Chapter summary

The current Australian Government gave a 2007 election commitment to consider the appropriateness of compensating Australian Federal Police (AFP) members for conditions arising from high-risk overseas missions through military compensation arrangements. This consideration forms part of the Review.

As Australian Government employees, AFP members are covered by the Safety, Rehabilitation and Compensation Act 1988 (SRCA) including when deployed, posted or working overseas. AFP members deployed with Peacekeeping Forces were eligible for benefits under the Veterans’ Entitlements Act 1986 (VEA) until the enactment of the Military Rehabilitation and Compensation Act 2004 (MRCA), and some on high-risk missions continued to be eligible. However, VEA coverage effectively ceased for the AFP when the previous Government announced in 2006 its intention that AFP members with eligible overseas service would be compensated under new arrangements comparable to the provisions of the MRCA. It was intended that these arrangements would be included in an enhanced SRCA. However, while work on amendments to the SRCA commenced in 2006, technical difficulties halted the work and the requisite legislation has not been drafted. The AFP has recently introduced interim compensation arrangements for members posted to Afghanistan, Timor Leste and Papua New Guinea.

When the MRCA replaced the VEA in 2004, coverage for AFP members was intentionally not carried over into the new legislation, as the MRCA was designed to be a military-specific scheme and to take account of the special characteristics of military service. The Committee believes that bringing the AFP into the MRCA would run counter to the commitments given to ADF members and the ex-service community in promoting acceptance of the MRCA on the basis it was specifically for military personnel.

The Committee also believes that the work performed by the AFP and the ADF while on overseas operations is not the same, nor is the role of the two organisations always integrated. Bringing the AFP into the MRCA would necessitate not insignificant technical amendments to the legislation, and give rise to considerable complexity and anomalies in administration.

For these reasons, the Committee recommends that AFP members not be given access to the MRCA.

Introduction

27.1 This chapter deals with the part of the terms of reference that direct the Review to:

- consider the suitability of access to military compensation schemes for members of the Australian Federal Police (AFP) who have been deployed overseas;
- consider whether the current arrangement to develop an ‘enhanced’ scheme under the Safety, Rehabilitation and Compensation Act 1988 (SRCA) remains appropriate;
- consider whether it is appropriate for members who have been deployed on high-risk overseas operations to have access to the Military Rehabilitation and Compensation Act 2004 (MRCA); and
• consider whether it is appropriate to develop a stand-alone compensation scheme for AFP members who have been deployed on high-risk overseas operations.

Background

27.2 The previous Australian Government’s intention was that eligibility for most benefits under the Veterans’ Entitlements Act 1986 (VEA), including those available to AFP members deployed with Peacekeeping Forces, would cease upon commencement of the MRCA. (As Australian Government employees, AFP members are covered by the SRCA, including when deployed, posted or working overseas.)

27.3 Some AFP members deployed overseas as peacekeepers on certain declared high-risk missions continued to be eligible for compensation under the VEA following the enactment of the MRCA on 1 July 2004. However, VEA coverage effectively ceased for the AFP when the previous Australian Government announced in 2006 its intention that AFP members with eligible overseas service would be compensated under new arrangements comparable to the provisions of the MRCA.

27.4 It was intended that these arrangements would be included in an enhanced SRCA, with the Department of Veterans’ Affairs (DVA) to administer the legislation once it was in place. In 2006, the then Department of Employment and Workplace Relations commenced work on amendments to the SRCA. However, there were considerable technical difficulties in drafting the proposed amendments and this work has now ceased. As the requisite legislation has not been drafted, the scheme proposed by the previous government has never operated.

27.5 The current Government gave a 2007 election commitment to consider the appropriateness of compensating AFP members for conditions arising from high-risk overseas missions through military compensation arrangements. As the terms of reference quoted above indicate, this consideration forms part of the Review.

Interim Australian Federal Police compensation arrangement

27.6 Following the abandonment of the proposed enhanced SRCA scheme, and pending the outcome of the Review, the AFP recently introduced an interim compensation arrangement for members of its International Deployment Group deployed to Afghanistan, Timor Leste and Papua New Guinea.

27.7 Under this arrangement, it is proposed to pay a differential in compensation — through the employer powers held by the AFP Commissioner under the Australian Federal Police Act 1979 — for death or permanent impairment resulting from high-risk deployments to the countries specified above. This differential approximates the difference in compensation payable under the MRCA (for operational service) and the SRCA.

Historical background

27.8 AFP members involved in peacekeeping gained access to the Repatriation Act 1920 as an outcome of the Independent Enquiry into the Repatriation System by the Hon Justice Touse, 1975 (‘the Touse Enquiry’). At the same time, Justice Touse provided ADF members who did not already have Repatriation Act 1920 coverage with

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access to that Act. The ADF and the AFP were part of a United Nations Peacekeeping Force established in Cyprus in 1964, causing Justice Toose to conclude that:

It is most desirable that Australians who, with Australian Government approval, serve as official representatives with United Nations Forces should have uniform compensation cover. The proposed national compensation scheme, if fully implemented, would provide such cover. At least until then both Service and Police personnel engaged in peacekeeping activities should be assured of compensation cover at least comparable to that provided under Repatriation legislation.¹

27.9 It appears that Justice Toose was proposing to provide uniform compensation cover for military and police personnel engaged in the same activity and that he saw this as an interim measure in the lead up to the introduction of a proposed national compensation scheme (which never eventuated).

Military compensation arrangements reflect the special nature of military service

27.10 When the MRCA replaced the VEA in 2004, coverage for AFP members was intentionally not carried over into the new legislation. The MRCA was designed to be a military-specific scheme.

27.11 The issue of whether to include the AFP in the MRCA, or a separate scheme based on the MRCA, raises a threshold question. Is the fact that AFP and ADF members gained access to the Repatriation Act 1920 in particular circumstances — while undertaking joint peacekeeping activities more than 30 years ago — a sufficient and sound reason for the AFP to be covered by the MRCA?

27.12 And, is it really appropriate that the AFP be given access to legislation that was conceived, designed and enacted for military personnel against the background of Australia’s military history, including the long-standing repatriation system?

27.13 These questions are perhaps best answered by reference to the beneficial standard of proof, termed the ‘reasonable hypothesis’. This involves the reverse criminal standard of proof and applies to operational service under the MRCA and the VEA. It has evolved in the specific context of veterans’ law and is unique to veterans’ compensation.

27.14 At one level, it reflects the difficulties associated with record keeping in relation to past (and possibly future) military conflicts. At a broader level, it can be seen as a legislative manifestation of the nation’s gratitude to those veterans who defended Australia during times of war and conflict; effectively, the maintenance of an important tradition.

27.15 Similarly, the Statement of Principles (SoPs) that are used to establish a service connection to determine liability for conditions claimed under the MRCA and the VEA are unique to veterans’ compensation. The SoPs were introduced in response to veterans’ case law relating to the beneficial standard of proof.²

27.16 It is difficult to see what policy justification there would be to extend compensation arrangements that have evolved to take account of the particular

¹ Toose p. 122.
² Robin Creyke and Peter Sutherland, Veterans’ Entitlements Law, Federation Press, Sydney, 2000, p. 428.
characteristics of military service — the remedial nature of which reflects the special status of veterans — to non-military personnel.

27.17 In promoting the virtues of the proposed new legislation that became the MRCA, and in seeking to gain the support of ADF serving members and ex-service organisations in establishing the new legislation, a consistent theme was evident: the MRCA was designed to take account of the special features of military service. In promoting the scheme widely to ADF members in mid-2003, the then Chief of the Defence Force, General Peter Cosgrove AC MC, stated:

The new scheme is a substantial departure from existing military compensation arrangements. Indeed, it will be the first compensation scheme in the ADF’s history to specifically deal with the special nature of military service in all its forms, warlike, non-warlike and peacetime. Military personnel will no longer be subject to a compensation scheme designed primarily for public servants.

Potential anomalies, complexity and transitional issues

27.18 In considering this matter, it is important to draw attention to the potential anomalies and complexities that would be created by covering AFP members under the MRCA, or a stand-alone scheme based on the MRCA.

27.19 Because of the necessity to supplement the AFP’s numbers, some police members engaged on overseas deployments are seconded to the AFP from their respective state police service for the duration of the deployment.

27.20 Thus, if AFP members were covered by the MRCA while deployed, it would be necessary for them to transition between the SRCA or their respective state scheme and the MRCA — statutory compensation schemes with inherent and substantial differences, particularly in the way liability and causation are determined.

27.21 While the SoPs provide a more rigorous application of medical–scientific causal factors, they can be less beneficial in some instances than the opinion of a medical specialist — as used by the SRCA (and state and territory compensation schemes). Chapter 5 of this report provides a more detailed discussion on this issue.

27.22 Furthermore, the assessment of permanent impairment under the MRCA is based on whole person impairment. In contrast, the SRCA assesses impairment on an incident or injury basis. This could lead to anomalies between the two Acts for injuries involving multiple conditions. Chapters 20, 21 and 22 of this report provide a more detailed discussion of this issue.

Comparisons between the roles of the Australian Federal Police and the Australian Defence Force fraught with difficulties

27.23 There is no basis to compare the work performed by the AFP and the ADF while the latter is on operations declared as warlike service, and indeed this has not been suggested to the Committee by the AFP themselves. Indeed, if this were the case, it would suggest that the AFP was being misused. This is illustrated by the fact that warlike service is defined as:

The application of force is authorised to pursue specific military objectives and there is an expectation of casualties. It may mean a declared war, conventional
combat operations against an armed adversary or peace enforcement in accordance with Chapter 7 of the United Nations Charter.  

27.24 That said, can a comparison be made between what the AFP does on certain overseas deployments with the ADF on non-warlike service? Non-warlike service is defined as ‘Military activities short of a warlike operation where there is a risk associated with the assigned tasks and where the application of force is limited to self-defence.’ The risk of casualties, while not as high as warlike service, remains nonetheless.

27.25 There are, in the Committee’s opinion, insufficient grounds to support the proposition that the risk experienced by the AFP on overseas operations it defines as high risk is necessarily the same as that experienced by the ADF on non-warlike service. The different nature of military and police operations makes comparison problematic, as does the different manner in which risk assessments are made by the two organisations. This in no way is intended to devalue the complex, risky and sensitive work undertaken by the AFP in high-risk deployments.

27.26 The nature of the mission, the rules of engagement and the expectation or possibility of casualties are all factors in determining whether the nature of service on a military operation is warlike or non-warlike.

27.27 Complicating any comparison is the fact that the level of risk will vary within an operational area depending on the role performed by different units, as well as the geographic location those units or individuals happen to be in. The fact there may be Australian civilians involved, including Australian Government employees — who, it should be emphasised, are covered by the SRCA — also makes it difficult to say that it is only AFP members who may experience a level of risk comparable with the ADF while on a non-warlike operation.

27.28 It follows from what has been said that comparisons between the service of the AFP and the ADF are difficult to make. Nevertheless, the Committee acknowledges that the role of, and tasks performed by, AFP members on certain overseas missions and deployments may involve a higher level of risk than would likely be experienced while engaging in ‘normal’ policing. From time to time, this risk may equate with that experienced by the ADF while performing non-warlike service.

Conclusions

27.29 A number of factors led the Committee to conclude that it would not be appropriate for the AFP to be given access to the MRCA, with the same factors militating against introducing a stand-alone scheme based on the MRCA.

27.30 First, the work performed by the AFP and the ADF while on overseas operations is not the same, nor is the role of the two organisations always integrated. This was apparently not the case when Justice Toose recommended in 1975 that AFP and ADF members have access to the Repatriation Act 1920 while conducting peacekeeping operations.

27.31 Second, it would undermine the integrity and standing of the MRCA, which is legislation that was designed specifically to take account of the special characteristics of

4 Ibid.
military service in all its forms. The legislation was formulated against a long history of beneficial compensation and recognition being provided to veterans who fought in the two World Wars or who served overseas in a number of other wars or conflicts, as well as case law unique to veterans.

27.32 Third, bringing the AFP into the MRCA would run counter to the commitments given to ADF members and the ex-service community in promoting acceptance of the MRCA on the basis it was specifically for military personnel.

27.33 Fourth, it would necessitate not insignificant technical amendments to the legislation, with the potential to impact upon the military-specific nature of the legislation — for a relatively small population that could be expected to generate only a very small number of claims.

27.34 Finally, it would give rise to considerable complexity and anomalies in administering the legislation. AFP members themselves would be required to navigate the transition between the MRCA (or a stand-alone scheme based on the MRCA) and the SRCA or their respective state scheme — statutory compensation schemes that have inherent differences in the way liability, causation and permanent impairment are determined.

Recommendation

27.1 The Committee recommends that Australian Federal Police members not be given access to the MRCA.