

**Senate Foreign Affairs, Defence and Trade  
Legislation Committee**

**SUBMISSION COVER SHEET**

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

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# VETERANS' SUPPORT AND ADVOCACY SERVICE AUSTRALIA INC

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Friday, 30 January 2004

Ms Saxon Patience  
Acting Secretary  
Senate Foreign Affairs, Defence and Trade Committee  
Suite S1.57  
Parliament House  
CANBERRA ACT 2600



Dear Ms Patience

We have submitted a submission on the proposed new Military Compensation and Rehabilitation Scheme (MCRS). This submission was made on behalf of our membership of 3000 members and future-servicing personnel a copy of which is attached.

The tobacco use is the main concern to us, as you will see from the attached submission along with the body of debate provided in the submission.

We look forward to the opportunity to discuss the matters that have been highlighted in the attached submission.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Paul MacPHEE'.

Paul MacPHEE

President

[ausvets@ausvets.com.au](mailto:ausvets@ausvets.com.au)

Enclosed:: VSASA submission.

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This document has been written on behalf of Veterans' Support and Advocacy  
Service Australia (Inc)

Authored by Mr Peter Thorp

THE SUBMISSION ON THE PROPOSED NEW MILITARY  
REHABILITATION AND COMPENSATION BILL No. ,2003

This document has been written on behalf of,  
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## **SUBMISSION ON THE PROPOSED NEW MILITARY REHABILITATION AND COMPENSATION SCHEME**

The points made in this submission follow the order of the Narrative Guide provided with the Military Rehabilitation and Compensation Bill 2003. Some of the points made relate to sections of the draft bill.

### **Chapter 2 – Accepting Liability**

#### **Key Features**

2. The more beneficial 'beyond reasonable doubt' provision applies to claims for liability arising from warlike and non-warlike service but not to the diagnosis of conditions or the cause of death for claims arising from warlike or non-warlike service. This means that the SOP for warlike or non-warlike service rather than the SOP for peacetime service would be used to determine whether the injury or disease was related to service. Why would not the beyond reasonable doubt provision be used for the diagnosis where the relevant service was warlike or non-warlike?

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**Part 1: When the MRCC must accept liability.....**

3. The last paragraph states 'The acceptance of liability only has effect for the purposes of compensation provided in the draft bill.' Does this mean that if liability is excluded under the tobacco provisions a member could still receive incapacity payments for loss of earnings (termed economic loss) or is a member covered by the tobacco provisions totally excluded under the draft bill?

**Aggravation**

4. The last paragraph states 'Under the SRCA, only the incapacity for work caused by the aggravation is compensable..... The new scheme will adopt a similar approach..... Further drafting may be necessary.....' Why does the new scheme not compensate for lifestyle effects that may not be related to incapacity for work? What new drafting is necessary?

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**Part 3: When the MRCC is prevented from accepting liability....**

5. The first exclusion is serious defaults or wilful acts..... A wilful act includes an injury or disease that resulted from a person who consumed alcohol or took a drug improperly or was under the influence of the alcohol or drug. However this default does not apply if the injury or disease results in serious or permanent impairment. This raises a number of questions:

- What drugs are included in this category?
- Does this mean that someone who smoked marijuana or injected heroine and subsequently developed an injury or disease is entitled to full compensation benefits if they suffered a serious or permanent impairment but that someone whose disease or impairment was related to tobacco is not?

**Reasonable disciplinary Action.....**

6. Where a member's injury or disease resulted from reasonable disciplinary action or failure to obtain a promotion and resulted in a serious and permanent impairment does the protection of the above paragraph apply? (That is if the person suffered a serious or permanent impairment they would be covered for compensation.)

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## Tobacco

7. I have a number of concerns about the tobacco exclusion as follows:

- I generally accept that members whose only service is peacetime service are advised in the media that smoking is detrimental to their health. They are under no particular stresses or strains due to service and the proposed provisions in the draft bill are not unreasonable **provided** they are advised regularly in service that they will forfeit compensation benefits under this provision if their smoking results in an injury or disease.
- When members are on warlike or non-warlike service they can be under immense pressures and strains. We have to remember that warlike service can be vastly different to short and bloodless campaigns such as East Timor, Afghanistan and Iraq. Members can spend months or years on active service and this service takes its toll physically and psychologically especially for the young infantrymen and those who walk and fight with them. How are members expected to deal with this pressure? Tobacco is probably the lessor of evils yet the draft legislation penalises its use worse than any other drug. The authors of the new legislation have tried to apply modern compensation principles to the new scheme but have completely lost sight of the difficulties of war service.

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- The Narrative Guide suggests that 'the factors in the SOPs relevant to tobacco use will now be redundant.' I strongly disagree. The SOPs represent the best of medical-scientific knowledge relating to particular conditions. Since SOPs were introduced members have had to prove that they smoked so many packs of cigarettes for so many years to produce a particular disease. The onus of proof should now be reversed. The new Commission should now have to prove that a member has smoked so many packs of cigarettes over so many years if it is going to deny the member compensation benefits. The SOPs should be rewritten to place this onus on the new Commission.

8. The narrative Guide states that the tobacco provision merely flows on from the similar exclusion made in subsections 8(6) and 9(7) of the VEA that apply after 31 Dec 97. I will quote subsection 8(6) in full. Subsection 9 (7) is identical except that it substitutes injury or disease instead of death.

8(6) Despite subsection (1), the death of a veteran is taken not to have been war-caused if the veteran's death is related to the veteran's eligible war service **only** because:



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- (a) in the case of a veteran who had not smoked tobacco products before 1 January 1998 – the veteran used tobacco products after 31 December 1997; or
- (b) in the case of a veteran who had used tobacco products before 1 January 1998 – the veteran increased his use of tobacco products after 31 December 1997.

9. You will note that I have highlighted the word 'only' and this is the key to the difference between the VEA and the draft bill. In the VEA, where a veteran dies and smoking after 1 January 1998 is not the **only** cause of death (ie there may have been a number of contributing causes related to service) then the veteran's death can be accepted on the basis of one of the other service related causes. In the draft bill if smoking is one of a number of causes, the death cannot be accepted as war caused. The draft bill is much harsher than the VEA. Why is this so?

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10. I am also concerned about continuity between the VEA and the draft bill. Take the case of a veteran with warlike service dating before 1 January 1998 who is covered by the VEA and continues to serve after the introduction of the new scheme. The veteran smoked as a result of his pre 1998 war service and continues to smoke at the same level as pre 1998. Under the VEA his continued smoking after 1998 would count towards the number of pack years. However, once the new scheme comes into force all of his subsequent service is counted under the provisions of the new scheme. I am concerned that his continued smoking would no longer count after the introduction of the new scheme even though he acquired the habit before 1998. Thus, although he may have actually smoked for the required number of pack years to satisfy the VEA SOP, the pack years smoked under the MCRS would not count and he might not satisfy the VEA SOP. Please explain how such a veteran would be treated under the VEA and the MCRS.

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## **Rehabilitation**

### **Overview.**

11. If a person refuses or fails to undergo an examination..... payment of compensation will be suspended. My concern is the veteran with psychological problems who is likely to get very agitated and walk out. What protection is contemplated for such veterans?

### **Rehabilitation Authority**

12. My concern here is the term 'suitable work'. I believe this term should be defined in the draft bill. In the public service suitable work means work for which the person is qualified through education, training or experience. This definition might be a useful starting point. The draft bill should give some protection to disabled members to ensure they are offered or re-trained for reasonable 'suitable work'.

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## **Chapter 4 (Part 1) Compensation for Members and Former Members**

### **Permanent Impairment**

13. The GARP table currently being used by DVA will be changed in the draft bill. For 15 of the 24 shaded areas slightly greater benefits will be available under the new arrangements. What about the other nine? When will the revised GARP be available?

### **Date From which periodic compensation is payable**

14. Compensation commences on the later of the date of application or the date the problem stabilises. Under the VEA payment commences three months before the date on which the application is received by DVA. Why are the provisions of the draft bill less generous than the VEA?

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### **Maximum Amount of Compensation**

15. The narrative Guide states that the maximum amount of permanent impairment compensation payable as a fortnightly periodic payment will be \$466.14. The guide then goes on to say that 'The amounts are higher than those payable under either the VEA or the SRCA...' This statement is patently incorrect. The VEA provides for the most seriously disabled veterans, those with multiple amputations and or blindness to be paid a disability pension under S22 and in addition to have their pension increased by an amount specified in S27. Items 1-6 of the items listed at S27 provide for affected veterans to be paid a total amount not to exceed the rate of the special rate pension. There is no inability to work criteria attached to these payments so the total amount payable is for non-economic loss. The total amount payable for a veteran whose disabilities are listed in items 1-6 is currently \$758-60. Under the provisions contained in the draft bill such a veteran would be paid \$292.46 less than he would be paid under the VEA. I believe it is outrageous that the most seriously disabled veterans covered by the draft bill are to be treated far less generously than provided for under the VEA.

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### **Lump Sum Choice onwards**

16. The draft bill gives a reasonable explanation of the merits of the choice between periodic payments and lump sum compensation but only if you understand the terminology. I understand the provisions to be as follows. If you take a lump sum you are expected to invest it and only to draw down on the capital gradually over time. If you spend the lump sum, say on a house, instead of investing it, and subsequently apply for a disability service pension your service pension will be decreased because the lump sum will be treated as a deprived asset. The issue is simple; if you take a lump sum you are banking on dying soon or you are betting that you can get a better return from your investment than is payable had you taken the periodic payment. Very few of us have the financial skills to outperform the periodic payment. While the draft bill provides for free financial advice we have to remember that the people who give financial advice want you to take a lump sum so that they can invest it for you and get a commission on the earnings. What protection is envisaged to make sure disabled veterans get a balanced explanation?

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## **Chapter 4 (Parts 2 and 3) Incapacity Payments**

### **Serving Members**

17. Incapacity payments include provision for allowances that the member would have received but the service chief determines the duration for which the allowances component will be paid. What does this mean? It could be straightforward if, say, someone was posted to East Timor for six months, was injured after three, and had the East Timor allowances component continued for a further three months after injury. But what happens, say, to an NCO in the SAS whose posting is reasonably expected to be open ended and is injured? Would he lose his SAS allowances once he was posted out of the unit after being injured or would they continue? If continued, for how long? What principles would be involved, if any?

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**18.** There is a discrepancy in the calculation of incapacity payments between what is paid to regular soldiers and what is paid to reservists. Reservists have their civilian earnings taken into account and this protects the earning capacity of highly paid reservists like medical officers. Especially in wartime it is going to be the young infantryman who bears the brunt of the fighting and takes most of the casualties. These young men, in the main, have not had the opportunity to establish themselves in a civilian capacity and their likely wartime rank of private or corporal bears no reflection to their potential. Yet in assessing incapacity payments their potential and capacity for growth and improvement both within the services and in civilian life is not taken into account. Why is this so?

**Former Members post discharge**

**19.** The calculation is based on the former member's military earnings at time of discharge. What does this mean? Does it mean that if a soldier was earning a total of \$30,000 per annum at the time of discharge and ten years later applied for incapacity payments he would be paid a percentage of \$30,000? Or does it mean that because he was a level 4 corporal earning \$30,000 at time of discharge he would be paid a percentage of what a level 4 corporal is being paid at the time the former member applied for incapacity payments?



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20. What allowances are 'compensable salary-related allowances'? - see  
S122(5) of the draft bill.

### **Superannuation Payments**

21. The narrative states that incapacity payments will be offset by amounts  
received from government funded military superannuation. Yet S108 the draft  
bill states:

The amount of compensation that the Commonwealth is liable under s102, to  
pay for a week to a person:

(a) who has retired voluntarily, or is compulsorily retired, from his or her work:

and

(b) who receives either or both a pension or a lump sum under a

Commonwealth superannuation scheme as a result of the retirement:

is calculated in accordance with the following sections:

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22. Commonwealth superannuation scheme is defined in the draft bill as  
'...any superannuation scheme under which the Commonwealth makes  
contributions on behalf of its members.'

23. Clearly the draft bill is not referring to military superannuation as stated in  
the narrative guide rather it refers to all Commonwealth superannuation. The  
Clarke Review highlighted the anomaly which allowed so called 'double dipping'  
which was claiming invalidity superannuation payments and the special rate  
pension for the same condition. But the draft bill goes much further than that. It  
takes into account when assessing the amount of incapacity payments voluntary  
retirement (not enforced invalidity) superannuation from another scheme. What  
is the intention of the draft bill with regards to Commonwealth superannuation in  
relation to incapacity payments?

#### **Minimum Earnings Provision**

24. Service personnel are screened according to physical and psychological  
standards that mean they are assessed as being smart enough and capable  
enough to earn above the federal minimum wage. Indeed their military salary  
once they have qualified in a skill level or trade is well above the minimum wage.  
Why has the minimum normal weekly earnings for incapacity payments been set  
against the federal minimum wage?

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## **Chapter 7 Claims**

### **Claims made by serving members**

25. The requirement to advise the service chief when a serving member has made a claim will act as a disincentive to members who have suffered an injury or disease. Apart from the fact that is policy under the SRCA, why is it necessary? What makes it different, say, to a member who obtains treatment for a disability in service. The service doctor would not advise the member's commanding officer of the fact a member was receiving treatment so why the need when a member makes a claim?

## **Chapter 8 Reconsideration and Review of Determinations**

### **Overview**

26. Legal aid is administered by the Attorney-General but why is it only **assumed** that legal aid will be available to those with warlike and non-warlike service who follow the VRB/AAT route? Surely the draft bill could adopt a whole of government approach and negotiations could take place between the departments of Defence and Attorney-General. This is an important issue that should not be left as an assumption.

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**Decisions that are not capable of review**

27. Where an MRCC determination is made to change a VRB decision with the consent of the claimant prior to the AAT decision the claimant has no right of review. What safeguards are proposed that will ensure the claimant makes an informed decision of such importance. What protection will exist to prevent coercion in circumstances where the Commission gets to change the decision of an independent authority, the VRB? This seems to me to be a draconian provision.