

Senate Foreign Affairs, Defence and Trade Committee inquiry into the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016*

Submission provided by the Department of Veterans' Affairs

Executive Summary

The DRCA is being created to enable the Minister for Veterans' Affairs to solely administer all legislation relating to veterans' entitlements. This will allow the recognition of the unique nature of military service that may not be appropriate for civilians under the SRCA.

For the reasons outlined in this submission, the Department of Veterans' Affairs (DVA) does not consider that the commencement of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) would disadvantage Australian Defence Force (ADF) members. This is because:

- Item 2 of Part 2 of Schedule 1 of the Bill replicates all historical versions of the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA) to ensure that the version of the SRCA that was in force at the time a Defence Force member's injury, illness or disease was sustained is the version that will be applied to any claim under the DRCA, and
- a "Henry VIII clause" will act as a safeguard to ensure that the DRCA operates in the way described above. It will provide the Minister for Veterans' Affairs with the ability to ensure that individual clients are not disadvantaged by the enactment of the DRCA in the application (for the purposes of the DRCA) of an earlier version of the SRCA and any application, saving or transitional provisions which were applicable to that earlier version of the SRCA.

Introduction

Pensions, compensation, rehabilitation, treatment and other benefits for veterans, members and former members of the ADF and their dependants are currently provided under three separate Acts, the *Veterans' Entitlements Act 1986* (the VEA), the *Military Rehabilitation and Compensation Act 2004* (the MRCA), and the SRCA.

In broad terms, the SRCA provides compensation, rehabilitation and treatment for defence-related injuries, diseases or deaths attributable to defence service rendered between 1 December 1988 and 30 June 2004. The SRCA also contains transitional provisions which preserve the rights and entitlements of members with coverage under the SRCA's predecessor Acts (the *Commonwealth Employees' Compensation Act 1930* (1930 Act) and the *Compensation (Commonwealth Government Employees) Act 1971* (1971 Act), both of which were repealed following the commencement of the SRCA.

The SRCA is also the current and ongoing workers' compensation legislation that is applicable to Commonwealth public servants, amongst others, and is administered by Comcare and the Safety, Rehabilitation and Compensation Commission. The commencement of the DRCA will not affect those arrangements.

Prior to 7 April 1994, the SRCA only provided compensation coverage for peacetime service for Defence members. All periods of “operational” service (which includes warlike/non-warlike service) were covered under the VEA. However, on 7 April 1994 coverage under the SRCA was expanded to include operational service for Defence members until the commencement of the MRCA on 1 July 2004. This expansion of coverage created a period of “dual eligibility” under the SRCA and the VEA. Compensation offsetting arrangements were subsequently put in place to ensure individuals were not compensated twice for the same injury/illness.

All injuries, illnesses and deaths related to service on or after 1 July 2004 (or related to service which occurred both before and after that date) are covered under the MRCA, irrespective of the type of service rendered by the member. The ongoing responsibility for determining and managing defence-related claims under the SRCA was, at the same time, also transferred to the MRCC through the addition of Part XI to the SRCA by the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*.

If enacted, the DRCA would separate the legislative framework for defence-related claims from civilians currently covered under the Comcare Scheme. Separating ADF coverage from the SRCA will provide ADF members with access to a “military specific” compensation and rehabilitation scheme and the Minister with policy responsibility for all three compensation Acts that cover ADF members. It would also enable the Minister and the MRCC to consider changes to the DRCA which recognise the unique nature of military service that may not be appropriate for civilians under the SRCA.

To enable the Minister to align the DRCA with more contemporary military compensation legislation, it is important that the Minister for Veterans’ Affairs has policy responsibility for all relevant veterans’ compensation legislation. Currently, the Minister for Employment is responsible for the SRCA. There will be appropriate consultation with the veteran and Defence communities on any areas of potential alignment between the DRCA and the MRCA.

The DRCA will apply retrospectively to members or former members with periods of ADF service from 1 December 1988 until 30 June 2004, after which coverage for ADF members is provided under the MRCA.

The DRCA would also give current and former employees of the Commonwealth covered by the earlier 1930 and 1971 Acts the right to claim compensation. This means that, if a member were to lodge a claim with the MRCC next year for an injury related to service in 2002, for example, the version of the SRCA (or an instrument made under the SRCA) that applied in 2002 would be the version of the DRCA that is taken to apply to the member and would be used to determine their claim.

If the Parliament passes the DRCA, at date of commencement it effectively duplicates the SRCA, modified to apply only to ADF members and their dependants. Eligibility and benefits under the DRCA would be exactly the same as those currently available to ADF members and their dependants under the SRCA. There will be no change to the entitlements available to relevant veterans and DVA clients. The Bill will interact with the VEA and the MRCA in the same way that the SRCA currently does.

Explanation about relevant items of the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016

The *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016* (the Bill) was introduced to Parliament on 9 November 2016. The Bill creates the structure under which the DRCA would be enacted. Subject to passage of the Bill, the DRCA will be in place from 1 July 2017.

Broadly, the Bill does three things:

1. creates and makes some amendments to the DRCA
2. makes some amendments to the SRCA, and
3. makes consequential amendments to other Ministers' legislation.

In each of these three groups of amendments, any changes that occur to the text of the Bill have been made to enable the DRCA to operate as a stand-alone Act. Where there are changes to definitions or amendments to clauses, these have been done to eliminate any doubt as to whom the Bill applies or clarify the means by which the Bill operates. This is necessary to preserve current entitlements for veterans. This is the first priority of the Bill.

Enactment of the DRCA

Part 1 of Schedule 1 of the Bill contains the provisions which enact the DRCA. The enactment provisions state that the DRCA will be a replica of the SRCA as exists at the point in time at which the DRCA provisions commence, which is expected to be 1 July 2017.

The second enactment provision provides 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. This is necessary because the DRCA will apply retrospectively. That is, it will be taken to have commenced in 1988 and hence previous versions of the DRCA (SRCA) are required to determine the applicable law at the point in time when an injury, illness or disease is sustained.

For the purposes of determining eligibility under the DRCA, an ADF member will also have the benefit of any saving, application or transitional provision that had been included in an Act that amended the SRCA and which would have applied at the time for which eligibility is being determined.

Amendments to the DRCA

Following the enactment of the DRCA, Part 2 of Schedule 1 of the Bill makes some necessary amendments to the DRCA so that it works as a stand-alone Act.

For example, many definitions used under the SRCA such as ACT enactment, ACT Self-Government Act, administering authority, Chief Executive Officer, Comcare, Commission, exit contribution, Finance Minister, member etc would no longer be relevant for administering defence-related claims as the provisions in which those definitions are being used are being repealed or the references are redundant.

Item 23 gives effect to compensation coverage for ADF members under the DRCA and makes it clear when coverage is to be provided under the MRCA instead. An earlier, similar provision existed in the SRCA which was inserted in 2004 by the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* when the MRCA scheme was created.

Broadly, section 4AA states the time period within which a member's injury, ailment or aggravation of an ailment, loss of or damage to property or injury suffered as an unintended consequence of medical treatment paid for the Commonwealth needs to have occurred as well as some other circumstances, in order for the DRCA to be applicable to a claim for compensation.

Item 24 creates a new definition of "employee" so that it is clear that the DRCA is limited to an employee who is a member of the Defence Force. Similar to section 8 of the MRCA, subsections 5(3) and (4) of the DRCA would enable the Minister to declare, by legislative instrument, that certain persons are taken to be members of the Australian Defence Force for the purpose of the DRCA. Subsection 5(5) makes it clear that, once the MRCC has incurred liability for an employee, the term employee includes a person who is no longer a member of the Defence Force.

Subsection 5(6) provides that, subject to subsections (7) and (8), the DRCA does not apply in relation to service of a member of the Defence Force if a disability pension is payable in respect of that service under either the VEA or the *Papua New Guinea (Members of the Forces Benefits) Act 1957*.

The effect of subsections 5(7) and (8) is to ensure that Defence Force members with operational service, hazardous service or peacekeeping service will continue to have the option of seeking compensation under either of the VEA or the DRCA as they had under the provisions that have been repealed. The repealed provisions had broadened the eligibility provisions of the SRCA to allow coverage for periods of operational service after the commencement of the *Military Compensation Act 1994* on 7 April 1994. Effectively, this created a period of "dual eligibility", giving clients the option of claiming under either the SRCA or the VEA (or both Acts) depending on their period of service.

Item 45 is the "Henry VIII clause." This provision is intended to be a back up to Item 2 of Part 2 of Schedule 1 of the Bill, which picks up the history of the SRCA and applies it to the DRCA.

In case there are any anomalies or the DRCA operates in a way that was unintended (ie, in the application of an earlier version of the SRCA and any application, saving or transitional provisions which were applicable to that earlier version of the SRCA), regulations may be made to modify the operation of the DRCA.

Before regulations can be made, the Minister for Veterans' Affairs must be satisfied that it is necessary or desirable to make the regulations to ensure that individual clients are not disadvantaged by the enactment of the DRCA in the application (for the purposes of the DRCA) of an earlier version of the SRCA and any application, saving or transitional provisions which were applicable to that earlier version of the SRCA. The regulations are intended to operate in a purely beneficial way. They cannot be made to benefit the government, only veterans or clients.

During drafting of the Bill, legal advice was sought from the Australian Government Solicitor about the best way to avoid any disadvantage to any defence force members. In addition to Item 2 of Part 2 of Schedule 1 of the Bill, AGS recommended that a Henry VIII clause be inserted into the Bill as it was not possible to be completely satisfied that Item 2 of Part 2 of Schedule 1 of the Bill would cover all possible consequences of the re-enactment.

Item 63 ensures that, where an instrument exists under the SRCA immediately before the DRCA commences, and there is a corresponding provision under the DRCA, then the instrument is taken to have been made under the corresponding DRCA provision. This means that instruments such as the Guide to the Assessment of the Degree of Permanent Impairment and the Specified Disease Notice

will continue under the DRCA until they are varied, amended or revoked. The corresponding provision may not have the same section number but any instrument made under it will have the same purpose.

It is important to note that legislative instruments are subject to a sun-setting regime. This avoids unnecessary and redundant legislative instruments from staying on the Commonwealth's statute books. This means that, after DRCA commences, it is possible that re-made sun-setting instruments under the DRCA may differ from those under the SRCA. Initially however, all instruments will be the same.

Item 64 ensures that claims, applications, requests and other processes started under the SRCA will continue and can be completed under the DRCA as long as there is a corresponding provision. Clients won't need to resubmit claims or other documents.

Item 65 ensures that compensation paid under the SRCA is taken to have been made under the corresponding provision of the DRCA.

There are five items in Part 2 of Schedule 1 that would create very small policy changes within the DRCA. These are items 48, 49, 50, 53 and 54.

Item 48 repeals paragraphs 142(1)(c) and (d) and item 49 repeals subsections 142(3) and (5). These amendments are necessary to reflect the fact that Comcare will no longer have any functions or roles with respect to defence-related workers' compensation claims.

The effect of the change made by item 50 is that the reference to Comcare in section 28 of the SRCA, which deals with Comcare issuing the "Guide to the Assessment of the Degree of Permanent Impairment, should be read as if it is a reference to the MRCC instead.

Item 53 removes subsection 148(2) from the DRCA. That subsection relates to paragraph 148(1)(b). Under section 148, the MRCC or the Chief of the Defence Force (as rehabilitation authority) can arrange a rehabilitation program for an injured person either by using an approved program provider (148(1)(a)), or by nominating someone who has appropriate skills and expertise in designing and providing rehabilitation programs (148(1)(b).) Before nominating a person under paragraph 148(1)(b), the MRCC or the Chief of the Defence Force must consult with Comcare about the proposed nomination. With the separation of coverage, subsection 148(2) is no longer required as Comcare will not have the same role under the DRCA as it does under the SRCA.

Item 54 repeals section 150, which provides that the Safety, Rehabilitation and Compensation Commission may make general policy guidelines in relation to Part XI of the SRCA (operation of the SRCA in relation to certain defence-related injuries and deaths.) As there will no longer be a Part XI of the SRCA once the DRCA is enacted, this provision is no longer required.

Amendments relating to pension age

Part 3 of Schedule 1 would amend the DRCA to make consequential amendments flowing from the increase in the pension age as defined under the Social Security Act. The amendments would ensure that incapacity payments under the DRCA will continue for those former Defence Force members who are the subject of an increase in their age pension age while in receipt of incapacity payments.

These amendments will align with the changes made to the MRCA by the *Veterans' Affairs Legislation Amendment (Budget and Other Measures) Act 2016*. The Minister for Employment has

introduced similar measures to amend the SRCA, which are contained in the *Seafarers and Other Legislation Amendment Bill 2016* (Seafarers Bill.)

The Seafarers Bill is currently before the Parliament and may be debated in the 2017 Autumn sittings. If the Seafarers Bill commences before 1 July 2017, then the amendments in Part 3 of Schedule 1 will not take effect. However, in case the Seafarers' Bill is not passed ahead of the DRCA, identical amendments have been included in the DRCA to ensure Defence Force members, who are the subject of an increase in their age pension age while in receipt of incapacity payments, continue to receive incapacity payments.

Amendments to the SRCA

Just as some amendments were required to make the re-enacted DRCA work, Schedule 2 makes some necessary amendments to the SRCA to reflect the fact that cover for ADF members and their dependants has been removed from the SRCA.

The amendments are quite minor in nature, but there are a few provisions worth noting.

For example, the substituted section 4AA of the SRCA (item 7 of Part 1 of Schedule 2) explicitly states that neither Comcare nor the Safety Rehabilitation and Compensation Commission has any liability under the SRCA in respect of an injury, loss, damage or death that relates to defence service.

Item 26 of Part 1 of Schedule 2 repeals Part XI of the SRCA. Part XI of the SRCA governs the operation of the SRCA in relation to defence-related claims. Part XI of the SRCA will no longer be needed once the DRCA commences and defence claims are dealt with under it. However, item 25 of Part 1 of Schedule 2 inserts new sections 97DAA and 97 DAB into the SRCA, replicating the requirements previously set out in sections 157 to 159 (which will be repealed with the repeal of Part XI.)

The effect of these two provisions is that Comcare must make a determination about the regulatory contribution that the Department of Defence has to pay for employees engaged in defence service. As part of determining the regulatory contribution, certain provisions (97E – 97P) are taken to apply to the Department of Defence, which otherwise would not normally apply once the DRCA commences. Sections 97E – 97P include such things as information to be given to Comcare, review of a Comcare determination about a premium or regulatory contribution and refund of a premium or regulatory contribution etc.

The regulatory contributions represent cost recovery by Comcare for activities and functions carried out under the SRCA and the *Work Health and Safety Act 2011* on behalf of Australian Government agencies, the Defence Force, the ACT Government and other entities. Those regulatory activities and functions include setting premium and regulatory contribution guidelines and support for research, the provision of information and statistics management.

Just as amendments were made to the DRCA to some of the definitions because the provisions in which they are being used are being repealed or the references are redundant, it is also necessary to amend some of the definitions in the SRCA. For example, a new definition of defence service has been added (mirroring the definition in the MRCA) and the rehabilitation authority definition with respect to the Defence Force has been removed as SRCA no longer covers ADF members.

Consequential amendments to other Acts

The amendments in Schedule 3 of the Bill are consequential amendments to existing references to the SRCA in various other Acts. Most of the amendments that are made by Schedule 3 insert references to the DRCA where it is appropriate, either as a substitute to a reference to the SRCA, or in addition to such a reference. For example, item 1 of Schedule 3 replaces the reference to the SRCA in paragraph 41(1)(fc) of the *Age Discrimination Act 2004* with a reference to the DRCA. This will mean that anything done by a person in direct compliance with the DRCA is not unlawful for the purposes of the *Age Discrimination Act 2004*.

The amendments to Veterans' Affairs portfolio legislation also insert references to the DRCA where it is appropriate, either as a substitute to a reference to the SRCA, or in addition to such a reference. These amendments are necessary as the provisions they amend deal with the interactions between compensation and other benefits provided to ADF members and their dependants under each of the three primary Veterans' Affairs pieces of legislation: the VEA, MRCA and DRCA. For example, references to the SRCA throughout Division 5A of Part 2 of the VEA, which deals with the effect of certain compensation payments on rates of pension, are omitted and replaced with references to the DRCA.