Lest We Forget: A critical analysis of Australian Veterans’ Entitlements Legislation

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This thesis is the student’s own account of her research.
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Abstract

This study analyses the history of veterans’ entitlements legislation in order to understand the shaping and creation of today’s entitlements schemes. Despite numerous government reviews, and an extensive history of legislative evolution, it appears that there are still anomalies and shortfalls associated with current Australian veterans’ entitlements legislation and schemes. The author provides recommendations on how to overcome the issues and anomalies addressed in the thesis.

The thesis focuses on four broad topics: 1) why it is necessary to have a unique compensation scheme for military service; 2) the decreasing levels of confidentiality assigned to documents pertaining to veterans’ entitlements claims; 3) payment offsetting for individuals eligible for benefits under more than one Act; and 4) benefits available to third parties, such as war widow/ers, in cases where the ADF member has died as a result of his/her service.

This study is part of a limited body of academic (non-government funded) research into Australian veterans’ entitlements schemes. The author hopes that this analysis of past and current schemes, based upon consideration of governmental reviews and a critical analysis of veterans’ entitlements legislation, will contribute to future research in the area and legislative reform.

Key terms: Veterans’ entitlements, compensation, Australia, reform
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Chapter 1: Introduction

The notion of workers’ compensation is founded on the principle that an employer can be held liable for employee injuries, illnesses or deaths caused by their work. Generally, it is a form of insurance provided by an individual’s employer that is available to individuals who become sick or injured due to their work. The payments cover expenses associated with the injury or illness including wages not paid due to unfitness for work, medical expenses and rehabilitation. As employees of the Australian Defence Force (‘ADF’), ADF members are also subject to workers’ compensation schemes. However, military service gives rise to a separate system of veterans’ entitlements legislation in place of workers’ compensation schemes used by employees in other industries.

The purpose of the author’s thesis is to produce applied research on legislation regarding veterans’ compensation. The author’s thesis seeks to critique current legislation, and concludes with a number of recommendations, thus focusing on law reform. Law reform is necessary to ensure that law fulfills its purpose to serve the needs of society. The Australian Law Reform Commission states that ‘improved access to justice’ can come to fruition where laws and related processes are more modern, efficient, fair and equitable. In his article, Lyon states that a problem exists not in the scholarly works relating to law reform, but in the translation of these documents into an operational result. He suggests that, as a matter of practicality, Law Reform Commissions should also be assessed on their ability to implement changes to the law- not simply on

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3 Ibid.
their research into an area that may benefit from such reform. It seems though that the process of law reform still largely starts with scholarly work and research. Therefore, it would seem that, in the absence of such academic work, it might be unlikely that the relevant area of law will face reform. This, the author submits, is a problem that exists for reforms in the veterans’ Entitlements sphere. With a very limited body of academic work on the topic, it does not seem that law reform is being promoted - at least not from an academic field.

The thesis begins with a description of the overview of the history of the evolution of veterans’ entitlements law from the original War Pensions Act 1914 (Cth) (the ‘WPA’) through to the legislative instrument most relevant to this thesis, the Military Rehabilitation and Compensation Act 2004 (Cth) (the ‘MRCA’). This overview provides context to the historical evolution of veterans’ entitlements legislation, including governmental reviews that have shaped veteran’s entitlements legislation into what it is today. To understand the current legislative instruments and subsequently offer recommendations for legislative reform, it is important to know how the instruments evolved and what shaped them. This is further explored in the ensuing chapter of the thesis, which discusses three prominent Government Reviews in the field of veterans’ entitlements legislation that have shaped veterans’ entitlements legislation into what it is today: the Baume Review; the Clarke Review; and the Military Rehabilitation and Compensation Review. There is also an overview of the process involved in making a claim as it stands today, and the potential benefits that a successful claimant may have access to. After this discussion of the evolution of veterans’ entitlements legislation, the thesis examines four main areas of the legislation and claims process. A number of recommendations are made in these areas. These four topics are:

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7 Ibid 423.
8 Throughout the thesis, there are a large number of abbreviations, owing largely to the military realm in which this legislation and research takes place. Whilst the author periodically offers reminders of the most commonly used abbreviations, a comprehensive list of all abbreviations used has been provided in Annexure 1.
1) The unique nature of military service as compared to civilian work, for compensation purposes;
2) The level of confidentiality of documents pertaining to veterans’ entitlements claims;
3) The offsetting of payments for individuals qualifying for compensation under more than one Act; and
4) The benefits available to third parties, particularly in situations when the relevant Australian Defence Force (‘ADF’) member has died as a result of their military service.

Throughout the paper, the author makes a number of recommendations, as highlighted in text boxes at the end of the relevant chapter. These recommendations arise from two general sources: firstly, some recommendations relate to recommendations already provided in governmental reviews. These recommendations are indicated by a ‘[GR]’ in the recommendation textbox. Secondly, the remaining recommendations are made regarding anomalies discovered through the author’s own experiences, observations and research. These recommendations are indicated by an ‘[A]’ in the recommendation textbox.

Source Materials

One substantial source of research material for this thesis has been government publications, in particular, publications from the Department of Veterans’ Affairs (‘DVA’). There are two main difficulties with focusing research on a topic primarily discussed in governmental documents:

1) Retrieving information from one source limits the scope of knowledge and analysis that the author can access. In particular, a government document is unlikely to be critical of any current legislation- such documents tend to aim to explain the current legislative arrangements instead of openly critiquing them; and
2) Recent legislation surrounding veterans’ issues, including the *Military Rehabilitation and Compensation Act 2004* (Cth) (the ‘MRCA’) has been passed through Parliament with bipartisan support. This, it could be argued, is for reasons of public reputation. It is doubtful that any party in Parliament would value a reputation of slowing the legislative progress for any provisions relating to veterans’ compensation. However, constructive debate would appear to be a crucial element of legislative creation and amendment, ensuring the passing of only beneficial and advantageous bills for veterans and for the wider Australian community. It can therefore be argued that referring to verbatim reports from Parliament, such as those from Hansard, does not provide a well-rounded debate about such legislation.

The author has attempted to mitigate the negative consequences of these implications by putting weight on government documents only for the purposes of discussing the history and evolution of such legislation. The author has used reviews and their recommendations to assist in the critique of the legislation as they provide a foundation of legislative analysis as initiated by the government.

Recent amendments to veterans’ compensation legislation have been encouraged by the publication of formal reviews. The author’s research focuses on three of the most influential and/or noteworthy reviews: 1) The Baume Review, 2) Clarke Review; and 3) the Military Rehabilitation and Compensation Arrangements Report.

Unlike government publications, these Reviews start exploring the deficiencies of veterans’ compensation legislation, and make recommendations for improvements. These Reviews are not readily available, and so the author has had to rely on commentary, largely through DVA publications. Despite this, summaries of recommendations and their status’s (i.e. whether they have been accepted, rejected or passed on to another body for consideration) paint a
picture of government priorities and provide greater contextual understanding regarding the compensation schemes and their evolution.

As stated above, the vast majority of documents pertaining to veterans’ compensation legislation are government publications, and government commentary on the aforementioned Reviews. There is a notable lack of academic research into this field in Australia, which limits the author’s access to a diverse range of secondary materials that would contribute to this argument.

As the author’s research rests heavily on the analysis of legislation, doctrinal research has been pivotal in thoroughly considering all legal materials.\(^9\) Non-doctrinal research makes a lesser, but still significant contribution to this thesis as it is important to consider the social implications involved with a certain group within society being treated and compensated differently to the rest of society. The author hopes that this broader appreciation for veterans’ entitlements legislation will better inform the recommendations throughout the thesis, including those specifically targeted at law reform.

Whilst conducting the research into the four aforementioned areas, the author has identified elements of the veterans’ entitlements law that may benefit from further research that cannot be addressed in this thesis because of research limitations. These are noted in the relevant Chapters.

\(^9\) Ibid.
Chapter 2: Evolution of Australian Veterans’ Entitlements Legislation

It is important to understand the history of Australian veterans’ entitlements legislation, as it is what has shaped the legislative schemes as they are today. This Chapter provides an historical overview of such legislation and reference to government reviews that have aided in the evolution of veterans’ entitlements Legislation.

General Historic Overview

Australian legislation providing for veterans’ compensation has existed since 1914. Since then, it has undergone several amendments and been superseded twice. An understanding of this history is crucial in order to examine current legislation, and to consider potential amendments that may better assist injured veterans and their dependents.

Compensation for veterans and their dependents is founded on principles of workers’ compensation and public policy. Firstly, workers’ compensation principles can encompass compensation for accidents arising from and in the course of employment. Relevant legislation for veterans’ compensation therefore applies to employees of the Australian Defence Force (‘ADF’), including ‘current and former members of the Defence Force [and] dependants of some deceased members’.

Secondly, public policy determines that veterans and their dependents should be treated differently to their civilian counterparts, as they have volunteered to serve Australia and have accepted the subsequent life-threatening risks present during training, peace keeping and war. This is discussed further in Chapter Five.

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10 Eg Workers’ Compensation Act 1912 (WA) s 6; Light v Mouchemore (1915) 20 CLR 647.
11 Military Rehabilitation and Compensation Act 2004 (Cth) s 3.
12 It is not appropriate to provide access to [AFP] members to a scheme that has been designed to provide for the unique nature of military service: The Australian Government, Government Response to Review of Military Compensation Arrangements (18 September 2014) Department
In 1914, the *War Pensions Act 1914* (Cth) (‘the *WPA*’) was introduced. Australian armed forces had previously been covered by legislation in the United Kingdom, as they had been operating as members of the Imperial Forces overseas.\(^{13}\) The *WPA* reflected the legislation of the United Kingdom.\(^{14}\) This legislation has applied to members throughout all subsequent military operations, including: the First World War, the Second World War, the Korean War, the Vietnam War, both Gulf Wars and modern day peacekeeping operations. Since 1914 a range of legislation relating to veterans’ compensation has been introduced and subsequently amended. This thesis will discuss: The *War Pensions Act 1914* (Cth); *Australian Soldiers’ Repatriation Act 1920* (Cth) (‘*ASRA*’); *Veterans’ Entitlements Act 1986* (Cth) (‘*VEA*’); the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (‘*SRCRA*’); and the *Military Rehabilitation and Compensation Act 2004* (Cth) (‘*MRCA*’).

A number of factors have influenced the amendments of old legislation, and introduction of new legislation, including several reviews. The reviews are instigated by the government, and subsequently have helped to provide the bases for legislative amendments and change with regards to issues including: burden of proof for making a claim; establishment of determining bodies; pension rates and the unique nature of military service. Three reviews which will be considered by the author are: 1) The Baume Review;\(^{15}\) 2) The Clarke Review;\(^{16}\) and 3) the Military Compensation and Rehabilitation Arrangements Report (the ‘*MRCA Review*’).\(^{17,18}\) This Chapter will include discussions of Veterans Affairs <http://www.dva.gov.au/consultation-and-grants/review-military-compensation-arrangements/government-response-review#response>.

\(^{13}\) Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth), 3.

\(^{14}\) Ibid.


\(^{18}\) Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth), 4-5; There have been many more reviews conducted, as the issues of entitlement consistency and effectiveness have historically been, and continue to be contentious.
relevant to the Baume Review and the Clarke Review. The MRCA Review will be discussed in Chapter 4.

It is crucial to have an appreciation for previous recommendations and government decisions in previous reviews when conducting an analysis of current legislation. This allows us to focus on new information and facts not already considered, and to evaluate the weight of such information on a potential governmental response. Furthermore, we can gain an appreciation for the context in which amendments have previously been accepted by the government.

The Baume Review provides an overview of the legislative amendments from 1920 (the then operative act being the Australian Soldiers’ Repatriation Act 1920 (Cth)) to 1986, and therefore is a sound building block upon which to examine veterans’ compensation legislative evolution more closely.

The Baume Review

The Baume Review was commissioned to report on the compensation scheme for veterans and war widows.19 It was produced in 1994 by the Veterans’ Compensation Review Committee (‘VCRC’), and examined issues resulting from a 1992 Audit Report20 and Bushell v Repatriation Commission.21 Its historical overview of veterans’ entitlements legislation, especially that relating to the evolution of burdens of proof in establishing injury causation with ADF service provides a sound starting point for the analysis of current veterans’ entitlements legislation. Furthermore, the Baume Review started shifting the entitlements focus from financial benefits to rehabilitative programmes, linking it closely to the concerns of today’s legislation’s emphasis on rehabilitation.

19 Above n 67.
20 Department of Veterans’ Affairs, Compensation Pensions to Veterans and War Widows (2 December 1992), Audit Report No. 8.
21 (1992) 175 CLR 408.
Additionally, the Baume Review criticised the standards of proof required for determining causation of an injury, illness or death by an individual’s ADF service, and recommended changes to the system of policing and examination of medical claims. It also recommended the establishment of a medical authority to determine cases of generalised medical questions, and the lowering of the rate at which pensions are calculated if the predominant cause of the condition is not related to war service. Both of these recommendations were subsequently adopted into the legislation.

This discussion of the Baume Review will consider its remarks regarding Burdens of Proof, the establishment of an expert medical committee, the rates at which pensions are calculated and the shifting focus away from financial benefits and towards rehabilitation.

**Burden of Proof**

The burden and onus of proof in determining the causation of an injury or illness have been a point of contention throughout the history of veterans’ legislation. There have been a number of amendments to the Acts that have ultimately resulted in the lessening of the burden on veterans, and an increased burden on the determining authorities in proving that the relevant injury was not covered by the legislation at that time. Table 1.1 provides a brief overview of this evolution, obtained from a Historical Overview of Australian Veterans’ compensation produced by the Department of Veterans’ Affairs (‘DVA’).

<table>
<thead>
<tr>
<th>Amendment Year</th>
<th>Operable Legislation</th>
<th>Standard of Proof</th>
</tr>
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<tbody>
<tr>
<td>1929</td>
<td><em>Australian Soldiers’ Repatriation Act 1920</em></td>
<td>Veterans: Were required to make a <em>prima facie</em> case that injury was caused by war</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Year</th>
<th>Organisation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1943</td>
<td>ASRA</td>
<td>Veterans: Had the benefit of any doubt regarding causation or aggravation or injuries by war service.</td>
</tr>
<tr>
<td>1977</td>
<td>ASRA</td>
<td>Veterans: Claims were given the “benefit of the doubt”.24 Repatriation Commission: To rebut the above presumption, the Repatriation Commission was required to satisfy beyond reasonable doubt that the causation was not war service.</td>
</tr>
<tr>
<td>1985</td>
<td>ASRA</td>
<td>Veterans: Were required to only establish a mere possibility that the injury was caused or aggravated by war service. No evidence was required. Repatriation Commission: Still required to adhere to reverse criminal standard of ‘beyond reasonable doubt’ to reject a claim for entitlements.</td>
</tr>
<tr>
<td>1985</td>
<td>ASRA</td>
<td>Veterans: Were required to present a ‘reasonable hypothesis’ connecting the injury to the veteran’s service.</td>
</tr>
<tr>
<td>1992-1993</td>
<td>Veterans’ Entitlements Act 1986 (Cth) (‘VEA’)</td>
<td>‘Reasonable hypothesis’ was found to be satisfied when a medical practitioner presents an expert view to support a claim of causality or aggravation.25</td>
</tr>
</tbody>
</table>

Table 1.1

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24 Ibid 66.
The evidential burden on veterans is minimised in the *VEA* in accordance with the 1977 amendment above, where there is a reverse criminal standard of proof placed on the veteran.\(^{26}\) If a medical practitioner reasonably hypothesises a realistically possible causal connection between the veteran’s disability and war service, then the burden of proof will fall on the determining authority (the Repatriation Commission) to a ‘beyond reasonable doubt’ standard.\(^{27}\) The Baume Review criticised this standard, proposing that it would lead to an excess of claims, and risk practices of ‘doctor shopping’.\(^{28}\) The Government rejected the Baume Review’s recommendation to lessen the burden to a civil standard of proof.\(^{29}\) Today, a reverse ‘beyond reasonable doubt’ standard of proof is applied to claims regarding injuries, diseases or deaths arising from operational service.\(^{30}\) That is, the Military Rehabilitation and Compensation Commission (the ‘MRCC’) must accept the claim unless it can disprove causation to a beyond reasonable doubt standard.\(^{31}\) Claims arising from peacetime service have a ‘reasonable satisfaction’ standard of proof.\(^{32}\) That is, causation of the injury, disease or death from military service must be ‘more likely than not’.\(^{33}\) The difference between injuries and/or illnesses incurred during a period of operational service involve the nature of the member’s work, and the proportion of time spent conducting tasks pertaining to ADF service, as opposed to external activities. A presumption of causation between a member injured or incurring an illness and their operational service is less questionable, due to the ongoing and high risk nature of the operations. Therefore, the MRCC must prove, beyond a reasonable doubt, that the causation linking injury or illness to service does not exist. During peacetime, an ADF member is more likely to be involved in tasks and activities beyond the scope of their

\(^{26}\) *Veterans’ Entitlements Act 1986* (Cth) s 120.


\(^{28}\) Creyke et al, ‘Veterans’ Entitlements Law’ (Federation Press, 2008) 646.

\(^{29}\) Ibid.


\(^{31}\) Ibid.

\(^{32}\) *Military Rehabilitation and Compensation Act 2004* (Cth) s 335(3).

ADF service, and are therefore likely to incur and injury or illness outside of their ADF service. Furthermore, the nature of peacetime service is arguably less risky than that of operational service. Therefore, there is a lesser burden (‘reasonable satisfaction’) for the MRCC to satisfy in order to establish that the ADF member’s service did not cause the injury or illness.

**Expert Medical Committee**

The Baume Review’s recommendation of the establishment of an expert medical committee to review decisions pertaining to claims of liability was successful, and resulted in the creation of the Repatriation Medical Authority (‘RMA’). This authority enacted Statements of Principals (‘SPs’), which provided guidelines for causation of different medical conditions, and the subsequent requisite standards of proof. The publication of the Baume Review also resulted in the establishment of the Specialist Medical Review Council (‘SMRC’). This authority was designed to review any appeals of decisions arising from the SPs, and has the power to review any SPs within three months of issuance.34

**Special Rate Pensions**

Special rate pensions (‘SRP’ s) assess pension rates for veterans who have been totally and permanently incapacitated by their military service at a higher rate. This was introduced in the ASRA to assist individuals who were no longer able to earn a full time income as a result of their injuries. Baume’s Review was particularly critical of the broadening of the courts’ grants of these pension rates, arguing that the interpretation had been far too generous. This seems to have been the case in a number of Federal Court decisions in the 1980s.35

(where SRPs were granted to individuals who were still able to commit to fulltime employment). The response was to incorporate into the *VEA* a narrower discretion on the courts for defining who was eligible to receive the SRP, and to place greater emphasis on rehabilitation through schemes such as the Veterans’ Vocational Rehabilitation Scheme (‘*VVRS*’).

**Changing the Focus to Rehabilitation**

One of the significant features of the Baume Report was that it recognised there was an inadequate system of rehabilitation in the current veterans’ entitlements legislation, citing a “perceived lack of social rehabilitation and targeted medical rehabilitation”. It is noted in the subsequent review, the Clarke Review that, since the government response to the Baume Report, there has been a “significant improvement” in the rehabilitation services and accessibility of such services to veterans.

**The Clarke Review**

The Clarke Review was conducted with the aim of identifying anomalies in veterans’ entitlements legislation and the support provided with association to Veterans’ Affairs disability pensions. The review was published in 2003, and was therefore concerned with the *VEA, SRCA, Military Compensation Act 1994* (Cth), and the *Defence Act 1903* (Cth). The Clarke Review Committee (the ‘*CRC*’) was aware of the development of a new military compensation scheme (to become the *MRCA*), but largely focused on the aforementioned

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Despite the introduction of the MRCA and the SRCA, the VEA is still operational for certain groups in the Defence community. Therefore, any recommendations made regarding the VEA may still be relevant today. This relevance resulted in the revisitation of the Clarke Review by the Government in May 2010.

The Clarke Review Committee developed an expression of its “essential core principle of the [repatriation] system”:

The Government, in expression of the nation’s debt of gratitude, shall provide a beneficial level of compensation and support to veterans and their dependants for incapacity or death resulting from service in the armed forces during times of war or of conflict or in warlike and non-warlike operations.

The Clarke Review focused largely on the eligibility of various groups of people for VEA entitlements. They considered World War II veterans, Australian participants in British atomic testing in Australia, veterans of the British Commonwealth Forces in Japan (the ‘BCOF’) and ADF personnel engaged in special recovery and counter-terrorism training. These references are concerned with very specific groups of people, and will therefore not be the focus of this thesis. However, more pertinent to the consideration of the evolution of veterans’ entitlements legislation and the current MRCA are the CRC’s comments about the structure and equity of the VEA and other entitlements legislation, and the apparent deficiencies in the medical, social and vocational rehabilitation programmes provided for by the VEA. It is also valuable to consider the acceptance or rejection of submissions by the CRC and/or the Government regarding totally and permanently incapacitated (‘TPI’) individuals. TPI benefits still exist in the more recent veterans’

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40 Department of Veterans’ Affairs, Report of the Review of Veterans’ Entitlements (2003), 3 [6].
41 Ibid.
42 Ibid.
44 Ibid 231 [9.1].
entitlements legislation, the *MRCA*, and therefore analysis of these submissions provide a background to the issues, and an understanding of the general attitudes of the CRC and/or the Government with regards to such submissions.

**Equity**

One successful recommendation made by the Clarke Review was that of the eligibility of North Korean prisoners of war (‘POW’s) during the Korean War to receive an ex-gratia payment.\(^{45}\) This was based on an argument of equity-legislation, which at that time, provided such one off ex-gratia payments to WWII POW of the Japanese, and their widows and widowers.\(^{46}\) The CRC likened the treatment of POW by the Japanese in WWII to the treatment of POW by the North Koreans in the Korean War.\(^{47}\) The CRC did not canvas the idea that such a payment should also be made available to survivors of European POW camps, or their widows or widowers, as the conditions were not comparable to those in Japan.\(^{48}\) This author would hypothesise that the comparatively small cost to the government of introducing this scheme for only Korean War POW (an estimated $0.5 million in 2003-2004)\(^{49}\) instead of all POW in a European theatre of war makes the prospect of implementation more financially attractive. This shows a discretion exercised by the CRC, demonstrating the necessary balancing act between treating people equitably and financial imperatives for the government.

**Structure**

The CRC made a recommendation that the Government consider providing additional assistance to veterans “who experience difficulty in maintaining

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\(^{46}\) *Compensation (Japanese Internment) Act 2001* (Cth); Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth), 7.

\(^{47}\) Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth), 7

\(^{48}\) Ibid.

\(^{49}\) Ibid.
housing equity”, and to veterans’ children wishing to pursue a tertiary education.\(^5\) The Government accepted this recommendation, and acted upon it, citing the MRCA’s initiative to allow an individual to access either a lump sum payment, or ongoing fortnightly payments, and income replacement payments, which it states would be suitable assistance with regards to the housing problem.\(^5\) With regards to tertiary education for veterans’ children, the Government cites the Veterans’ Children’s Education Scheme and the MRCA Education and Training Scheme.\(^5\)

This recommendation for the amendment to the structure of veterans’ entitlements legislation is of wider scope than the above recommendation in equity, in that it applies to all veterans. It provides an example of positive action taken by the Government to seemingly alleviate the problems addressed in the Clarke Review.\(^5\)

There are other general recommendations regarding war widows’ payments and third party benefits presented in Chapter 9 regarding rehabilitation and vocational training for war widows and a compassionate payment scheme for other third parties.

**Total and Permanent Incapacity Recommendations**

A large number of recommendations regarding benefits for totally and permanently incapacitated individuals were submitted to the CRC.\(^5\) The

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\(^5\) Ibid.

\(^5\) Ibid.

\(^5\) Above n 68.

author considered which of these submissions were accepted, published by the CRC in the Review and subsequently accepted (or rejected) by the Government, and which submissions appear to have been rejected or overlooked by the CRC. The explanations for such rejections can be valuable when considering similar recommendations regarding the current MRCA.

**TPI Veterans’ Special Rate Pensions and Disability Pensions**

In contrast to the Baume Review’s criticism of the broadening of the courts’ grants of these pension rates, submissions to the CRC suggested that the SRP was too inflexible to meet the varying financial demands of TPI individuals in modern life.\(^55\) The unsuccessful submissions from organisations including The Australian Federation of Totally and Permanently Incapacitated Ex Servicemen and Women suggested that the SRPs were not current, as they were not continuously reviewed to maintain parity with community standards.\(^56\) That is, the changes applied to SRPs were not allowing the maintenance of a steady purchase power within the community, as they were not following the movements of the Consumer Price Index (‘CPI’). This submission consequently made the recommendation that SRPs be indexed quarterly to other comparable rates (such as the Male Total Average Weekly Earnings (‘MTAWE’)) to ensure that the SRP be regularly revised and updated in accordance with community standards to ensure it closely follows the CPI movements. The Clarke Review criticised the simplicity of the comparison in the submission, suggesting a more accurate comparison would also include other benefits for TPI veterans provided under the VEA.\(^57\) Regardless, the original aim of the TPI payments was “to put the TPI veteran in the same social

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context and enable him to support and provide for his family” as compared to the accepted community standard.\textsuperscript{58} The Clarke Review acknowledges that, after taking into account all complementary services under the \textit{VEA}, the then SRP for a single TPI veteran would provide them with 90\% of the MTAWE. Taking into account the unique nature of military service (see Chapter 7) the author submits that anything less than parity with the MTAWE is inadequate for TPI veterans.

A submission that was successful asserted that Centrelink determinations included TPI payments in a financial assessment of an individual, which some submissions suggested was unfair when considering the unique pressures on a TPI veteran.\textsuperscript{59} In obtaining income support, veterans receiving disability pensions under the \textit{VEA} receive payment from Centrelink under the \textit{Social Security Act 1991 (Cth)} (‘\textit{SSA}’) while veterans with qualifying service can receive payments through DVA. Under the DVA scheme, disability pensions are not taken into account when calculating income support payments. Conversely, under the \textit{SSA} scheme, disability pensions are taken into account when calculating income support payments. This creates a disparity between the two groups of veterans. One submission recommends that the disability pension be treated as exempt from income calculations for both the \textit{SSA} and \textit{DVA} schemes.\textsuperscript{60} The CRC agreed with this submission, and it appears that the Government accepted this submission,\textsuperscript{61} based on the simplicity of amending the \textit{SSA} income exemption provisions to include disability pensions.\textsuperscript{62}

The subsequent consideration of the Clarke Review recommendations in 2010 resulted in a number of recommendations being transferred for consideration.

\textsuperscript{58} Above n 111.
\textsuperscript{60} The Australian Federation of Totally and Permanently Incapacitated Ex Servicemen and Woman, Submission No 1265 to Clarke Review Committee, \textit{Review of Veterans’ Entitlements}, 17 April 2002, 18.
\textsuperscript{61} Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth), 16.
\textsuperscript{62} Amending exemptions as defined and listed in \textit{SSA 1991 (Cth)} ss 8(4), 8(5) or 8(8).
by the Committee conducting the MRCA review. The above understanding of a select few of the recommendations the Clarke Review, including those relating the structure and equity of the VEA, and the apparent deficiencies in various programmes provided for by the VEA provides a basic appreciation for the types of recommendations that may be accepted or rejected by the government in future reviews.

From this overview of the history of veterans’ entitlements legislation we can gain an appreciation for the basis upon which such legislation has been created, and gain knowledge of the legislation preceding the current VEA, SRCA and MRCA.
Chapter 3: The Current Process: the MRCA

After considering veterans’ entitlements schemes prior to 2004, it is important to understand the claim process and the benefits available to claimants, as they exist today under the Military Rehabilitation and Compensation Act 2004 (Cth) (‘MRCA’). This understanding will provide context for the recommendations provided in the MRCA review, to be discussed in Chapter 6.

This chapter outlines four fundamental elements of the claim process: 1) Who can claim under the schemes; 2) how a claim is lodged; 3) what the potential benefits are; and 4) how those benefits are calculated/provided. This chapter will focus on the processes involved specifically with the MRCA.

Who can claim under the schemes?

The MRCA applies to various groups of people, including: current and former members of the permanent Australian Defence Force (‘ADF’) and Reserve Force;63 Cadets and Officers and Instructors of Cadets;64 persons holding an honorary rank in the ADF;65 persons performing acts at the request or direction of the ADF as an “accredited representative of a registered charity”;66 and dependents of deceased members.67,68

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63 Military Rehabilitation and Compensation Act 2004 (Cth) s 3.
65 Military Rehabilitation and Compensation Act 2004 (Cth) s7A(a).
67 The death of whom is service-related.
War widows may therefore be eligible for compensation, however there are issues surrounding the status of the war widow— that is, whether that person is a ‘wholly dependent partner’, or an ‘economically dependent partner’. This issue will be addressed in Chapter 9. The MRCA will apply to these groups of people if they enter into such categories on or after 1 July 2004. Claims will only be successful if the claimant can establish a causal link between the injury, disease sustained or death and their service on or after 1 July 2004. Any claims regarding events predating 1 July 2004 may be covered by the Veterans’ Entitlements Act 1986 (Cth) (‘VEA’) or Safety, Rehabilitation and Compensation Act 1988 (Cth) (‘SRCA’). The current chapter will focus on the application of the MRCA to members of the Australian Regular Army (the ‘ARA’), members of the Army Reserves (the ‘ARes’) on continuous full-time service (‘CFTS’) and members of the Ares.

How is a claim lodged?

In order to lodge a claim, the claimant must complete various forms describing their relevant condition, and the circumstances that gave rise to the condition. The Department of Veterans’ Affairs (‘DVA’) advocates may assist in the completion of these forms and throughout the process. DVA advocates may be found or allocated through branches of the Returned Services League (‘RSL’s) or through DVA. Once lodged, a Military Rehabilitation and Compensation

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72 Ibid.
73 Form D2051 Claim for Liability and/or Reassessment of Compensation and D2049 Injury or Disease Details Sheet, or Form D2033 Claim for Compensation for Dependants of Deceased Members and Former Members.
Committee (‘MRCC’) delegate will investigate the claim.\textsuperscript{74} The delegate may ask the claimant to provide relevant documents, or to undertake medical examinations, the costs for which will be covered by the MRCC (including reasonable accommodation and travel costs).\textsuperscript{75} After a claim has been successful, an individual may apply for various benefits, as outlined below.

**What are the potential benefits?**

Benefits that may be awarded to individuals include: Medical treatment; rehabilitation; income support; lump sums; attendant care and household services.\textsuperscript{76}

**Medical treatment**

The ADF will meet the full cost of medical treatment for conditions accepted by DVA required by members of the ARA and members of the Ares on continuous full-time service.\textsuperscript{77} This includes treatment internal to the ADF and references to external private health service providers.\textsuperscript{78} ARes members are also entitled to payment of “reasonable costs for reasonable medical treatment” or for the provision of treatment for condition/s accepted by DVA.\textsuperscript{79} Furthermore, treatment for some medical conditions may be covered, even in the absence of a connection between the condition and the member’s ADF service.\textsuperscript{80,81} Members serving in a full time capacity (those in the ARA or


\textsuperscript{75} Ibid.

\textsuperscript{76} *Military Rehabilitation and Compensation Act 2004* (Cth).


\textsuperscript{78} Ibid.


\textsuperscript{80} Ibid.

\textsuperscript{81} These conditions are: malignant cancer; post traumatic stress disorder; anxiety and depressive disorders; or pulmonary tuberculosis.
ARes on CFTS) generally have access to medical facilities and treatment, which can include treatment for conditions before liability is accepted by DVA. For members not serving in a full time capacity (ARes members), the general course for repayment for such treatment privately incurred is to submit an Application for Refund of Payment of Medical Expenses Privately Incurred.\(^{82}\)

Financial supplements may also be awarded for other expenses, such as pharmaceutical costs.\(^{83}\)

**Rehabilitation**

Historically, veterans’ entitlements have been associated only with financial payments. However, recent Australian veterans’ compensation schemes have shown an increasing focus on rehabilitation.\(^{84}\) This was particularly evident in the evolution from the VEA to the SRCA and MRCA. Furthermore, in October 2006, the Australian Defence Force Rehabilitation Program (‘ADFRP’) was established to “maximise a member’s potential for restoration” regarding physical, occupational, psychological, educational and social standing.\(^{85}\)

Members are eligible for funded rehabilitation if they have a successful claim for that injury/condition under the MRCA or SRCA, and suffer from impairment or incapacity resulting from that injury/condition.\(^{86}\) An assessment


\(^{83}\) Military Rehabilitation and Compensation Act 2004 (Cth) s300.


is conducted verbally, and the outcome of that assessment will determine whether the claimant may access rehabilitative resources.  

Lost income support

There are times when a claimant may be entitled to lost income support, as was the case above for rehabilitation. These entitlements are broadly referred to as ‘incapacity benefits’. These benefits compensate an individual for their economic loss due to loss of work resulting from their relevant injury or illness. Incapacity payments are continued so long as actual earnings are less than normal earnings. Lost income support payments are of particular use to ADF members, as obtaining income insurance from private companies can be problematic, as provision of such coverage is subject to a risk assessment. Members of armed forces are often automatically excluded from income insurance cover due to the risky nature of their employment.

Lump sums

The most notable lump sum payment comes as a ‘permanent impairment compensation payment’. This payment is compensation for non-economic losses- that is, for “pain, suffering, functional loss or dysfunction and the effects of the injury or disease on lifestyle”. It may be awarded when an individual has suffered an indefinite (permanent) and stable impairment as a

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87 Ibid 2.
89 Ibid 1.
90 Ibid 4.
92 E.g. Ibid 43.
93 Military Rehabilitation and Compensation Act 2004 (Cth) s 67.
result of the injury caused by their ADF service.\textsuperscript{94} Satisfying the criteria of both stable and permanent can create problems, especially for individuals claiming for psychological injuries or illnesses. This is discussed in further detail in chapter 6. If a condition has not yet stabilised, the claimant may be entitled to an interim payment.

**Attendant care**

Attendant care may be available to claimants who have an incapacitating condition making it difficult for that individual to manage their personal needs.\textsuperscript{95} These services can be provided for a short or longer period, depending on the individual’s circumstances (for example, short term care to be provided to someone recovering from surgery).\textsuperscript{96} A need for attendant care is generally conducted by an occupational therapist, taking such factors into account as the nature of injury and ability to care for oneself. Each individual is required to select the care provider.\textsuperscript{97} Requirement for attendant care is continually reviewed and re-assessed.\textsuperscript{98}

**Household Services**

Claimants may also be granted access to household services if they have established an incapacitating medical condition that creates difficulties in managing household tasks.\textsuperscript{99} These services may be provided on a short-term


\textsuperscript{95} Department of Veterans’ Affairs, *Attendant Care DVA Factsheet MRC41* (2 October 2014) DVA, 1, ⟨http://factsheets.dva.gov.au/documents/MRC41%20Attendant%20Care.htm⟩.

\textsuperscript{96} Ibid.

\textsuperscript{97} Ibid 2.

\textsuperscript{98} Ibid 3.

basis or a long-term basis.\textsuperscript{100} Types of services available include, but are not limited to: meal preparation; lawn mowing; ironing; cooking; and cleaning.\textsuperscript{101} Services involving home repairs such as plumbing and decorating are not provided.\textsuperscript{102} Individuals claiming for household services are subject to a needs assessment conducted by a qualified professional, such as an Occupational Therapist.\textsuperscript{103} Other persons living in the same household and their ability to assist is taken into account when making this assessment.\textsuperscript{104} These services are only provided when the claimant is residing at the household, not in periods of absence (for example during stays in the hospital).\textsuperscript{105}

**How are those benefits calculated/provided?**

For medical treatments, once liability for the injury or aggravation of injury has been accepted by DVA, the claimant may pay for medical conditions through either a reimbursement pathway of a Repatriation Health Card (‘\textbf{RHC}’).\textsuperscript{106} The more common form of medical treatment payment is through a RHC, which can be either a white RHC for the treatment of specific conditions, or a gold RHC for the treatment for all conditions. The determination of an award of a white RHC or gold RHC is dependent on a points system. Impairment points range from five to 100, with points awarded based on the level of impact the injury or disease has on the individual’s life.\textsuperscript{107}

DVA will cover all reasonable costs of approved rehabilitation programs.\textsuperscript{108}

\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid 2.
\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
\textsuperscript{108} Ibid.
Benefits for Incapacity for Service or Work are based on the difference between normal earnings for a week at the time of injury and actual earnings per work after injury.\textsuperscript{109} Calculations become more complex as the injury continues over a longer term, but generally, after 45 weeks of incapacity the claimant will receive a percentage of normal earnings and actual earnings.\textsuperscript{110} More information about these calculations can be accessed on the DVA website.\textsuperscript{111}

Calculations of entitlements for a permanent incapacity payment are based on the same points system as in calculations for RHCs above, with individuals at maximum incapacity (that is, those assessed at 80 or more impairment points) being entitled to maximum benefits.\textsuperscript{112} Individuals assessed at less than 80 impairment points will be entitled to an amount proportionally less than the maximum amount.\textsuperscript{113}

Attendant Care and Household Services compensation are generally assessed based on the reasonable requirements of a claimant, by a qualified professional (usually an Occupational Therapist).\textsuperscript{114} Generally, costs will be reimbursed to the person incurring the cost. However, where services are required for a longer term, or if an individual is not able to meet these costs upfront, arrangements can be made with DVA.\textsuperscript{115}

\begin{itemize}
\item[\textsuperscript{110}] Ibid.
\item[\textsuperscript{112}] Ibid.
\item[\textsuperscript{113}] Ibid.
\item[\textsuperscript{115}] Ibid.
\end{itemize}
It is possible to accrue a number of these benefits at the same time. For example, an individual who has become permanently incapacitated by their injury may be entitled to the permanent incapacitation lump sum payment, income support (if their incapacity has affected their ability to work) and rehabilitation benefits.

It is with this understanding of the claims process that we can explore the anomalies and shortfalls of the current Veterans’ entitlements schemes, and subsequently make relevant recommendations.
Chapter 4: MRCA Review

The MRCA Review carries significant weight in a discussion of current veterans’ entitlements legislation as it is the most recent review (2011), and therefore discusses issues and provides recommendations that, in the absence of government action, are largely still relevant today. Such an analysis of entitlements schemes is imperative for this thesis, as a number of the recommendations to improve the current schemes stem from the information and recommendations provided in this review.

The MRCA Review was conducted by a Steering Committee (‘the Committee’), with the aim of assessing the operation of the MRCA and identifying any anomalies that exist in the Military, Rehabilitation and Compensation Act 2004 (Cth) (the ‘MRCA’). Furthermore, the Committee was to consider “the level of medical and financial care” provided to Australian Defence Force (‘ADF’) members for injuries/diseases incurred during peacetime service; the implications and suitability of broadening the MRCA scope to also apply to members of the Australian Federal Police (‘AFP’); and the “implications of a compassionate payment scheme for families of deceased ADF members”.

The author will consider three of the areas of focus as established through the Committee’s recommendations in this Chapter, and at least five other areas in other Chapters of this thesis. Topics to be discussed in this Chapter include: Initial liability and the Statements of Principles (‘SoP’s); Permanent Impairment Compensation and ancillary benefits. Topics to be considered in other Chapters include: The unique nature of military service; coverage by the

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117 Ibid.
118 Ibid.
119 The unique nature of military service; coverage by the MRCA of the AFP; death benefit provisions; permanent impairment compensation and the compassionate payment scheme.
MRCA of the AFP; death benefit provisions; permanent impairment compensation and the compassionate payment scheme.  

Initial Liability and the Statements of Principles

Under the MRCA, Statements of Principles (‘SoP’s) are the legislative instruments detailing factors that may cause specific medical conditions. They are used to determine whether an ADF member’s injury, illness or death was caused by their Defence service. The Repatriation Medical Authority (‘RMA’), an independent statutory authority, considers a determination with reference to “sound medical-scientific evidence”. The RMA consists of medically qualified personnel. Decisions made by the RMA and contents of the SoPs are reviewable by the Specialist Medical Review Council (the ‘SMRC’). Under the SRCA, claims were determined on a case-by-case basis. The Committee recommended that there be no change to the current SoPs regime. The Government accepted this recommendation. However, a number of concerns were raised in submissions with regards to the SoPs regime, indicating that the current system is not being applied equitably for all individuals.

Submissions to the Committee indicated that the SoP regime lacks the flexibility required in considering causation for claims. Furthermore, submissions also recommended discretionary use of SoPs for cases where other

120 Chapters 7-10.
123 Veterans’ Entitlements Act 1986 (Cth) s 5AB(2).
medical evidence supports the ADF member’s claim. The recommendation was that claims should be considered with discretion where there is:

‘Substantial compliance’ with a SoP, or if other medical evidence such as a specialist report, supports the claim, as is the case under the SRCA.

This recommendation was based upon provisions in the MRCA, where the MRCC is “not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks just”. The Committee disagreed with this premise, interpreting the provision to require fairness and equity, and not to confer such discretion on decision makers. The then response was that it is difficult for a non-medically qualified tribunal to balance competing medical opinions. The author would recommend that, as the RMA consists of medically qualified personnel, there is scope for the use of discretion on claims that only substantially satisfy the SoPs.

**RECOMMENDATION:**

The government revisit the recommendation that ‘substantial compliance’ with SoPs be sufficient for consideration to accept liability for a claim. [GR]

**Permanent Impairment Compensation**

In order for an individual to have a successful claim for permanent impairment compensation, their injury or illness must be both permanent and stable.

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128 Ibid; *Military Rehabilitation and Compensation Act 2004* (Cth) s 334(a).
129 Above n 129.
131 Above n 126.

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Methodology and Time Anomaly

The technique for determining eligibility for permanent impairment compensation had originally been the ‘whole person impairment methodology’, requiring consideration of all injuries or diseases suffered by a person. Furthermore, permanent impairment compensation payments would be awarded when the last-in-time injury or disease was deemed ‘stable’ (or, from the date that the liability claim was lodged- whichever is the latter). The Committee found an anomaly in this methodology for claimants with multiple injuries that would become stable at different times. The Committee therefore recommended that permanent impairment payments be granted on an injury-by-injury basis. It upheld the requirement for a condition to be stable, but also recommended that “decision makers make greater use of the interim permanent impairment compensation provisions”. The Government responded by accepting both recommendations, and enhancing the second recommendation by allowing an interim payment when an injury can be medically evidenced to satisfy the minimum threshold for impairment points for receiving this payment when stabilised.

The Necessity of ‘Stability’?

It was also noted by the Committee that submissions were received with regards to the requirement for an injury or disease to satisfy the requirement of ‘stability’ before permanent impairment compensation can be awarded. The Committee details in the review that the requirement for stability allows degree of impairment (and consequent compensation) to be calculated at peak

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134 Military Rehabilitation and Compensation Act 2004 (Cth) s 77.
136 Ibid.
accuracy.\textsuperscript{138} That is, if the condition was to improve or worsen over time after payment has been made, the change in the severity of condition would not have been taken into account for the compensation of non-economic loss. While this may be a realistic evaluation of circumstances for individuals with physical impairment, it is difficult to believe that the same evaluation can be made of claimants with psychological impairments.

Research has shown differences in the time it can take for a psychological condition to stabilise in different people having been exposed to the same scenario.\textsuperscript{139} Consider a hypothetical situation involving soldier X and soldier Y, both privy to the same traumatic event, both psychologically affected in the same way by this event. Then consider that Soldier X’s psychological injuries are found to have stabilised before Soldier Y’s (perhaps due to different coping mechanisms, or different assessing Doctors). An anomaly has now been exposed where Soldier X would receive compensation for the same trauma as Soldier Y before Soldier Y.

The existence of this anomaly suggests that there should be a review of the requirement for an injury or incapacitation to be both stable and permanent before the individual qualifies for permanent impairment compensation, particularly with regards to psychological injuries and illnesses.

RECOMMENDATION:
The government reevaluate the effectiveness of the ‘stable and permanent’ criteria when making decisions regarding permanent impairment compensation- especially with regards to psychological injuries and/or illnesses. [GR]

\textsuperscript{138} Ibid.
\textsuperscript{139} Bonnie L. Green, ‘Buffalo Creek Survivors in the Second Decade: Stability of Stress Symptoms’ (1990) 60 (1) American Journal of Orthopsychiatry 43.
It is evident from the above that a discussion of the *MRCA* review is imperative to an analysis of current veterans’ entitlements legislation. The author’s recommendations in this Chapter are founded in the information and recommendations of the *MRCA* review. Of particular importance in this chapter were recommendations from the review that were rejected by the government. It is through this analysis of the *MRCA* review that we begin to identify shortfalls and anomalies that exist within the current veterans’ entitlements legislative schemes.
Chapter 5: Unique Nature of Military and Operational Service

The existence of a unique military compensation scheme has created controversy within the veterans’ community, resulting in a number of recommendations regarding perceived shortfalls in the veterans’ entitlements schemes. This chapter will address two qualifying notions with regards to the ‘unique nature of military service’. Firstly, the author will address the necessary difference between civilian compensation systems, and Veterans’ entitlements schemes. Secondly, the author will focus more closely on the military setting, and discuss the difference between operational service and peacetime service, and how such a difference could affect an individual’s claim for liability for an injury, illness or death caused by their service.

Military vs. Civilian Compensation Schemes

One of the fundamental principles behind the differentiation between a specific military compensation scheme and civilian worker’s compensation scheme is the unique nature of military service. There is no other service like war service. Individuals who join the Australian Defence Force (‘ADF’) volunteer to fight Australia’s wars. In the case that one of these ADF members is sent to serve in war, they will face a direct threat to their personal safety and wellbeing. Despite claims that increased income and allowances account for such risks taken, it is difficult to accept that current pay scales would incorporate appropriate market rates for such risk. It is therefore imperative that military-specific compensation schemes remain in place, and are continually revised to ensure that they represent a modern perspective of career risk. Such revision may also involve evaluation of benefits awarded to ADF members with operational service compared to those with peacetime service.
Workplace Risk

When assessing appropriate schemes for compensation in a workplace, it is important to have an appreciation for the requirements and associated risks of the considered job.

When an individual is employed by the ADF, there are a number of expectations that individual should have and accept about their chosen career. Due to the limited length of this thesis, the author will focus on the situation of a soldier in the Australian Regular Army (‘ARA’) and/or the Australian Army Reserves (‘ARes’).

A soldier must accept that there may be a time at which he/she is to provide service at war. In a modern analysis of this service, we can look to duties assigned to Australian soldiers in the Afghanistan combat theatre, Operation Highroad.140 These can involve patrols by day or night, clearing villages for enemy or actively seeking out enemy. In the process, people can expect that injury and death will result from hostile encounters with this enemy. Furthermore, the development of Improvised Explosive Devices (‘IED’s) mean that soldiers are constantly exposed to the risks associated with detonations and explosions of such devices (psychological or physical injury, and/or death). Furthermore, recent ‘inside’ killings by members (or individuals purporting to be members) of the Afghan National Army (or ‘green-on-blue killings’) of foreign troops broaden the likelihood of soldiers from all corps being involved in fatal incidents, and increase risk to those in non-combat roles. As at 31 August 2012, there had been 45 deaths resulting from these green-on-blue incidents in Western forces.141

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140 As transitioned into from the better know ‘Operation Slipper’- http://www.defence.gov.au/operations/afghanistan/.
Not only do soldiers face the physical and psychological risks associated with the dangerous work environment of a war zone, but also there are potentially psychological costs involved for the soldiers in being trained to kill, and to actually kill. Soldiers may be psychologically affected by the desensitisation training pre-deployment, or may return from a war zone with psychological conditions such as post traumatic stress disorder. The stress involved with an act of killing is beyond imagination for those who have not been involved in such a situation. In a typical enemy contact scenario, the death is an assault on every sense—seeing the death of a person, hearing their cries, and smelling burning flesh and blood. Although this seems a somewhat melodramatic picture of death, it is important to appreciate these experiences of serving soldiers when comparing the risks (and consequent compensation schemes) undertaken by soldiers versus civilians.

**Current pay scales and allowances assessed against market rate for risk**

It is often stated that current pay scales and allowances provide for the increased risk of a career in the ADF. This assertion suggests that the market rate for compensation is incorporated into a soldier’s upfront salary.

It is difficult to calculate a market rate for payments to soldiers in lieu of the risks they may encounter. How can a market rate be quantified for a combat medic remaining in the battlefield to treat fallen comrades while enemy combatants continue to fire at them? Or the market rate for a driver...

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143 Ibid.
144 Ibid, 73.
145 Letter from Tim McCombe, President Vietnam Veterans’ Federation to Peta Furnell, General Manager The Treasury, 17 October 2009.
146 Ibid.
continually travelling over roads that are susceptible to the burying of IEDs?\textsuperscript{147}

This thesis does not purport to conduct in-depth quantitative analysis of risk premiums paid as a proportion of one’s salary. It is, however, interesting to consider private security contractors who work in the Middle East, employed in similar roles to soldiers but in a non-governmental capacity. A Google search of such private security positions revealed a number of relevant contractor jobs, including Armed Security Guard with the ‘elite security specialists’, Academi.\textsuperscript{148} Private contractors in such positions can expect three to four times the salary of a soldier.\textsuperscript{149} This differential brings into question the assertion that ADF members are paid market rate compensation in their salaries.

**Integrating civilian and military compensation schemes**

There have been suggestions that compensation for injuries caused during military service should be awarded on an ‘equivalent’ civilian scale.\textsuperscript{150} This has been justified by quantifying risk, operating on the assumption that the risk posed by a military career could be equated to risk in some civilian careers (for example, for firefighters).\textsuperscript{151} There is no doubt that there is risk involved in various civilians employs. A firefighter faces real risk when fighting a fire. However, unlike enemy combatants and forces in war zones, a fire has no ill intention or malice towards the fire fighter. There is no intention to harm the firefighter- but purely to move where there is fuel and oxygen. In contrast, a soldier must accept that he/she will face enemy forces with the intention and determination to kill him/her.\textsuperscript{152} The enemy will, more likely than not, also have the tools and training to kill that soldier. Furthermore, in a war zone,

\textsuperscript{147} Ibid.
\textsuperscript{149} Above n 148.
\textsuperscript{150} E.g. Tony Abbot, MP, Submission 2466 to the Pearce Inquiry, Repatriation Commission of Employment and Workplace Relations, *Submission to the Review of Veterans’ Entitlements by the Repatriation Commission of Employment and Workplace Relations*.
\textsuperscript{151} Ibid.
\textsuperscript{152} Above n 148.
there is a lack of health and safety officers, an inability of a soldier to refuse tasks and orders of a nature that may result in loss of limbs, and operational requirements that may render soldiers unable to take preventative medicines against illness and disease. The MRCA Review addressed the issue of broadening the MRCA scope to encompass members of the AFP members who have been deployed overseas. The Steering Committee recommended that AFP members not be given access to the MRCA, as the MRCA was “designed to be military-specific”, and to take into account the special nature of military service. The Government accepted this recommendation on the basis that:

It is not appropriate to provide access to [AFP] members to a scheme that has been designed to provide for the unique nature of military service.154

It is therefore evident, in comparing the fire fighter to the soldier, and in the MRCA Review recommendations regarding AFP entitlements, that simply classing a risk as ‘life-threatening’ and treating all occupations facing such a risk to the same compensation scheme is an oversimplification of the circumstances of the jobs.

While military and civilian compensation schemes are currently largely separate, it is important to reinforce the above principles in order to prevent any future movements to align and integrate these systems.

RECOMMENDATION:
The government maintain an appreciation for the unique nature of military service, and apply this appreciation to its decisions regarding amendments to legislative instruments and veterans’ entitlements schemes. [GR]

154 Above n 137.
It is with this appreciation of the difference between the nature of civilian and military employment that the necessity for a separate military entitlements’ scheme is evidenced.

**Unique nature of operational service**

After an assessment of the unique nature of military service as compared with civilian employment, it is the author’s view that the different nature of operational (warlike and non-warlike) and peacetime service should give rise to necessarily different entitlements and benefits to the two classes of ADF members. Ultimately, this is a distinction made between members who have served in an operational capacity and those who have spent their careers working in a peacetime environment. This issue was explored in the Clarke Review with regards to a number of World War Two (‘WWII’) veterans seeking access to a Gold Repatriation Health Card (‘RHC’), despite having only served in Australia during the war.\(^{155}\) The principle that a claimant requires operational service to obtain such benefits under the *VEA* was reaffirmed in both the review, and in the subsequent Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth).

The most recent review of military compensation\(^{156}\) was conducted by a Steering Committee (the ‘Committee’) consisting of representatives from DVA, the Australian Defence Organisation (the ‘ADO’), the Department of Finance and Deregulation (Finance), the Treasury, the Department of Education, Employment and Workplace Relations and Mr Peter Sutherland, an expert in workers’ and military compensation.\(^{157}\) Two recommendations that divided members’ opinions involved the differential between warlike and non-warlike service (or operational service) as opposed to peacetime service.\(^{158}\) Mr Sutherland and the representatives from DVA and the ADO supported

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\(^{155}\) Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth), 6.

\(^{156}\) Above n 69.


\(^{158}\) Ibid 18.
recommendation 8.2(a), proposing that individuals who have rendered operational service should be entitled to “higher rates of compensation”.

At an estimated cost of $1.15 million over four years, Committee members representing the Treasury, the Department of Finance and Deregulation (Finance), the Department of Education, Employment and Workplace Relations rejected this proposal. Furthermore, recommendation 9.4(a) (reliant on the success of the recommendation 8.2(a)), proposed that lump sum death benefits for deaths related to warlike or non-warlike service be increased by 10 percent, at calculated cost of $2.85 million over four years.

The division of members for supporting and rejecting recommendation 9.4(a) was identical to the division resulting from recommendation 8.2(a). The Government rejected both recommendations. While the explanation for rejection of recommendation 8.2(a) simply stated that an alternative presented by the rejecting members was preferred, and that recommendation 9.4(a) was thus also rejected, it is this author’s submission that the rejection may have been based on the calculated financial commitments of both proposals. While finances are a necessary consideration for making and accepting or rejecting recommendations regarding compensation legislation, they should not be considered in isolation. Pursuant to the above discussion of the unique nature of military service and specifically, to the anecdotal references to situations presented through operational service, it is also crucial to evaluate the nature of the specific jobs giving rise to compensation claims.

RECOMMENDATION:
The government revisit the issue of differentiating operational service and peacetime service with regards to compensation claims. [GR]

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159 Ibid 47.
160 Above n 161.
161 Ibid 48.
162 Ibid 20.
163 Ibid.
164 Above n 137.
165 The alternative recommendation, recommendation 8.2(b) suggested not altering current arrangements, as did recommendation 9.4(b) in response to recommendation 9.4(a).
Chapter 6: Confidentiality

A shortfall identified by the author, but not yet addressed in any Military Compensation Review, is that of the confidentiality of documents pertaining to claims for liability, especially for Australian Defence Force (‘ADF’) members still serving, or ADF members hoping to return to service at some point in time.

Confidentiality in compensation claims

The confidentiality of compensation claims in the ADF is paramount to the potential career progression and opportunities for operational service of individual ADF members. Claims that are pursuant to the Veterans’ Entitlements Act 1986 (Cth) (the ‘VEA’) are protected by the confidentiality classification ‘medical-in-confidence’. This classification is used for documents concerning medical and dental matters of a personal nature. The author has been unable to find an exhaustive definition of the term ‘medical-in-confidence’, and therefore relies on the aforementioned definition on the assumption that it is a generally accepted definition of the term.

Duty delegation, MRCA

Claims that are pursued under the Military, Rehabilitation and Compensation Act 2004 (Cth) (the ‘MRCA’) are subject to less confidentiality than those under the VEA, as relevant documents are not entitled to the classification of ‘medical-in-confidence’. Instead, claimants are required to sign various information release forms and waivers. Documents pertaining to MRCA claims are subsequently available to the Chief of the Defence Force (‘CDF’).\textsuperscript{166} The CDF has powers that allow him/her to reconsider an original

\textsuperscript{166} Military Rehabilitation and Compensation Act 2004 (Cth) s331.
determination for a Department of Veterans’ Affairs (‘DVA’) claim, and may subsequently revoke, confirm or vary the original determination.167 The CDF may also request the determining authority- the Military Rehabilitation and Compensation Commission (‘the Commission’)- to reconsider a determination.168 The CDF also has powers of delegation for these duties, while retaining the power of ‘final decision-maker’.169 This delegation may be to a Service Chief (‘SC’), that is, Chief of Navy, Chief of Army or Chief of Air Force.170 SC’s may then delegate such duties to a person engaged in employment under the Public Service Act 1999,171 or a member of the ADF ‘whose duties relate to matters to which the provision relates’.172 When a member is downgraded in medical classification as their injury prohibits their capacity to perform work, they will be subject to periodical reviews by a Medical Employment Classification Review Board, often consisting of members in their chain of command. This will generally mean that a claimant’s Commanding Officer (‘CO’), Platoon Commander and other senior ranks within their chain of command will be privy to documents pertaining to the claim. Access to such information could potentially extend to anyone within the member’s hierarchy, or chain of command. Therefore, whereas under the VEA, claims and their relevant documents were only to be sited by medical personnel (pursuant to their classification as ‘medical-in-confidence’, claims are now accessible by a wide range of persons, who are not necessarily medically qualified, which has the potential to affect a claimant’s career progression and opportunities for deployment, and risks the claimant becoming subject of the stigma of associated with malingerers, as discussed below.

167 Ibid s347.
168 Ibid s349.
169 Ibid s438.
170 Ibid s438(1).
171 Military Rehabilitation and Compensation Act 2004 (Cth) s438 (2)(a).
172 Ibid s438 (2)(b).
Impacts of lessening confidentiality

1) Career Progression and Deployment

It is important that individuals who are physically and/or mentally incapable of performing their duties in the ADF are not putting themselves or others at risk in doing so. However, if an individual were still able to function in their role, there would appear to be no reason to stop that person from doing so. This is not always the case though. We can consider this issue through the circumstance of a soldier in the Australian Army. All soldiers are required to complete initial recruit training at Kapooka, in order to provide them with basic soldiering skills. These include physical training, drill, weapons handling and battlefield contact scenarios. While it is necessary for many soldiers to employ these skills beyond their training at Kapooka, some positions may largely be focused on administrative jobs that are far from the ‘front lines’ requiring such capabilities. It is in these jobs that some of these problems relating to confidentiality arise. Consider the hypothetical scenario of a Private in the Royal Australian Army Pay Corps who has sustained a low severity knee injury during their service. While that soldier may still be capable of performing their tasks of processing and transferring pay, they may be found to be unfit for deployment, and may suffer hindrance in their career progression if they have a current DVA claim. Furthermore, exacerbating the problem of career development in the face of injury is the potential lack of medically qualified on a person’s Medical Review Board. Dissatisfaction with the person’s work may contribute to a decision that should only be made on a person’s ability to perform their work at full capacity. The unique situation faced by members of the Australian Army Reserve is discussed below.

176 Soldiers are required to pass physical fitness tests before deployments, and are to adhere to a requisite state of wellness and health.
2) Stigma

A claimant may also have concerns for accusations amongst his/her peers and/or hierarchy of malingering, and the stigma that is attached. Malingering is the ‘conscious feigning or exaggeration of physical injury or mental illness for personal benefit’.\textsuperscript{177} Malingering within the ADF is an unacceptable form of behaviour. As a member of an organisation that relies on teamwork, honesty and integrity,\textsuperscript{178} each individual is required to adhere to and apply these values. Not only does a malingerer face stigma amongst their peers, they could also be subject to imprisonment of up to 12 months as malingering is an offence under Defence Force legislation.\textsuperscript{179} Therefore, it is evident that malingering is a behaviour that will not be tolerated by peers or by the hierarchy. If an individual has made a claim to DVA for an injury incurred or aggravated in the course of service to the ADF, and those documents are made accessible to his/her chain of command, we can now begin to appreciate that the individual may be concerned about attracting the aforementioned stigma.

3) The Special Case of Reservists

When a member has suffered an injury that impacts on their ability to conduct workplace activities, they are ‘medically downgraded’. In order to be deployable, an individual must be medically cleared in the top class, Medical Employment Classification (‘MEC’) 1 (that is, fully employable and deployable as they are medically fit without restrictions).\textsuperscript{180} Once downgraded from MEC 1, the medical classification and the persons’ work capabilities are continually reviewed. There will often be a time limit placed on an individual

\textsuperscript{179} \textit{Defence Force Discipline Act 1982} (Cth) s38.

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to reach MEC 1 again,\textsuperscript{181} or else the individual is likely to face a medical discharge if they are found by the MEC Review Board to be medically unfit for further service.\textsuperscript{182} As mentioned above, the MEC Review Board that reviews a person’s Medical Classification ordinarily consists of persons in that individual’s hierarchy. This author’s own Medical Review Board included her CO, Regimental Sergeant Major and Platoon Commander. None of these members were medically qualified, creating the same issues as those mentioned above in the discussion of career progression and deployment. In order for progression of the reviews, the injured member must sign a waiver, releasing all (relevant) medical documentation to members of this Board. The special case of reservists is that the members are also likely to be employed in civilian jobs. This increases the chances that a conflict of interest will arise from the review. That is, dealings between the injured members and the members of the Board may not be limited to the military realm. One potential conflict can be illustrated in the hypothetical situation where a member suffers from a psychological injury, is deemed unable to cope with the demands of work in the military, and subsequently applies for civilian work in a company where one of the Board Members is employed.

\textbf{RECOMMENDATION:}

All documents pertaining to a member’s injury and/or DVA claim are reverted to a classification of 'Medical-in-Confidence', with no requirement to release documents to non-medical personnel. [A]

\textsuperscript{181} E.g. a MEC3 member undergoing rehabilitation has a defined period of 12 months; Department of Defence, \textit{Military Personnel Policy Manual} (October 2010) 2-5, <http://www.defence.gov.au/dpe/pac/MILPERSMAN.pdf>.

\textsuperscript{182} Ibid 2-13.
Chapter 7: Compensation Offsetting

An anomaly in the current veterans’ entitlements schemes exists when an individual is eligible to claim for one injury, illness or death under more than one piece of legislation.

The method employed by the Government to prevent claimants ‘double dipping’ with payments for permanent incapacity and disability is offsetting. Offsetting is used in two situations: Firstly, when a claimant is covered by more than one compensation Act (that is, they have dual eligibility); and secondly, when a claimant retires.

**Dual eligibility**

The reason for compensation offsetting for persons with dual eligibility for incapacity payments is to ensure that a claimant is not paid more than once for the same incapacity or death. That is, it reduces one compensation payment in lieu of another compensation payment received for the same incapacity or death. This is justified as a legal requirement, ensuring that an individual does not ‘double dip’ for the same incapacity. However, the simplicity of the descriptions of this scheme does not seem to match the complexity of comparing benefits gained from different Acts. Under the *Veterans’ Entitlements Act 1986* (Cth) (the ‘*VEA*’), there are no provisions for lump sum payments. All incapacity payments are made periodically over a long period of time. In contrast, the *MRCA* allows claimants to elect to receive a lump sum payment. Offsetting therefore requires a comparison with long-term

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ongoing payments and one-off lump sum payments. Therefore, there is a differential of offsetting between claimants with dual eligibility who elect to receive a lump sum, and those who elect to receive ongoing payments. Incapacity payments under both acts are quantified using complex calculations including variables such as life expectancy.\textsuperscript{186} It is possible that a claimant who is engaged in an ongoing payment scheme will suffer a larger cost from offsetting if a variable of the equation used to predict offsetting amounts is predicted inaccurately- for example, if the claimant were to live longer than their expected length of life.

\begin{quote}
\textbf{RECOMMENDATION:}
Retain offsetting for members with dual eligibility, but if offsetting results in a periodic cost in pension payments, ensure that the ongoing costs are limited to a timeframe. For example, costs could cease once the individual has passed their age of life expectancy. [A]
\end{quote}

\section*{Superannuation Offsetting}

Members receiving incapacity payments and the Special Rate of Disability Pension who retire from serving in the ADF have these payments offset by Commonwealth contributions to their superannuation benefits.\textsuperscript{187} The justification for this has been that the Government should not pay two separate income maintenance payments to the one person.\textsuperscript{188} An anomaly exists when we compare two individuals, both suffering from the same injury and subject to the same entitlements from the Department of Veterans’ Affairs, but where one discharges from the Australian Defence Force (‘\textbf{ADF}’) before retirement age, and the other remains in the ADF until retirement age. The individual who discharged early and transferred his/her superannuation into a civilian fund

\textsuperscript{186} Ibid 79.
\textsuperscript{187} Ibid 159.
\textsuperscript{188} Ibid.
receives both the disability pension and full superannuation payments upon retirement. The individual who remained in the ADF until retirement experiences has their superannuation offset against their disability payments. The second individual therefore receives less in retirement than the first individual who discharged early. This presents an opportunity for further research into the superannuation-offsetting scheme.

RECOMMENDATION:
Further research be undertaken into the superannuation-offsetting scheme. [A]

Public Criticism of Offsetting and future research

A recent Parliamentary address by Senator Jacqui Lambie was highly critical of the offsetting system. While her address gave anecdotal evidence of the ‘systemic failure’ of the offsetting system, the author failed to find any clear indication of what Senator Lambie felt were the specific failures of the system. Whether the criticism related to the above recommendations or not, it is clear that there is unease about the use of the offsetting schemes. This may present an opportunity for future research into this topic.

189 Commonwealth, Parliamentary Debates, Senate, 5 March 2015, 117 (Jacqui Lambie).
Chapter 8: Third Party Benefits

The identification and analysis of any anomalies and/or shortfalls that exist within the current Australian veterans’ entitlements scheme would be incomplete without a discussion of the benefits provided to third parties—that is, individuals other than the claimant who are affected by the Australian Defence Force (‘ADF’) member’s injury, illness of death. After all, the veterans’ entitlements schemes were created to cater not only for the ADF member affected, but also for relevant third parties as discussed below.

When an Australian Defence Force (‘ADF’) member dies as a result of their service within the ADF, consideration must be given to the people left behind. Such people include partners (wholly or partly economically dependent on the member), former partners and non-dependent family members (such as parents). Issues in the current veterans' entitlements scheme include the lack of vocational training and rehabilitation for war widow/ers, exclusion of former partners from benefits eligibility, and the inadequacy of compassionate payments to non-dependent family members of ADF members wrongfully killed during their service. However, the recent amendment of the Military Rehabilitation and Compensation Act 2004 (Cth) (the ‘MRCA’) to include same sex couples in relevant third party benefits definitions (such as ‘partner’) show a promising willingness on the government’s behalf to modernise the legislation.

Eligibility

The Committee of the Military Rehabilitation and Compensation Review (the ‘MRCA Review’) referred to three classes of persons entitled to death benefits in the event of the death of an ADF member. The classes are: wholly dependent partners (war widow/ers); eligible young persons; and ‘other’
dependants. Non-dependent parents and other close family members are not automatically entitled to benefits after the death of the ADF member, although this has been questioned and addressed through discussions of a compassionate payment scheme in the *MRCA* Review. This is considered below.

A person will be eligible for the aforementioned payment if that person was legally married to-or in a de facto relationship with a veteran who died as a result of their service. The person must have been in such a relationship immediately before the veteran’s death, and must not have since married, remarried or entered a de facto relationship with another person. The Repatriation Commission delegate considers applications for this benefit. The claim must establish causation between the veteran’s death and their service, as determined by the Statements of Principles (‘SoP’s). There is no upper time limit for the processing of the claim.

**Benefits**

The war widow(er)’s pension is currently $853.80 per fortnight, and is indexed twice yearly. These payments are not subject to tax. Furthermore, war widow(er)s are issued with a gold Repatriation Health Card (as discussed in Chapter 4). There is also the possibility of an income support supplement that is income and assets tested. Other available payments include: an

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191 Ibid.
193 Ibid 3.
194 Ibid.
195 Ibid.
196 Ibid 4.
197 Ibid.
198 Ibid.
Energy Supplement;\textsuperscript{199} costs of public and private transport; funeral costs;\textsuperscript{200} and financial assistance and counseling provided by the Veterans’ Children Education Scheme.\textsuperscript{201}

**War Widow/er Rehabilitation and Vocational Training**

As income support payments are means tested,\textsuperscript{202} war widow(er)s who find themselves without work, and/or without the skills to find work, are likely to remain dependent on the income supplement payments. Vocational training and rehabilitative services are provided to the veterans who suffer injuries or illnesses, along with the financial benefits associated with the Gold Repatriation Health Card (‘RHC’) and compensation payments. It does not appear that vocational training and/or rehabilitative services are offered to war widow(er)s (with the exception of counseling services, which may be obtained through the use of a gold card). It seems that the provision of rehabilitative and vocational training would be financially beneficial for the government, as the war widow/er would then be capable of earning a greater income. Earning this income would affect the individual’s means test, and would subsequently decrease (if not terminate) income support payments. Furthermore, it would undoubtedly provide the individual with a greater sense of independence. This is relevant to the system of entitlements offered by the Department of Veterans’ Affairs as it is accepted that ADF service by a person also affects and involves that person’s family members. The scheme therefore appears to take a more holistic view of the family unit. It is therefore the author’s


submission that the provision of vocational training and rehabilitation to war widow/ers would be beneficial for all parties involved.

RECOMMENDATION:
Vocational training and rehabilitation be provided to war widow/ers in order to increase their earning potential, and decrease reliance upon income support payments from the government. [A]

Wholly Dependent Partners

In order for partners of ADF members killed in the course of service to be granted economic support, they must be wholly or partly dependent on the member at the time of the member’s death. If the claimant was partly dependent on the deceased member at the time of death, they must also be in a relationship with the member as accepted under the MRCA. Accepted relationships to the member include partner; father; mother; brother; and sister.

Submissions to the MRCA Review pointed to the lack of provisions for former partners who were economically dependent on the ADF member at the time of the member’s death, or who still have the care of the member’s children. The Review’s Committee recommended that exclusion of former partners in the MRCA be reexamined. The Government accepted this recommendation.

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204 Military Rehabilitation and Compensation Act 2004 (Cth) s 15(2).
206 Above n 137.
207 Ibid.
Compassionate Payment Scheme

Compassionate payments are generally sought by non-dependent parents of deceased ADF members to compensate for grief or pain and suffering.\(^\text{208}\) Such non-dependent family members play an important role in supporting ADF members throughout their career in the ADF, particularly in younger members who may not yet have dependents. The philosophy of a compassionate payment scheme largely revolves around this support, and the grief and bereavement suffered in the case of wrongful death of the ADF member.\(^\text{209}\) Australian common law does not generally recognise such compensation schemes.\(^\text{210}\) A compassionate payment scheme currently also does not exist in Australian veterans’ entitlements legislation, with the Government accepting the MRCA Review’s recommendation that a compassionate payment scheme not be introduced. The MRCA Review and the Government’s subsequent response to its recommendations stated that non-dependent parents and family members of deceased ADF members may be considered for compensation on a case-by-case ex-gratia basis.\(^\text{211}\) However, the MRCA Review appears to contradict itself on this point, stating that eligibility will exist where the ‘non-dependent’ family member can establish that they were financially dependent on the deceased ADF member.\(^\text{212}\)

The death of an ADF member can become a very public issue, especially when it is a wrongful death caused in some way by the ADF. Such publicity can subsequently raise questions about the adequacy of the current veterans’ entitlements schemes.\(^\text{213}\) The MRCA Review states that two predominant justifications for the introduction of a compassionate payment scheme are: to prevent the politicisation of these matters that can result from the


\(^{209}\) Ibid 353.

\(^{210}\) Ibid.

\(^{211}\) Above n 137.


\(^{213}\) Ibid.
aforementioned public scrutiny and to provide support in a clear and consistent way.\textsuperscript{214}

One instance of public scrutiny arose from a Royal Australian Navy (‘\textbf{RAN}’) helicopter accident in 2005 that resulted in the deaths of nine ADF personnel.\textsuperscript{215} The crash was attributed to faulty repairs conducted by the RAN two months earlier.\textsuperscript{216} Legal action instigated by the parents of the victims (non of whom were dependent on their children) resulted in a recommendation that “Defence give consideration to the provision an ex gratia payment” in acknowledgement of the parents’ grief and bereavement.\textsuperscript{217} The claims have subsequently been settled with the Department of Defence.\textsuperscript{218}

The \textit{MRCA} Review advises against the introduction of a compassionate payment scheme on three fundamental submissions.\textsuperscript{219} Firstly, it asserts that it would grant access to a compensation payment not currently available to most Australian citizens.\textsuperscript{220} This argument does not seem to hold much weight when one considers the unique situation that ADF members and their families find themselves in, by virtue of the member’s employment. Secondly, the \textit{MRCA} Review suggests that the criteria upon which to base a decision granting compassionate payment would be particularly difficult—particularly in the case where an individual is not granted the payment, such as for fiancées and girlfriends or boyfriends.\textsuperscript{221} The author would suggest that the current case-by-case system must have some criteria framework upon which to base decisions, which may then be applied to a broader spectrum of potential claims. Furthermore, the concern of backlash arising from certain individuals not receiving payments seems redundant, as those persons are currently generally

\textsuperscript{214} Ibid.
\textsuperscript{216} Ibid 356.
\textsuperscript{217} Ibid.
\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid.
\textsuperscript{220} Ibid.
\textsuperscript{221} Ibid.
not entitled to such payments, regardless of the existence of a compassionate payment scheme. Thirdly, the MRCA Review suggests that the introduction of such a scheme would still attract criticism for insufficiency, regardless of the level of compensation. Again, the author submits that this conclusion is irrelevant, as the payments should not be granted to please the general public, but instead to alleviate the grief and bereavement suffered by the claimants.

It seems, from the author’s analysis, that the basis upon which the MRCA Review recommends maintaining the current system of a case-by-case ex gratia payment scheme for non-dependents of ADF members wrongfully killed in the course of their service is flawed. It does not appear to focus on the original aim of compassionate payment schemes- to provide for the grief and bereavement suffered by family members, whether they are dependent or non-dependent, in the case of their family member’s wrongful death. Furthermore, despite the noted lack of such schemes in Australia, the author submits that the unique nature of military service (see Chapter 7) and the subsequently unique circumstance of the ADF member’s family members warrant the creation of such a system.

**RECOMMENDATION:**

A compassionate payment scheme be introduced with strict criteria and guidelines to provide for the grief and bereavement suffered by non-dependent family members of ADF members wrongfully killed in the course of ADF service. [A]

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222 Ibid.
Same Sex Couples

The treatment of same sex couples by veterans’ entitlements legislation has, until recent years, been discriminatory and oppressive. However, reforms to the legislation and definitions have resulted in the modernisation of the MRCA, with inclusion of same sex couples in definitions pertaining to relationships. This provides one example of an attempt to make the MRCA a contemporary and relevant piece of legislation.

As stated above, partners of deceased ADF members are entitled to several benefits, the amount of which is determined by the degree of the partner’s economic dependence on the deceased member. A 2007 report by the Human Rights and Equal Opportunity Commission (the ‘HREO Commission’) asserted that veterans’ entitlements legislation presents substantial discrimination against partners of ADF members who are in same-sex relationships. That was subsequent to the finding that definitions of ‘partner’, ‘member of a couple’, ‘widow’, ‘war widow’, ‘widower’ and ‘war widower’ did not incorporate members of same sex couples. The 2011 MRCA Review does not appear to address this issue, however it appears that the MRCA has been amended to include same sex couples in the above definitions pertaining to partners. These amendments provide promising examples of the willingness of the Government to make the MRCA a contemporary piece of legislation.

RECOMMENDATION:
The government remain willing to update veterans’ entitlements legislation in order that it stays relevant in contemporary society. [A]

224 Ibid.
225 Military Rehabilitation and Compensation Act 2004 (Cth) s 5.
It is evident, from the above discussion, that there are anomalies and shortfalls in the veterans’ entitlements schemes not only for the veterans and ADF members themselves, but also for family members and other third parties who are affected by the injury, illness or death of that ADF member.
Chapter 9: Conclusion

This thesis has examined and analysed current veterans’ entitlements schemes, and has identified a number of anomalies and shortfalls that exist within the schemes with regards to: the recognition of the unique nature of military service, the levels of confidentiality associated with documents pertaining to claims, offsetting for individuals with dual eligibility and services provided to third parties after the death of an ADF member in the course of their service. The author has developed a number of recommendations, purporting to improve the current entitlements scheme, and to mitigate the discussed anomalies and shortfalls. The recommendations have largely focused on those made in previous government reviews, but also on those resulting from the author’s own observations and experiences with this legislation and these schemes.

It is imperative that schemes of military compensation and entitlements are appropriately created and applied in order to assist ADF members who have sustained injury, illness or death as a result of their service. As with all other workers’ compensation schemes, the employee must have the peace of mind that any injury, illness or death caused in the course of their work will be provided for by the employer. However, different to civilian workplaces is the unique nature of military service, and the risk that individuals voluntarily assume in the pursuit of a stable and secure domestic and global environment. While we spend this year commemorating the Anzac legend and the events of 1915, it is imperative that we should not forget the needs of recent veterans, and the still-serving ADF members who incur the risks of injury, illness and death in defence of the nation.
# Annexure 1- List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Meaning</th>
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<tbody>
<tr>
<td>ADF</td>
<td>Australian Defence Force</td>
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<tr>
<td>ADFRP</td>
<td>Australian Defence Force Rehabilitation Program</td>
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<td>ADO</td>
<td>Australian Defence Organisation</td>
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<td>AFP</td>
<td>Australian Federal Police</td>
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<td>ANA</td>
<td>Afghan National Army</td>
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<td>ARA</td>
<td>Australian Regular Army</td>
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<td>ARes</td>
<td>Australian Army Reserves</td>
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<tr>
<td>ASRA</td>
<td><em>Australian Soldiers’ Repatriation Act 1920 (Cth)</em></td>
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<td>BCOF</td>
<td>British Commonwealth Forces in Japan</td>
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<tr>
<td>CFTS</td>
<td>Continuous full-time service</td>
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<tr>
<td>The Committee</td>
<td>The Steering Committee that conducted the 2011 review of Military compensation schemes</td>
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<td>CPI</td>
<td>Consumer Price Index</td>
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<td>CRC</td>
<td>The Clarke Review Committee</td>
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<td>DA</td>
<td><em>Defence Act 1903 (Cth)</em></td>
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<tr>
<td>DVA</td>
<td>Department of Veterans’ Affairs</td>
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<tr>
<td>HREO</td>
<td>The Human Rights and Equal Opportunity Commission</td>
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<td>MCA</td>
<td><em>Military Compensation Act 1994 (Cth)</em></td>
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<td>MEC</td>
<td>Medical Employment Classification</td>
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<td>MRCA</td>
<td><em>Military Rehabilitation and Compensation Act 2004 (Cth)</em></td>
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<tr>
<td>MRCC</td>
<td>Military Rehabilitation Compensation Committee</td>
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<tr>
<td>MTAWE</td>
<td>Male Total Average Weekly Earnings</td>
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<td>POW</td>
<td>Prisoner/s of War</td>
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<td>PTSD</td>
<td>Post Traumatic Stress Disorder</td>
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<td>Abbreviation</td>
<td>Description</td>
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<td>RAN</td>
<td>Royal Australian Navy</td>
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<td>RHC</td>
<td>Repatriation Health Card</td>
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<td>RMA</td>
<td>Repatriation Medical Authority</td>
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<td>RSL</td>
<td>Returned Services League</td>
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<td>SMRC</td>
<td>Specialist Medical Review Council</td>
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<td>SoPs</td>
<td>Statement of Principles</td>
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<td>SRCA</td>
<td>Safety, Rehabilitation and Compensation Act 1988 (Cth)</td>
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<td>SRP</td>
<td>Special Rate Pension</td>
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<td>SSA</td>
<td>Social Security Act 1991 (Cth)</td>
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<td>VEA</td>
<td>Veterans’ Entitlements Act 1986 (Cth)</td>
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<tr>
<td>VCRC</td>
<td>Veterans’ Compensation Review Committee</td>
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<td>VVRS</td>
<td>Veterans’ Vocational Rehabilitation Scheme</td>
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<td>WPA</td>
<td>War Pensions Act 1914 (Cth)</td>
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<td>WWI</td>
<td>World War One</td>
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<td>WWII</td>
<td>World War Two</td>
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Byrnes v Repatriation Commission (1993) 177 CLR 564
Delkou v Repatriation Commission (1984) 2 RPD 327
Gilbert v Repatriation Commission (1989) 86 ALR 713
Light v Mouchemore (1915) 20 CLR 647
Webb v Repatriation Commission 1988 78 ALR 696

C Legislation

Australian Soldiers’ Repatriation Act 1920 (Cth)
Defence Force Discipline Act 1982 (Cth)
Military Rehabilitation and Compensation Act 2004 (Cth)
Safety, Rehabilitation and Compensation Act 1988 (Cth)
Veterans’ Entitlements (Clarke Review) Bill 2004 (Cth)
Veterans’ Entitlements Act 1986 (Cth)
War Pensions Act 1914 (Cth)
Workers’ Compensation Act 1912 (WA)

D Other

Academi, Armed Security Guard (7 August 2014) <
299&portalID=7401>
Australian Army, 1st Recruit Training Battalion <
http://www.army.gov.au/Army-life/Army-careers/ARTC-Kapooka/Soldier-
Training/1st-Recruit-Training-Battalion>
Australian Defence Force, Australian Defence Force Rehabilitation Program
ADF Army < http://www.army.gov.au/Army-life/Wounded-Injured-and-Ill-
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