and the various options.

⁴ Comcare, *Policy review of permanent impairment guide — options paper*, 2009.

⁵ Taylor Fry Consulting Actuaries report, 15 May 2008.

Table 4.1 Comcare's preferred options from 'Policy review of permanent impairment guide — options paper'

Options paper issue number (page reference)	Comcare's preferred option
Legislation — Safety, Rehabilitation and Compensation Act 1988 (SRCA)	
01 — The adequacy of current impairment benefits (pp. 8–11)	Increase the maximum amount payable for permanent impairment or non-economic loss to 90% of the death benefit, to be indexed annually, but not increase the maximum amount available under common law
02 — Separate payments for permanent impairment and non-economic loss (pp. 11–12)	Permanent impairment benefit be increased to include the previous non-economic loss component and, by consequence, section 27 of the SRCA be repealed
03 — The irrevocable election between permanent impairment and common law (pp. 12–14)	Irrevocable election between permanent impairment and common law be maintained
04 — The reasonableness of current impairment thresholds (pp. 14–20)	Threshold of 10% be retained for initial impairment but that threshold for deterioration of impairment be reduced from 10% to 5%
05 — Multiple injuries (Canute) (pp. 20–24)	All impairments resulting from all injury occurrences under the SRCA be combined
06 — Pre-existing conditions (pp. 24–27)	Clear legislative mechanism be introduced for the discounting of pre-existing conditions
Guide to the assessment of the degree of permanent impairment, 2nd edition (PIG)	
07 — General review of <i>Guide to the assessment of the degree of permanent impairment</i> , 2 nd ed. 2005 (PIG) (pp. 29–31)	Base next edition of PIG on the American Medical Association's (AMA) <i>Guides to the evaluation of permanent impairment</i> , 5th edition (2000) and complete an in-depth analysis of the appropriateness of a transition to the 6th edition (2007) of the AMA Guide
08 — Stand-alone guide (pp. 31–35)	Ask New South Wales (NSW) to agree that Comcare develop a modifier guide based on the NSW <i>Workcover guides for the evaluation of permanent impairment</i>
09 — An impairment of a kind that cannot be assessed in accordance with the provisions of PIG (pp. 35–36)	Amend PIG to instruct that where an impairment is of a kind that cannot be assessed in accordance with the provisions of PIG, that assessment is to be made under the edition of the AMA Guides upon which that provision was based
10 — Slow onset conditions (pp. 36–37)	Work with an oncologist to consider diseases, other than lung cancer and mesothelioma (i.e. malignant or terminal diseases), that can be compensated for permanent impairment upon diagnosis
11 — Psychiatric conditions (pp. 38–41)	Adopt the Psychiatric Rating Impairment Scale (PIRS) for the assessment of psychiatric conditions (including 15% WPI threshold for psychiatric conditions)
12 — Comcare tables and the 10 per cent threshold (pp. 41–42)	In reviewing PIG, work with relevant medical bodies to consider whether tables in PIG can be created to enable most, if not all, conditions to be assessed at the relevant threshold
13 — Review of percentage amounts — Comcare tables (pp. 42–43)	Review all tables to incorporate the 'ranges' used in edition 5 of the AMA Guide
14 — Movement to future editions of the AMA Guides (pp. 43–44)	Establish a Permanent Impairment Working party to consider topical permanent impairment issues such as the appropriateness of moving to future editions of the AMA Guides
15 — Ongoing training package (pp. 44–45)	Structure an ongoing training schedule on PIG. Develop a training package for non-medical practitioners to obtain an 'understanding' of PIG; issue regular bulletins to trained medical practitioners on topical issues relating to the assessment of permanent impairment

High Court decision in *Fellowes v Military Rehabilitation and Compensation Commission*

4.35 There has been an increased focus on SRCA permanent impairment compensation (and issues discussed in the options paper) following the High Court decision in *Fellowes v Military Rehabilitation and Compensation Commission*,¹ handed down on 23 September 2009.

4.36 Before this decision by the High Court, determining authorities had considered that subsequent injuries to a lower limb, or limbs, that did not increase the degree of permanent impairment to the 'lower limb function' under Table 9.5 in Part 2 of PIG, or to the 'lower extremity' under Table 9.7 in Part 1 of PIG, could not be compensated. This approach was consistent with the Full Federal Court decision in *Comcare v Van Grinsven*.² However, in the case of *Fellowes*, the High Court overruled the decision made in *Van Grinsven* on the basis that it was incompatible with *Comcare v Canute*³ and therefore wrongly decided.

4.37 The decision by the High Court in the *Fellowes* case challenged the approach taken by Comcare and DVA in applying the functional loss tables in PIG Parts 1 and 2. The effect of the decision could even extend to questioning the methodology by which 'injuries' are identified for the purposes of paying compensation under the SRCA. The latter may only be demonstrated by subsequent decisions by the Administrative Appeals Tribunal and the Federal Court.

4.38 Comcare has issued a jurisdictional policy advice (JPA).⁴ Pursuant to subsection 142(1)(c) of the SRCA, the MRCC will be guided by this JPA to ensure equity of outcomes resulting from administrative practices and procedures used both by Comcare and by MRCC delegates.

Safe Work Australia and Heads of Workers' Compensation Authorities

4.39 SWA is an independent Commonwealth body, established on 1 July 2009, to make recommendations to the Workplace Relations Ministers' Council for legislative change regarding occupational health and safety (OHS) and workers' compensation issues. Its primary function is to progress 'harmonisation' of OHS and workers' compensation laws in partnership with governments, employers and workers, who are represented by SWA. The HWCA supports SWA in its workers' compensation function.

4.40 The HWCA is a group comprising the chief executives (or their representatives) of the peak bodies responsible for workers' compensation regulation in Australia and New Zealand. This includes Australia's 10 workers' compensation authorities (six state, two territory and two Commonwealth) and the New Zealand Accident Compensation Corporation.

4.41 HWCA held a permanent impairment workshop on 2 October 2009, facilitated by Comcare's Chief Executive Officer, Mr Paul O'Connor. The workshop supported the drafting of an issues paper on 'harmonisation' of permanent impairment compensation

¹ [2009] HCA 38.

² [2002] FCA 371.

³ [2006] HCA 47.

⁴ JPA 2010/02 (12 March 2010).

across the jurisdictions, including the creation of a common tool for assessment of permanent impairment.

4.42 In a subsequent communiqué, HWCA ‘agreed to work together toward a harmonised approach to permanent impairment assessments’.

4.43 DEEWR supports this approach in its submission to this Review, stating ‘that an agenda of harmonising the methodology used to assess permanent impairment throughout the Australian Government, including both the SRCA and the MRCA, be pursued’.

4.44 The Secretary of the Department of Veterans’ Affairs has accepted an invitation for DVA to join HWCA and a senior DVA representative has attended 4 meetings as at 2 February 2011. This will allow DVA to provide ongoing input into HWCA activities, such as any continuing agenda of harmonisation across different workers’ compensation benefits, and ensure that HWCA will remain aware of issues that may impact on the military compensation jurisdiction. The Committee supports this ongoing involvement.

Conclusions

4.45 The MRCA is a modern, military-specific scheme covering all ADF members, both permanent and part-time. It brings together features of the VEA and the SRCA. The existence of a military-specific scheme recognises that military service is different from civilian employment and the MRCA is not simply another workers’ compensation scheme.

4.46 Nevertheless, the Committee believes that comparisons between the MRCA and other workers’ compensation legislation, particular the SRCA, are inevitable and useful to a limited degree. The MRCA must remain contemporary in relation to other compensation jurisdictions, not only in Commonwealth and state workers’ compensation legislation, but also military compensation arrangements in other countries. An overview of the features of international military compensation schemes is provided in Appendix F, and a brief comparison of state workers’ compensations schemes is provided in Appendix G.

Recommendations

The Committee recommends that:

4.1 the Military Rehabilitation and Compensation Commission (MRCC) should constantly monitor and review the *Military Rehabilitation and Compensation Act 2004* (MRCA) to ensure it appropriately reflects and recognises the unique nature of military service;

4.2 the MRCC should periodically review developments in Australian workers’ compensation jurisdictions and international military compensation arrangements at least every five years to ensure the financial benefits under the MRCA and associated policies and procedures remain contemporary; and

4.3 Department of Veterans’ Affairs representation and participation on the Heads of Workers’ Compensation Authorities continues.