

1. The purpose of the Henry VIII clause is to allow for regulations to be made if anomalies arise between the SRCA and the DRCA. Is the inclusion of the clause redundant given that the DRCA is a “straight copy of the SRCA”?

- No. Part of creating the DRCA includes replicating all previous versions of the SRCA, with 28 years of amendments, as if they were a previous version of the DRCA. While this approach to drafting the legislation is to ensure that no one is disadvantaged, the “Henry VIII clause” has been added as an additional safeguard, in case any ADF member is disadvantaged as a result of the enactment of the DRCA.
- The DRCA, as modified by the amendments which commence upon its enactment, can be regarded as a “straight copy” of the SRCA in regard to the entitlements provided under it to ADF members.
- In applying the DRCA to a claim for compensation, it is the version of the SRCA, and any relevant legislative instrument, that applied at the time of the injury which is used in determining liability for compensation.
- Since its introduction, the SRCA has been amended by 68 Acts with 33 having made amendments which would have impacted upon ADF members. Included in some of those amending Acts were application, transitional and saving provisions which will also continue to be applicable for the purposes of the DRCA.
- In recognition of the complexity of retrospectively administering an Act with so many iterations, the Australian Government Solicitor (AGS) advised that the inclusion of a “Henry VIII clause” would provide a remedy for any adverse consequences that may arise from the unique manner in which the DRCA was enacted.
- AGS recommended that regulations to modify the operation of the DRCA could only be made under the clause “if the Minister certified to the Governor-General that he or she is satisfied that such a modification is necessary or desirable to ensure the re-enactment of the DRC Act does not place any person other than the Commonwealth at a disadvantage”.
- The additional benefit of including such a clause is that it would avoid the need to go back to the Parliament for any amendments to the DRCA.
- Under the “Henry VIII” provision set out in new section 121B of the DRCA, regulations can be made to apply retrospectively to ensure that an ADF member will not be inadvertently disadvantaged by the enactment of the DRCA and the requirement under the enactment provisions for earlier

versions of the DRCA or instruments made under the DRCA to apply in a particular case.

- As is expressly stated in section 121B, the regulations can only be beneficial with subsection 121B(2) requiring that the Minister for Veterans' Affairs must be satisfied that the regulations are being made on the basis that they are to ensure that no person (other than the Commonwealth) has been disadvantaged by the enactment of the DRCA.
- Once made, a section 121B regulation will apply to remedy the disadvantage faced by the member for which it has been made and can then be applied to other members or classes of members in similar circumstances.
- A further safeguard is imposed as any regulations made under section 121B are subject to a 15 sitting days disallowance period by either of the Houses of Parliament.

a. What happens if the circumstances raised conflicts with broader government reform?

- Veterans' entitlements are frequently exempted from broader government reforms where there may be an adverse impact on veterans and their families.
- The impetus which led to the enactment of the DRCA came from reforms to the SRCA proposed for civilian employees which may have had an adverse impact on ADF members.
- While noting the above, the inclusion of the "Henry VIII clause" is not designed to override the Government's ability to amend the DRCA in the future.
- Any policy changes that require legislation to implement them would be subject to the standard legislative parliamentary process as exists for changes to any other Act.

b. Who will make the decision that the individual is worse off under the DRCA then they would be under the SRCA?

i. Department identified

(i) how will officers determine this?

(ii) is there training or is it based on experience?

ii. MRCC

(i) how will it be determined?

(ii) is there training or is it based on experience?

(a) Experience – how will this work in the future as people change roles and corporate knowledge is lost?

iii. Individual

(i) What assistance will be provided to the individual?

(ii) How will they raise it?

**(a) Call the department; how will the department ensure whoever answers the phone has the ability to recognise the issue as one that stems from the SRCA/DRCA change?
How will the individual escalate the case?**

- The Minister will decide if an individual or a group is worse off when the DRCA is applied based on advice from the Department. Any person can raise the issue of disadvantage with the Minister.
- The transition to the DRCA will be accompanied by the provision of information to all of the various parties which may be impacted by the change.
- The veteran community will be provided with information about the process to inform the Department of any areas where it is considered that the application of the DRCA operates to the detriment of the claimant in comparison to the operation of the SRCA prior to the commencement of DRCA.
- Information on the transition to the DRCA will also be provided to DVA staff, with a focus on claims, frontline and phone staff.
- The representatives of Ex-service Organisations (ESOs) and their advocates will be able to raise any concerns about the application of the DRCA with DVA staff.
- In addition, the existing formal ESO/DVA consultative groups will be able to raise issues concerning the transition.
- If there are individual cases where a detrimental effect applies, the proposed regulations made under section 121B will address the issue for all clients in those circumstances.

- 2. Are there any proposed changes to the Comcare guide of impairment?**
- a. If Yes;**
 - i. What changes?**
 - ii. Will this align the DRCA with the MRCA?**
 - b. If No;**
 - i. Given the complexity of the MRCA guide, how does this align with the promise that no claimant will be worse off for the creation of this Act?**
 - ii. What safeguards are there to stop the MRCC from amending, varying or revoking the guide to assess the degree of impairment?**
 - (i) How does this align with the promise that no claimant will be worse off for the creation of this Act?**
- No. There has been no formal discussion about changes that might be made to the DRCA after commencement. Consultation will be undertaken prior to any amendments to align DRCA and MRCA.

3. Once the DRCA is enacted the Government has indicated its intention to align the DRCA with MRCA. Given the differences in Acts, how does this align with the promise that no claimant will be worse off for the creation of this Act?

a. How will the government ensure DRCA claimants continue to be no worse off into the future?

- The enactment provisions within the Bill state that the DRCA will be a replica of the SRCA as exists at the point in time at which the DRCA commences. It also ensures that all previous versions of the SRCA (and instruments made under the SRCA), are to be applied as if they were previous versions of the DRCA.
- In addition, the “Henry VIII clause” will provide an additional safeguard, in case any ADF member is disadvantaged as a result of the enactment of the DRCA.

b. What changes does the Government plan on making to the DRCA?

- The Minister in his Second Reading Speech on the introduction of the Bill to enact the DRCA stated that the duplication of the SRCA in the form of the DRCA would allow “the DVA to consult with the veteran and defence communities in the future on areas of potential alignment with the Military Rehabilitation and Compensation Act 2004 once the standalone Act commences”.
- There has not yet been any specific consultation on these issues.

c. What are the timelines for these changes?

- As mentioned at the hearing, there will need to be policy and legislative work, in addition to consultation with the veteran and defence communities, to examine which changes should be proposed to the Minister and the Government. No timelines have been established. It should be noted that any changes with a financial impact will need to be considered in the context of the Budget process.

d. How will this affect new/ future claimants?

- The Department will need to carefully examine the effect of any changes on current and future clients and reflect these in the transitional provisions.

e. It has been suggested by Slater and Gordon that the Statement of Principles in determining liability for impairment is more restrictive and unnecessarily technical in the MRCA than in the SRCA. How does the government intend to ensure that those claimants under the DRCA are

not worse off [if the Statements of Principles are used] than those under the SRCA?

- There has been no formal consideration of areas of potential alignment with the Military Rehabilitation and Compensation Act 2004 once the standalone Act commences, including plans for the introduction of the Statements of Principles (SOPs). Such considerations would be subject to consultation with the veteran and defence communities.
- The SOPs are legislative instruments used under the VEA and the MRCA that list the factors by which causation of a given medical condition can be related to service in the ADF.
- The Repatriation Medical Authority (RMA), an independent statutory authority, determines SOPs for types of injury, disease or death that could be related to service, based on sound medical-scientific evidence. The SOPs are regularly reviewed by the RMA to ensure that they remain up to date based on the latest sound medical-scientific evidence.
- The SOPs provide consistency, equity and transparency in decision making
- The SOPs are highly regarded by other Commonwealth countries with New Zealand using the SOPS to assist with the determination of compensation claims in those countries.
- DVA's Annual Reports for the last two financial years contain the following acceptance rates at the primary determination level for conditions claimed under the SRCA, the MRCA and the VEA:

	SRCA	MRCA	VEA
2015 – 16	60%	71%	62%
2014 – 15	54%	78%	64%

f. Will the DRCA adopt the single appeal pathway?

- The SRCA currently has a single appeal pathway - primary consideration by a delegate of the Military Rehabilitation and Compensation Commission, internal reconsideration and then merits review at the Administrative Appeal Tribunal. It was only the MRCA that had a dual appeal path for compensation claims. The attached Table sets out the existing appeal paths for compensation claims under the three Acts administered by DVA.

4. As the DRCA is a new statute, how does the Government believe that previous interpretive decisions or legal determinations/ authoritative rulings previously applied to the SRCA will be applied to the DRCA?

- Following the commencement of the DRCA, all of the existing case law and the decisions and interpretations that have been applicable in proceedings that were brought under the SRCA will also be applicable for the purposes of the equivalent provisions under the DRCA.
- As stated, the enactment provisions of the DRCA make it clear that in retrospectively applying the DRCA to the determination of a claim, it will be the version of the SRCA that was applicable at the time the injury or illness was sustained that will be used in the determination of that claim. As such, any case law (whether related to military or civilian employees), which was applicable to the interpretation and determination of the relevant provisions of the SRCA, will continue to apply for the purposes of the same relevant provisions of the DRCA.
- The situation concerning the application of the SRCA case law and precedents is similar to the situation that applies for the purposes of those parts of the VEA concerning the provision of service pension which mirror the provisions of the Social Security Act 1991 that provide for the payment and administration of age pensions. The Department, the Administrative Appeals Tribunal and the Federal Court apply the decisions made in respect of the mirrored provisions of the Social Security Act 1991 for the purposes of the equivalent income support provisions of the VEA.

a. Will any future legal determinations made to the SRCA apply to the DRCA?

- As per the answer above, while the words of the SRCA and DRCA remain similar in construction and/ or effect, the case law and the way it is interpreted by the AAT and the Federal Court will continue to apply.

i. *If they won't; how does this align with the promise of no veterans being worse off?*

- N/A.

5. According to Slater and Gordon's submission the provisions repealing and substituting 4AA within item 23 of the Bill may impact veterans by changing the basis of a claim from date of injury to employment dates.

a. How does this compare to the SRCA?

- There is no change under the DRCA. As is the case under the SRCA, the claim is determined based on the date of injury.
- The enactment provision of the DRCA makes it clear that in retrospectively applying the DRCA to the determination of a claim, the same test and eligibility criteria applicable under the SRCA at the date of the injury or illness will be used to determine the claim. As such, the purpose of repealing and replacing section 4AA was to ensure that the entitlements of ADF members under the DRCA were preserved.
- Section 4AA was inserted into the SRCA by the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004 (MRC (C&T) Act).
- Section 4AA has the effect that the SRCA does not apply to cases where an injury or illness occurs on or after the MRCA commencement date of 1 July 2004 AND the injury or illness relates to service rendered by the veteran on or after 1 July 2004 or both before and on or after 1 July 2004.
- The SRCA version of section 4AA effectively sets out the circumstances in which the SRCA was not applicable to ADF members while the effect of the DRCA section 4AA is to set out the circumstances in which the DRCA will be applicable to ADF members.
- In interpreting the intended consequences of section 4AA the section needs to be read alongside subsection 7(1) of the MRC (C & T) Act which states that:

The MRCA applies to a person's injury, disease or death if:

- (a) the injury is sustained, the disease is contracted, or the death occurs, on or after the commencement date; and
- (b) the injury, disease or death either:
 - (i) relates to defence service rendered by the person on or after that date; or
 - (ii) relates to defence service rendered by the person before, and on or after, that date.

Note: After the commencement date, benefits stop being provided under the VEA and the SRCA for such injuries, diseases and deaths (see sections 9A and 70A of the VEA and section 4AA of the SRCA).

- For the interpretation provided by Slater & Gordon to be correct, the MRCA would have to apply to all ADF members with service post 1 July 2004, no

matter when the injury occurred. That is not the case as stated in subsection 7(1) of the MRC (C & T) Act which provides that the MRCA will only be applicable to an “injury, disease or death” that occurs after that date.

b. How will previous interpretive decisions interact with the new provisions in Section 4AA?

- Both section 4AA of the DRCA and section 4AA of the SRCA provide that either Act will not be applicable for an injury that occurred on or after 1 July 2004. The effect of section 4AA of the SRCA was discussed in the case *Re Woolmer and MRCC* [2007] AATA 1506. Deputy President Forgie stated that:

The effect of s 4AA makes it clear that the SRC Act does not apply where an injury or disease, or an aggravation of either, was *first* suffered on or after the commencement of the MRC Act on 27 April 2004. If it was first suffered after that date, a person did not have a right to apply under the SRC Act because that injury or disease would not be taken to be one for the purposes of the legislation. In most cases, a person would have no option but to apply under the MRC Act.

31. Section 4AA does not refer to an injury or disease first suffered before the commencement of the MRC Act. When read with ss 5(10), (10A), (10B) and (10C), its omitting to do so reinforces the view that the amendments made in 2004 were not intended to affect the rights of employees and members of the Defence Force preserved over the years by earlier amending legislation.

- The same interpretation could be applied for the purposes of section 4AA of the DRCA.

c. Does Section 4AA mean that if a person continues serving after the MRCA came into effect that they would only be eligible under the MRCA and not the DRCA, despite the date of injury?

i. If Yes;

- 1. How is the process different?**
- 2. How does this align with the promise that no claimant will be worse off?**
- 3. Why is this different, given the government’s assurances the DRCA is a direct copy of the SRCA?**

- No. For the reasons outlined in the previous answer.

6. How does Section 5 in the DRCA differ from the SRCA?

- While section 5 of the DRCA has been rewritten for the purposes of the DRCA it does not impact on the entitlements that ADF members currently have under the SRCA.
- Section 5 of the SRCA was an extensive provision setting out the different classes of persons who were considered or not considered to be an employee for the purposes of coverage under the SRCA.
- Section 5 of the DRCA expressly provides that, for the purposes of the DRCA, an employee is a member of the ADF. The new section simply renumbers and restates all of the existing provisions of section 5 of the SRCA which were applicable to ADF members. These provisions include:
 - subsections 5(1) and (2) restate the relevant parts of subsections 5(1) and (2) of the SRCA and provide that, for the purposes of the DRCA, an “employee” is a member of the ADF and that for the purposes of the DRCA, a person who is a member of the ADF is taken to be employed by the Commonwealth, and the person’s employment is taken to be “constituted by the person’s performance of duties as such a member of the ADF”.
 - subsection 5(3) is a restatement of subsection 5(6A) of the SRCA and provides the Minister with the power (by legislative instrument) to declare that persons holding an honorary rank in the ADF, persons who were members of a philanthropic organisation or who had undertaken resettlement training are to be taken to be members of the ADF for the purposes of the DRCA;
 - subsection 5(4) restates subsection 5(6) of the SRCA and provides the Minister with the power (by legislative instrument) to declare that certain persons who have engaged in activities or performed acts at the request or direction, for the benefit, or under a requirement by law, in relation to the ADF, are for the purposes of the DRCA to be taken to have been employed by the Commonwealth;
 - subsection 5(5) restates subsection 5(9) of the SRCA and provides that a reference to an employee in the DRCA can also include a person who has ceased to be an employee; and
 - subsection 5(6) restates subsection 5(10) of the SRCA and excludes coverage under the DRCA to persons in receipt of a disability pension under Part II or Part IV of the *Veterans’ Entitlements Act 1986* or the *Papua New Guinea (Member of the Forces Benefits) Act 1957*. The provision is subject to the exclusions set out in subsections 5(7) and (8) of the DRCA.

- subsections 5(7) and (8) replicate subsections 5(10A) and (10B) of the SRCA which were inserted with effect from 7 April 1994. Subsections 5(7) and (8) allowed ADF members operational, hazardous or peacetime service at that time to have the option of SRCA or VEA coverage.
- for periods of service subsequent to the 7 April 1994 coverage was provided by the SRCA and now the DRCA. Any ordinary peacetime ADF members who did not on 7 April 1994 have an existing entitlement under Part IV of the VEA, or who entered the ADF after that date, would only have SRCA and now DRCA coverage.
- The provisions of section 5 of the SRCA which had referred to ADF members and which no longer apply were not included in section 5 of the DRCA. They are:
 - subsections 5(10C) and (10D) which were “saving” or “transitional” provisions related to the extension of operational service to certain veterans.
 - subsection 5(10C) was inserted in 1997 when operational service for the purposes of the VEA was substantially extended to make disability pensions and other benefits available to ADF members who had serviced in various overseas deployments in the post World War II period.
 - subsection 5(10C) was inserted in 2010 to extend operational service to certain service on submarine special operations for the period 1 January 1978 - 31 December 1992.
 - In both cases the extension of operational service under the VEA was retrospective and there was a need to ensure that claims made under the SRCA prior to the actual commencement of the amendments remained valid despite the effect of subsection 5(10) of the SRCA (subsection 5(6) of the DRCA) which operates to invalidate claims under the SRCA where disability pension is payable under the VEA in respect of the same service.
 - In both subsections 5(10C) and (10D) there is a clear reference to the provisions being applicable “to a claim lodged before the commencement of this subsection”. On the basis that the excluded provisions related only to claims lodged prior to 1997 and 2010 respectively they were redundant for the purposes of the DRCA.

a. Does this new section in the DRCA restrict the ability to be paid any entitlement under the VEA?

- No. See previous answer.

b. Will sections 14-17 of the DRCA affect offsetting for dual compensation?

- There will no impact on offsetting for dual compensation as access to compensation under both Acts still applies. Therefore compensation offsetting still applies if a person receives compensation for the same incapacity under the DRCA and the VEA.
- The only amendments made to sections 14 to 17 in the enactment of the DRCA were those that related to the repeal of section 15A which had referred to the coverage under the MRCA for the loss or damage to property that occurred after the commencement of the MRCA.
- The DRCA equivalent was included as subsection 4AA(3).
- Following the enactment of the DRCA there will be no changes to operation of the provisions which concern the offsetting of dual compensation.

c. How does this align with the assurance that the DRCA is direct copy of the SRCA?

- See previous answers.

7. Concerns have been raised with the repeal of Part VII of SRCA which deals with Administration and Finance by Comcare and Part XI which deals with the MRCC. Both sections mention claims are to be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities. Both of these appear to be repealed under the DRCA. Is there a reason these guiding principles are not included in the MRCA.

- The requirements for the MRCC to manage the determination of defence-related claims “accurately and quickly” and “to be guided by equity, good conscience and the substantial merits of the case” currently exist in section 142 of the SRCA. The provision has been duplicated in the DRCA and therefore there is no need to include a reference to the requirements set out in any of the sections in Part VII.
- Part VII was repealed by the amendments included in the Bill which enacts the DRCA. That Part related solely to the operations and financial arrangements that underpin Comcare. The provisions of that Part have not been applicable to the administration of claims related to service by ADF members since the insertion of Part XI of the SRCA in 2004.
- Part XI of the DRCA has not been repealed. The Bill which enacts the DRCA includes amendments which will repeal Part XI of the SRCA as it will not be relevant to the administration of the SRCA after the DRCA commences.
- Subsection 142(2) of the DRCA states in paragraph (a) that it is a requirement for the MRCC “to be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities”.
- The provision was included in Part XI of the SRCA when that Part was inserted in 2004.

a. Is this to align the Act with MRCA?

- No. As stated in an earlier answer any amendments to align the DRCA with the MRCA will require extensive consultation followed by the normal legislative processes.

8. The repeal of section 69 and subsection 147(1)(d)(ii) [paragraph 142(1)(a)?] which deals with making determinations accurately and quickly and minimising the duration and severity of injuries by organising rehabilitation etc. is not replicated in the DRCA. What is the impact of this repeal?

- The requirement for the MRCC to manage the determination of defence-related claims “accurately and quickly” currently exists in section 142 of the SRCA. The provision has been duplicated in the DRCA.
- Section 69 of the SRCA, was located in Part which concerned the “Administration and Finance” of Comcare, outlines the functions of Comcare.
- Following the creation of Part XI of the SRCA, section 142 was inserted to outline the functions of the Military Rehabilitation and Compensation Commission as it related to military claims under SRCA.
- Subsection 142(1) of the DRCA (and its equivalent in the SRCA prior to the enactment of the DRCA) provides that the functions of the MRCC include in paragraph (a) “determining defence-related claims under this Act accurately and quickly”.
- Therefore, in enacting the DRCA, section 142 applies specifically to the Military Rehabilitation and Compensation Commission and it is not necessary to duplicate section 69, which only applies to Comcare.

c. Does this remove the recourse for a claimant to get their matter dealt with by the MRCC?

- No.

d. Could this mean that a decision such as Crow v Comcare (2002) [Crowe v Comcare (No, 1) 69 ALD 195] is no longer binding on MRCC and DVA?

- The decision in Crowe v Comcare concerned a refusal by Comcare to make a determination as required by section 69 of the SRCA. The Federal Magistrate Court found that the refusal to make a determination was reviewable as the refusal was a “decision” for the purposes of section 3 of the Administrative Decisions (Judicial Review) Act 1977.
- When the DRCA commences, all of the relevant case law developed with respect to the SRCA, will continue to apply to the equivalent DRCA provisions until a body of DRCA specific case law is developed. As section 142 of the DRCA is the equivalent of section 69 of the SRCA, the decision in Crowe will be followed by the Department unless and until there is different case law on section 142 of the DRCA.

9. What impact will removing section 89B and subsection 142(5), which deals with equity outcomes, have on claimants?

- There will be no impact on claimants under the DRCA as a consequence of the repeal of those provisions.
- Section 89B was located in Part VII which concerned the “Administration and Finance” of Comcare. Section 89B of that Part concerned the functions of the Safety, Rehabilitation and Compensation Commission. With the repeal of the Part which included section 89B the DRCA included the consequential amendment to repeal subsection 142(5) which had referenced that section.
- With the insertion of Part XI of the SRCA in 2004 the functions of the Safety, Rehabilitation and Compensation Commission for defence related claims became the responsibility of the MRCC.
- The requirements set out in paragraph 89B(a) of the SRCA which were imposed on the MRCC by way of the reference to that provision in subsection 142(5) were in effect the same requirements for the MRCC that are set out in paragraph 142(2)(a) of the DRCA which requires the MRCC:
 - “to be guided by equity, good conscience and the substantial merits of the case”.

a. How does this align with the promise no claimant will be worse off?

- No claimants will be worse off. See previous answer.

10. It has been suggested, the DRCA will require ComSuper to seek the view of the MRCC regarding retirement and incapacity payments, is this a change from the SRCA?

- Comsuper, now referred to as the Commonwealth Superannuation Corporation (the CSC) is responsible for administering military superannuation. While the receipt of military superannuation can impact the rate of DVA payments, the CSC is independent of the Department in terms of its decision making on military superannuation.
- The DRCA does not change this issue.
- Quite separately, the Department is working with the CSC and Defence to simplify medical examinations for ADF members who have recently separated from the ADF and avoid duplication.
- This is an administrative improvement to processing claims and does not change the responsibility of each agency to make determinations under its legislation ie.
 - Defence - medical separation
 - CSC - invalidity superannuation
 - DVA - incapacity payments due to inability to work as well as compensation payments

SINGLE APPEAL PATHWAY FOR MRCA CLAIMS AND APPEALS

