

Reported Health and Other Issues

Introduction

- 6.1 This Chapter examines a range of issues relating to the personal circumstances of those in both the formal DSRS and squadron programs, particularly, the reported health issues.
- 6.2 Evidence before the Committee points to a wide range of health concerns amongst the F-111 aircraft maintenance community. Many attribute the causality of their symptoms to the use of chemicals within the formal DSRS programs and ad-hoc squadron maintenance. As outlined in previous Chapters, many also feel aggrieved at the way their health complaints have been handled by DVA.

Conditions suffered

- 6.3 Nearly all of the submissions received from affected individuals report health effects of chemical exposure associated with fuel tank leak repair work on F-111s. The range of conditions suffered include skin conditions, bowel problems, cancers, digestive tract disorders, sexual health problems, asthma, allergies, eye problems and a range of mental disorders. Although several of those making submissions suffered a similar range of health conditions, or had single conditions in common, the range of conditions mentioned in the evidence remains extremely wide.

6.4 As a first response to reported problems, the IHCS allowed for the admission of any personnel who had conditions that may have been linked to their work on the formal DSRS programs or ad-hoc maintenance squadron activities relating to the F-111. Following the SHOAMP study, this group was transferred to the SHCS at which point new entries to the scheme were limited to those in the formal DSRS programs. The scope of conditions covered by the SHCS was also reduced.

6.5 Concurrently, eligibility for the ex-gratia payment, which was also limited primarily to those in the formal DSRS programs, also provided participants with access to s7(2) of SRCA. Access to this section provided compensation for the conditions covered by the scheme.

6.6 Dr Gardner told the Committee:

the background to that list arose from the early days of the interim health care scheme, where a group of doctors, of which I was one, looked at the list of conditions claimed and looked at the literature in the occupational medicine to say, 'Is there any evidence that would support looking at these cases further?' In those days, the test was whether it could conceivably be linked. You might notice from that list, from memory, that cardiovascular is not there. In the earliest version, cardiovascular was there because there were links in some of the literature, but it was not supported by the SHOAMP study. So this list was refined from an earlier version based on the outcome of the SHOAMP study.¹

6.7 The Department of Veterans' Affairs stated:

The following diseases are accepted as meeting the requirements of subsection 7(2) of the SRCA and ss31 of the *Commonwealth Government Employees (C(CGE)) Act 1971* for all ADF personnel involved in the DSRS programs at RAAF Base Amberley with a Tier 1, 2 or 3 employment classification:

- Skin Rashes and associated systemic conditions (Dysplastic naevus, Eczema/dermatitis);
- Neurological conditions (Multiple sclerosis, Parkinson's disease, Peripheral neuropathy, Spinal muscular atrophy, Erectile dysfunction, Cauda equine syndrome, Neurogenic

1 Dr I Gardner, *Transcript*, 17 April 2008, p. 55.

bladder, Non-alcoholic toxic encephalopathy, Acquired colour vision deficiency);

- Mental disorder and personality changes (Depression, Sleep disorders with neurological basis, Bi-polar affective disorder, Vertigo, Memory loss, Anxiety, Panic disorders (including Agoraphobia with panic disorder), Impaired cognition;
- All malignant neoplasms and myeloproliferative disorders
- Liver disease (Liver disease and pancreatic disease, excluding diabetes);
- Gastrointestinal problems (Irritable bowel disorder, Ulcerative colitis/Crohn's disease, Diverticulitis, Bowel polyps); and
- Immunological disorders - Mixed connective tissue disease, SLE (systemic lupus erythematosus), Sarcoidosis.²

6.8 This list of conditions corresponds closely to those complained of in the majority of submissions to the Inquiry from affected service personnel and their families. Many of those who made submissions worked only within the maintenance squadrons and were therefore not eligible for treatment under this scheme.

6.9 In evidence, Dr Gardner made particular reference to the fact that those affected may suffer from a complexity of conditions which could be difficult to diagnose, or directly attribute to a particular cause:

I would just like to point out that, where people claim multiple, apparently strange, symptoms, including musculoskeletal, neuropsychiatric, erectile dysfunction – all sorts of things – this is exceptionally difficult to assess. If they have a named disease, preferably with an ICD code number attached to it, then it is relatively easy. Where you have these vague symptoms complexes, it does not fit neatly into any of the statements of principles, it does not fit neatly under any of the three compensation schemes and, even more difficultly – and our lawyer raised the issue of mediation et cetera – there are very few occupational health toxicology medical experts in this country who have any real understanding of workplace chemical exposures and health outcomes. That is an ongoing issue.³

2 Department of Veterans' Affairs, *Submission* No. 119, pp. 5-6.

3 Dr I Gardner, *Transcript*, 21 July 2008, p. 31.

- 6.10 Dr Gardner's comments accurately pin point one of the principal difficulties encountered by the F-111 workers. Put simply, the various compensation schemes are not structured to respond to symptoms, no matter how widespread or well documented, in the absence of an ICD code number.

Latency of onset of health conditions

- 6.11 Another important characteristic of chemical exposure injury drawn to the attention of the Committee is the latency of conditions. Sometimes conditions take years to appear as distinct symptoms, adding to the complexities of identification and the establishment of causal links. Mr Malcolm Wheat, on behalf of the Queensland Branch of the Vietnam Veterans Federation, told the Committee:

There seems to be a unilateral agreement that the effects of the deseal-reseal chemicals may have a varying period of effect, and that was borne out on the first day of the inquiry. The science has also been stated as to be uncertain; that no evidence is available as to when the onset of a disease might happen as a result of the exposure. ⁴

- 6.12 A witness, Mr Greg Craven, told the Committee that his respiratory problems were not evident when he worked as a non-destructive technician, however soon afterwards:

In 1975... I saw the doctor on several occasions. I had occasions where I would just faint to the ground and hit whatever was on the way down. They gave that pretty short shrift and said that I had low blood pressure, something I had never had in my life. I never ever had asthma, and I have full-blown asthma now. I have attempted suicide. Some people who know me here knew me as a pretty fun-loving sort of guy. I am now totally the opposite. I sit in the dark at home at night just watching television, just crying. When my wife comes out and asks, 'What's wrong with you?' I say, 'I don't know.' ⁵

- 6.13 Mr Barry Gray told the Committee that although he had a blood test in 1986 on discharge after 20 years in the Air Force which showed no problems:

4 Mr MJ Wheat, *Transcript*, 29 July 2008, p. 50.

5 Mr GS Craven, *Transcript*, 28 July 2008, pp. 24-5.

But here you are' – and it was then 2005 – 'you've had another blood test as part of the deseal-reseal and, coincidentally you've got leukaemia, so it should have shown up before then. It is evidence that has been thrown around before that it is going to take some time for all this to come out. DVA people, the delegates in there, do not understand that; they really do not. ⁶

- 6.14 The Department of Defence acknowledged that latent effects were an ongoing possibility:

Some Deseal/Reseal personnel may not be experiencing health affects now but they may experience chemical exposure related health problems in the future. The overall response should take account of these latent health issues in a similar manner to the Commonwealth approach to potential asbestos exposure. Personnel who have been exposed to potentially toxic chemicals should be provided with the means to be registered and identified now so that access to health care for anticipated health conditions is simplified and guaranteed. ⁷

Health effects on families and support provided

- 6.15 A common theme in the evidence received by the Committee was the concern about flow-on effects on their families. These concerns were not simply confined to the immediate difficulties involved with treating their own identified illnesses or those of their partners, but to the possible intergenerational effects of their chemical exposure.⁸
- 6.16 The range of health problems identified by those providing evidence to the Committee included a large number of debilitating conditions referred to above, including skin disorders, asthmas, cancers and sexual function disorders. In addition, those affected often suffer debilitating mental disorders which affect cognitive ability (including memory loss) which impair their ability to engage socially and which have severe adverse consequences for family relationships.

⁶ Mr B Gray, *Transcript*, 28 July 2008, pp. 42-3.

⁷ Department of Defence, *Submission No. 83* p. 2.

⁸ The following Submissions draw attention to the concerns of affected individuals to the health issues suffered by their families included stress related issues suffered by spouses and carers: Nos 3, 11, 13, 17, 22, 26, 35, 36, 37, 40, 49, 52, 63, 74, 77, 85, 86, 88, 91, 108, 110, 114, 116.

- 6.17 The evidence of some of the witnesses who appeared before the Committee is a compelling illustration of the complexity of conditions suffered by those affected and the associated effects on their lives:

I retired after 20 years and 17 days as a corporal, so my promotion prospects were destroyed. I have suffered lung damage. I tend to be a bit self-destructive in my employment. The effects that I had in the Air Force with insubordination and generally mood issues have continued through into my civilian employment. It is a struggle from day to day dealing with that. With the lung issue, it takes away a lot of the enjoyment of life that I participate in. I am an avid landscape photographer and I enjoy bushwalking to do that, and it limits the scope of what I can do. I still try to do it, but it takes me weeks to recover from a good bushwalk. My family life is a juggle of indifference, I suppose is the best way to put it. I have an inability to go to public events with my children because there are too many people. I just cannot go anywhere where I am enclosed or in crowds. ⁹

- 6.18 Mr Stan Lawler, an Airframe Fitter, noted the physical and mental issues affecting him and his family:

I do not think I would have been the only one going through some pretty bad mood swings and things like that. To give you an example, I would go home and my wife would know to leave me alone because I would be out in the yard for two hours hosing. That was my way. I was quite explosive at anything. The slightest thing would set me off. ...I have some skin issues, psychological problems, some gut problems, and my daughter has had medical problems. ¹⁰

- 6.19 Speaking on behalf of the DSRS Support Group Inc, Mr Ian Fraser told the Committee in answer to a question about affects on families:

If you talk to any families, we all have children that have strange illnesses. My daughter is one of those. Other people have children that have problems. For us, it is anecdotal. We talk to each other and, as a cohort, we all seem to have problem children, which is why, when SHOAMP was being planned, we were very keen for a study into our children. ¹¹

9 Mr I Fraser, *Transcript*, 28 July 2008, p. 9.

10 Mr S Lawler, *Transcript*, 29 July 2008, p. 10.

11 Mr I Fraser, *Transcript*, 28 July 2008, p. 10.

- 6.20 Mrs Amanda Grady told the Committee about the direct effects on the family of the complex of conditions affecting her husband:

With the physical problems with the lungs, bowel, rashes and eyes there is something that can be done relatively easily about it, but it is the mood swings and the depression that the families have to live with that is very difficult.¹²

- 6.21 The DSRS Support Group Inc summarised members' fears for their families:

The family is responsible for the financial burden of these diseases and illnesses. Most are also suffering major psychological conditions... There is much anecdotal evidence of the effects on the next generation; however the required study of children has not been undertaken. This has remained a major concern for the F-111 Aircraft Maintenance Workers and their partners who are fearful for the future of their children and believe a study would prove statistically significant increases in birth defects and the ability of the next generation to conceive and carry live births.¹³

- 6.22 The Department of Defence also noted that 'the effects on families from chemicals associated with the DSRS processes remains an issue. There was no evidence found during the Health Study of any association between DSRS exposure and miscarriage or still births, but the original concerns could not be addressed during SHOAMP.'¹⁴

- 6.23 Speaking on behalf of the many family members and particularly spouses involved with the F-111 DSRS Support Group Inc, Mrs Kathleen Henry told the Committee:

We definitely need group counselling. Part of the difficulty of this for the first 10 years has been isolation – that one of the spouses has been handling it at home in isolation. We need to be provided with the ability to meet together and have psychologists who are versed on partners of veterans – the Vietnam veterans is a possibility – to assist us with coping skills for dealing with the effects on these members. We need to have respite. We desperately need to have respite. It is not forthcoming. That should also be a group respite as well so that we can just get away even for two to three days. We can

12 Mrs A Grady, *Transcript*, 29 July 2008, p. 21.

13 F-111 Reseal/Deseal Support Group Inc, *Submission* No. 91, p. 12.

14 Department of Defence, *Submission* No. 83, p. 12.

get away from our environment and have our partners cared for in that time so that we can just get some time out and get some space to recharge our batteries. I think they are the first two priorities.¹⁵

- 6.24 Chapter 3 noted the findings of the *Study into Psychological Functioning of Partners and Spouses of Deseal/Reseal Personnel*. The study confirmed the impact on family members' health and wellbeing. The evidence cited here is a reflection of the individual human face of those problems.

Access to health care initiatives

- 6.25 The overwhelming weight of submissions to the Inquiry points to the confusion and frustration felt by claimants when trying to pursue some relief for their plight from the existing healthcare schemes. This section considers some of these matters.

- 6.26 As has been discussed earlier in this report, perceptions of unfairness began to arise on the part of individual claimants and groups of claimants when different eligibility criteria were applied to access the compensation schemes and the ex-gratia payment.

- 6.27 The effects on claimants of the accumulation of programs with different criteria for access are clear from evidence to the Inquiry. For example, Mr Ian Fraser, of the DSRS Support Group Inc told the Committee:

It was identified that the 482 Squadron workers during the BOI had met a lot of the criteria and had spent as much time in the tanks as many of the core desealers had; again, evidence from the BOI supporting their position and all of a sudden after the BOI, their positions have been reversed and they have been excluded.¹⁶

- 6.28 In response from an observation from the Chair that 'there are different laws relating to the RAAF personnel because of the time frames we are talking about', Mr Fraser replied:

I think we all need to be considered equally, and that is the problem that we face today. Military people are treated across different acts differently. Civilians are treated differently.

15 Mrs K Henry, *Transcript*, 17 April 2009, p. 21.

16 Mr I Fraser, *Transcript*, 28 July 2008, p. 4.

What we need is a response that treats everybody with equity.¹⁷

- 6.29 Mr Fraser described the effects on claimants of the perceived difficulties of accessing health care under the programs:

One of the real issues that we face is health. Many of our members find themselves rejected for claims, so they currently have no access to health care. I am on a white card, but we all suffer from conditions that get no name. We all feel ill. We all suffer daily from things that nobody can diagnose. They have the healthcare scheme but it tends to be a mire to navigate.¹⁸

- 6.30 Another witness, Mrs Amanda Grady told the Committee about the effects on claimants of what was seen as a complicated process to access the available compensation:

What I wanted was to fix the way they are handling the claims with the men, because the way they have handled it and what they have made the men go through has only made the problems worse. That is what needs to be fixed. When we put the claim in for the ex gratia payment we would follow it up: 'Yes, that is fine. Very good. Not a problem.' Then months down the track there is a problem. There was a constant seesawing. People in that state of mind are being given ...hope and then having it taken away.¹⁹

- 6.31 Defence also pointed out two issues identified in the range of evidence to the Committee and discussed in the above paragraphs. These were:

- Members of the Support Group commented on the reduced number of conditions covered by the SHOAMP Health Care Scheme and the cut off date for registration of new claimants.
- The families of affected personnel were not eligible for health care under either scheme, except for counselling covering genetic issues and broader lifestyle issues.²⁰

- 6.32 The Defence Force Welfare Association in its evidence to the Committee summed up the nature of the difficulties experienced by

17 Mr I Fraser, *Transcript*, 28 July 2008, p. 11.

18 Mr I Fraser, *Transcript*, 28 July 2008, p. 11

19 Mrs A Grady, *Transcript*, 29 July, pp. 23-4

20 Department of Defence, *Submission* No. 83, p. 4

claimants, taking into account the complexity of symptoms, the latency in their appearance and the existing legislative and administrative frameworks restricting access to health care:

No single person can prove that any particular activity involving the workplace environment has led to any particular health problem if it has taken years for the problem to become manifest. As this case shows... the Department of Defence and the Department of Veterans' Affairs later demanded proof that in effect the disabilities can only be caused by a particular work environment. With such small samples of workers in many Defence work environments and with the long latency before effects can become manifest, proof beyond reasonable doubt will seldom be possible. While this legalistic approach to occupational health and safety issues may save the Commonwealth money in the short term, the long-term effect is to increase the cost to the community and also increase the suspicions of ADF personnel about Defence being a good employer that is prepared to stand by its employees.²¹

Financial issues affecting families

- 6.33 In addition to the many health effects documented in submissions to the Inquiry, there is much evidence in relation to the financial losses experienced by families supporting members through long term debilitating illnesses. The Defence Force Welfare Association made this point:

In addition to pain, suffering, quality of life and impact on family members and structure, those affected by this program will also face for the rest of their lives, a significant decrease in their earning capacity and career prospects. Underemployment is a punishment in itself and information available to DFWA makes clear that this outcome exists in varying degrees for all affected by the exposure to toxic chemicals that is at the centre of F-11 and C-130 maintenance programs.²²

- 6.34 The Defence Force Welfare Association also notes that the financial losses are cumulative:

21 Col DK Jamison, *Transcript*, 19 September 2008, p 17.

22 Defence Welfare Association National Office, *Submission* No. 62, p. 3.

It is also reasonable to suggest on the basis of anecdotal evidence, that: the vast majority of affected families have already experienced income losses well in excess of the maximum compensation that has been paid. Moreover, these losses will continue throughout their working lives, with associated impact on superannuation incomes on retirement.²³

- 6.35 Some of the 'anecdotal evidence' of the kind referred to by the Defence Force Welfare Association is also to be found in submissions from affected individuals. For example, one submission states:

As of 30 June 2008 I'm still on an invalid pension waiting for a decision on what level of pension I will be paid from the Department of Defence. My conditions haven't changed since my medical discharge and I still require treatment for these conditions. The invalid pension doesn't even come close to paying for the cost of these treatments while I'm waiting for compensation for some of the conditions. I went from earning close to sixty thousand to only nineteen thousand and will soon have to sell my house as I don't have enough money for mortgage repayments while waiting for a medical pension.²⁴

- 6.36 Another submission notes that after acquiring a number of health disorders, 'On retirement at my own request after twenty years service I could not handle full time employment. It was an unbelievably difficult task to just keep working part time for the next ten years.'²⁵ Other submissions also draw attention to the financial problems as a consequence of the inability to undertake regular work experienced by former DSRS personnel and their families.²⁶

- 6.37 Another states that:

Since leaving the RAAF I have had four jobs and a total of approximately two and a half years out of work. I feel socially isolated. I have been on a Disability Pension for almost two years and the prospects of my return to work are very poor. My ability to realise my full potential regarding earnings and promotions has been reduced by at least 25 years.²⁷

23 Defence Welfare Association, National Office, *Submission* No. 62, p. 4.

24 (Name Withheld), *Submission* No. 80, p. 5.

25 Mr D Sayer, *Submission* No. 82, p. 2.

26 (Name Withheld), *Submission* No. 58 and Mr Kenneth Carey, *Submission* No. 59.

27 Mr D Treleven, *Submission* No. 3, p. 2.

- 6.38 The Committee understands the financial burden which this issue has placed on many families. Statutory schemes may provide relief for some. Some may have recourse to civil law actions where negligence can be established. Many will not. Some who may wish to pursue civil law remedies may not have the means to.

Litigation

- 6.39 This section discusses the progress of current common law claims against the Commonwealth.

Class Actions

- 6.40 There were two separate class actions launched on behalf of DSRS claimants commenced in the Queensland Supreme Court in December 2006 and January 2007. Because of a number of significant flaws, and the fact that they would be time barred under the operation of the *Limitation of Actions Act 1974 (Qld)*, the claims were struck out after negotiations with the Commonwealth, on 11 April 2007.²⁸
- 6.41 With respect to the failed class actions lodged with the Queensland Supreme Court noted above, Defence told the Committee:

There were two class actions attempted, and they failed... Part of the problem in bringing them all together is the sheer scale of this exercise. You have four programs traversing over 30 years. The details of work undertaken and exposure to chemicals over that time are different. It is very hard to clearly and neatly define a class into which people will group, and that was one of the reasons the two actions that were commenced back in 2006 were discontinued. They were not drafted well enough to actually attract people into the class.²⁹

Common law claims

- 6.42 The Department of Defence provided details of the litigation regarding the DSRS issue to which the Commonwealth is a party:
- There are 31 common law claims seeking damages against the Commonwealth arising out of the F-111 Deseal/Reseal

28 Department of Defence, *Submission* No. 83, p. 13.

29 Mr M Lusewycz, *Transcript*, 21 July 2008, p. 22.

programs. The claims are before the Queensland Supreme Court and commenced between 2002 and 2006.³⁰

6.43 The submission noted that between 1991 and 1993, the second DSRS program 'involved contractor staff from Hawker De Havilland and some RAAF personnel involved in training and contract supervision.'³¹

6.44 The plaintiffs are:

The plaintiffs are either former RAAF members who participated at various times between 1975 and 1999 in the Deseal/Reseal programs, or employees of sub-contractors used by the RAAF for the second program between 1991 and 1993. They are seeking compensation for loss and damage, past and future economic loss and past and future medical expenses.³²

6.45 The submission notes that the two further claims from ex-employees of Hawker de Havilland had been settled by Workcover Queensland. In further evidence to the Committee, Defence noted that in addition to the two claims (above) which had been settled:

We have four current claims by private contractors that we are defending in the Supreme Court of Queensland – six in total. At this stage we have sought information from the solicitors representing them to establish how they wish to proceed.³³

6.46 The Committee wrote to WorkCover Queensland and asked for statistical information in relation to the numbers of claims that have been handled by that organisation on behalf of private contractors. WorkCover Queensland have advised the Committee that they are unable to provide the Committee with this information.³⁴

6.47 Herbertgeer Lawyers, on behalf of clients involved in the DSRS programs between 1977 and 1999, argued that the pursuit of claims through common law actions was never a realistic possibility:

It is submitted that the injured have been let down by a Statutory scheme which is not designed for the nature of

30 Department of Defence, *Submission* No. 83, p. 12.

31 Department of Defence, *Submission* No. 83, p. 10.

32 Department of Defence, *Submission* No. 83, p. 13

33 Mr M Lysewycz, *Transcript*, 19 September 2008, p. 68

34 WorkCover Queensland, *Correspondence*, 3 April 2009.

these claims and that the common law alternative was in reality no alternative.³⁵

- 6.48 Herbertgeer claimed that common law actions were ‘replete with limitation of actions difficulties to a much greater extent than any other type of Civil injury action.’³⁶ Further that the Commonwealth’s Solicitors declined a mediated solution:

The Australian Government Solicitors asserted that they were restrained by Commonwealth legislation and so could not concede limitation and could not negotiate matters. Each and every point on limitation would be, and presumably in many cases has been, taken thereby ensuring that informal negotiating which is part and parcel of any other civil claim was not available in these cases.³⁷

- 6.49 Because the chemical poisonings associated with DSRS claims are ‘a unique form of insidious developing injury’, determining the date for the onset of the limitation period was in many cases impossible.³⁸ In addition, claimants covered by the SRCA, ran the risk of having to abandon claims if they also pursued damages under common law.³⁹

- 6.50 This point requires clarification. If an applicant applies under SRCA and fails, there is no barrier to a subsequent common law action. However, if a common law action fails, it is generally not possible to then apply for the same injury under SRCA.

- 6.51 At the centre of the difficulty was the fact that:

The statutory process simply did not have the flexibility to recognise and then act upon the SHOAMP conclusions. Yet as we have seen above the injuries for which clients have been seeking recompense are consistent with the SHOAMP conclusions. The strictures of the statutory system are such that its design prevents it from accommodating any extra statutory guidance or imperative.⁴⁰

- 6.52 The Department of Defence noted with respect to the common law damages claims, that the matters raised in the Hebertgeer submission had been the subject of careful consideration:
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35 Herbertgeer Lawyers, *Submission* No. 115, p. 1.

36 Herbertgeer Lawyers, *Submission* No. 115, p.5.

37 Herbertgeer Lawyers, *Submission* No. 115, p. 5.

38 Herbertgeer Lawyers, *Submission* No. 115, pp. 5-6.

39 Herbertgeer Lawyers, *Submission* No. 115, p. 6.

40 Herbertgeer Lawyers, *Submission* No. 115, p. 7.

any settlement of the common law claims takes account of the long-term impact on the plaintiffs' statutory entitlements. In each case, careful consideration will be given to obtaining a balance between the general proscription against 'double compensation' and the need to provide for long-term medical treatment for former RAAF members who have been injured in the course of their employment.⁴¹

- 6.53 With respect to progress with the 31 outstanding Common Law damages claims mentioned above at paragraph 6.42, the Department of Defence told the Committee:

What we are doing with them is engaging in a series of negotiations and discussions through their lawyers to try to bring their claims to a position where we can actually assess them. They are pretty broad claims. There is still a lot of supporting material that has to be brought forward for us to be able to assess them, and at this stage we have not even got to the serious stage of trying to put a value on any of those claims. That is quite separate to any entitlement that these people may have under the MCRS or the SRC Act. Those claims they would make to DVA.⁴²

- 6.54 Whilst common law claims are separate from the legislative compensation schemes, any payment from a common law case may create an obligation to repay some of the compensation already paid under MCRS or SRCA. It is not possible to 'double dip'.

- 6.55 Defence outlined for the Committee some of the particular complexities which had been encountered with the cases and which were also alluded to by Herbertgeer:

Problems that we have encountered so far are that some of the claimants' participation in various parts of the program traverses different legislative schemes. Some, for example, were engaged in these schemes pre 1988, which is when the SRC Act started, so it is a straight common-law claim. Others are in the period straight after that, so there may be a limit on the amount that they can recover should they elect to go for a lump sum payment. Some traverse both periods, so that brings an added complication. That is a structural problem in the way in which the pleadings are put forward. Proof of

41 Department of Defence, *Submission* No. 83, p. 14.

42 Mr M Lysewycz, *Transcript*, 21 July 2008, pp. 16-17.

injury and its causal connection back to the program is a real source of concern for us. The claimants are not restricted to former members of the Air Force. They do, in one or two cases, include spouses, so that raises the question of scope of duty of care that is owed beyond the immediate worker into the family.⁴³

- 6.56 Defence explained in evidence to the Committee that with the current 31 cases under litigation they were trying not to repeat the mistakes of the past under the SHOAMP:

part of the reason for seeking to meet lawyers and plaintiffs in an alternative dispute resolution setting is to try to agree on the nature of the medical examinations and who will conduct the medical examination so that both parties can work from a common set of findings and facts. That is a process we are engaged in right now.⁴⁴

- 6.57 Defence told the Committee that the earliest common law action of the 31 currently the subject of litigation had commenced in 2002 and the latest in 2006, no action was as yet advanced to the trial stage.⁴⁵ However Defence hoped that lengthy litigation could be avoided:

Just last month the Attorney-General issued some amendments to the legal services directions that are administered by the Office of Legal Services Coordination. There is exhortation on agencies such as us to avoid litigation. The encouragement is for us to seek alternative means to resolve disputes. This one really cries out for a resolution around a table, not in a court. We would think that if we could not resolve these matters by negotiation we will have failed. We have set ourselves a fairly high hope that we can resolve all of these claims without the need for a formal hearing of any kind.⁴⁶

- 6.58 Mr Lysewycz provided the Committee with an indication of the Defence Department's approach to the proposed mediation:

The approach that we have adopted is a collaborative one. We are not expecting plaintiffs to bear all these costs on their own, and that is part of the reason for reaching out and trying

43 Mr M Lysewycz, *Transcript*, 21 July 2008, p.21.

44 Mr M Lysewycz, *Transcript*, 21 July 2008, p.21.

45 Mr M Lysewycz, *Transcript*, 21 July 2008, p. 23.

46 Mr M Lysewycz, *Transcript*, 21 July 2008, p. 23.

to get people around the table. If we can agree on the nature and identities of experts who are going to examine people, come up with reports and share them, that will be a considerable saving both in time and cost.⁴⁷

6.59 Defence's evidence of a desire on their part to settle bona fide claims through negotiations is at odds with the evidence of Hebertgeer. The Committee is not in a position to reconcile those alternative views.

6.60 The Committee accepts the assurance of Mr Lysewycz that whatever may have been the past situation; Defence now pursues a 'collaborative' approach in dealing with common law claims.

6.61 The Committee enquired about the baseline parameters involving exposure or health outcomes being considered in any proposed mediation. Defence replied:

the common law has a checklist, if you like, that we go through. When we are looking at a claim – put aside liability; assume we have lost or conceded liability – it comes down to assessing the quantum. We would be looking at an amount for pain and suffering past and future and out-of-pocket expenses past and future. Then there would be the broad category of economic loss past and future and calculations of interest on each of those amounts.⁴⁸

6.62 Further, in response to a question about possible settlements where a claim is successful, Defence added:

It is a guess referenced to the threshold amount that one needs to claim to legitimately get into the Queensland Supreme Court. We are assuming that the minimum claimed is \$750,000.⁴⁹ The Department of Defence provided further insights into its approach to the cases currently proceeding:

One of the advantages of approaching the current cases as we are is that we are able to tailor the approach to the individual and to the firm of solicitors representing that individual and come up with a process that is amenable to progressing the claim to a point where we can formally mediate it. Each of them comes from a different point in time, different

47 Mr M Lysewycz, *Transcript*, 21 July 2008, p. 24.

48 Mr M Lysewycz, *Transcript*, 21 July 2008, p. 25.

49 Mr M Lysewycz, *Transcript*, 21 July 2008, p. 26.

employment circumstances and different sets of medical conditions. We are accommodating all that.

We are at the stage where, with the agreement of solicitors representing these claimants, we have six at a stage where we expect to be in a position to start negotiations at the end of November (2008). Basically, it is a paste program. Pre-litigation there is such a degree of exchange of information between parties around the table that we should have sufficient information to evaluate each claim, put a value on it and resolve it. That is emerging to be a fairly standard approach that we are adopting within defence in litigious claims. Currently that draws its inspiration from the Attorney-General's drive to have the Commonwealth appearing less often in courts.⁵⁰

- 6.63 As with any common law claim, ultimately it is a matter for the parties and the court to determine, based on the specific facts of each case under consideration.
- 6.64 For completeness, the Committee did seek information on any similar cases that may have occurred in the USA involving workers undertaking similar duties on their F-111 aircraft.
- 6.65 Neither of two Defence reports – *The Board of Inquiry into the F-111 (fuel tank) Deseal/Reseal and Spray Seal Programs (1977-1999)*⁵¹ or the *Study of Health Outcomes in Aircraft Maintenance Personnel (SHOAMP)*⁵² examined the issue of litigation.
- 6.66 A search based on Sacramento Air Logistics Center, McClellan AFB, where the USAF and RAAF F-111 underwent DSRS did not identify any litigation. Nor did a search based on relevant unions covering employees there who carried out the DSRS program.
- 6.67 Similarly, examining material relating to El Dorado Chemical Company and to General Dynamics, the manufacturer of the F-111, produced no evidence of litigation.
- 6.68 The dearth of available information may not indicate absence of litigation. However it has not been possible to establish this conclusively because the databases of US courts which can be

50 Mr M Lysewycz, *Transcript*, 19 September 2008, pp. 69 – 70.

51 *F-111 Deseal/Reseal Board of Inquiry*.

52 SHOAMP Report

accessed may not cover all courts; and/or may not extend far enough back in time.

- 6.69 The Committee was advised of some media reports in the USA on these issues. For example a 1988 *New York Times* article announced that the USAF would “hold a conference on health complaints by aerospace workers who handle plastic-based composite materials”.⁵³ This article also mentions that:

Workers at Lockheed Corporation plant in Burbank, Calif., have gone to court with contentions that the composites have caused health problems ranging from headaches to cancer. Results of a health inspection of the plant last month have not been made public. Workers at Boeing plants in the Seattle area have made similar complaints.⁵⁴

- 6.70 It was not possible to definitely identify these cases in searches of US courts. However, the Center for Justice & Democracy reported as follows:⁵⁵

“Skunkworks” Facility. From the 1940s through the 1990s, workers involved in building top-secret military aircraft at Lockheed’s “Skunkworks” facility were exposed to toxic chemicals during the manufacturing process. Employees began to suffer illnesses ranging from cancer and brain damage to rashes and mild congestion, with one-third severely injured or killed. Under the fraud exemption in California’s workers’ compensation laws, 650 victims were able to sue Lockheed and various chemical manufacturers, eventually reaching a \$33 million settlement with Lockheed in 1992. That same year, failure to warn and wrongful death cases were starting to be tried in groups of 15 to 40 plaintiffs, ultimately resulting in five jury verdicts totaling over \$800 million. The Court of Appeals upheld three of the five

53 New York Times (13 November 1988) *Illnesses of Aircraft Workers to be Discussed* viewed 17 May 2008 at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=940DE6DF123FF930A25752C1A96E948260>.

54 New York Times (13 November 1988) *Illnesses of Aircraft Workers to be Discussed* viewed 17 May 2008 at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=940DE6DF123FF930A25752C1A96E948260>.

55 *Center for Justice & Democracy, Environmental Tort Lawsuits: Holding Polluters Accountable Mass Torts and Class Actions* at: http://www.centerjd.org/archives/issues-facts/stories/MB_envirocases.php

judgments, sending two back for retrial because of judicial error. Horvitz, Ellis and Stephanie Rae Williams, "Unpublished State Toxic Tort Ruling Offers Valuable Guidance," *Legal Backgrounder*, October 6, 2000; "The Big Numbers of 1998," *National Law Journal*, February 22, 1999; "Winning Justice for Poisoned Workers," *Trial Lawyers Doing Public Justice* 1996."⁵⁶

56 *Trial Lawyers Doing Public Justice* deals with cases brought by lawyer Thomas V Girardi against chemical manufacturers for providing inadequate warnings about toxicity of chemicals *Public Justice*, Fall 1996, at http://www.girardikeese.com/assets/docs/girardi_1996-12-20-ladailyjournal.pdf