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2 July 2018

Veterans Compensation and Rehabilitation Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2604

Via Online Submission

Dear Commissioners,

We welcome the opportunity to provide feedback in relation to the Productivity Commission's Inquiry into Compensation and Rehabilitation for Veterans.

We would be pleased to make our extensive experience in representing Veterans and their families available to the Productivity Commission. To this end, we would welcome the opportunity to meet with your staff to further discuss the matters in this submission, and to engage in any ongoing discussions on these important issues.

Please do not hesitate to contact Georgia to discuss these matters further, via the contact details listed below.

Yours faithfully,

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MAURICE BLACKBURN

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Submission to the Productivity Commission's Inquiry into Compensation and Rehabilitation for Veterans

July 2018

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Maurice Blackburn has assisted numerous veterans in obtaining benefits from the Department of Veterans' Affairs (DVA) under the various legislative arrangements. We have also assisted veterans in relation to appeals to the Veterans' Review Board (VRB) and in the Administrative Appeals Tribunal (AAT).

Our Submission

Maurice Blackburn understands that the Productivity Commission proposes to examine the collective legislative framework and supporting architecture underpinning the Australian military compensation scheme in order to determine whether:

- the arrangements reflect contemporary best practice, drawing on experiences of Australian workers' compensation arrangements and military compensation frameworks in other similar jurisdictions (local and international);
- the use of the Statements of Principles as a means to contribute to consistent decision-making based on sound medical-scientific evidence; and
- the legislative framework and supporting architecture delivers compensation and rehabilitation to veterans in a well targeted, efficient and veteran-centric manner.

Maurice Blackburn has for some time been calling for a major review and revision of the legislative and administrative bases for the compensation and rehabilitation of veterans. We applaud the Productivity Commission on the broad nature of its inquiry.

Maurice Blackburn's primary submission is that the entire legislative framework underpinning services to veterans and their dependents requires fundamental redrafting which will in turn address deficiencies within the broader scheme.

Throughout this submission, we refer to a redrafted legislative framework underpinning for veterans' entitlements as 'consolidated military compensation legislation'.

In this submission, we have outlined what we believe should be the critical elements that should inform consolidated military compensation legislation. We have also included commentary on priority adjustments that should be made to the existing three acts in order to make the system better for Australian veterans, should our call for consolidated military compensation legislation not be acceded to.

Maurice Blackburn further believes that any legislative change must take place at the same time as reform of the business systems and processes in the administration of claims.

BACKGROUND

Members and former members of the Australian Defence Force (ADF) who suffer injuries or conditions in the course of their military service may be covered under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA), the *Veterans' Entitlements Act 1986* (VEA) or the *Military, Rehabilitation and Compensation Act 2004* (MRCA) (the Acts).

These three Acts are collectively referred to as the military compensation scheme (the Scheme) and are widely known for their complexity. The three Acts have different requirements for eligibility and liability and provide different entitlements to veterans through different claims and appeals processes. The key reason for these differences is that the philosophical foundations for these Acts differ significantly.

The DRCA, introduced in late 2017, mirrors the existing *Safety, Rehabilitation and Compensation Act 1988* (SRCA), which provides long-tail workers' compensation benefits to predominantly white collar Federal Government employees in environments where workplace, health and safety standards are generally met. As such, the DRCA provides almost identical entitlements through the same claims process that currently exists under the SRCA.

By comparison, the VEA is the successor to the repatriation system which was "developed during and after World War I to meet the needs of hundreds of thousands of veterans returning from active service overseas".[1] As a result of these two different philosophical bases, arrangements for pensions, compensation, rehabilitation, health care and other benefits differ significantly.

The MRCA was introduced to resolve these inherent differences and the general complexities of the Scheme. However, the uneasy alignment of the, at times contradictory purposes of the VEA and the DRCA, as well as the continuation of the VEA and the DRCA alongside the MRCA has meant that the Scheme has become unnecessarily convoluted and no longer represents a modern approach to veteran-centric rehabilitation and compensation.

Maurice Blackburn has a proud history of assisting veterans in obtaining benefits from DVA primarily under the DRCA and the MRCA. We have also assisted veterans in relation to appeals to the Veterans' Review Board (VRB) and in the Administrative Appeals Tribunal (AAT).

Structural deficiencies in the Scheme have impacted our ability to assist in some types of claims, such as claims under the VEA. These difficulties relate to cost recoverability and the preclusion of legal advocates in some claims.

Maurice Blackburn's comments and recommendations relating to specific sections and questions in the discussion paper appear on the following pages.

[1] Peter Sutherland, 'The History of Military Compensation Law in Australia' (2006) 50 *Australian Institute of Administrative Law Forum* 39, 39.

A SYSTEM TO MEET THE NEEDS OF FUTURE VETERANS

Questions from the Issue Paper:

What should the system of veterans' support seek to achieve in the longer term? What factors should be considered when examining what is in the best interest of veterans?

How have veterans' needs and preferences changed over time? How can the system better cater for the changing veteran population and the changing needs of veterans?

Maurice Blackburn submits that the military compensation scheme, including the legislation and administration of the scheme by the DVA, should take "an holistic approach to injured personnel by integrating the safety, rehabilitation, resettlement and compensation elements".[2]

In doing so, we propose the consolidation of military compensation legislation. We propose that any new scheme would need to enshrine that any consolidation of military compensation legislation is focused on meeting the needs of veterans and their families. Such an approach is important given the unique nature of military service.

The existing Scheme fails to adequately protect and compensate many veterans in the case of their service-related injuries and diseases. In our view, the Scheme cannot be sufficiently remedied by amendment; it requires repeal in its entirety and fundamental redrafting to ensure that it delivers compensation and rehabilitation to veterans in a well targeted, efficient and veteran-centric manner.

In our view, the Scheme is no longer fit for its original purpose as it no longer meets the needs and expectations of veterans and their families.

Achieving a mutually beneficial, comprehensive and commercially robust – but simplified – compensation scheme is possible. We understand that there are a number of options to consider to achieve simplification of the existing Scheme. We submit that the most preferable option is a consolidated and simplified act designed with new benefits to ensure that no veteran's existing entitlements are reduced.

Our recommendation, at a minimum, is that the existing legislation be repealed or new legislation enacted which incorporates features from contemporary best practice, drawing on experiences of Australian workers' compensation arrangements and military compensation frameworks in other similar jurisdictions.

To facilitate this, we have set out a series of *specific* reforms of the Scheme below which should occur to ensure that the proposed consolidated military compensation legislation meets the needs of future veterans.

Our Submission:

1. That the military compensation scheme, including the legislation and administration of the scheme by the DVA, should take "an holistic approach to injured personnel by integrating the safety, rehabilitation, resettlement and compensation elements".[3]

[2] Peter Sutherland, 'The History of Military Compensation Law in Australia' (2006) 50 *Australian Institute of Administrative Law Forum* 39, p.54.
[3] Ibid. p.54

HOW SHOULD THE NATURE OF MILITARY SERVICE BE RECOGNISED?

Questions from the Issue Paper:

What are the key characteristics of military service that mean veterans need different services or ways of accessing services to those available to the general population? How should these characteristics be recognised in the system of veterans' support?

What is the rationale for providing different levels of compensation to veterans to that offered for other occupations, including people in other high-risk occupations such as emergency services workers? Are there implications for better policy design?

Previous reviews of the military compensation scheme have noted that military service is unique for the following reasons:

- Military personnel are required to perform a range of activities, many of which involve high risk, particularly those undertaken during operational service where ADF members may engage in combat against enemy forces or face risks from dissident elements;
- ADF members are liable to be relocated within Australia and to other parts of the world, often at short notice;[4]
- The nature of the work performed by military personnel, including the requirement to be deployable, means ADF members need to maintain a level of fitness beyond that required of most types of civilian employment; and
- Military personnel are subject to an extensive disciplinary code with significant punitive measures in cases of breach.[5]

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

Our Submission:

2. That the proposed consolidated military compensation legislation should apply to all individuals who are currently entitled to claim under the existing military compensation scheme.

[4] *Review of Military Compensation Arrangements: Report to the Minister for Veterans' Affairs* (2011), p.94.
[5] *ibid*, p.94.

THE COMPLEXITY OF VETERAN'S SUPPORT

Questions from the Issue Paper:

What are the sources of complexity in the system of veterans' support? What are the reasons and consequences (costs) of this complexity? What changes could be made to make the system of veterans' support less complex and easier for veterans to navigate?

Can you point to any features or examples in other workers' compensation arrangements and military compensation frameworks (in Australia or overseas), that may be relevant to improving the system of veterans' support?

Is it possible to consolidate the entitlements into one Act? If so, how would it be done? What transitional arrangements would be required? How might these be managed?

Are there approaches, other than grandfathering entitlements, that can preserve outcomes for veterans receiving benefits or who may lodge a claim in the future?

Sources of Complexity

The fact that the scheme is based on three distinct legislative instruments is one of the reasons why the Scheme is generally considered to be one of the most complex legislative compensation schemes in Australia. Justice Logan in *McDermid v Repatriation Commission* [2016] FCA 372 (15 April 2016) commented:

> *"… [The Applicant] has also had what he doubtless sees as the added misfortune of becoming enmeshed in the complexity of the provision made from time to time by Parliament in the VEA in an endeavour to prevent any duplication of benefits in respect of like injuries or incapacity as between those payable under the [DRCA] or its predecessors and those otherwise payable under the VEA. In turn, that complexity is but one pathway in the labyrinth that is the VEA, an Act which has been amended no less than 127 times over the 30 years since its enactment in 1986…. Both for the members of that class and for the respondent Repatriation Commission (the Commission) and those of its delegates within the Department of Veterans' Affairs (DVA) who must administer it, that complexity, to say nothing of the wider labyrinth, presents considerable challenges of comprehension as to its application*."

Additionally, the Secretary of the Department of Veterans' Affairs (DVA), Simon Lewis, commented during a Senate Estimates Hearing on 25 October 2017 that the Scheme:

> *"… is complex: we have three acts that are completely different philosophically It is not just difficult for us to administer; it is virtually impossible for veterans—and even for expert advocates, in many cases—to understand*."

Furthermore, in submissions to the Inquiry into Suicide by Veterans and ex-Service Personnel by the Foreign Affairs, Defence and Trade References Committee, the South Australian Government commented that:

> "*This legislative framework is cumbersome, complex, confusing and difficult to navigate for advocates, DVA staff and members of the serving and ex-serving community. In some circumstances a veteran may have a claim under more than one Act requiring the claimant (or their advocate) to make a number of applications to more than one compensatory scheme. The assessment process within DVA requires delegates to have a thorough understanding of all legislation in order to assess the validity of a claim. The complexity of the legislative framework can lead to significant delays to the processing of claims adding unwarranted stress to those involved.*

> "*It is worth noting that both the US and Canada operate a single scheme and the UK operates one past and one current scheme. This approach removes any overlap between legislative elements simplifying the process. Consideration should be given to a complete review of Commonwealth veteran related legislation that preserves veterans' entitlements while simplifying the process under a single Act."*

In addition, the DVA have acknowledged that the "*current legislative framework for veteran entitlements is complex, with individuals potentially having compensation coverage under one, two or three Acts, depending on their date of service and date of injury*".[6]

Illustrating this complexity is a veteran who developed a major depressive disorder as a result of her military service. Her treating doctors attributed her psychological condition to three distinct stressors that she experienced during her military service over a particular period of time. The differing date of each contributory stressor meant that the stressors were individually covered under a different Act to the other stressors. Theoretically, this meant that her one psychological condition could have been covered under each of the three Acts. However, practically, the entitlements she ultimately claimed for this condition under one Act cancelled out her entitlements under the other Acts due to complex offsetting arrangements between the Acts.

We are also familiar with other examples of veterans who have sustained multiple injuries, at different times and under different types of service, rendering them liable for compensation under different Acts and in many cases the need to pursue different appeals processes concurrently.

Unfortunately, the current Scheme is a reflection of the "evolution of the reparation system and Government decision over decades in response to changes in circumstances and expectations".[7] This piecemeal and ad hoc approach to the development of the legislation, policy and administration of the Scheme has not only significantly contributed to the existing complexities of the Scheme but it has also created a level of inconsistency in terms of the claims and appeals process, whether a veteran may be entitled to compensation and if so, their level of benefits.

Veterans who have approached our firm have experienced confusion with Scheme. It is also not unusual for a significant number of the veterans who have approached our firm to seek advice as to whether they have any opportunities to 'opt out' of the scheme. We recently had a veteran suggest to us that he would prefer receiving a lower rate of pension from Centrelink's disability support pension then continuing to deal with the DVA.

As such, without urgent steps to simplify the legislation, policy and administration of the Scheme, we are likely to see increasing levels of dissatisfaction and decreasing levels of engagement by veterans and their families.

In our experience, many veterans feel abandoned, rejected, marginalised and demeaned by the Government of the nation they have served. In some cases, this dissatisfaction can have tragic consequences, including suicide. We share the veteran communities concerns about the number of veterans suffering from having to deal with delays and procedural difficulties caused by DVA.

One practical and critical consequence of the schemes' complexities is the necessity of those who have served or are serving in the ADF to have quality legal representation to navigate

[6] Foreign Affairs, Defence and Trade References Committee, *The Constant Battle: Suicide by Veterans* (2017) p.53.
[7] Ibid, p.54.

and interpret these Acts. Maurice Blackburn believes that each of the Acts underpinning the schemes should support that in both word and in deed.

Our Submission:

3. That new legislation be enacted which incorporates features from contemporary best practice, drawing on experiences of Australian workers' compensation arrangements and military compensation frameworks in other similar jurisdictions.

4. That the proposed consolidated military compensation legislation should apply to all those individuals who are currently entitled to claim under the existing Scheme. That no veteran should have their existing entitlements reduced. We understand that in ensuring this, some veterans will experience an increase in their level of entitlements.

   This would also mean that there would be very little, if any need, for grandfathering entitlements to preserve outcomes for veterans receiving benefits or who may lodge a claim in the future as all entitlements would effectively be transitioned to the proposed new Scheme.

5. That the proposed consolidated military compensation legislation includes the following entitlements available to a veteran if liability for an injury has been accepted by the DVA:
   a) Income support payment for past and future income lost by a veteran as a result of their service-related injury or injuries;
   b) Compensation for permanent impairment on a combined whole person impairment basis payable as either a lump sum or as weekly tax-free amount;
   c) Compensation for medical treatment through the Repatriation Health Care Cards;
   d) Compensation for any aids and appliances;
   e) Compensation for household services and gardening assistance;
   f) Compensation for rehabilitation, including but not limited to vocational rehabilitation;
   g) Compensation for funeral expenses and dependents in the event of the death of a veteran.
   h) A choice between long-tail statutory benefits and commuting statutory benefits into a lump sum; and
   i) Access to unrestricted Common Law damages for economic and non-economic loss, by way of an election, in negligent circumstances.

In recommending that the above entitlements be included in the proposed consolidated military compensation legislation, we have considered not only the nature of the existing Scheme entitlements but those comparable entitlements available under the military compensation schemes in the United Kingdom and Canada.

THE CLAIMS AND APPEALS PROCESS

Questions from the Issues Paper:

How could the administration of the claims and appeals process be improved to deliver more effective and timely services to veterans in the future?

Are there diverging areas of the claims and appeals process under the different Acts that could be harmonised?

Are there aspects of the claims and appeals process that result in inequitable outcomes for veterans, such as limitations on legal representation?

Will the Veteran Centric Reform program address the problems with the administration of the veterans' support system?

Are advocates effective? How could their use be improved? Are there any lessons that can be drawn from advocates about how individualised support could be best provided to veterans?

The Scheme, including both the legislation and administration of the Scheme by the DVA, should take "an holistic approach to injured personnel by integrating the safety, rehabilitation, resettlement and compensation elements".[8]

In doing so, we submit that the proposed consolidated military compensation legislation must expressly state that it is beneficial legislation. This would ensure that any consolidated military compensation legislation is truly veteran-centric.

Claims Process and Claims Management

We submit that the proposed consolidated military compensation legislation should include the following aspects in relation to the claims process and claims management:

- Mandatory claims processing time frames;
- Use of individual case management and case managers in the administration of claims;
- Resources to provide holistic advice for veterans prior to lodging claims; and
- Statutory restrictions on the range and frequency of independent medical examinations required to be attended by veteran.

These are explained in more detail below.

However, in the alternative, or even until a consolidated Act could be drafted, we submit that the existing acts should be maintained, and modified to ensure that veterans only have to go through a single claims process for all their injuries regardless of which act may apply.

[8] Peter Sutherland, 'The History of Military Compensation Law in Australia' (2006) 50 *Australian Institute of Administrative Law Forum* 39, 54.

Mandatory claims processing time frames

The general view of our clients is that the delivery of services by DVA is inefficient. Many of our clients have reported that it has taken years for DVA to process their claim. Most of these veterans were medically discharged as a result of service-related injuries and were unable to work. They were unable to access benefits until DVA processed their claims. The financial difficulties caused by these delays resulted in some veterans almost losing their homes.

The financial difficulties occasioned by DVA's administrative delays can cause or worsen psychological injuries. However, the Scheme precludes a veteran from claiming for injuries that have been caused or contributed to by DVA's claims process. It is a cruel irony that a veteran is unable to receive compensation for an injury caused or aggravated by unreasonable administrative delays within the scheme designed to compensate the veteran.

It is clear that defined timeframes need to be part of the legislative framework. Indeterminate periods of time to make decisions including accepting and rejecting claims are unacceptable.

We acknowledge that, on occasion, DVA can be efficient in the delivery of compensation, support and health services to veterans. For example, we recently acted for a terminally ill veteran with adenoid cystic carcinoma. Liability was accepted by the Administrative Appeals Tribunal (AAT) in a decision dated 27 September 2017. By 22 November 2017, DVA had made favourable determinations in relation to past and future incapacity payments and lump sum compensation for permanent impairment and non-economic loss. Unfortunately, our experience in this claim was the exception as opposed to the rule.

We believe the main reason this claim progressed expeditiously is because we were acting for the veteran and engaged directly with DVA to request a short turnaround on determinations in light of the veteran's terminal prognosis. Whilst we commend the efforts of DVA in this case following the AAT decision, this should set the standard for DVA's dealings and processing times.

For example, in April 2016 we requested that DVA assess a client's claim for permanent impairment and non-economic loss. We did not receive a determination about the claim until the end of January 2017, despite our attempts to follow up. We were not provided with any reasoning or justification for the delay, except to say that the matter was waiting to be processed. The matter did not require extensive investigation or review and in our view the delay was unreasonable and avoidable.

These delays are currently tolerated by DVA because there are no statutory requirements for DVA to provide veterans with a decision within a timeframe. By comparison, Australia's State jurisdictions have the following timeframes for determining workers' compensation claims:

Table 1.1 Legislated timeframes for determining Workers' Compensation claims by jurisdiction.

Jurisdiction	Timeframes for claim decision
New South Wales	Under sections 275 and 280 of the *Workplace Injury Management and Workers Compensation Act 1998*, provisional acceptance of weekly payments and/or medical costs up to $5,000 within seven days after the claim is made. Additionally, under sections 274(1) and 279(1) of the Workplace *Injury Management and Workers Compensation Act 1998*, a decision on the liability of the claim must be made within 21 days following notification of injury.
Victoria	Under section 75 of the *Workplace Injury Rehabilitation and*

	Compensation Act 2013, if an insurer does not make a decision to accept or reject a claim within 28 days of receiving a completed claim form, the claim is deemed to have been accepted.
Queensland	Under the *Workers' Compensation and Rehabilitation Act 2003*, under section 134(2) of the *Workers' Compensation and Rehabilitation Act 2003*, claims must be determined within 20 business days where practical.
Western Australia	Under section 57A(3) of the *Workers' Compensation and Injury management Act 1981*, insurers have up to 14 days to make a decision.
South Australia	Under section 31(4) of the *Return to Work Act 2014,* insurers must determine claims for compensation as expeditiously as reasonably practicable and where the claim is for compensation as expeditiously as reasonably practicable and where the claim is for compensation by way of income support must, wherever practicable, endeavour to determine the claim within 10 business days after the date of receipt of the claim.
Tasmania	Under section 81A(1) and 81AB of the *Workers Rehabilitation and Compensation Act 1988*, if liability has not been disputed via a referral to the Workers Rehabilitation and Compensation Tribunal within 84 days then liability is deemed to have been accepted.
Northern Territory	Under sections 85(1) and 87 of the *Return to Work Act*, if an employer fails to notify a person of a decision within 10 business days, the person's claim is deemed to be accepted.
Australian Capital Territory	Under section 128(1) of the *Workers Compensation Act 1951*, if an insurer has not decided to reject a claim within 28 days than the claim is deemed to be accepted.

In seeking best practice from the above table, Maurice Blackburn submits that the introduction of a mandatory 30 day processing period for determinations should be legislated, along with a stipulation that this timeframe must be adhered to unless special circumstances for a delay exist.

We believe this would be a feasible timeframe if initiatives such as file digitisation are adopted (see page 16 of this submission). Additionally, such timeframes would still be one of the most generous timeframes in consideration of the existing timeframes from other jurisdictions outlined above.

We also submit that a deeming provision be introduced into the legislation so that a claim is deemed to be accepted if a determination is not made within the specified time and special circumstances are not demonstrated. If a deemed decision is subsequently overturned, we submit that any compensation received by a veteran ought not to be repayable to DVA.

Use of case management and case managers in the administration of claims

In its December 2017 report titled '*Taking Action: A Best Practice Framework for the Management of Psychological Injury Claims for the Australian Workers' Compensation Sector*, SafeWork Australia noted that making "a workers' compensation claim can be a confusing and stressful experience"[9].

Within this report, SafeWork Australia formed the view that an optimum claims management practice would include a claims manager providing "end-to-end case management and a continuous single point of contact"[10] for the person claiming compensation as well as their treating practitioner and other service providers throughout the claims process.

Such end-to-end case management is an appropriate and realistic model to be adopted by the Scheme, in a similar manner to the model utilised by Comcare when handling claims under the SRCA.

Comcare and many State and Territory workers' compensation schemes utilise claims managers. Claims managers are responsible for managing and determining benefits payable under the SRCA and they work closely with the employer and employee to proactively support return to work and overall wellbeing in a cost effective and timely manner. It also means that a person with a Comcare claim is able to call a single claims manager who is able to provide a claimant with information on the status of all their claims and entitlements under the SRCA.

By comparison, a veteran may need to speak to a number of different people to get information on the status of their various claims and entitlements due to the siloing of claims within DVA as set out above.

The only exception to this siloed approach to claims management is when a veteran is provided with support through the Coordinated Client Support (CCS) service model. The CCS is an internal DVA support service provided to contemporary veterans and dependants identified as having complex and multiple needs. Identified clients are referred into the program by Departmental staff, and are assessed based on the following model:

- Level 1 – Self-Manage: Support provided throughout DVA including through the Veterans' Access Network (VAN), claim delegates and Health Access.
- Level 2 – Guided Support: Support provided by an APS5 Client Support Coordinator.
- Level 3 – Comprehensive Support: Support provided by an APS6 Client Support Coordinator.

Where a client requires management at Level 2 or Level 3, a Coordinator is appointed for a limited time period to assist that client to navigate their DVA entitlements and access other critical support services. The intent of the service is to assist with identified needs, with a view to transitioning back to 'business as usual' arrangements. However, the very ad hoc and temporary nature of this support has only a limited impact in addressing the more substantive issues caused by the siloed case management model implemented by DVA.

[9] SafeWork Australia, *Taking Action*, (December 2017) <https://www.safeworkaustralia.gov.au/system/files/documents/1802/taking-action-framework-2018.pdf>.
[10] SafeWork Australia, *Taking Action*, (December 2017) <https://www.safeworkaustralia.gov.au/system/files/documents/1802/taking-action-framework-2018.pdf>.

We submit that every veteran who lodges a claim with DVA should be provided with a case manager who is responsible for the oversight and determination of all claims and entitlements.

Effectiveness of advocates

Maurice Blackburn staff are often approached by veterans who have not been able to access any information or have not been given accurate or complete information in relation to their potential claims and entitlements. From our experience, this occurs too often and leaves the veterans we speak to dissatisfied and confused.

For example, we were recently approached by a veteran who had received advice from an Ex-Service Organisation (ESO). The veteran had specifically asked the ESO for assistance in obtaining lump sum compensation for permanent impairment and non-economic loss. Instead, the ESO lodged a claim for a pension. On receiving this pension, the veteran's ability to access any lump sum compensation (as was the veteran's preference) was rendered impractical due to offsetting provisions in the legislation.

If veterans were provided with holistic advice about their potential entitlements in advance of lodging claims, veterans would feel informed and supported. It may also reduce the administrative burden on DVA in processing claims incorrectly lodged and allow a further reduction in the time associated with claims processing.

We submit that all veterans should have access to funds to obtain holistic administrative and legal advice about their options in relation to compensation and assistance lodging claims for compensation.

Statutory restrictions on the range and frequency of independent medical examinations required to be attended by a veteran

Veterans are frequently required to attend multiple independent medical examinations (IME) with differing specialists throughout the course of their claim(s). In addition, it is not uncommon for a previous supportive IME report to be overlooked and instead, the veteran is required to attend an additional IME for the same injury, albeit for a different benefit. In our experience, many of these IMEs are unreasonable and unnecessarily repetitious.
Not only is this an unnecessary cost worn by the DVA, the repetitive attendance at IMEs can be physically burdensome and in some cases, psychologically damaging to the veteran who is required to 'retell' their story.

We submit that statutory restrictions should be imposed on the range and frequency of IMEs attended by veterans and that this should include a statutory test that the IME should not be unnecessarily repetitious.

Comments Relating to Current Reforms:

Veteran Centric Reform Program

Recently, the Australia Government has invested in a program referred to as 'Veteran Centric Reform'. This program is said to be focused at energising and accelerating the transformation of the DVA to improve the way that the DVA supports veterans and their families. The DVA have suggested that this reform will allow the DVA to completely bypass the complexity of legacy systems, so that veterans and their families need only tell the DVA things once. As such, those who need help will get it quicker.

As such, the Veteran Centric Reform program has been designed to provide the veteran community with a greater standard of service through the reform of business processes and culture, identification and implementation of government-endorsed best practice service options and targeted information and communication technology (ICT) redevelopment.

Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No.1) Act 2018

On 28 March 2018, the *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No.1) Act 2018* received Royal Assent. For the most part, these amendments were necessary to make technical updates to the Scheme, but had little substantive impact such as, for example, the veteran payment amendments.

The Veteran Payment is a form of interim income support payment available to veterans to bridge the gap between lodging a claim for a mental health injury and the claim being determined. The DVA has stated that this payment was designed to provide immediate short-term financial assistance to vulnerable people who may be experiencing financial difficulty.

In order for a veteran to be entitled to receive a Veteran Payment, a veteran:

- Must have made a claim for a mental health injury or disease under either the MRCA or the DRCA;
- Be incapable of undertaking remunerative work for more than 8 hours per week;
- If capable of participating in rehabilitation, must be participate in the rehabilitation to the satisfaction of the DVA; and
- Has not reached pension age.

Our significant concern with the Veteran Payment is the length of time for which the payment is to be paid.

The *Veterans' Entitlements (Veteran Payment) Instrument 2018* stipulates that the payment period of the Veteran Payment would end forty-two days after liability is determined; not the date that a veteran's claim for incapacity payments is determined. The distinction is significant.

In our view, this would do little to mitigate the potentially disastrous implications of indeterminable claims processing times such as was seen with the tragic death of Jesse Bird on 27 June 2017. Jesse's claim for liability for his psychological condition was accepted on 5 August 2016 and yet his claim for incapacity was determined *after* he committed suicide on 27 June 2017.

Despite Jesse lodging multiple claims for incapacity payments to replace income lost due to incapacity for work as a result of accepted mental health conditions, and despite a plea by Jesse's RSL advocate for urgency in handling the claim due to Jesse's significant financial distress, and despite Jesse's family writing submissions to the Parliamentary Inquiry into Suicide, and despite Jesse personally requesting immediate assistance for fear of being "another statistic", DVA finally made a determination of Jesse's claim for incapacity payments *after* he committed suicide on 27 June 2017. By that time:

- **631 days (i.e., 1 year, 8 months, 123 days)** had elapsed since 13 October 2015, when DVA received a claim from Jesse seeking access to health care in respect of mental health conditions and was put on formal notice of his mental health conditions. The treating doctor noted "2009 Afghanistan war veteran with PTSD +

Depression + Periodic Binge Alcohol Use". DVA granted access to medical treatment, but the chilling advice that Jesse was an "Afghanistan war veteran with PTSD" was ignored by DVA.

- **312 days (i.e., 10 months, 8 days)** had elapsed since 27 August 2016, when Jesse claimed permanent impairment and incapacity payments for his accepted mental health conditions.

- **250 days (i.e., 8 months, 8 days)** had elapsed since 28 October 2016, when Jesse repeated his claim for permanent impairment and incapacity compensation.

- **96 days (i.e., 3 months, 6 days)** had elapsed since 31 March 2017, when Jesse's RSL advocate noted that Jesse "has not received any correspondence on the process of his application for incapacity payments". The RSL advocate pointed out that Jesse "needs financial support". He asked DVA to investigate the delay and to "please evaluate this claim urgently".

As such, we submit that the Veteran Payment should be payable until the veteran starts receiving incapacity payments if the claim is accepted or until some other form of income support is obtained if liability is not accepted. We also submit that this should be included in the legislation and not contained in a legislative instrument.

Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No.2) Bill 2018

On 24 May 2018, the *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No.2) Bill 2018* was introduced before the House of Representatives. Of particular note are the proposed amendments to incapacity payments and claims for compensation.

The proposed amendments to incapacity payments under the DRCA and the MRCA are designed to allow veterans who are studying fulltime as part of their approved rehabilitation plan to remain on 100% of their incapacity payments after 45 weeks. Normally a veteran's incapacity payments are reduced after 45 weeks depending on a person's circumstances.

Whilst these amendments are commendable, we submit that these proposed amendments do not go far enough to benefit veterans. We submit that the starting calculation point for these payments should be the veteran's gross weekly earnings as opposed to their net weekly earnings. This is because veterans are currently taxed on a payment based on a net amount. The effect of this is that veterans are effectively taxed twice.

We also submit that income support payments should be paid at 100% of a veteran's anticipated earning capacity. Currently, an injured veteran is significantly economically disadvantaged by their service-related conditions.

To illustrate this, we use the example of a 25-year old veteran injured in the early stages of his career as a Corporal with ambition and realistic potential to reach the rank of Warrant Officer. If he is catastrophically injured under the current Acts, he would receive 75% of his earnings as a ranked Corporal to pension age. But for the injury, more likely than not, he would have had an earning capacity of at least an additional $450 per week as a Warrant Officer. This is a total of approximately $600,000 of lost earnings to pension age that the veteran is disadvantaged as a result of his service-related injury.

The proposed amendments to claims for compensation enable veterans with claims under the MRCA to make claims orally as well as in writing.

Currently, under the MRCA and the DRCA, a needs assessment may be carried out any time after a claim for liability is accepted. Needs assessments are often carried out over the telephone, and during this needs assessment process, a veteran will sometimes orally state that they would like to seek some form of compensation.

Currently, both the DRCA and the MRCA require a claim for compensation to be put in writing. This is unnecessarily burdensome on veterans and creates administrative inefficiencies for the DVA.

The proposed amendments would enable veterans to state orally that he or she is seeking some form of compensation under the MRCA and that oral indication is to be treated as a valid claim under the MRCA.

We submit that given that both the DRCA and the MRCA use a needs assessment process, we submit that these amendments should also be extended to include the DRCA.

ICT systems and processes used in the administration of claims

Delays in DVA's administration of claims are greatly exacerbated by inefficient business systems and processes used by DVA, namely, the use of paper files and the siloing of claims within DVA.

Our understanding is that currently, DVA predominantly utilise hard copy paper files and do not yet have digitised copies of claim files. In addition, the processing of benefits available under the scheme is siloed to different offices in different locations depending on the benefit type.

For example, general claims management is handled out of offices in Victoria, whereas claims for permanent impairment are handled out of offices in either Brisbane or Perth. Therefore, if a veteran lodges a claim for permanent impairment, it is necessary for their claims manager to send their physical file to another office for the duration of the processing and assessment of the permanent impairment claim.

This can cause a considerable delay, during which a claims manager may be unable to access a veteran's file for any other issues which may arise in the interim.

For example, we have acted for a client who suffers from a serious back injury which has caused partial paralysis of the lower limbs. As a result of his injuries, he suffers from a psychological condition. As part of his treatment, DVA approved for him to be admitted for inpatient treatment of his psychological condition. On the day that he was to be admitted, he received a call from the hospital advising him that DVA would no longer be covering his treatment. When our client enquired with DVA, he was advised that DVA could not locate his file because a Needs Assessment Officer had sent the file to another office to be considered for a permanent impairment claim. It took a number of calls from our office and from the client over a number of days before the issue was rectified and our client's treatment was re-approved. As a result, our client's treatment was unnecessarily delayed by a number of weeks.

This type of administrative dysfunction, in our experience and in that of our clients, is common, and an additional and unnecessary stressor.

We understand that the introduction of the *Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Act 2017* allows for computerised decision making and that this may assist the timeliness of determinations. However, we submit that these issues could

be resolved through the complete digitisation of DVA's files so that individuals from different offices and different teams could access a veteran's file simultaneously.

We note that it has been recommended that the DVA be adequately funded to achieve full digitisation of its records and modernisation of its ICT systems by 2020, including the introduction of a single coherent system to process and manage claims. This recommendation was agreed in principle by the Australian Government which acknowledged that many of DVA's current ICT systems are out of date and in substantial need of modernisation.

Maurice Blackburn suggests that DVA should set an aspirational deadline for this task to be completed. We would suggest that July 2019 would be an appropriate target.

We further submit that the cost of digitisation would be countered by cost savings from shipping claim files between offices.

We acknowledge that transitioning to digitisation will be a significant project. Maurice Blackburn believes that this is a project that must commence immediately, without further review.

We submit that, in the meantime, all DVA staff should be able to access a 'claim summary' of a veteran's injuries, claims and entitlements until a complete digitised file is available. This will aid them to immediately answer any questions put to them by a veteran about the status of their file.

In addition, we submit that all new claims received by DVA be completely digitised from the outset.

Appealing Decisions and Legal Representation

Veterans and their families are required to navigate a labyrinth of compensation mechanisms; often without assistance from lawyers or trained advocates.

A veteran's claim may need to be reviewed and appealed on up to six occasions before liability is accepted. A veteran may then need to lodge separate claims to receive compensation for time off work and also subsequently for permanent impairment. If each separate claim is disputed by the DVA, it is foreseeable that a veteran could pursue eighteen reviews and appeals before receiving the full range of benefits available under the scheme.

Appeals to the Veterans' Review Board (VRB)

As of 1 January 2017, any veteran who disagrees with decisions made by DVA in relation to claims under the VEA and the MRCA must be appealed to the Veterans' Review Board (VRB) within 12 months.

DRCA matters can still be appealed by internal reconsideration within 30 days before proceeding to the AAT within 60 days of receipt of a Reviewable Decision. These processes and timeframes are simple enough to understand when presented clearly in this submission. It is glaringly more complex when these processes and timeframes must be adduced by the veteran from a series of ad hoc reviews of the DVA website, fact sheets, the Acts themselves or multiple visits to an ESO – and notably this would occur after the Veteran had formed a view on what Act applies to the particular injury being claimed.

Despite the complexity, lawyers are prohibited from appearing on behalf of veterans and their families before the VRB. This means that many veterans or their families navigate the

labyrinth without legal representation. Individuals appealing to the VRB can request assistance from ESOs and other non-legal advocates. Whilst we applaud the ESOs and other advocates for their commitment to advocating the interests of veterans, the total exclusion of legal practitioners is a barrier to justice.

We note the comments made by Senator Jacqui Lambie in her dissenting report to this Committee's Inquiry into the *Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017*:

> *"Since 2010, DVA's own reviews of Ex-Service Organisations ("ESO") advocacy services indicates that there are issues with the adequacy of non-lawyer advocacy services available to the veterans' community appearing before the VRB. Indeed, "some ESOs have reported difficulty in attracting, training and retaining a sufficient number of advocates, welfare and pension officers to act on behalf of DVA beneficiaries and claimants and to deal with increasingly complex legislation." Nearly one year ago, on 30 June 2016, the DVA-Training and Information Program ("TIP"), which trained layman advocates, was scrapped by DVA for implementation of a different model yet to be proven effective*."

Our clients frequently report an inability to source an advocate to assist them as fewer are active participants in this area. Of those active advocates, some specialise in particular areas and decline to provide advice on the broad range of entitlements across the Acts and/or act on a veteran's behalf through the appeal avenues. This can, at times, leave a veteran without any representation through to the AAT or the Federal Court and is an impediment to justice.

Additionally, existing ESOs and advocates are facing considerable shortages in funding. For example, a veteran came to Maurice Blackburn requesting assistance with an appeal to the VRB. He advised us that he had received assistance from an advocate; however, he had been advised by the advocate that due to funding cuts, the advocate could only afford to send one email per veteran per week. The veteran was very concerned about the capacity of an advocate with these restrictions. Many other veterans have enquired with Maurice Blackburn for assistance appealing an unsuccessful VRB decision to the AAT, because their advocate doesn't act in the AAT. This is a common response that we experience with ESOs and advocates.

We submit that the prohibitions within the VEA and the MRCA preventing lawyers appearing before the VRB be repealed immediately to ensure access to justice for veterans now and into the future. By comparison, the DVA can access in-house legal teams, private lawyers and other in-house specially trained advocates to progress claims through both the VRB and the AAT. Additionally, there are no restrictions on the costs that these lawyers can incur in defending DVA's decision.

Unqualified, albeit, committed and well-meaning assistance, or minimal or no assistance at all is incredibly stressful for participants in these processes. That stress must, on any common sense analysis, enhance or alleviate the risk of self-harm including suicide.

In addition, we submit that the VRB be changed to a full costs jurisdiction for the Applicant. Currently, a veteran cannot claim any costs for legal assistance in the VRB. We note that the *Review into Military Rehabilitation and Compensation Arrangements* completed in 2011 recommended that if veterans were only able to appeal to the VRB, the Committee's preference was to have the VRB become a full costs jurisdiction. This would allow legal and other representatives to assess the merits of cases and pursue them on a 'no win, no fee' basis.

As veterans with claims under the VEA and the MRCA are now only able to appeal to the VRB, we submit that the VRB become a full costs jurisdiction for the Applicant.

Appeals to the AAT

Veterans and their families often seek assistance from legal representatives when appealing claims to the AAT due to the complexity of the Scheme. Whilst non-legal advocates are sometimes available, many are reluctant to run a matter before the AAT. Additionally, whilst efforts have been made by the AAT to reduce formality and complexity, an understanding of administrative law is fundamental to the appeals process.

We submit that access to legal representation should not be curtailed by legislative technicalities and costs restrictions. By excluding independent lawyers from the process, the ability to maintain checks and balances on the operation of DVA is significantly reduced. Governments commonly wax lyrical about how our nation owes a debt of gratitude, as indeed we do, to our veterans. Access to justice to be meaningful must include the right to retain legal practitioners. The present legislative framework is contrary to that objective.

We note the statistics provided by the AAT in their submissions to the Inquiry into Suicide by Veterans and ex-Service Personnel (the Inquiry) in relation to the number of veterans appealing matters to the AAT. The statistics, on the face of it, suggest that most veterans are represented. With respect, we submit that these statistics would more accurately reflect the level of representation of veterans if they were broken down by legislation, for example, MRCA, DRCA or VEA. We suspect that levels of representation in VEA matters, or those appealing from the VRB, are lower than those appealing MRCA or DRCA decisions following an internal review. We submit that this is probably due to the limits on legal costs recovery for VEA matters, or matters appealing from the VRB.

We also note that, as suggested by the AAT in their submissions to the Inquiry into Suicide by Veterans and ex-Service Personnel (the Inquiry), some veterans may be able to access legal aid through the War Veterans' Legal Aid Scheme. In reality, though, this Scheme is limited and is only accessible by a limited number of veterans.

Restrictions on legal costs in the AAT

The submissions to the Inquiry made by the AAT suggest that legally represented applicants can recover, if successful, 75% of *all* professional costs from DVA. This statement is an inaccurate representation of an applicant's recovery of legal costs in the AAT.

Legal costs are comprised of two components: *solicitor-client*, and *party-party*. Together, solicitor-client and party-party fees make up a client's total legal costs. The party-party component is the amount that is recoverable from the Respondent in the event of a successful outcome under the Federal Court of Australia's Scale of Costs. The solicitor-client component is the balance of the total legal costs payable by the client directly to the solicitor.

In the AAT, a successful Applicant is limited to recovering party-party costs, calculated at 75% of the Federal Court of Australia's Scale of Costs. By way of example, if a claim before the AAT costs $50,000.00 in total legal costs to run to hearing, the Applicant is only able to recover a portion of these costs from the DVA as party-party costs.

In some cases, this can be as low as 50% of the total costs. As such, the Applicant may be required to pay the balance as solicitor-client costs from their compensation amount, or alternatively, from their pocket if the compensation doesn't result in a lump sum. This paucity in cost recovery has resulted in a shortage of firms offering military compensation legal services, or many veterans choosing not to obtain legal representation, or in some cases, not pursue their appeal.

Unless significant changes in costs recovery are effected, veterans will not be able to afford access to justice.

Our Submission:

6. That consolidated military compensation legislation should include objectives which facilitate holistic, timely and meaningful rehabilitation and return to work options.

7. That, in the absence of a wholesale rewriting of the underpinning legislation, the claims process be modified to ensure that veterans only have to go through a single claims process for all their injuries regardless of which act may apply.

8. That the DVA introduce a mandatory 30 day processing period for determinations which must be adhered to unless there are special circumstances causing this delay.

9. That deeming provisions be legislated to accept a decision if it is not made within the specified time and special circumstances are not demonstrated.

10. That if a deemed decision is subsequently overturned, we submit that any compensation received by a veteran ought not to be repayable to the DVA.

11. That every veteran who lodges a claim with the DVA should be provided with a case manager who is responsible for the oversight of any claims and entitlements that the veteran has.

12. That in the interim, the CCS service model be used to provide all veterans with a central point of contact in relation to their claims and entitlements.

13. That all veterans should have access to funds to obtain holistic administrative and legal advice about their options in relation to compensation and getting help to obtain compensation.

14. That the Veteran Payment should be payable until the veteran starts receiving incapacity payments if the claim is accepted or until some other form of income support is obtained if liability is not accepted.

15. That the period of time that the Veteran Payment is payable should be included in the legislation and not contained in a legislation instrument.

16. That DVA commit to the complete digitisation of compensation claim files by July 2019, if not earlier, with open claims to be given priority.

17. That until DVA has completed a complete digitisation of compensation claim files, all DVA staff be able to access a 'claim summary' for each veteran.

18. That all new claims received by DVA be completely digitised from the outset.

19. That the prohibitions within the VEA and the MRCA preventing lawyers appearing before the VRB be repealed.

20. That the VRB should become a full costs jurisdiction for the Applicant, enabling legal and other representatives to assess the merits of cases and pursue them on a 'no win, no fee' basis.

21. That the AAT should become a full costs jurisdiction for the Applicant in the event of successful outcome in a claim against the DVA.

LIABILITY AND STANDARD OF PROOF

Questions from the Issue Paper:

Have the Statements of Principles helped to create a more equitable, efficient and consistent system of support for veterans? Are there ways to improve their use?

What is the rationale for having two different standards of proof for veterans with different types of service? Are there alternatives to recognise different groups of veterans? What would be the costs and benefits of moving to one standard of proof for all veterans (for example, would it make the claims process easier)?

Liability

Compared to the DRCA, both the VEA and the MRCA provide several 'heads of liability' or legislative tests that must be met to establish the relevant connection between a claimed injury, disease or death, and service. However, only one head of liability needs to be satisfied for a condition to be determined to be related to service. Therefore, if similar provisions are included in the proposed consolidated military compensation legislation it would ensure that existing coverage for veterans is maintained.

As such, we submit that the proposed consolidated military compensation legislation should establish that an injury sustained, or a disease contracted, by a person is a service injury or a service disease if one or more of the following apply:

a) the injury or disease resulted from an occurrence that happened while the person was a member rendering defence service;

b) the injury or disease arose out of, or was attributable to, any defence service rendered by the person while a member;

c) in the opinion of the Commission:

    i. the injury was sustained due to an accident that would not have occurred; or

    ii. the disease would not have been contracted;

    but for:

    iii. the person having rendered defence service while a member; or

    iv. changes in the person's environment consequent upon his or her having rendered defence service while a member;

d) the injury or disease:

    i. was sustained or contracted while the person was a member rendering defence service, but did not arise out of that service; or

    ii. was sustained or contracted before the commencement of a period of defence service rendered by the person while a member, but not while

the person was rendering defence service; and, in the opinion of the Commission,

iii. the injury or disease was contributed to in a material degree by, or was aggravated by, any defence service rendered by the person while a member after he or she sustained the injury or contracted the disease;

e) the injury or disease resulted from an accident that occurred while the person was travelling, while a member rendering peacetime service but otherwise than in the course of duty, on a journey:

i. to a place for the purpose of performing duty; or

ii. away from a place of duty upon having ceased to perform duty.[11]

In addition, we submit that the proposed consolidated military compensation legislation should enshrine that, where:

a) a veteran has suffered, or is suffering, from a disease or the death of a veteran results from a disease;

b) the disease is of a kind specified by the Minister, by legislative instrument, as a disease related to service of a kind specified in the instrument; and

c) the veteran was, at any time before symptoms of the disease first became apparent, engaged in military service of that kind;

the service in which the veteran was so engaged shall, for the purposes of this Act, be taken to have contributed, to in a material degree, to the contraction of the disease, unless the contrary is established.[12]

In addition, we submit that the proposed consolidated military compensation legislation should establish that, where a veteran develops a secondary or subsequent injury or disease of a primary injury or disease which has already been accepted by the DVA, the primary injury or disease should be taken to have contributed, in a material degree, to the contraction of the secondary injury or disease, unless the contrary is established.

In addition, we submit that the proposed consolidated military compensation legislation should establish that for service injuries, service diseases or service death arising from treatment provided by the Commonwealth if:

a) For the purposes of liability for injuries and diseases caused by treatment, an injury (the relevant injury) sustained, or a disease (the relevant disease) contracted, by a person is a service injury or a service disease if:

i. all of the following apply:

A. the person receives treatment for an earlier service injury or service disease;

B. the treatment is paid for or provided wholly or partly by the Commonwealth;

[11] *Military Rehabilitation and Compensation Act 2004* (Cth) section 27.
[12] *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) section 7.

C. as a consequence of that treatment, the person sustains the relevant injury or contracts the relevant disease; or

ii. the person receives any treatment under regulations made under the Defence Act 1903 for an earlier injury or disease that is not a service injury or service disease and as an unintended consequence of that treatment, the person sustains the relevant injury or contracts the relevant disease.

b) For the purposes of liability for injuries and diseases aggravated by treatment, an injury (the relevant injury) sustained, or a disease (the relevant disease) contracted, by a person is a service injury or a service disease if:

i. all of the following apply:

A. the person receives treatment for an earlier service injury or service disease;

B. the treatment is paid for or provided wholly or partly by the Commonwealth;

C. as a consequence of that treatment, the relevant injury or relevant disease, or a sign or symptom of the relevant injury or relevant disease, is aggravated by the treatment; or

ii. the person receives any treatment under regulations made under the Defence Act 1903 for an earlier injury or disease that is not a service injury or service disease and, as an unintended consequence of that treatment, the relevant injury or relevant disease, or a sign or symptom of the relevant injury or relevant disease, is aggravated by the treatment.

c) For the purposes of liability for deaths caused by treatment, the death of a person is a service death if:

i. either:

A. the person receives treatment under this Act for a service injury or disease and the treatment is paid for or provided wholly or partly by the Commonwealth; or

B. the person receives any treatment under regulations made under the Defence Act 1903; and

ii. as a consequence of that treatment, the person dies.[13]

In addition, we submit that the proposed consolidated military compensation legislation should establish that, an injury sustained, or a disease contracted, by a person is a service injury or a service disease if:

a) the injury or disease:

[13] *Military Rehabilitation and Compensation Act 2004* (Cth) section 29.

i. was sustained or contracted while the person was a member rendering defence service, but did not arise out of that service; or

ii. was sustained or contracted before the commencement of a period of defence service rendered by the person while a member, but not while the person was rendering defence service; and

b) in the opinion of the Commission, a sign or symptom of the injury or disease was contributed to in a material degree by, or was aggravated by, any defence service rendered by the person while a member after he or she sustained the injury or contracted the disease.[14]

We acknowledge that the abovementioned recommendations are broad in the extent of their proposed coverage of liability. However, the above provisions largely mirror the existing provisions for establishing liability under sections 27, 29 and 30 of the MRCA.

The only additions are the proposals relating to deemed acceptance of specified diseases and secondary or subsequent injuries. The proposal above relating to specified diseases replicates the existing provisions under section 7 of the DRCA. As such, these provisions should be included in the consolidated military compensation legislation to ensure that existing coverage for veterans is maintained.

Comparatively, the MRCA has the most beneficial provisions relating to liability as it encompasses the comparable provisions under the DRCA and the VEA as well as providing some additional avenues to establish liability. If such provisions are included in the proposed consolidated military compensation legislation, it would ensure that existing coverage for veterans is maintained.

Burden of Proof

In the existing Scheme there are different standards of proof that apply in determining claims for liability. The MRCA and the VEA both use two standards of proof that apply in determining claims for liability. These are the "beyond reasonable doubt" standard of proof and the "reasonable satisfaction" or "balance of probability" standard of proof.

The "beyond reasonable doubt" standard of proof applies to claims under the MRCA and the VEA were the veteran has suffered an injury in warlike or non-warlike service. Relevantly, when the application of force is authorised to pursue specific military objectives and there is an expectation of casualties, the determination is likely to be that of warlike service and non-warlike service operations are those military activities short of warlike operations where there is a risk associated with the assigned tasks and where the application of force is limited to self-defence

By comparison, the "reasonable satisfaction" or "balance of probability" standard of proof applies to injuries relating to peacetime service under the VEA and the MRCA as well as all claims under the DRCA. Relevantly, all other service, which has not been determined to be warlike or non-warlike service, is considered peacetime.

For these purposes, it is important to note that the distinction between peacetime, non-warlike and warlike service is only relevant in determining liability. This distinction does not impact any other entitlements except for permanent impairment compensation under the MRCA and service pension under the VEA. However, in terms of permanent impairment

[14] *Military Rehabilitation and Compensation Act 2004* (Cth) section 30.

compensation under the MRCA, it only impacts the amount of compensation a veteran may be entitled to and not the amount of compensation.

As such, we submit that when determining claims for injuries caused during warlike or non-warlike service the "beyond reasonable doubt" standard of proof whilst the "reasonable satisfaction" or "balance of probability" standard of proof should apply to injuries sustained during peacetime service.

However, we submit that the test for determining whether the reasonable hypothesis standard of proof applies as articulated by the Full Federal Court in *Repatriation Commission v Deledio* [1998] FCA 391 could be significantly simplified.

Statements of Principles (SoPs)

The Statements of Principles (SoPs) are used in determining claims for liability for injuries, diseases and deaths under both the VEA and the MRCA.

The SoPs are legislative instruments that set out the factors which can connect particular injuries, diseases or death with service. SoPs are determined by the Repatriation Medical Authority (RMA). In order for a claim to succeed at least one of the SoP factors must be related to service.

For example, if a veteran developed major depressive disorder they would need to satisfy one of the factors set out in the Statement of Principles concerning Depressive Disorder (No. 83 of 2015 or No. 84 of 2015). One of these factors is that the veteran must have experienced a category 1A stressor within two years before the clinical onset of depressive disorder. For these purposes, a category 1A stressor means one of the following traumatic events:

- Experiencing a life-threatening event;
- Being subject to a serious physical attack or assault including rape and sexual molestation; or
- Being threatened with a weapon, being held captive, being kidnapped, or being tortured.

Therefore, if a veteran suffered a serious assault in the course of their military service but only started to develop symptoms 25 months after the assault, DVA would find that they do not suffer an injury related to their military service in accordance with this factor. The time periods set out in many SoPs are restrictive and do not reflect accepted principles in psychiatry regarding the latent onset of psychiatric symptoms following traumatic events.

This is illustrated through the following case study. One of our clients was diagnosed as suffering from cervical spondylosis. A neurosurgeon reported that our client's condition was caused by repetitive and significant trauma to his cervical spine during the course of his military service. However, when lodging his claim, he needed to satisfy one of the factors set out in the Statement of Principles concerning Cervical Spondylosis (No. 66 of 2014 or No. 67 or 2014).

One of these factors is that a veteran must have experienced trauma to the cervical spine. For these purposes, trauma to the cervical spine means a discrete event involving the application of significant physical force, including G force, to the cervical spine that causes the development within twenty-four hours of the injury being sustained, of symptoms and signs of pain and tenderness and either altered mobility or range of movement of the cervical

spine. In the case of sustained unconsciousness or the masking of pain by analgesic medication, these symptoms and signs must appear on return to consciousness or the withdrawal of the analgesic medication. These symptoms and signs must last for a period of at least seven days following their onset; save for where medical intervention has occurred and that medical intervention involves either:

A. Immobilisation of the cervical spine by splinting, or similar external agent;

B. Injection of corticosteroids or local anaesthetics into the cervical spine; or

C. Surgery to the cervical spine.

Therefore, despite the specialist medical opinion stating that our client's claim was caused by his military service, his claim was denied by the DVA as he failed to meet any of the factors set out in the Statement of Principles concerning Cervical Spondylosis (No. 66 of 2014 or No. 67 or 2014).

Maurice Blackburn submits that the individual facts and circumstances of a case and the best medicine available are the touchstones for the determination of liability in most other statutory compensation schemes around the world. As such, the use of the SoPs to restrictively limit liability is not consistent with best practice.

Additionally, the current application of the SoPs fails to consider general principles of causation and is restrictive and unfair. As such, we submit that an acknowledgment or direction be inserted within the proposed consolidated military compensation legislation, or within the SoPs to the effect that the SoPs are to be used as a guide only to assist the delegate in making a decision.

We note that if these submissions are implemented there is a possibility that some veterans could successfully claim for injuries or diseases which did not meet the standards established under the existing Scheme. However, such an outcome would be ultimately beneficial for the veterans and this is consistent with a veteran-centric reform.

Our Submission:

22. That the provisions relating to liability under the proposed consolidated military compensation legislation should be broad in their coverage by mirroring sections 27, 29 and 30 of the MRCA and section 7 of the DRCA as well as providing for deemed acceptance of specified diseases and secondary or subsequent injuries.

23. That in determining claims, injuries caused during warlike or non-warlike service the "beyond reasonable doubt" standard of proof whilst the "reasonable satisfaction" or "balance of probability" standard of proof should apply to injuries sustained during peacetime service.

24. That the test for determining whether the reasonable hypothesis standard of proof applies as articulated by the Full Federal Court in *Repatriation Commission v Deledio* [1998] FCA 391 could be significantly simplified.

25. That the individual facts and circumstances of the case and the medicine available should be the touchstone for the determination of liability.

26. That e time periods for stressors set out in SoPs concerning psychiatric injuries be removed.

27. That the SoPs be amended by the RMA to explicitly provide that they are to be used as guidelines only.

PROVIDING FINANCIAL COMPENSATION FOR AN IMPAIRMENT

Questions from the Issues Paper:

Is the package of compensation received by veterans adequate, fair and efficient? If not, where are the key shortcomings, and how should these be addressed?

Is access to compensation benefits fair and timely? In particular, are there challenges associated with the requirements in the MRCA and DRCA that impairments be permanent and stable to receive permanent impairment compensation? How could these provisions be improved?

Is there scope to better align the compensation received under the VEA, MRCA and DRCA? In particular, could the provisions for permanent impairment compensation and incapacity payments in the MRCA and DRCA be made consistent?

Are there complications caused by the interaction of compensation with military superannuation? How could these be addressed?

What is the rationale for different levels of compensation to veterans with different types of service in the MRCA? Should these differences continue?

For those veterans who receive compensation, are there adequate incentives to rehabilitate or return to work? Are there examples of other compensation schemes that provide support for injured workers and successfully create incentives to rehabilitate or return to work?

The current regime for determining compensation is confusing and convoluted. Maurice Blackburn is pleased to share our experiences in this area, and make some suggestions for a better system.

If a veteran has a claim accepted under either the DRCA or the MRCA, they may be entitled to claim compensation for permanent impairment and non-economic loss. In addition, whilst not specifically referred to as compensation for permanent impairment, veterans under the VEA who are entitled to receive the General Rate of the Disability Pension receive these pensions based on their level of impairment instead of an ability to earn or loss of earnings.

As such, all of the Acts in the military compensation scheme provide compensation for permanent impairment.

Under a consolidated framework, veterans should be able to elect to receive compensation for permanent impairment as either a lump sum or as a weekly, tax-free amount payable for life.

Compensation for Permanent Impairment

If a veteran has a claim accepted under either the DRCA or the MRCA, they may be entitled to claim compensation for permanent impairment and non-economic loss. In addition, whilst not specifically referred to as compensation for permanent impairment, veterans under the VEA who are entitled to receive the General Rate of the Disability Pension receive these pensions based on their level of impairment instead of an ability to earn or loss of earnings.

As such, all of the Acts in the Scheme provide compensation for permanent impairment. Consequently, we submit that in the proposed consolidated military compensation legislation, compensation for permanent impairment should continue. To encompass the existing

entitlements, veterans should be able to elect to receive compensation for permanent impairment as either a lump sum or as a weekly, tax-free amount payable for life.

Access to permanent impairment compensation on a whole person impairment basis:

In *Comcare v Canute* (2006) 226 CLR 535, the High Court found that where an accident results in a number of injuries, each injury must be assessed as a separate injury, each of which must satisfy the required threshold of 10% impairment in order for permanent impairment compensation to be payable in respect of that injury.

We have seen the grossly unfair result of this decision in practice. It is entirely unfair for veterans who have permanent impairments about which there is no dispute (accepting that there may be some dispute about quantum of impairment) to receive no compensation if that impairment does not reach the arbitrary 10% or 10 point threshold. It is crucial to understand the distinctions between medical impairment on the one hand and the disability impact of that impairment on the other.

In our experience, small percentage impairments can have major disability consequences for our clients. For example, a veteran might have injuries to both his shoulders, back and both knees, each of these injuries resulting in 8% impairment. Accordingly, that person would receive nothing. We therefore believe that the Court's judgment should be addressed by way of a legislative amendment making clear that injured veterans are able to access permanent impairment compensation on a whole person impairment basis (i.e. impairments from separate accepted injuries can be combined). The whole person impairment basis has been applied to claims under the MRCA and the VEA, which we support.

It is submitted that there should be no threshold for permanent impairment benefits under any consolidated military compensation legislation. Medical assessment methods are far more sophisticated now than when the DRCA was proclaimed in 1988. We believe it is appropriate to remove the current 10% and 10 impairment point threshold to ensure that veterans with a permanent impairment of any degree are appropriately compensated.

A choice between long-tail statutory benefits and commuting statutory benefits into a lump sum:

After liability for a claim has been accepted by DVA, veterans are continuously subjected to medical assessments and ongoing disputes with respect to the extent of their weekly entitlements.

Unfortunately, this aspect of the Scheme can have significant impacts on the mental health of veterans who are seriously injured. It is equally common to see the alleviation of stress after a claim has been resolved in a State based scheme which allows for the resolution of a claim through the lump sum payment of benefits or damages.

The interminable nature of the scheme also imposes a significant administrative burden and cost on DVA. This is because DVA are required to calculate entitlements on a weekly basis, including after the veteran has been discharged, right up until the age of pension, at substantial administrative cost.

The experience in Australia and internationally in terms of this type of pension and long-tail schemes is clear:

- Such schemes are large and expensive bureaucracies.

- Participants on these schemes often feel stressed and commonly overborne by their dealings with the bureaucracy.

- The methodologies applied to reining the costs or fiscal burdens of the scheme commonly involve a process participants describe as "being ground into submission" with repetitious medical examinations and ongoing invasive scrutiny of their life and health.

In contrast, schemes which by design foster lump sums and finality are more likely to achieve:

- Participant satisfaction;

- Meaningful returns to work; and

- More positive psychological state of mind.

Accordingly, we recommend that veterans should have the ability to pursue common law damages with all heads of damage to be available. This will finalise the veterans' statutory entitlements save in the event that a veteran elects to retain ongoing medical treatment under a Repatriation Health Care Card.

Alternatively, we submit a mechanism be introduced by which, irrespective of common law liability, the claimant can make an election to commute prospective statutory benefits to a lump sum where the evidence supports a conclusion, on the balance of probabilities, that the benefits are likely to be payable under the proposed consolidated military compensation legislation into the future.

Minimum Level of Amendments to the Existing Scheme's Compensation for Permanent Impairment:

Currently, if a veteran has a claim accepted under either the DRCA or the MRCA, they may be entitled to claim compensation for permanent impairment and non-economic loss. However, veterans who are only entitled to claim benefits under the DRCA face significantly higher thresholds and lower entitlements.

As of 1 July 2017, the maximum amount of permanent impairment and non-economic loss compensation available under sections 24 and 27 of the DRCA is $255,448.04. With the exception of the ACT and Western Australia, this is the lowest maximum permanent impairment compensation available to Australian workers. However, by comparison, the ACT and Western Australia schemes allow for access to a significant common law lump sum in negligent circumstances to compensate for the lower permanent impairment compensation.

The same allowances are not replicated in the DRCA (an omission that we fundamentally oppose). As such, in the event that a consolidated Act is not achievable, the maximum permanent impairment amount available under the DRCA should be increased to $598,360 (the applicable maximum in Victoria) and continue to be indexed annually in line with Consumer Price Index inflation.

Additionally, for the reasons outlined above, in the event that a consolidated Act is not achievable, we submit that there should be no threshold for permanent impairment benefits under either DRCA or MRCA. Medical assessment methods are far more sophisticated now than when the DRCA was proclaimed in 1988. We believe it is appropriate to remove the current 10% and 10 impairment point threshold in light of more precise medical assessment methods.

Offsetting provisions

Prohibitions against "double-dipping" as a principle are sound but the practical application within the legislation in the Scheme is flawed.

The effects of some of the offsetting provisions under the VEA is that any subsequent compensation that is received by a veteran for the effects of an incapacity caused by an injury, disease or death which is the same as an incapacity for which a veteran is receiving compensation from DVA will be offset, irrespective of the date that the incapacities commenced. Not only will a veteran need to refund money retrospectively to DVA, but their benefits will also be reduced into the future.

The practical implication of these provisions presents a significant barrier to veterans' access to justice as it can prevent veterans from claiming compensation for subsequent injuries, even when they are unrelated to service.

For example, we have a client who served in the First Gulf War. Following his military service, he developed post-traumatic stress disorder (PTSD). He never formally lodged a claim with DVA. However, he did receive treatment through his Non-Liability Health Care Card. Our client was able to return to work for a state police service. During his employment, he was exposed to traumatic events and circumstances which aggravated his PTSD. Our client is now attempting to lodge a claim for workers' compensation for aggravation of PTSD. If he receives compensation for his aggravation of PTSD, he is likely to be asked to repay DVA the costs of all the treatment that they paid for. This potential refund severely impacts the viability of any claim for his aggravation of PTSD. This may mean that he could be worse off by lodging a claim to receive workers' compensation benefits.

Another example involves a client who served in the Vietnam War. During the course of his service in Vietnam, he developed hearing loss, tinnitus, a depressive disorder, an anxiety disorder and thoraco-lumbar spondylosis. Following this injury, he lodged a claim with DVA under the VEA and started receiving a fortnightly pension from 2003. In 2014, our client was involved in a motor vehicle accident unrelated to his service. He developed chronic PTSD and major depressive disorder as well as suffering from a whiplash injury to his cervical and lumbar spine as a result of the accident. After settling a common law claim for damages from the motor vehicle accident, DVA directed our client to repay his VEA pension retrospectively as well as reducing his fortnightly pension indefinitely.

Given the wording of the current provisions, it is irrelevant that the original condition and the aggravation are different, with different causes, and with a different date of onset.

As such, we submit that if offsetting provisions are to be included in consolidated military compensation legislation, the provisions should reflect that a veteran only needs to refund benefits paid for the same injury and not the same incapacity. This would mean that benefits will only be repayable and reduced into the future if compensation is being paid for the same injury.

We also submit that DVA should provide early advice to each veteran at risk of being impacted by offsetting provisions to enable veterans to make an informed choice about the economics of proceedings with subsequent compensation claims. This advice should be shrouded in legal professional privilege to ensure accurate quantum ranges can be provided to DVA by the veteran.

Our Submission:

28. That the maximum amount of permanent impairment and non-economic loss compensation available under sections 24 and 27 of the DRCA should be increased to $598,360 to be indexed annually.

29. That the DRCA should be amended to allow for permanent impairment compensation to be payable on a whole person impairment basis similar to MRCA.

30. That the 10% and 10 impairment point threshold for payment of compensation for permanent impairment and non-economic loss under the DRCA and MRCA be removed, respectively.

31. That offsetting provisions under the military compensation scheme should be amended so that only compensation received for the same injury, and not the same incapacity, is subject to offsetting.

32. That DVA should provide early advice to each veteran at risk of being impacted by offsetting provisions. This advice should be subject to legal professional privilege and not disclosable to any other party.

HELPING PEOPLE TRANSITION FROM THE ADF

Questions from the Issues Paper:

Are transition and rehabilitation services meeting the needs of veterans and their families? Are veterans getting access to the services they need when they need them? What could be done to improve the timeliness of transition and rehabilitation services, and the coordination of services? What changes could be made to make it easier for ADF personnel to transition to civilian life and to find civilian employment that matches their skills and potential?

Veterans who are medically discharged are generally in higher needs categories than people who access other rehabilitation and compensation schemes, and have exhausted options for return to work in the ADF. How should this be reflected in the design of rehabilitation services for veterans?

How should the effectiveness of transition and rehabilitation services be measured? What evidence is currently available on the effectiveness of transition and rehabilitation services? How can the service system be improved?

In some countries, rehabilitation services are provided to the families of severely injured and deceased veterans. Is there a rationale for providing such services in Australia? If so, what evidence is there on the effectiveness of these services?

In *The Constant Battle: Suicide by Veterans* by the Foreign Affairs, Defence and Trade References Committee, it was noted that the "period of transition to civilian life was identified as a critical time for the provision of support to veterans".[15] Relevantly, the Committee noted:

> "*The 2017-18 Budget estimated there were 59,194 permanent ADF personnel. Of these serving members approximately, 5,500 discharge and return to civilian life each year. While most of these members are transitioning voluntarily, some are separating for medical reasons (900-1,000 each year) or are recruits who do not complete initial training (around 600-700 each year). Others separate for a range of other reasons which can include redundancy, reaching compulsory age retirement, for disciplinary reasons and administratively*". (p.101)

This highlights the number of people who face significant pressures as they leave from the ADF.

Gaps in transition services

Transition services are designed to help veterans adjust to civilian life after discharging from the ADF. The National Mental Health Commission, for example, highlighted many of the pressures faced by transitioning military personnel, including the psychological transition from being a member of the ADF to becoming a civilian, and noted that some personnel are institutionalised or dependent on the ADF and fear returning to civilian life. In addition, Phoenix Australia noted that "the post-discharge period has been recognised as a period of elevated risk for mental health problems and suicidality".

Currently, the ADF has responsibility for transition and rehabilitation services for its members, and for providing some transition services following discharge. After discharge, though, the DVA has responsibility once it has accepted liability for a veteran's condition.

[15] Foreign Affairs, Defence and Trade References Committee, *The Constant Battle: Suicide by Veterans* (2017)

Unfortunately, there can be gaps in the continuity of care following a veteran's discharge.

As such, we submit that a veteran's discharge should not be finalised until all of their paperwork has been completed and processed by the DVA and Military Super, if appropriate.

Transitioning to Post-Military Employment

Currently, the aim of the Prime Minister's Veterans' Employment Program is to increase employment opportunities for veterans by raising awareness in the Australian business community of the unique skills and experience that veterans can bring to the civilian workplace.

Veterans can access services through the Department of Defence's Career Transition Assistance Scheme (CTAS) for up to 12 months after separation from the ADF. However, these services vary according to the length of a veterans' ADF service and other factors.

This measure is to provide support for veterans who need additional services to secure appropriate employment. It will cover the cost for services such as resume and interview preparation, translation of ADF skills into civilian competencies, mentoring and coaching services pre and post-employment.

We submit that the Department of Defence and the DVA should continue to support this transition by investigating unique partnerships with not-for-profit organisations and other government departments to help military members prepare for alternative careers by providing continuing education, vocational training and entrepreneurial opportunities.

Our Submission:

33. That a veteran's discharge should not be finalised until all of their paperwork has been completed and processed by the DVA and Military Super, if appropriate.

34. That the Department of Defence and the DVA should continue to support this transition by investigating unique partnerships with not-for-profit organisations and other government departments to help military members prepare for alternative careers by providing continuing education, vocational training and entrepreneurial opportunities.

INCOME SUPPORT AND HEALTH CARE

Questions from the Issues Paper:

Is health care for veterans, including through the gold and white cards, provided in an effective and efficient manner? Has the non-liability coverage of mental health through the white card been beneficial?

Is there scope to simplify the range of benefits available, and how they are administered? Are all of the payments available necessary and beneficial? Are they achieving value for money outcomes?

What are the benefits of having generally available income support payments also available to veterans through DVA? What are the costs?

Income Support Payments

Whilst enlisted in the ADF, a Permanent Forces member's or a continuous full-time Reservist's income continues to be paid for by the ADF. However, following their discharge and for all other veterans, a veteran may be entitled to income support payments, or incapacity payments, which compensate veterans for lost income.

As it stands, the VEA only allows for compensation when a veteran, who is in receipt of or eligible to receive a disability pension of at least 70% of the general rate of the disability pension, is also unable to engage in work, where that veteran's inability to work is solely as a result of their VEA accepted conditions.

By comparison, if a veteran is unable to work as a result of their injury, both the DRCA and the MRCA provide for incapacity payments to be paid at one hundred per cent of the difference between their normal pre-injury weekly earnings for the first forty-five weeks after discharge or after their injury has been accepted. After the forty-five weeks, normal earnings are reduced to seventy-five per cent. If a veteran is able to work, whether part-time or paid at a lower rate, they are entitled to receive 'top-up' payments to supplement their income. Incapacity payments are payable for the duration of a veteran's incapacity or until the veteran receives pension age as defined in the *Social Security Act 1991*.

We submit that consolidated military compensation legislation should continue to provide income support payments to veterans if they are unable to work or are unable to work at the same level as the result of their accepted conditions. This is because the level of incapacity payments available under the DRCA and the MRCA for a veteran unable to work is "vastly greater than the level of disability pension paid under [the] VEA including the pension paid at the TPI rate under the VEA".[16]

However, we submit that the starting calculation point for these payments should be the veteran's gross weekly earnings as opposed to their net weekly earnings. This is because veterans are currently taxed on a payment based on a net amount. The effect of this is that veterans are effectively taxed twice.

We also submit that income support payments should be paid at 100% of a veteran's anticipated earning capacity for the reasons set out above.

[16] Foreign Affairs, Defence and Trade References Committee, *The Constant Battle: Suicide by Veterans* (2017) 52 – 53.

In addition, to allow for those veterans who are in receipt of the Special Rate Disability Pension (SRDP) under the MRCA and either the Extreme Disablement Allowance (EDA), Intermediate Rate and Special Rate pensions under the VEA, we submit that if a veteran's combined impairment reaches a set threshold a veteran should be entitled to elect to receive the Special Rate Disability Pension (SRDP). We submit that the threshold used should be comparable to the existing thresholds of 70% of the General Rate of the Disability Pension or 50 impairments points under the MRCA.

Health Care through the Repatriation Health Care Cards

Whilst enlisted in the ADF, a veteran's treatment costs are paid for by the ADF. However, following their discharge, a veteran may be entitled to one of two Repatriation Health Care Cards to cover the costs of their medical treatment. The available Repatriation Health Care Cards are commonly called White Cards and Gold Cards.

A Gold Card entitles the holder to DVA funding for services for all clinically necessary health care needs, and all health conditions, whether they are related to war service or not.

By comparison, a White Card entitles the holder to care and treatment for injuries or conditions which have been accepted by DVA as being related to military service. In addition, a White Card also provides some medical treatment to veterans without the need to establish a link to service or recognise liability for providing compensation. Under these arrangements, the DVA is able to provide treatment for malignant cancers, pulmonary tuberculosis and mental health conditions. These are considered to be non-liability conditions.

We submit that the proposed consolidated military compensation legislation should continue to provide veterans with treatment through the use of the Repatriation Health Care Cards. We submit that veterans should be entitled to receive a White Card until their combined impairment reaches a set threshold.

Whilst we support the use of the Repatriation Health Care Cards, we submit that if under the proposed consolidated military compensation legislation a veteran's combined impairment reaches a set threshold they should be entitled to a Gold Card regardless of the nature of their service. We submit that the threshold used should be comparable to the existing thresholds of 70% of the General Rate of the Disability Pension or 50 impairments points under the MRCA.

We also submit that non-liability White Cards providing treatment for malignant cancers, pulmonary tuberculosis and mental health conditions should be provided to all veterans on discharge to assist with their transition to civilian life.

In the event that a consolidated Act is not achievable, we submit that former ADF members with claims under the DRCA should also be entitled to receive Gold Cards. Currently, a Gold Card is only available to former ADF members who have claims accepted under either the VEA or the MRCA. Former ADF members with claims accepted under the DRCA are not entitled to receive a Gold Card despite how many injuries they may suffer or how severe their level of impairment is.

Appeals of repatriation health care card decisions

A veteran has no internal review or merits review appeal avenues to challenge a decision made in relation to the provision of, or refusal to provide, treatment under a Repatriation Health Care Card. These issues cannot be appealed to the VRB or the AAT.

The only review mechanism open to veterans is an appeal directly to the Federal Court of Australia. However, this can only be on narrow administrative law grounds. Such an application is complicated, stressful, expensive and requires detailed legal knowledge.

Accordingly, the policy reasoning for an internal review mechanism followed by a merits review to the AAT should be embedded into the legislation. This is because:

- Rehabilitation outcomes will improve with better health care;
- Repatriation Health Care Cards will foster better health outcomes; and
- Those better health outcomes are likely to mitigate suicide risks.

As such, we submit that the Scheme be amended to allow for the review of the merits of a decision of DVA in relation to the provision of, or refusal to provide, treatment under a Repatriation Health Care Card. The usual avenues and time limits which apply within the Scheme should be applicable in these circumstances and a veteran should be entitled to the full legal costs of pursuing an appeal.

Our Submission:

35. That the provision of Repatriation Health Care Cards is amended so that former ADF members with claims under the DRCA also are entitled to receive Gold Cards.

36. That the military compensation scheme should be amended to allow for the review of the merits of a decision of DVA in relation to the provision of, or refusal to provide, treatment under a Repatriation Health Care Card.

37. That non-liability White Cards providing treatment for malignant cancers, pulmonary tuberculosis and mental health conditions should be provided to all veterans on discharge to assist with their transition to civilian life.

38. That the legislation should be amended to entitle the veteran to the full legal costs of pursuing a successful appeal of a Repatriation Health Care Card decision.

OTHER COMMENTS

The Need for Holistic Reform

We acknowledge that this Inquiry was one of a number of recommendations made by the Inquiry into Suicide by Veterans and ex-Service Personnel (the Inquiry) by the Foreign Affairs, Defence and Trade References Committee. In addition, the Inquiry also recommended:

- that the Australian National Audit Office (ANAO) examine the efficiency of veterans service delivery by the DVA, and
- that DVA commence a series of legislative workshops designed to provide a mechanism for Government to consult, discuss and prioritise future legislation and allow DVA to understand the priorities of ex-service organisations and issues of concern in developing veteran legislation.

Whilst we acknowledge the potential benefit of these three reviews, Maurice Blackburn is of the view that a single comprehensive process aimed at broad-based reform of the Scheme would be more beneficial.

In our experience, a substantial number of the problems associated with the Scheme stem just as much from the legislation which underpins the scheme as to the way it is administered by DVA.

Important practical considerations risk being overlooked from one review to another. As such, we recommend that holistic reform of the Scheme, including the military compensation legislation, should be conducted as soon as possible instead of further ad hoc and piecemeal reviews of different fragments of this scheme.

Access to unrestricted Common Law damages for economic and non-economic loss, by way of an election, in negligent circumstances

In the event that a veteran is unable to fully recover from their injuries, the most glaring deficiencies in the current Scheme are:

- The inability for practical purposes for a veteran to pursue common law damages; and
- The long-tail (pension-like) nature of the scheme and the inability to capitalise that income stream to assist veterans in moving on and living a fulfilled life more akin to what they envisioned pre-injury.

Common law damages

When the DRCA was introduced in 1988, it catastrophically diminished a veteran's right to common law relief against the ADF and other ADF members. The MRCA followed suit. The effect of this is that a veterans' right to a Common law claim for damages in negligence is limited to $110,000.00 in pain and suffering, and that they must remain "on the scheme" to apply for ongoing benefits for as long as the DVA deem they continue to suffer from their injury.

A person injured in unsafe circumstances such as negligence ought to have the usual and well understood remedies available for such negligently inflicted injuries and the legislation ought to be amended to permit that.

Not only would this bring claims to an end if a veteran elected to do so, but it would also help produce, promote and create a culture of safety within the ADF. In the absence of common law rights, a negligent employer cannot be held responsible for their negligent acts or omissions. In the absence of responsibility, poor safety cultures thrive.

Our recommendation is that, if a claimant elects to pursue a common law claim and are successful by comprise or judgment, all heads of damage be available to the claimant. If a claimant were to elect to do so, this would require recovery of past compensation in respect of that injury and finalise a claimant's statutory entitlements into the future.

Indexation of the cap on common law damages

If the common law cap of $110,000 had been indexed quarterly in line with the Consumer Price Index, it would currently equal $237,402.34 when using the Consumer Price Index Inflation Calculator provided by the Australian Bureau of Statistics (ABS). Unfortunately, the cap on common law claims of $110,000, which was fixed in December 1988, has not changed since. As a result, the cap has almost completely eroded any benefit in a veteran electing to pursue a common law claim.

The effect of the current cap is that Common Law claims are not economically viable for the claimant to pursue and justice is not served on the veteran in circumstances of negligence.

In the event that our submissions for the introduction of unrestricted common law are not accepted, we submit that the cap on common law claims of $110,000 be indexed quarterly in line with the Consumer Price Index Inflation.

Our Submission:

Maurice Blackburn submits that:

39. Veterans should have an ability to pursue common law damages with all heads of damage to be available. This will finalise the veteran's statutory entitlements save in the event that a veteran elects to retain ongoing medical treatment under a Repatriation Health Care Card.

40. Alternatively, we submit that a mechanism be introduced by, which irrespective of common law liability, prospective statutory income replacement benefits be commutable to a lump sum at the election of the veteran.

41. Alternatively, the cap on common law claims of $110,000 is to be indexed quarterly in line with the Consumer Price Index Inflation.

SUMMARY OF RECOMMENDATIONS

1. That the military compensation scheme, including the legislation and administration of the scheme by the DVA, should take "an holistic approach to injured personnel by integrating the safety, rehabilitation, resettlement and compensation elements".[17]

2. That the proposed consolidated military compensation legislation should apply to all individuals who are currently entitled to claim under the existing military compensation scheme.

3. That new legislation be enacted which incorporates features from contemporary best practice, drawing on experiences of Australian workers' compensation arrangements and military compensation frameworks in other similar jurisdictions.

4. That the proposed consolidated military compensation legislation should apply to all those individuals who are currently entitled to claim under the existing Scheme. That no veteran should have their existing entitlements reduced. We understand that in ensuring this, some veterans will experience an increase in their level of entitlements.

5. That the proposed consolidated military compensation legislation includes the following entitlements available to a veteran if liability for an injury has been accepted by the DVA:
    a) Income support payment for past and future income lost by a veteran as a result of their service-related injury or injuries;
    b) Compensation for permanent impairment on a combined whole person impairment basis payable as either a lump sum or as weekly tax-free amount;
    c) Compensation for medical treatment through the Repatriation Health Care Cards;
    d) Compensation for any aids and appliances;
    e) Compensation for household services and gardening assistance;
    f) Compensation for rehabilitation, including but not limited to vocational rehabilitation;
    g) Compensation for funeral expenses and dependents in the event of the death of a veteran.
    h) A choice between long-tail statutory benefits and commuting statutory benefits into a lump sum; and
    i) Access to unrestricted Common Law damages for economic and non-economic loss, by way of an election, in negligent circumstances.

6. That the proposed consolidated military compensation legislation should include objectives which facilitate holistic, timely and meaningful rehabilitation and return to work options.

7. That the claims process be modified to ensure that veterans only have to go through a single claims process for all their injuries regardless of which act may apply.

8. That the DVA introduce a mandatory 30 day processing period for determinations which must be adhered to unless there are special circumstances causing this delay.

[17] Peter Sutherland, 'The History of Military Compensation Law in Australia' (2006) 50 *Australian Institute of Administrative Law Forum* 39, 54.

9. That deeming provisions be legislated to accept a decision if it is not made within the specified time and special circumstances are not demonstrated.

10. That if a deemed decision is subsequently overturned, we submit that any compensation received by a veteran ought not to be repayable to the DVA.

11. That every veteran who lodges a claim with the DVA should be provided with a case manager who is responsible for the oversight of any claims and entitlements that the veteran has.

12. That in the interim, the CCS service model be used to provide all veterans with a central point of contact in relation to their claims and entitlements.

13. That all veterans should have access to funds to obtain holistic administrative and legal advice about their options in relation to compensation and getting help to obtain compensation.

14. That the Veteran Payment should be payable until the veteran starts receiving incapacity payments if the claim is accepted or until some other form of income support is obtained if liability is not accepted.

15. That the period of time that the Veteran Payment is payable should be included in the legislation and not contained in a legislation instrument.

16. That DVA commit to the complete digitisation of compensation claim files by July 2019, if not earlier, with open claims to be given priority.

17. That until DVA has completed a complete digitisation of compensation claim files, we submit that all DVA staff be able to access a 'claim summary' for each veteran.

18. That all new claims received by DVA be completely digitised from the outset.

19. That the prohibitions within the VEA and the MRCA preventing lawyers appearing before the VRB be repealed.

20. That the VRB should become a full costs jurisdiction for the Applicant, enabling legal and other representatives to assess the merits of cases and pursue them on a 'no win, no fee' basis.

21. That the AAT should become a full costs jurisdiction for the Applicant in the event of successful outcome in a claim against the DVA.

22. That the provisions relating to liability under the proposed consolidated military compensation legislation should be broad in their coverage by mirroring sections 27, 29 and 30 of the MRCA and section 7 of the DRCA as well as providing for deemed acceptance of specified diseases and secondary or subsequent injuries.

23. That in determining claims under the proposed consolidated military compensation legislation, injuries caused during warlike or non-warlike service the "beyond reasonable doubt" standard of proof whilst the "reasonable satisfaction" or "balance of probability" standard of proof should apply to injuries sustained during peacetime service.

24. That the test for determining whether the reasonable hypothesis standard of proof applies as articulated by the Full Federal Court in *Repatriation Commission v Deledio* [1998] FCA 391 could be significantly simplified.

25. That the individual facts and circumstances of the case and the medicine available must be the touchstone for the determination of liability.

26. That the time periods for stressors set out in SoPs concerning psychiatric injuries be removed.

27. That the SoPs be amended by the RMA to explicitly provide that they are to be used as guidelines only. Alternatively, the proposed consolidated military compensation legislation explicitly provides that the SoPs are to be used as guidelines only.

28. That the maximum amount of permanent impairment and non-economic loss compensation available under sections 24 and 27 of the DRCA should be increased to $598,360 to be indexed annually.

29. That the DRCA should be amended to allow for permanent impairment compensation to be payable on a whole person impairment basis similar to MRCA.

30. That the 10% and 10 impairment point threshold for payment of compensation for permanent impairment and non-economic loss under the DRCA and MRCA be removed, respectively.

31. That offsetting provisions under the military compensation scheme should be amended so that only compensation received for the same injury, and not the same incapacity, is subject to offsetting.

32. That DVA should provide early advice to each veteran at risk of being impacted by offsetting provisions. This advice should be subject to legal professional privilege and not disclosable to any other party.

33. That a veteran's discharge should not be finalised until all of their paperwork has been completed and processed by the DVA and Military Super, if appropriate.

34. That the Department of Defence and the DVA should continue to support transition by investigating unique partnerships with not-for-profit organisations and other government departments to help military members prepare for alternative careers by providing continuing education, vocational training and entrepreneurial opportunities.

35. That the provision of Repatriation Health Care Cards is amended so that former ADF members with claims under the DRCA also are entitled to receive Gold Cards.

36. That the military compensation scheme should be amended to allow for the review of the merits of a decision of DVA in relation to the provision of, or refusal to provide, treatment under a Repatriation Health Care Card.

37. That Non-liability White Cards providing treatment for malignant cancers, pulmonary tuberculosis and mental health conditions should be provided to all veterans on discharge to assist with their transition to civilian life.

38. That the legislation should be amended to entitle the veteran to the full legal costs of pursuing a successful appeal of a Repatriation Health Care Card decision.

39. That veterans should have an ability to pursue common law damages with all heads of damage to be available.

40. Alternatively, we submit that a mechanism be introduced by, which irrespective of common law liability, prospective statutory income replacement benefits be commutable to a lump sum at the election of the veteran.

41. Alternatively, the cap on common law claims of $110,000 is to be indexed quarterly in line with the Consumer Price Index Inflation.