Chapter summary

The question of whether or not to introduce an Australian Defence Force (ADF) compassionate payment scheme was referred to the Review by the then Minister for Defence Science and Personnel and the then Prime Minister in 2008. The purpose of such a scheme would be to provide compassionate payments to the non-dependent parents (and other close family members) of ADF members who die while serving. Occasionally the government grants payments for grief or pain and suffering resulting from the loss of an ADF member, on a case-by-case basis.

Public emotion generated by a death of an ADF member can be accompanied by concern about the adequacy of the compensation and support provided to bereaved family members, particularly in circumstances where the ADF is at fault, or perceived to be at fault. Arguments for the introduction of a compassionate payment scheme for non-dependent family members include eliminating or reducing the potential for these matters to be politicised, and providing a clear and consistent way of providing support.

Consistent with other workers’ compensation legislation, the Military Rehabilitation and Compensation Act 2004 (MRCA) does not pay compensation to parents or other family members unless they can establish they were financially dependent on the deceased. Common law in Australia does not generally provide compensation for grief or bereavement arising from the wrongful death of a close family member.

Implementing a military compassionate payment scheme would clearly go further than any other Australian workers’ compensation scheme and would extend the notion of compassionate payment well beyond its present statutory scope. It would be difficult to design a scheme that would seem fair to all families, be relatively simple to understand and administer, entail minimal costs, and provide minimal potential for flow-on effects to other legislation.

The Committee concluded that, if such a scheme was introduced, it would have the potential to create more problems than it would solve. However, it recommends that the Australian Defence Organisation (Defence) continue to consider the circumstances of individual cases under the current arrangements as there may be grounds for the Australian Government to make payments in certain limited circumstances.

Introduction

26.1 In September 2008, the then Prime Minister, the Hon Kevin Rudd MP, and the then Minister for Defence Science and Personnel, the Hon Warren Snowdon MP, referred to the Review the question of whether payments should be made to non-dependants of the Australian Defence Force (ADF) members who die while rendering service. This chapter considers the merits of such a scheme.

Background

26.2 Part 4 of the Military Rehabilitation and Compensation Act 2004 (MRCA) provides for compensation to be paid to dependants (other than wholly dependent partners or children) who were either wholly or partly dependent on the deceased member for economic support. An amount of up to $238,107.62 is available for distribution among all those who satisfy this criterion, subject to a maximum of
$75,191.88 per person. Chapter 9 of this report provides a more detailed discussion on benefits payable to dependants.

26.3 There have been representations over a number of years by the non-dependent parents of ADF members seeking compensation from government in connection with the service-related death of their son or daughter. Essentially, compensation has been sought for the grief or pain and suffering resulting from the loss of the person. Such a payment is known as a ‘solatium’ and is sometimes defined as damages for injured feelings or on the grounds of sentiment.

Payments by the Australian Defence Force to families

26.4 The issue of payment to non-dependants for grief or pain and suffering was referred to the Review following a decision by the Australian Government in September 2008 to make payments to the families of four ADF members who committed suicide in the period 1996 to 2004.

Sea King helicopter accident

26.5 The Sea King Board of Inquiry into the Nias Island Sea King helicopter accident in 2005 dealt with the question of compensation for the parents of those killed. None of the parents were dependent on their son or daughter, and therefore were not entitled to compensation under the MRCA.

26.6 Counsel representing the next of kin submitted that the loss of life was contributed to by the failure of the Royal Australian Navy to properly maintain the aircraft, including equipping it with basic safety equipment. Therefore, the Navy had failed, it was claimed, to fulfil its duty of care to its people.

26.7 It was explained by counsel that the ‘common law in Australia has not provided any remedy for grief or bereavement suffered as a consequence of wrongful death of a close family member’.

26.8 The Board noted the individual and systemic failures and deficiencies that led to the accident and agreed (with counsel’s submissions) that the circumstances made a compelling argument for the payment of a solatium as requested by the parents. The Board recommended (at 20.1) that:

The Department of Defence should give consideration to the provision of an ex gratia payment by way of consolation for the grief and bereavement suffered by parents of those killed in the crash of Shark 02 on 02 Apr 05.

26.9 There is little doubt that this recommendation is premised on the notion that the deaths were somehow wrongful. This is a contentious conclusion and, ultimately, one that could only be proved by a court. The claims by parents relating to the Sea King crash have since been settled by Defence.

Rationale for an Australian Defence Force compassionate payment scheme

26.10 The ADF relies on the recruitment and retention of large numbers of young men and women. The Defence Census 2007 reported that the median age of a member of the Permanent Force was 29; 51 per cent were aged under 30 years, while 82 per cent were...
aged under 40 years. Some 34 per cent of the Permanent Force indicated that they had no dependants.

26.11 Members’ families are seen as playing an important role in supporting ADF members. For young members of the ADF with no dependants, parents and other family members may provide that support. A wide range of services are provided by the Defence Community Organisation and the Services directly to support and assist families.

26.12 A service-related death often generates strong public emotion and examination of the adequacy of compensation and support provided to bereaved family members. Increasingly, non-dependent family members are seeking some form of redress, such as ex gratia or act of grace payments. A compassionate payment scheme would provide a consistent basis for evaluating and providing payments to non-dependent family members in these circumstances.

Australian compensation legislation

26.13 Consistent with virtually all compensation legislation in Australia, the MRCA makes no provision for the payment of compensation to parents or other family members, unless they can establish they were economically dependent on the deceased.

26.14 A number of Australian compensation schemes provide for death benefit payments to be made to claimants, provided they were economically dependent to some extent on the deceased worker. Except for New South Wales and Queensland, all the schemes make it clear the payments require economic dependence.

26.15 In early 2009, New South Wales introduced a provision in its Workers Compensation Act 1987 for the payment of a lump sum death benefit to a deceased worker’s estate should he or she leave no dependants. While the legislation is silent as to the purpose of the payment, in introducing the bill into parliament it was stated that the amendment was aimed at alleviating financial hardship.

26.16 Section 202 of Queensland’s Workers’ Compensation and Rehabilitation Act 2003 prescribes that non-dependent parents, who usually reside in Queensland, be paid $24,570 in the event their child — who must have been under 21 years — died as a result of their employment and did not have a dependant. The Queensland legislation, which was introduced some years ago, does not define the purpose of the payment.

Other relevant Australian legislation

26.17 As noted in submissions to the Sea King Board of Inquiry, the common law in Australia does not generally provide compensation for grief or bereavement arising from the wrongful death of a close family member.

26.18 While legislation covering wrongful death exists in all Australian states and territories, claims for the loss suffered by the family on the death of a family member is limited to financial loss in all jurisdictions, except for South Australia and the Northern Territory.

26.19 South Australia’s Civil Liability Act 1936 permits the parents to claim solatium for the death of their ‘infant’ child and the surviving spouse or domestic partner to claim for the death of his or her partner, the amount being limited to $10,000 in each instance. The Northern Territory’s Compensation (Fatal Injuries) Act 1974 permits the
payment of solatium, unlimited in amount, for the grief and loss suffered by the death of a family member.

26.20 The only other Australian legislation covering this area applies to domestic airline fatalities under the Civil Aviation (Carriers’ Liability) Act 1959, Part II of which gives the Warsaw Convention\(^1\) the force of law in Australia. This Act deals principally with the rules of liability governing international carriage of persons, baggage and cargo by aircraft.

26.21 The Act provides that ‘in awarding damages, the court … is not limited to the financial loss resulting from the death of the passenger’. Thus, any of the designated relatives entitled to seek damages under the Act would be entitled to claim solatium. There appears to be no case law relating to this Act in Australia. The purpose of the legislation is primarily to limit the liability of the airlines.

26.22 These three Acts are the only statutes operating in Australia that expressly provide for the payment of solatium.

**United States death gratuity scheme**

26.23 The United States Department of Defense has a long-standing death gratuity scheme for the families of American servicemen and women who die in the course of their duty, regardless of whether they are economically dependent.

26.24 The scheme provides for a lump sum payment of US$100,000 ‘for survivors of those whose death is a result of hostile actions and occurred in a designated combat operation or combat zone or while training for combat or performing hazardous duty’. An amount of US$12,000 is provided for deaths arising from all other forms of service.

26.25 The purpose of the United States death gratuity scheme, as set out at Chapter 111.D.3 of the United States Department of Defense’s Military Compensation Background Papers, is:

   To provide an immediate cash payment to assist survivors of deceased members of the Armed Forces to meet their financial needs during the period immediately following a member’s death and before other survivor benefits, if any, become available.

26.26 The United States scheme provides survivors of deceased Armed Force members with financial support until they receive compensation death benefits or social security benefits. It is not a compassionate payment scheme in the sense that the Committee has been asked to examine — that is, providing payments to non-dependants. It does not appear that the United Kingdom, Canada and New Zealand have death gratuity schemes along the lines of the United States.

26.27 The United States scheme must also be considered in the context of the totality of the United State’s military compensation death benefits, which, it would appear, are not as generous as the MRCA’s death benefits.

26.28 The Committee does not consider the United States scheme to be an appropriate model for a compassionate payments scheme for non-dependants in Australia, particularly given the overall entitlements available under MRCA.

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\(^1\) The Warsaw Convention was signed in 1929 and deals with the rules of liability governing international carriage of persons, baggage and cargo by aircraft (see the Australian Government Department of Infrastructure and Transport website: [http://www.infrastructure.gov.au](http://www.infrastructure.gov.au)).
Policy considerations

26.29 A fundamental question to be addressed is whether there are grounds, from a public policy perspective, to pay non-dependent parents (and potentially other family members) of deceased ADF personnel for their grief and suffering. That is, what shortcomings will be addressed by going beyond existing military compensation arrangements to compensate non-dependants? Is the absence of an ADF compassionate payment scheme inherently unfair or unjust?

26.30 For example, could an argument be made that the ADF is in some way lagging behind the wider community? Conversely, can the argument be made that the special nature of military service suggests the ADF should lead the community in this respect? As already noted, neither of the two Australian workers’ compensation jurisdictions that provide for death benefit payments to the deceased person’s estate or parents define the payments as being for compassionate reasons. As to deaths caused by wrongful act, neglect or default, there is limited statutory scope for a person to seek damages in the form of a compassionate payment for the loss of their child or another close family member, with virtually no scope in common law. Therefore, if a military compassionate payment scheme is introduced, it would be the first of its kind in Australia.

26.31 There are a number of implications in making a payment that is premised on compassion. If the payment is explicitly for compassion, that is to say, solatium, then determining the amount of compensation to be paid would be difficult. Regarding the level of compensation payable to dependants under the MRCA, it would be difficult to justify a large payment; for example, any amount higher than $75,191.88 — the amount currently provided by the legislation to parents and other family members who were economically dependent on the member. Yet a small payment would be seen as tokenism, and therefore insensitive in view of the circumstances.

26.32 It is likely that any compassionate payment scheme would not operate if there were dependants to which the normal MRCA payments would be made. Yet in the event that a parent loses a child and the child had a dependant at the time of death, some parents may argue that their grief in losing their son or daughter is not diminished because he or she was survived by somebody who was economically dependent on the member. They could be expected to take the view that the question of whether there is a dependant is irrelevant. In fact, it could be argued there would be an inherent contradiction in a scheme that provides access to a compassionate payment to a parent upon the loss of a child, but then denies the payment because the child was married or had a partner.

26.33 Thus, a payment that is explicitly for compassion is likely to be the subject of ongoing criticism, with frequent demands for the quantum to be increased and the eligibility criteria to be expanded. It would clearly go further than any Australian compensation scheme and, as has already been noted, it would extend the notion of solatium well beyond its present highly limited statutory scope.

26.34 Lastly, the Committee notes that ex gratia payments have previously been made to families in certain circumstances on a case-by-case basis. Therefore, individual claims by parents and others can continue to be considered on the merits of the particular case. The Committee believes that these arrangements are a more appropriate mechanism, as opposed to the creation of a compassionate payment scheme, to respond to the circumstances of non-dependent family members following the death of an ADF member.
Summary of pros and cons

26.35 The arguments in favour of introducing a compassionate payment scheme are that it would:

• recognise, from the parents’ perspective, the profound emotional impact that the death of a member son or daughter can have on ADF families;

• specify the parents’ entitlements by legislation or administratively, thus providing clarity, certainty and transparency;

• demonstrate the ADF’s (and the Australian Government’s) commitment as a responsible and caring employer; and

• minimise litigation or claims for ex gratia or act of grace payments.

26.36 The arguments against the introduction of an ADF compassionate payment scheme are that:

• it would extend access to a form of compensation (solatium) to the families of ADF members that is not presently available to most Australian citizens;

• the criteria governing eligibility would be difficult to define and may attract criticism if certain persons with a close personal relationship to the deceased member are excluded, such as fiancées and girlfriends or boyfriends; and

• the amount of the benefit, no matter at what level it is set, would likely be criticised as insufficient.

Conclusions

26.37 Having considered carefully the arguments for and against an ADF compassionate payment scheme, the Committee finds it difficult to avoid the conclusion that, were a compassionate payment scheme introduced for the non-dependent parents of ADF members killed while rendering service, there would be real potential for it to create more problems than it would solve.

26.38 The Committee notes that payments have been made to families in certain circumstances, and it recommends that individual claims by parents and others continue to be considered having regard to the merits of the particular case. This is important, as the circumstances and the consequences relating to some deaths among ADF members — presumably a very small number — may justify payment along the lines of a solatium. Ultimately, this is a decision for government.

Recommendations

The Committee recommends:

26.1 an Australian Defence Force (ADF) compassionate payment scheme should not be introduced; and

26.2 that the payment of compensation to families in relation to the service-related deaths of ADF members continue to be managed by the Australian Defence Organisation in accordance with existing arrangements as considered appropriate to the circumstances.