Senate Foreign Affairs, Defence and Trade Legislation Committee

SUBMISSION COVER SHEET

Inquiry Title: Military Rehabilitation and Compensation Bill 2003 and Related Bill

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THE AUSTRALIAN VETERANS AND DEFENCE SERVICES COUNCIL "AVADSC"

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Atomic Ex-Servicemen's Association
Australian Commando Association
Australian Federation of T & FI Ex-Servicemen & Women Ltd
Australian Legion of Ex-Service Clubs
Australian Legion of Ex-Servicemen & Women
Australian National Veterans' Association
Australian Peacekeepers and Peacemakers Association
BCOF Executive Council of Australia
Blinded Soldiers of St Dunstan's Australia
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Council of Ex-Servicewomen's Associations (NSW)
Council of the 2nd AIF
Defence Reserves Association
EDA Association (Inc) of Australia
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RAN Corvettes Association
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Royal Australian Artillery Association (NSW)
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Totally & Permanently Incapacitated Veterans Association (NSW)
Vietnam Veterans' Association of Australia
Vietnam Veterans' Federation of Australia
War Widows Guild of Australia
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The Secretariat,
Senate Foreign Affairs, Defence and Trade Committee
Suite S1.57, Parliament House Canberra ACT 2600

Dear Sir / Madam

The Australian Veterans and Defence Services Council are pleased to submit the consolidated submission of the 43 member Associations in preparation for the Senate Hearing.

We were grateful that an extension of time was allowed and we trust that the enclosed submission meets with your approbation.

Also, two or three senior Councillors look forward to appearing before the Senate Committee, one of whom, Colonel John Haynes, has been largely responsible for compiling the enclosed report.

Yours Truly

KM Barnett
20 January 2004
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28 January 2004

The Secretariat,
Senate Foreign Affairs, Defence and Trade Committee
Suite S1.57, Parliament House Canberra ACT 2600

MILITARY REHABILITATION AND COMPENSATION BILL (MRCB)

COMMENT FOLLOWING THE TABLING IN PARLIAMENT

PREAMBLE

The Australian Veterans and Defence Services Council (AVADSC) represents over 40 Ex Service Organisations (ESOs) all of which have a national membership base. Inevitably there are differing views expressed in the following comments due to the diverse nature of the ESOs, from WW11, to the deployments of the Cold War and the conflicts of the period of Afro-Asian independence, peacekeeping and Service at home. Because this new legislation is to take effect from 01 July 2004, it should cater for the significant change in the type and range of deployments now being undertaken, rather than those of the past. Similarly it should recognise the much higher standard of living and attendant higher incomes now being enjoyed in the Australian community.

INTRODUCTION

The Clarke Report recommended that a system based on 'civilian community norms' be used for the military. The MRC Bill completes the shift from Military to civilian in that, in many ways, it blurs the fundamental difference between Military Service and civilian work. It fails to recognise the unique nature of Military Service whereby a government can call on some members of the community to give up their employment against their will, and put themselves in harm's way to risk death or injury without any recourse to redress or refusal. No such conditions exist in the rest of the community. It is incumbent on the Government to stop the trend towards all cover for injury in Service to be 'civilianised'.

At the first of many meetings between the Department of Defence (DOD)/Department of Veterans' Affairs (DVA) and Ex Service Organisations (ESOs), the question was put "Are we wasting our time because the Government has accepted the Tanzer Review", which left only the question of the Review process for clarification. This would have resulted in nothing more than an image of the SRCA, an Act designed to cover civilians. The response from DOD Staff was "Yes that is correct", thus accepting the quest for 'civilian norms' to be applied. The Chairman from DVA, however, denied this and encouraged the ESOs to ask for all the changes they felt were needed. Only then were discussions commenced. The point is that DOD were quite happy to impose on their troops a fundamentally civilian based cover for injury in Service despite the unique nature of Military Service.

The categories of service that should be recognised by the Bill should be:

- Warlike service which should provide the same entitlements for the armed forces whether they are raised as a result of a general mobilisation to meet a defence emergency or employment of the ADF and Reserves short of a general mobilisation;
- Non-warlike service; and
- Peacetime service,

with the last two categories based on recognition that the military lifestyle and associated entitlements are drawn from the axiom that those who are prepared to pay the supreme sacrifice are entitled to values which differ from those of the mainstream of society. This should eliminate any alignment with the features or the philosophy of the SRCA.

Although some changes were then accepted for the Bill, many were rejected which left the current Bill as no more than a 'band-aid' edition of the SRCA, an act created to deal with casualties in the civilian workforce. The Bill is laced with provisions which ignore the fundamental difference between Military Service and civilian work. The name of the Act is a typical example. Further, the MRCB contains parsimonious provisions which make it more difficult to become eligible for benefits. No doubt this is in response to Government's directions to the bureaucrats to ensure that the new Act is cost neutral.

THE NAME – CHANGE 'COMPENSATION' TO 'ENTITLEMENT'

It is with considerable relief that the term Military Compensation Scheme has been shelved. Its continued use would have caused great confusion in the minds of injured Service personnel because of the current use of the SRCA/MCS/MCRS mix.

The words 'Military' and 'Rehabilitation' are fully descriptive of the Bill's intention. Indeed the latter establishes an historic link with the post WWI 'Rehabilitation' scheme.

This cannot be said for the word 'Compensation'. We propose that 'Compensation' be replaced by 'Entitlements'. The latter fully describes the Bill's intention beyond rehabilitation, whereas 'Compensation' does not because of the many ancillary provisions, which are not compensation. Further, the word 'Entitlements' links with the Veterans' Entitlements Act (VEA), an Act designed to cover Service personnel. 'Compensation' links with the SRCA, an Act to cover civilians.

There is concern that interpretations of the term 'Compensation' could, due to income and assets assessments, adversely effect beneficiaries, especially upon retirement.

Further, Service personnel consider that they enjoy entitlements and privileges such as medical treatment, paid convalescence leave etc, and don't see this as compensation. On the other hand civilians are entitled to compensation and, as a result, the term ' 'compo' has a connotation in Service person's mind of often 'shady' behaviour.

It seems reasonable to retain the link to VEA, now that a number of its provisions are in the MRC Bill, added to the fact that it better describes all non-rehabilitation aspects of the Bill.

PAYMENT ADJUSTMENT CRITERIA

Governments have been progressively changing from CPI adjustments of payments to MATAWE etc. The intention to use Defence Salary Movements (DSM) as a basis for adjusting some payments is welcomed. However, this should be linked to adjust all other payments based on DSM, MATAWE or CPI, whichever is the greatest. The system should be standardised throughout the Bill. All adjustments should be applied twice each year as is currently the case with many other Government payments.

DIFFERENCES BETWEEN 'WAR WIDOW' AND 'DEFENCE WIDOW' ENTITLEMENTS

There are a significant number of ESOs who believe that all widows of Australian Defence Force (ADF) personnel should be treated equally, irrespective of the deceased's category of Service. They argue that once the commitment is made and the oath taken on enlistment, the same entitlements should apply, as Servicemen and women have no control over their deployments. Therefore, all widows should receive the WWP etc entitlements. The Black Hawk Disaster alerted the Government to the inadequacy of the discredited SRCA, as amended in 1994. If the MRCB is introduced in its present form there will be a return to the pre Black Hawk inequities.

INEQUITY OF WAR WIDOWS' PENSION BEING WITHHELD WHEN THE DISABLED VETERAN DIED OF NON-SERVICE RELATED CAUSES

Widows, in most instances, spend decades caring for veterans when suffering from Service injuries. In most cases the veteran dies of a non-compensatory cause, thus denying the widow a WWP. All widows of veterans with qualifying Service should receive the WWP irrespective of cause of death.

COVER FOR EX-PRISONERS OF WAR AND EQUIVALENT SITUATIONS

There does not appear to be provision for special conditions to cover Ex-POW and, for example, soldiers taken as hostages by terrorists. We believe that this should be included as well as entitlement provisions for the widows of these Service personnel, such as automatic issue of the Gold Card.

CUT OFF OF PAYMENTS AT AGE 65

Payments of entitlements for injury in Service should be continued for life, not stopped at age 65. This provision in the Bill is not acceptable to the ESO community. Never before has there been such a provision in any previous repatriation act, and this seems to be a further attempt to 'civilianise' and save money at the Service persons expense.

AUTOMATIC ISSUE OF THE GOLD CARD AT AGE 70

Currently all Service people with qualifying Service receive the Gold Card at age 70. This provision should be included in the new legislation.

DEPENDANCY TEST (S5, S15, S17)

As a principle, on behalf of the dependants of veterans, Legacy expects that there should be no diminution of their eligibility to compensation under the Veterans' Entitlement Act (VEA). The concept described in the Bill introduces a totally new test for eligibility in this Act – that of **'living with'**. (This test is not adopted in either the VEA or the Safety, Rehabilitation and Compensation Act [SRC Act] from which the Bill is derived. The test was used in the Social Security Act until 1995, and was then repealed and a test similar to that in S11A of the VEA took its place. The cases before then indicate difficulty in interpreting the 'living with' test.) It is considered that this test will be too easy for temporary 'living with' relationships and could override the normal rights of a 'spouse' (whether legal or de facto). It is contended that the concept will deprive existing spouses of benefits that they could reasonably expect to receive as compensation for the death of their partner. Instead, Legacy prefers that the well-established tests for a spousal relationship of legal marriage and/or marriage-like relationships (described in Section 11A of the VEA, and which is common with the SRC Act) be adopted in this legislation.

COVER FOR ADF FAMILIES TRAVELLING TO NEW POSTING LOCALITIES

The MRCB should extend cover for injury to all family and dependant members during this travel. After all, it is Government funded travel. There is also concern for those dependants where, due to their location as a Service requirement, they may be exposed to hostile acts.

OFFSETTING

This is a vexed issue, with ESOs unanimously harbouring continued concern over the inequity of its application. It remains an issue which must be raised with the Government. In no circumstances should DFRDB/MSBS payments be offset against

any benefit received under the MRCB. Advice is that offsetting will occur even when a member is to receive benefits from a non-governmental source. Offsetting in any mode is totally unacceptable to ESOs. Surely the Government's removal of the retrospectivity threat to the pre 01 July 2004 provisions signals the need to maintain the status quo into the future. The situation is compounded for many regular Service personnel due to the continued use of outdated actuarial tables in the calculation of pensions and the application of reduced CPI adjustments to their widows' pensions.

DEFENCE HOUSING AUTHORITY (DHA) SUPPORT FOR THE SEVERELY DISABLED

Probably the most critical issue with severely disabled ex-Service personnel after medical etc. care, is the problem of finding affordable, accessible, compatible accommodation. As the Department of Defence has the responsibility to house Serving members, it seems reasonable to expect it to extend that responsibility to those severely injured as a result of Service. Such an entitlement should be incorporated in the Bill.

FINANCIAL SUPPORT FOR ACCOMPANIED CARER TO THE SEVERELY INJURED

If such a member wishes to attend a sporting event or concert there is no provision for the extra cost of his accompanying carer. Further if the member needs 24 hour care and wishes to visit a distant relative or take a holiday, he needs two (2) carers to travel with him. Again no financial provisions exist to cater for this.

FINANCIAL SUPPORT FOR NON-QUALIFIED CARER FOR THE SEVERELY DISABLED

Despite DVA assurances that financial provision is made for non-qualified carers such as family members, the allowance is inadequate particularly when the family member has to give up employment to provide the care.

SPECIAL HOME LOAN PROVISION FOR THE SEVERELY DISABLED

Although the member is entitled to the $80,000 home loan, this 1991 figure is out of date with today's prices. This should be adjusted at least for the severely disabled with reduced deposit requirements and lower interest.

COMMON LAW CLAIM CEILINGS

In the SRCA of 1988 a ceiling of $110,000 was set for common law claims. This should be adjusted to today's conditions, or at least fully indexed from 1988 onwards.

REASONABLE EXPECTATION

This has been hotly argued with no success to date. A Private sailor, soldier or airman invalided at age 21 will have his/her lifetime payment geared to the salary of a Private, even though he/she would most likely have reached a higher rank if uninjured. This is

inequitable but not recognised in the Bill. The Bill already includes some provisions acknowledging the need to provide for 'reasonable expectations'. Thus, this inequity is highlighted by the case, for example, of a fully qualified professional who has just left university and is due to take up a lucrative position, and who was seriously injured whilst serving in the interim period in the Reserves.

RECOGNITION OF THE EXTENT OF CURRENT RESERVE SERVICE

It should be noted that under current and forseeable circumstances many Reservists are serving up to 250 days per year. However, they continue to serve under Reserve conditions of service without any benefits such as superannuation, housing etc. The MRCB should contain provisions to ensure equality with the remainder of the ADF particularly when a Reservist is injured on duty.

CIVILIAN SALARIES FOR COMPENSATION PURPOSES–REGULARS AND RESERVES

If a Regular is granted compensation some years after leaving Service, the payment will be based on his salary at time of discharge, despite the fact that he/she could be receiving a higher civilian salary when the delayed effects of the Service injury are felt. Reserves on the other hand who receive a salary higher than their Service pay will have the civilian salary used as the basis for payments. To be equitable the higher salary at the time of granting the payment should be used to assess all the entitlements.

NOTIONAL $100 PER WEEK ADDITIONAL PAYMENT

This is welcomed in principle as recognition of the for the 'hidden' value of Service benefits which are lost on discharge, eg accommodation and food costs, clothing allowance, medical and dental care etc. This will be subjected only to CPI adjustment which is criticised above. As a notional figure the $100 seems paltry. The unanimous view of ESOs is that the sum of $100 per week is totally inadequate, and therefore unacceptable. It should be at least doubled to $200 per week.

LEVEL OF IMPAIRMENT FOR PERMANENT INCAPACITY

The projected 80 impairment points is too difficult to reach, based on the current lifestyle weighting. The requirement should be 70 impairment points, as it is currently under the VEA.

THE 'SPECIAL RATE' IS INADEQUATE

The amount of $233.07 is derived directly from the VEA, without receiving the attention it deserves as part of the development of the MRCB. This rate should be set at 75% of MATAWE. Also, there is concern that the 10 hour limit should be extended to allow a gradual increase to full employment, linked to an appropriate reduction of benefits. Further the Committee should note that civilian cover is far more generous. For example, the Seafarers Rehabilitation and Compensation Act provides for a payment of $2,794.20 PF to a disabled member.

RETENTION OF THE TERM TPI

Military people over many decades have become familiar with and respect the meaning of TPI. This is a well known colloquialism, used since WWI to describe the "Special Rate". We cannot understand why the drafters of this Bill have sought to change the name. It seems to be change for change sake. It certainly illustrates the shift to civilian connections, when it would be a simple matter to retain as much connection with the terminology of the VEA and the Repatriation Act as practicable.

BEREAVEMENT PAYMENTS TO TPI WITHOUT SPOUSE/DE FACTO

Bereavement payments are not provided for in the MRCB where an injured Service person was not married or in a de facto relationship at time of death. The MRCB provides for a reasonable payment to cover burial where the injured Service person is married or in a de facto relationship at time of death. Although some provision is made for TPI to receive a funeral benefit, this is quite inadequate and should be increased for all injured Service persons to the same level as for those who have a spouse or de facto at time of death.

LOSS OF REVIEW OPPORTUNITIES BY REGULARS WITH COVER UNDER THE VEA FOR PEACETIME INJURIES

The MRCB fails to recognise that many Regulars enjoyed VEA cover for life for injuries sustained in peacetime Service with its attendant access to the VRB for review. For example, in the case of those still serving with peacetime Service only, the choice of an appeals system, post MRCB, is restricted to an SRCA equivalent. It is important that the same provisions be included for Reserve forces who are injured on duty. Of course, this problem will be overcome if the VRB option is retained for all Service people especially Reservists. It is interesting to note that despite the planned reduction in appeal provisions, the RMA and SOP of the VEA are still to be applied to all ADF cases. This seems to be another push for 'civilianisation'.

LOSS OF AUTOMATIC COVER FOR CERTAIN CONDITONS BY REGULARS WITHOUT QUALIFYING SERVICE WHO CURRENTLY HAVE VEA COVER FOR SERVICE INJURIES

As with the threat to VRB access, the entitlements of these Regulars have not been included in the MRCB. The conditions are Cancer, Post Traumatic Stress Disorder (PTSD) and severe mental illness. This is not acceptable to the ESOs. Further, ESOs insist that they apply to all Service personnel in the future.

FULL DISCLOSURE BETWEEN DEPARTMENTS (THE POSSIBLE FRAUD ASPECT OF A BELATED CLAIM)

This is quite a complex issue within the new Bill that covers a range of Chapters and Sections that, taken on the whole, could result in the Department of Defence, and only that Department, initiating a prosecution for fraud under the Defence Act, or having a claim declared fraudulent.

It could apply to a serving member but, more significantly, to an ex-member making a claim some years after discharge. This part of the Bill is obviously included to put a

stop to rorting by certain members, and is a necessary step in relation to 'in Service' injury or disease and rehabilitation. However, it does cross the grey area of 'Clinical Onset' and 'Diagnosis', and may have implications affecting the VEA under the Clarke review.

Here we should be vigilant though not obstructive in ensuring a fair and equitable outcome for all. The simplistic version of this provision is: "under the current system there is nil disclosure of information or outcomes between Departments". Under s17 of the VEA, the Secretary has the enforceable power to obtain all relevant information from any sources to make a determination on any claim.

There is no legal obligation to advise any person, or Commonwealth or State Government Department, that a claim has been made. In fact, currently under the Privacy Act 1988 as amended, any disclosure at all about a claim or its outcome, unless in litigation, cannot be made. This anomaly can and does bring about the result that a Serving member can injure him/herself, have the incident recorded on their medical documents then, without DOD knowledge, make a claim under the VEA, have it assessed as between 70% and 100% disability payment with all the benefits that accrue, and still purport to DOD as MEC1 (Military Employment Category Level 1), and participate in 'active Service'. Should an ex-Service person with 'qualifying Service' make a claim a long time after discharge, and the criteria of the relevant SOP met, he/she is awarded a disability pension. If he or she were aware of that injury or disease at the time of the 'clinical onset' but failed to report it, this would constitute an offence under the Defence Act 1903.

Other issues not covered by the VEA, but which will be relevant under the new Bill are, of course, Rehabilitation as well as TMS on discharge. Then the sharing of information with DVA becomes critical for the good management of the person's physical and mental health, and their transition back into civilian life.

However for clarification we invite your attention to **Wilful Misrepresentation, Exclusions** Part 4 s41, s34, also **Powers and Functions of the Commission** s362, **General Powers** Ch 7, and **Claims** s330 and s346.

Advocates clearly understand how the Department interprets 'black letter law', as we have been told that the intent is honourable so as to protect the integrity of the claim system. We are concerned that 'clinical onset' as described in the MRCB and known to the claimant will result in the onus of proof being assessed on the basis of **"reasonable satisfaction".**

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INADEQUATE SERVICE REPRESENTATION ON THE COMMISSION

There should be more uniformed representation on the Commission at least to the extent of one senior officer with Personnel experience from each of the three Services of the ADF. Indeed, even more importantly, ESOs should be represented by an ex-regular and an ex-reserve officer who has experience with the Government's treatment of injured Service personnel.

THE PROVISION OF LEGAL AID ONLY TO VETERANS WITH 'WARLIKE' SERVICE

Legal aid should be available to all injured members appealing decisions under the MRCB. If not, some other form of financial assistance should be provided.

THE EXCLUSION OF TOBACCO AS GROUNDS IS INEQUITABLE

Tobacco is a legal substance, which has always been and will continue to be a source of comfort in combat operations. Its use should be accepted as grounds for MRCB benefits. The effects of the use of tobacco should not be classified as self inflicted.

THE EFFECTS OF THE CLARKE REVIEW OF THE VEA

ESOs have been promised that any positive improvement to the VEA introduced by the Government as a response to Clarke will flow on to the MRCB.

DEFENCE REVIEW OF LEVELS OF SERVICE

ESOs would welcome the opportunity to comment on this Review, and its possible effects on the MRCB provisions. There is concern that the Bill is geared too much to the nature of long passed deployments, rather than to the more recent and expected future United Nations and humanitarian etc. types of deployment. Further, it is imperative that each level of Service is accurately defined in the MRCB.

THE UNIQUE NATURE OF MILITARY SERVICE

All ESOs are concerned that this Bill is threaded with provisions which blur the difference between Military Service and civilian work. Many of the above concerns exemplify this trend which was initiated by the then Government in the VEA of 1986, and re-affirmed by the amendments to the SRCA in 1994 which is now totally discredited. The Bill now incorporates some of the provisions of the VEA which recognises the unique nature of Military Service.

CONCLUSION

ESOs believe that to progress this Bill through Parliament in its present form would do a great disservice to serving and future ADF members. Many of the provisions of the MRCB are more parsimonious in intent than in the VEA, and most seek simply to contain expenditure.

We appeal to the Senate Committee to reverse the trend to equate Military Service with civilian work, and to accept the many amendments which Ex-Service organisations have sought.

THE AUSTRALIAN VETERANS AND DEFENCE SERVICES COUNCIL INCORPORATED

28 January 2004