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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Patron: His Excellency Major General Michael Jeffery AC CVO MC (Retd
Governor-General of the Commonwealth of Australia

RDFWA

Ref: 66.04
29 January 2004

The Secretary
Foreign Affairs, Defence & Trade References Committee
Parliament House
CANBERRA ACT 2600

Dear Sir,

Inquiry into
Military Rehabilitation and Compensation Bills (2003)

Submission by the Regular Defence Force Welfare Association

The attached submission on the above legislation is forwarded for consideration by the Senate Foreign Affairs, Defence and Trade References Committee.

While this Association has been closely involved in the development of this legislation through its membership of the DVA steering group, there are certain aspects which we consider need to be incorporated in the legislation in order to reflect the unique nature of military service.

Ever since 1917, nearly 100 years, the Australian community through their elected representatives at all levels of Government have recognised the special place of the 'returned soldier' within the community – in other words the Australian veteran, an Australian citizen who has volunteered to serve his country in war.

The Prime Minister has described this commitment 'as a job unlike any other'. And because it is a job unlike any other this should be reflected in the way the government provides for 'these special people' – a term used by both sides of politics. It has done so in the past, it should therefore do so in the future. Related to the idea of 'a job like no other' is the fact that it is a job primarily for fit and young people and consequently most military careers are short and are not a career for life – they go on to do other things, and other careers.

Accordingly we have suggested a number of amendments which we consider to be essential in order to reflect the near century old compact between the Australian community, the Government and the Australian serviceman/woman.

Firstly we consider the proposed Act should be retitled 'The Military and Veterans' Rehabilitation and Compensation Entitlement Act'. In agreeing this small but significant amendment it would reflect Parliament's acknowledgement of the fact that

Australian servicemen, because of what they are required to do, are entitled to a fair and just system of compensation. In similar vein we would like to see the term 'veteran' introduced into the legislative package and defined as a serviceman who has been deployed on warlike or non-warlike operations.

Members of our Council are available as required to meet with the Committee to expand on any points made in our submission.

Harold Adams

H.J.P. Adams AM
National President

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INQUIRY INTO THE MILITARY REHABILITATION AND COMPENSATION BILL 2003

SUBMISSION BY
THE REGULAR DEFENCE FORCE WELFARE ASSOCIATION

INTRODUCTION

1. RDFWA welcomes the opportunity to make a submission for the Committee's consideration as part of its inquiry into the MRC Bill 2003. The Association has taken an active and, we hope, constructive part in the consultative meetings between the Departments of Defence and Veterans' Affairs and the Ex-Service community. The consultative Working Party met on many occasions during 2001 and 2002. The RDFWA was represented at all but one of those meetings.

2. Though it would be seriously misleading to suggest that we achieved agreement on every point of contention throughout the consultative process, or that there do not remain some serious reservations about the contents of the Bill, we wish to record our appreciation of the spirit of cooperation and willingness to listen which the representatives of the two government departments, especially those from Veterans' Affairs, so often brought to the table.

3. There is ample evidence in the Bill that the consultative mechanism has had some effect. In several of its major features the influence of the Ex-Service organisations can be discerned. It is, however, a matter of regret that some major, and some seemingly minor, but important, matters have not been taken up by the drafters of the Bill, and remain of considerable concern to this Association and to the wider Ex-Service community.

General Remarks

4. RDFWA is disappointed to find that a number of general concerns that it put both in the consultative meetings and in its response to the Exposure Draft of the Bill have not been addressed. These concerns relate not just to its intangible spirit, or culture. They relate also to what we think is a serious gap in coverage and to an unnecessary, and in our view unjustly narrow, method of calculating compensation for incapacity for work or service for former members of the ADF.

5. We also wish to state in the strongest terms our outright opposition to the concept of using notional salaries, based on last achieved rank in the ADF, to calculate incapacity payments for retired members of the ADF who were not unfit for service when they voluntarily or were compulsorily retired from the ADF, but who later became incapacitated for civilian work as a result of a service - caused injury. We strongly deplore also the grossly misleading statements about this matter made in

the Explanatory Memorandum. We advocate most strongly a system of incapacity payments which actually delivers the outcome the Explanatory Memorandum says is achieved by the Bill (Clause 117) but which patently is not achieved.

SPECIFIC CONCERNS

Title of the Bill

6. In our view the Bill gives too little visibility to the concept of rehabilitation and compensation as an entitlement due to those who have rendered military service and who have thereby suffered loss. We believe the title of the Bill should incorporate the word 'Entitlements'. In our response to the Exposure Draft we suggested the title 'Military and Veterans' Rehabilitation and Compensation (Entitlements) Bill 2003'.

The Veteran

7. In the view of RDFWA, the Bill does not give sufficient visibility to the veteran as the first object and claimant on any scheme for Military compensation. The very simple, but profound and powerful idea of service to the nation rendered on the battlefield, principally by its young sons - the healthiest and, most vital of its citizens - and resulting in the sacrifice of life or limb, underpins the deeply felt response of the nation as a whole. The government enacts a compensation scheme not only because good governance requires it, but also as a response to the people's almost instinctive realisation that sacrifice on the battlefield creates a debt of gratitude, and an obligation in justice that they want to be paid. All governments (and parliaments) have recognised and acted on this truth.

8. In practice things are more prosaic and more complicated. All service in the Defence Force that results in the death or injury of one of its members merits access to a just, even generous, compensation scheme. But the fact remains that service in the face of the enemy is the archetype of military service, and this Bill consistently, and effectively, obscures it.

9. The draft Bill recognizes this truth, appropriately, in some of its provisions, but it does not emphasise in its spirit and culture the primacy due to the 'returned' veteran. We think the Bill should incorporate the following elements:

- **Permanently impaired** veterans with warlike/non-warlike service and more than 50 impairment points should be **categorised officially** as 'Disabled Veteran' in the Act

- **A badge or other material token** should be provided, and the Act should authorise it and establish entitlement to wear/use it.

- **Documents and other instruments** such as treatment and concession cards should be endorsed with an official device such as 'DV' or 'Disabled Veteran', and the Act should authorise its use. Disabled veterans with lower levels of permanent disability should be categorised appropriately perhaps as 'Active Service Veteran'.

Reasonable Expectation

10. RDFWA is disappointed to see that any recognition of a concept of reasonable expectation of advancement in rank in a military career for the purpose of calculating incapacity payments has been specifically excluded from the Bill by S 180. In our view this cannot be an exclusion based on principle, since there are numerous examples in Chapter 4 where postulated increases in ADF or

civilian pay are taken into account in calculating incapacity. Treatment of trainees for this purpose under S 189 is an example.

11. Recognition of the structured nature of a military career at certain stages, most notably for junior soldiers and officers, and appreciating the importance of the word 'reasonable', with its implication of the potential to impose conditions and safeguards, would have resulted in a fairer, more accurate compensation of loss.

12. Taking into account the almost bizarre treatment of former members of the ADF in calculating incapacity payments under Chapter 4 Part 4, the argument for reasonable expectation acquires even more force.

Compensation of Dependants

13. There is no provision in the Bill for compensation of dependants of ADF members who accompany them on postings overseas for Service reasons, and who are injured or contract disease endemic to the environment in which they are required to live, but not endemic to Australia. It is a matter of Defence Force policy that some postings abroad be 'accompanied'. Representative posts and long-term schooling are examples. In an unstable and dangerous world, there should be provision for compensation for family members who contribute to the successful accomplishment of the ADF mission overseas and who are adversely affected in the process.

Actuarial Tables

14. There does not appear to be any requirement in the draft Bill for current actuarial tables to be used when compensation payments are calculated. RDFWA is of the view that the Bill should require the use of current tables whenever actuarial tables are to be applied to military compensation.

Definitions

15. There is no definition, either at S5 or at Chap 3 Part 1 Divisions 2 and 3 of 'rehabilitation'. While the aim of rehabilitation is given at S38, there is no tool, by way of a definition, to allow both claimant and Rehabilitation Authority to have a clear appreciation of when it has been achieved. Bearing in mind some of the powers given to the Military Rehabilitation and Compensation Commission (MRCC) and to Service Chiefs in making judgments about 'rehabilitation' and the compulsory nature of 'Rehabilitation Programmes' (which are defined), we believe it would be highly desirable to include a definition in the Bill. It happens that there is a pretty good definition of rehabilitation, as applied to the Bill, in the Explanatory Memorandum, at clause 38. We suggest that this definition, which identifies three types of rehabilitation, be incorporated in the Bill.

Incapacity Payments to Former Members

16. It is in its provisions for determining incapacity payments to former members of the ADF that the Bill contains what is in our view its most serious flaw. It seems to us that in attempting to graft principles of workers' compensation legislation onto the circumstances of employment in the ADF, a serious anomaly has been created. We acknowledge that this anomaly is already enshrined in the SRCA (an Act not intended to apply exclusively, or even principally, to the ADF), but we see no reason why it should be perpetuated in a compensation entitlements Bill tailor made for the Defence Force. In our view, the Bill as a whole ought to reflect the real circumstances under which ADF members serve: in our view, the provisions of Chap 4 Part 4 Division 3 do not.

17. As the committee may well know, full - time membership of the ADF is part job, part occupation, part vocation, part career and part unalloyed selfless service. In different members, the parts are to be found in different proportions, but the sum of the parts is about the same in all. And the sum of the parts does not even approximate to any other profession or occupation. The legislation, therefore, should reflect this.

18. A Regular serviceman or woman accepts it as a given that he or she might cease membership of the ADF at some time in the future due to the requirements of the Service. He/she understands that there could be no choice in the matter. Even if all goes well, and there is no injury or disease that causes incapacity for service, separation will occur, either voluntarily or under compulsion. And it is axiomatic that no one, under any circumstances, will serve to the notional 'retiring age' of 65 years recognised by this Bill. It is therefore inherent in regular Service that at some time before the age of 65, nearly every former member will be employed in a post - service job or career, and a significant proportion of them will be doing so as a consequence of decisions made by the Commonwealth. In short, most former members will be performing civilian jobs and earning actual incomes from them. The jobs might, or might not, produce incomes that approximate to the former member's final ADF salary.

19. So, what has the Bill to say when incapacity for these jobs is caused by impairment resulting from injury or disease suffered or contracted during service, for which the Commonwealth has accepted liability, and which leads to inability to earn these incomes? The Bill creates the fiction that the income lost is not the one earned from the civilian job, but the one last earned while a member of the ADF - amazingly, called 'normal weekly earnings'. If the last income in the service was that of a Corporal, perhaps ten or fifteen years ago, and the former member is incapacitated for his/her current work as, say, a TAFE instructor, the Bill pretends that, for incapacity payment purposes he/she is incapacitated for service as a Corporal. This in spite of the fact that the Commonwealth cheerfully dispensed with his/her services as a Corporal all those years ago, and would not accept him/her as a Corporal again, even if he/she wanted it! The expectation appears to be that, having been a Corporal on his/her final ADF day, all he/she could achieve would be a job with something like a Corporal's pay, until the age of 65. The reality of his/her actual loss of earnings from his/her actual civilian job is totally ignored. Equally, a member who separates as, (say) a Brigadier, and is subsequently incapacitated for his job as a hotel doorman (a job he took after retirement as much to satisfy his love of a fetching uniform as his need for an income), his incapacity payments are based on his 'normal weekly earnings' as a Brigadier - roughly $2,000 - and not on his real normal weekly earnings of about $450 as a hotel doorman.

20. It does not even appear that the Bill requires a claimant actually to have been in work, or to be seeking work, for him/her to be entitled to receive incapacity payments. To be incapacitated for work seems to be the only criterion for eligibility. Thus there need be no actual loss of earnings at all. In these circumstances, calculations of notional loss based on notional earnings have some internal logic, while maintaining the most tenuous connection to reality.

21. In our view, underlying the principles that ought to govern incapacity payments to former members of the ADF who have lost income from civilian employment due to service injury or disease, is a question of justice. In any circumstances the veteran should not suffer detriment because of incapacity for which the Commonwealth has accepted liability. Where injustice is to be done to one individual by applying one method of calculation, then a principle of no detriment ought to be invoked. and an alternative method used. Where notional 'normal weekly earnings' (NWE) are greater than actual 'normal weekly earnings', then the method outlined in the Bill, as it clearly imposes no detriment, ought to be used. Where actual NWE lost are greater than the notional figure, the higher earnings lost should be compensated. Moreover, the Explanatory Memorandum is grossly misleading on this matter. The contents of Clause 117 are an unadorned miss-statement of fact. The third paragraph of Clause 132 is at best an attempt to saddle the language with a load that it clearly cannot bear.

Superannuation Offsetting

22. Leading logically from the entirely fictitious concept of 'normal weekly earnings' is the equally creative conception of military superannuation for retirement as income maintenance payments. If 'normal weekly earnings' really were the earnings as at the last week of ADF service, and if what was being compensated really were incapacity for service, and not incapacity for civilian work. then offsetting of retirement superannuation payments against incapacity payments would be perfectly just. This is exactly the state of affairs Clause 127 of the Explanatory Memorandum seeks to conjure. But, as we have attempted to show above. this can only be accepted if reality is consistently ignored. Military superannuation relates only to military service. It is the outcome of a mutually accepted obligation entered into by both the member and the Commonwealth. The member agrees to make a contribution (actually, it is compulsory), and so does the Commonwealth. At the end of an appropriate time, determined by the DFRDB or MSBS legislation, payments are made to the member, and the obligations of both sides are discharged. No restriction is placed on the former member as to employment that may be taken up, or income that may be earned. In no other way is the superannuation paid treated as 'income maintenance', and it has nothing to do with normal weekly earnings from post-service civilian employment. When those earnings are lost because of incapacity due to military service, incapacity payments should be based on real, as opposed to notional, earnings lost. Military Superannuation payment should be completely irrelevant to calculation of incapacity payments for lost civilian income.

Wholly Dependent Partner

23. RDFWA is concerned that the combined effect of S5, 15 and 17 of the Bill are confusing, and potentially inimical to the interests of both claimants and dependants. The prominence given to 'living with' as the proof of total dependency, both in the Bill and in the Explanatory Memorandum, tends to obscure the Bill's real purpose in addressing the entitlements of dependents. The definition given in S 5 seems clear enough, as does that given in S 15. But the provisions of S 17, and the language of the Explanatory Note at Clause 15 could be interpreted as establishing a 'living with' test as the principle on which total dependency is founded. Marriage and marriage-like relationships are well understood, are already enshrined in veterans' legislation (S 11A of the VEA) and carry less potential for confusion in the minds of claimants on the one hand, and for mistakes on the part of decision-makers on the other.

Eligible Young Persons

24. Our concerns in relation to eligible young persons are similar to those given above for wholly dependent partners. The emphasis given to 'living with', as the test for dependency, has the potential to deprive claimants of benefits to which they might actually be entitled. It could have the effect of drawing a decision-maker's attention to this aspect, to the neglect of other evidence of dependency. This is of particular concern when younger children are in the care of a custodial parent separated from the claimant, but economically dependent on him/her.

Impairment/Lifestyle Balance

25. S67 of the Bill empowers the Commission to determine the criteria to be used in determining the degree of impairment and the effect on lifestyle resulting from a service injury or disease. Clause 67 of the Explanatory Memorandum gives an account of how this will work. In the process it makes it clear that under this Bill the effects on lifestyle of injury or disease will be given very much less

weight than is the case of the VEA, from which the methodology has been derived (GARP). We believe that this will significantly reduce the value of the claimant's input to assessment of the amount of compensation in the one area where he is unquestionably expert: the effect on his lifestyle of his injury or illness.

26. By giving increased emphasis to impairment - a medical judgment - the process has been made more 'clinical' and, it is no doubt hoped, more objective. No matter how much objectivity eases the decision-maker's task, assessing compensation for injury or disease can never rely wholly on objective factors. In reducing the weight given to lifestyle, the new GARP proposals reduce the claimants' stake in the process of assembling evidence. Inevitably, confidence in the scheme as one in which claimants' interests and their needs are given fair weight will be reduced.

Written Notice of Suspension of Payments

27. The Bill provides for suspension of incapacity payments in certain circumstances. There does not appear to be any requirement for the MRCC formally to notify the recipient of its intention to do so, and to give an opportunity to the recipient to make representations before the suspension takes effect. RDFWA considers decisions to suspend payments to be very serious and urges that such provision should be in the Bill.

Original Determination / Reviewable Determination

28. In Chapter 8 the Bill introduces two concepts new to veterans' compensation legislation. S345 defines the terms 'Original Determination' and 'Reviewable Determination'. It requires considerable effort and imagination to grasp exactly what the definitions mean, but with the help of the Explanatory Memorandum, it appears that the distinguishing mark of a reviewable determination is that it can be reviewed by the AAT. An original determination can be reconsidered under a number of mechanisms, and still remain an original determination. What is absolutely clear in these murky provisions is that only an original determination can be reconsidered, and only an original determination can become, at some stage, a reviewable determination. Not all determinations are original determinations.

29. S345 (2) lists a number of determinations that are not original determinations. First listed are determinations suspending compensation under various sections of the Bill, for failure to comply with various requirements laid down. The sections listed are S50, 52, 329 and 397. S354 (2) then proceeds to allow application to the AAT for review of determinations under these very sections, thus identifying them as reviewable determinations, and creating a category of reviewable determination not covered by S345. Here the Explanatory Memorandum is again of absolutely no help as it states baldly at Clause 345 that that the determinations listed at 345(2) 'cannot be reviewed'.

30. As we indicated above, RDFWA considers determinations to suspend the payment of compensation rightly identified in the Bill as actions of last resort - as very serious. It should be absolutely clear in the Bill that there is a right to challenge them, and it should be very clear what action a veteran may take to do so.

Reconsideration by the Commission

31. RDFWA is anxious to preserve the flexibility afforded by S31 of the VEA in relation to reconsideration of determinations. In the VEA, S31 allows for reconsideration, at the Commission's discretion, of a determination at any point of the process before consideration by the Veterans' Review Board (VRB). This reconsideration may be at the instigation of the Commission, or it may be at the request of the claimant.

32. Under the Bill, a claimant with warlike/non-warlike service cannot request the Commission to reconsider an original determination if he has already made application to the VRB for a review [S349 (3)], although the Commission itself appears to have the power to initiate a reconsideration at any time before the Board hearing.

33. Experience with preparation of cases for presentation to the VRB under the VEA shows that, not infrequently during assembly of a case, evidence comes to hand that makes it highly likely that a S31 review, in the light of the new evidence, would result in granting of the claim. Thus it becomes possible for a case to be withdrawn from the Board's list, and a hearing obviated. This situation can come about under the VEA because the claimant can request a S31 review at any time. RDFWA believes that the Bill should contain a similar provision, making it unambiguously clear that at any time before a Board hearing, reconsideration by the Commission, at its discretion, may occur whether initiated by the Commission itself or at the request of the claimant.

Tax File Number Provisions

34. S412 deals with the requirement for those receiving compensation for incapacity for work to supply the Commission with his/her Tax File Number (TFN). S412 states clearly that it applies to those receiving compensation under Parts 3 and 4 of Chapter 4 of the Bill, and at Subsection (3) provides that a person who does not comply is not to be paid any compensation under Part 3 or 4 of Chapter 4 as long as he/she fails to comply.

35. Clause 412 of the Explanatory Memorandum, in its second paragraph, again states clearly that S412 applies only to those receiving compensation under Parts 3 & 4 of Chapter 4. Its third paragraph, however, states that as a consequence of failing to disclose a TFN a person will not receive 'compensation periodic payments or weekly incapacity payments' until the TFN is provided. Compensation periodic payments are payments made under Part 2 of Chapter 4 and, as it is drafted, cannot be withheld under S412. Nor should they be. Compensation periodic payments are not income, and are entirely free of tax.

36. RDFWA is satisfied with S412 as it is presently drafted, but we are uneasy about the wording of the Explanatory Memorandum, and not a little apprehensive lest it should point more accurately to the drafters' intention than the Bill itself. We would be opposed to any attempt to include compensation paid under Part 2 of Chapter 4 in the provisions of S412. Nor can we forbear to comment on the sanctimonious tone of both S412 and Clause 412 of the Explanatory Memorandum. Given the sanctions it has available to it under this section, to aver that the Commission cannot 'compel' the disclosure of a TFN is disingenuous.