Australian National University

10 July 2018

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COMPENSATION AND REHABILITATION FOR VETERANS

Submission to the Productivity Commission by Peter Sutherland

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Objectives of Veterans' Support

The Commission's summary of objectives, drawn from the Clarke and Toose Reports, appears appropriate to me.

In my opinion, the current system fails to uphold those priority objectives, in particular because the VEA has a very inadequate focus on rehabilitation and return to a fulfilled civilian life. Its pension-based structure encourages identification of illness and impairments to increase rate of pension, however the highest rate of pension, Special Rate, is inadequate to support a reasonable family lifestyle.

The SRCA had a much improved focus on rehabilitation, when compared to the predecessor 1930 and 1971 Acts, and the incapacity payment, based on pre-injury earnings, provides a reasonable level of support for both fully incapacitated and partly incapacitated veterans. A significant problem, in this sense, with SRCA has been poor and often inconsistent operationalisation of rehabilitation and return to work processes over the decades since 1988.

I strongly support the application of a veteran-centric approach to DRCA clients, and the introduction of "non-liability" healthcare for mental health conditions.

The Changing Needs of Veterans

The pension basis of the VEA (then the Australian Soldiers Repatriation Act) was a necessary approach to compensation for the injured veterans of World War 1 and their dependants. The Australian economy could not have afforded the relatively generous provisions of the MRCA scheme applied to such a large number of injured veterans and dependents. The same could be said of World War 2.

I suggest that the Repatriation Act was less fit for purpose for the cohort of 43,000 veterans (mostly male) who served in the Vietnam War, and this problem was exacerbated by post-war community attitudes towards Vietnam veterans. Because of their age, the Vietnam cohort are now best served by the VEA benefit structure, however I suggest this is less the case for those veterans who served in post-Vietnam conflicts up to 2004.

Two demographic changes have had an important effect on military compensation in Australia:

1. The increasing number of women serving in the ADF raises new design issues for the schemes. Originally, only nurses and entertainers were veterans under the schemes; the vast majority of female participants were dependent spouses and widows. Now a significant proportion of veterans are female and they are re-entering civilian life at a child-rearing age.
2. Until the 1960s, most marriages were long-lasting (if not long-loving) and many wives were expected to stay out of the workforce and be supported by their husbands. This provided a rational basis for the war widow pension. Today, the average marriage continues for less than 10 years, which suggests that new war widows today, if substantially younger than pension age, are probably not the person who married the veteran before, during or after ADF service and raised the veteran's children together with the veteran. For this reason, I suggest that the DRCA/MRCA approach to dependent partners is now more appropriate than the VEA approach.

The position of dependent children of veterans has remained relatively constant over decades, however children are now requiring more parental support for their education, and often well into their 20s.

Other important demographic and social changes, which affect military compensation, include the increasing ethnic diversity of the Australian population, the changing nature of work, increased life expectancy and an improved quality of life for older Australians, and increasing difficulty of access to home ownership.

The Characteristics of Military Service

As a member of the 2011 Review of Military Compensation Arrangements, I supported the recommendation for a separate system of military compensation because of the unique nature of military service, for the reasons stated in the Report at p 94. I recall that the members of the Committee representing Departments outside the Defence Portfolio were not supportive of this approach (see p 47).

My particular personal reason for supporting a separate military compensation system lies in the burden of active service. On active service, a member is under strict discipline and may be required to subject themselves to extreme risk in situations where there is no realistic way to mitigate those risks. In my opinion, peacetime service in the ADF, even combat training and situations such as clearance diving and submarine service, can be equated to some civilian employments such as emergency services and flying helicopters. However, the distinction emerges sharply in combat situations.

A number of ex-service organisations submitted to the Review that there should be no distinction between active service and peacetime service because of the high risk involved in peacetime training and the rigours of service life generally. However, what was telling to me was that these organisations were only prepared to accept equality of treatment by bringing the benefit levels for peacetime service up to those for active service. There was no support for a model which brought the MRCA permanent impairment benefits into alignment on a cost-neutral basis, or on a basis which would result in a reduction of benefit for any veteran.

I observe that the opinion that active service and peacetime service should be treated in a similar fashion in military compensation is gaining traction in the ex-service community and over time will shape the direction of military compensation. We should, however, be careful to recognise when concerns arise because of the poor structure or implementation of an element of the scheme, and not because of the inherent nature of the scheme. For example, the pressing need for a "wellness" approach to treatment, rehabilitation and compensation of veterans should not be seen as a reason for mainstreaming veterans into civilian workers compensation schemes and health care through Medicare.

Over time, I believe the differences in support and ways of accessing support between service types can be removed from the MRCA, but we need to continue and improve the MRCA, not fold it back into a Commonwealth civilian workers compensation scheme. In MRCA, there are two main areas of difference based on service type: the differing standards of proof; and the higher impairment payments for 71 or more impairment points. As discussed later, I think the two standards of proof SoPs could ultimately be merged. Similarly, over time, the additional cost of aligning PI payments could be met through Budget initiatives and off-setting savings.

Removing the differential in respect of the VEA would be more challenging, but I question the necessity for this if, as discussed under "One New Act", we allow the existing, elderly VEA cohort to come to an end naturally and move younger VEA cohorts into the MRCA.

Qualification for service pension (and the attached entitlement to a Gold Card) is a more complex problem.

One New Act

The current legislative scheme is very complex as a result of various historical actions, including:

- The decision in 1917 – 1920 to take a pension approach to compensation for war service through the various Repatriation Acts and their "no policy change" successor, the VEA, in 1986;
- The decision in 1948 to compensate peacetime injuries through the Commonwealth employee workers compensation scheme, the 1930 Act, and then through its successors, the 1971 Act and the 1988 Act (SRCA/DRCA), each of which had different entitlement provisions;
- The decision in 1972 to open the VEA to peacetime ADF members with three years continuous full-time service;

- The closure of the VEA coverage and the opening of SRCA coverage by the *Military Compensation Act 1994*;
- The introduction of additional military compensation for deaths and severe injuries following the Blackhawk training accident; and
- The creation of the MRCA on 1 July 2004, with complicated transitional provisions in the MRCA(C&TP) Act;
- The transition to DRCA on 12 October 2017.

The end result of this mishmash of legislation is complexity, inconsistency, opaqueness (and any other negative epithet you can think of).

The simple answer is to make "One New Act"!

The real outcome of this simplistic answer would be to worsen the complexity because there would then be six Acts rather than five, and a whole new set of transitional and application provisions.

The proponents of the One New Act also insist that no veteran should be worse off because of the new Act. The real outcome of this proviso would be to sentence DVA to processing alternative entitlement under at least three Acts for the next 50 years by which time the pre-2019 cohort of veterans will be covered by the new Act, or inactive. This insistence also begs the question which is better: apples under the DRCA/MRCA schemes or oranges under the VEA scheme.

In my opinion, a satisfactory solution to this policy dilemma can be achieved by a detailed remake of the overall scheme which focuses on improving outcomes for veterans and consigning the complexity to the back end - the administration of the scheme by DVA. Features of this "harmonisation" approach are:

- MRCA is recognised as the one new Act and is amended to reduce its complexity and enhance its suitability for harmonisation with the other four Acts (VEA; 1930 Act, 1971 Act, SRCA/DRCA);
- DRCA is brought more and more in line with MRCA over time, and the VEA is harmonised with MRCA where compatible;
- Cohorts currently under the VEA and DRCA are moved into MRCA coverage through a combination of measures such as outright transfer, irrevocable election and grandfathering;
- The complexity of multiple Acts becomes a DVA processing issue. Veterans themselves should see their engagement with DVA as seamless, whatever Act they continue to be covered by. The main visible difference would be benefit type.

MRCA is unnecessarily complex, particularly in its benefit provisions in Chapter 4. The 20 sections providing for incapacity and impairment benefits in SRCA/DRCA have ballooned into approximately 160 sections in the MRCA because the MRCA turned processing rules and policy into black letter law. Chapter 4 MRCA could and should be scaled back to essential principles and authorisations, supplemented by legislative rules, legislative instruments and policy guidelines – without any loss in transparency or accountability. Even in its expanded form, MRCA fails to state clearly some basic principles, for example that the National Minimum Wage is the minimum amount of incapacity compensation under the MRCA (*Jensen v MRCC* [2015] FCA 209).

The basic architecture of MRCA is similar to, and was built on, SRCA in 2004. However, MRCA is based on the VEA in several respects including initial liability (including SoPs) and the SRDP option. There is a great deal of room for harmonisation of the SRCA/DRCA Acts with MRCA, and for harmonisation of the VEA and MRCA (other than in respect of benefit types).

Moving a cohort of veterans from VEA or DRCA into MRCA coverage has the advantage of resolving transitional and application issues in one process and thereafter the cohort is in MRCA. Likely cohorts for this process are SRCA clients with injuries on or after 7 April 1994 (the commencement date of the MCA) and VEA clients with injuries from service in Timor, the Gulf, Iraq and Afghanistan. For the VEA clients, a one-off irrevocable election may be suitable as many of these veterans probably should have sought coverage under SRCA in the first place because of its superior incapacity and impairment compensation and more active support for rehabilitation. VEA clients approaching pension age should stay under VEA because MRCA/DRCA incapacity payments cease at age 67.

Transitioning potential widow(er)s from the VEA is a complex issue, but it may be possible to create a rational scheme for support of dependents covering all Acts.

An Attachment to this Submission "Harmonisation of the Veterans' Entitlements and Military Compensation Legislation" provides a visual summary of how the five Acts could be substantially harmonised.

Claims and Appeals Processes

It should be possible to almost fully harmonise claims and appeal processes over time, particularly in relation to form of claim, time lines, notices, manner of payment, internal review and case management.

I recommend that some elements of the VEA/VRB appeals process should be changed:

- Legal representation should be allowed at the VRB, but in a "no costs" environment. The current arrangement contributes to an opaqueness in the jurisprudence of the VRB, as does its failure to publish reasons for decision. I recommend that the VRB should start publishing redacted copies of its significant decisions.
- The current costs arrangements for AAT SRCA review should apply to all appeals from the VRB to the AAT. The costs rules mean that veterans have reasonable prospects of legal representation at the AAT on a "no win, no pay" basis. It is a furphy to suggest that legal aid could be made available to support AAT veterans' appeals. Even if DVA provided hypothecated funding to the legal aid commissions, the funding would most likely be used for legal assistance to persons with the status of a veteran on priority legal needs such as family law, family violence, criminal defence, elder abuse and civil law.

The current quality of veterans' advocacy is very variable, ranging from knowledgeable and effective to adverse to client interests. I consider there has been a particular problem arising from advocates' knowledge of, and preference for, the VEA rather than SRCA. In general, the SRCA scheme was more beneficial to clients in a financial and well-being sense than the VEA, for all but elderly veterans.

The MRCA scheme is preferable to both DRCA and the VEA. Younger advocates are now coming to terms with the MRCA, which is the dominant scheme for younger veterans currently returning from service in Afghanistan, the Gulf and Iraq, and their families.

Statements of Principles

From their inception, I considered that the Statement of Principles were an unsatisfactory basis for rejecting claims. I acknowledge, however, that the SoP system has widespread support among the ESOs and therefore the focus should be on refining their use and harmonising the use of SoPs across all schemes:

- There needs to be a discretionary mechanism to deal with emerging issues in the period before full epidemiological evidence is available (see Agent Orange, malaria and nuclear tests as examples).
- There is a possibility of moving towards one SoP for each condition, given that the "balance of probabilities" SoPs are based on a probability far less than 50%.
- SoPs could be introduced to DRCA cases without legislative amendment if they were used as an "accept contention" but not as a basis for refusal of a claim. Where a SoP indicated refusal of a claim, the "arising out of, or in the course of, employment" test would apply and be based on medical and other evidence adduced by the parties. I understand something of this nature may already being piloted by DVA – the Lighthouse project?
- Administration of the SoPs system was practicable only because of the coincidental introduction of the Compensation Claims Processing System (CCPS) in 1994/5. The new IT system replacing CCPS needs to be able to replicate its capacity to determine liability on the basis of relevant SoPs.

Governance

I suggest that the Repatriation Commission and the Military Rehabilitation and Compensation Commission could be merged to have one Commission oversighting harmonisation of the various military compensation schemes. The recent creation of the DRCA within the Defence Portfolio has cleared the way for such a merger.

I consider that Ex-Service Organisations play a vital advocacy role in military compensation. They need to be assisted towards greater professionalism and concentration of advocacy resources (separate from their commemorative, industrial and unit-based roles).

Reduction of Service-Related Injuries

There is a fundamental conflict between appropriate support for injured personnel and the pressure on unit commanders to have an effective unit ready for deployment in accordance with rotation requirements. There needs to be recognition of this dilemma and practical mechanisms to address it. I doubt that a premium system or a mechanism for financial accountability would prove effective.

The ADF has always placed great emphasis on the issue of safety of weapons, explosives, etc, but has been less successful in recognising and addressing risks to the health of Defence personnel. This is illustrated by a visit to the RMC gym where sports-related injuries abound. There is insufficient focus on intelligent exercise and fitness regimes, rather than the (male) culture of "bash and bash through".

Similarly, the ADF has been poor at recognising and addressing the problems of mental health in ADF service. Developments in recent years, such as "non-liability" heath care, early rehabilitation and the veteran-centric approach are encouraging, but require a great deal of nourishment.

The Package of Compensation Benefits

I consider that the "stable" issue in relation to permanent impairment is overblown. It has arisen because of a failure to apply the interim PI compensation arrangements in an effective manner.

Overall, I consider the broad package of benefits in MRCA and SRCA are adequate, fair and efficient. The same cannot be said about VEA benefits, as discussed in "Objectives of Veterans' Support" above.

In the Review of Military Compensation, I expressed my concern that incapacity benefits under MRCA may be too generous and conflict with the important objective of helping veterans to obtain civilian employment upon discharge and thereby benefit from socialisation through return to work. At the time of the Review, there was insufficient evidence about incapacity payments, return to work rates, deeming ability to earn, etc to form any kind of judgement on the issue. Recommendation 10.2 (p 49) reflects these concerns.

My concern about the level of incapacity payments centres on the additional amount of $100 per week (indexed) added to ADF pay as compensation for the loss of non-pay related allowances (ss 104, 109, 144, 164 and 168). This now amounts to more than $160 pw and has the effect that a junior private will receive about $50,000pa in incapacity payments, an amount which they are unlikely to be able to earn in civilian employment. I think the add-on was probably a necessary compromise to get the MRCA Bill passed into law, however its logic is doubtful: the service allowance is already built into normal earnings for discharged veterans (without the inconveniences compensated for by the service allowance) and many of the non-pay issues are no longer relevant after discharge.

My recommendation is to carefully review the current evidence and, if it appears that the level of incapacity payments fights against the return to work objective, the add-on amount should be removed or, at least, frozen at current level. As a trade-off for this measure, the saved funds could be redirected to paying the superannuation guarantee amount on incapacity payments to discharged veterans. In the current environment of retirement savings through accumulation superannuation funds, it is inequitable that veterans on incapacity payments cannot access compulsory superannuation to help them after age 67 when their incapacity payments cease.

I also recommend that MRCA have a maximum amount of incapacity payment set at about 200% of AWOTEFA.

Transition and Rehabilitation

The average service life is seven to 10 years, making transition a critical element of post-service life for the vast majority of ADF members.

In the past, transition from ADF service to post-service life has been poorly handled by the ADF and DVA. Particular problems have included:

- Transition was a short add-on in the last days of service life, and often went very little past exit medicals and lodging compensation claims with DVA.
- ADF members hid injuries to avoid medical downgrade in their fitness to serve rating and consignment to "cripples" units. This meant that there were often considerable delays between cessation of service and commencement of incapacity payments, even though ADF medical records were available for the whole time of the veteran's service.
- Rehabilitation was often poorly supported and resourced during service and then slow to commence post-service.
- There was often very little cooperation between the ADF and DVA, particularly in ADF bases and units without a DVA presence on-site. Often members with significant mental injuries discharged without DVA identification of those injuries and therefore no timely access to support services.

It appears to me that transition arrangements have been rapidly improving over the past few years, including in relation to cooperation between DVA and the ADF in their respective roles in transition. These initiatives must be expanded and truly operationalised so that transition planning commences on the day that the member joins the ADF and is fully operational by the day that ADF service ceases. The member should be retained in the ADF until key decisions about superannuation and compensation entitlements have been determined.

Transition for Reservists needs additional consideration. In many areas of military compensation and rehabilitation, systems are designed for the needs of full-time ADF members and little thought is given to how the systems must be adapted for part-time Reservists, particularly where their capacity for full-time civilian employment has been affected by a service-related injury.

Background of the Submitter

The Submitter, Peter Sutherland, has had a number of significant interactions with veterans' entitlements and military compensation law over his professional life since 1990, including:

- Co-author (with Professor Robin Creyke) of the book *Veterans' Entitlements and Military Compensation Law* published by The Federation Press in 2000, 2008 and 2016 (3rd ed). He is also the author of the book *Annotated Safety, Rehabilitation and Compensation Act 1988* (11th edition, 2018) and co-author (with Allan Anforth) of the book *Social Security and Family Assistance Law* (3rd edition, 2013), each published by The Federation Press.
- Independent Legal Member of the Steering Committee for the Review of Military Compensation Arrangements (Campbell, I 2011a).
- Editor, Compensation Reports and Social Security Reports for the *Administrative Law Decisions (*ALD) law report, published by LexisNexis.
- Content Expert and Consultant to SoftLaw Corporation Ltd in the development of the Defcare OHS and Compensation Processing System for the Department of Defence (1997 – 2001) and Project Manager for the Compensation Claims Management System (CCPS) built by SoftLaw Corporation for the Department of Veterans' Affairs (1993 – 1995).