Current issues in Australian military compensation law

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Recent years have seen an upswell in community dissatisfaction with existing military compensation arrangements, prompted to a large extent by the complexity of the legislative arrangements, major service delivery issues, and a growing recognition that military compensation needs a more holistic, 'wellbeing' approach if it is to meet the needs of veterans and their families.

This article follows from 'The History of Military Compensation Law in Australia' – a paper presented to the Veterans' Review Board's 2004 Veterans' Law Conference in July 2004, which was subsequently published in *AIAL Forum* in 2006.[1] The 2004 paper outlined the development of military compensation in Australia on a chronological basis from federation until 2004. This article is drawn directly from a more detailed paper, 'Military Compensation Law in Australia: 2004–2021', which was commissioned by the Royal Commission into Defence and Veteran Suicide and discussed in evidence before the royal commission by the writer on 5 April 2022.

The principal military compensation Acts and schemes

The *Military Rehabilitation and Compensation Act 2004* (Cth) ('MRCA') was intended to create a single military compensation scheme for injuries and diseases sustained by members of the Australian Defence Force ('ADF') in both operational service and peacetime service on and after 1 July 2004. The MRCA has achieved a single set of compensation entitlements going forward from 2004 in most cases. The objective, however, has been compromised by the fact that the previous two schemes (and the more than six Acts involved[2]) continue to apply in complex ways to injuries sustained before 1 July 2004. The predecessor legislation may also apply to new claims, aggravations and recurrences that manifest decades after the original injury.

Veterans' Entitlements Act 1986

The first bespoke Australian military compensation scheme was established during World War I, initially by the *War Pensions Act 1914* (Cth) and later as the *Repatriation Act 1920* (Cth). The *Veterans' Entitlements Act 1986* (Cth) ('VEA'), which commenced on 26 May 1986, was a consolidation of the various Repatriation Acts and associated legislation, and was the principal legislation which governed entitlements to pension or compensation for a service-related injury, disease or death occurring in operational service prior to 1 July 2004. The VEA also covered veterans who had full-time, peacetime service between 7 December

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1 Peter Sutherland, 'The History of Military Compensation Law in Australia', (2006) 50 AIAL Forum 39.

2 Including the *Veterans' Entitlements Act 1986*, *Commonwealth Employees' Compensation Act 1930*; *Compensation (Commonwealth Government Employees) Act 1971*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, *Defence Act 1903* and *Military Compensation Act 1994*.

1972 and 7 April 1994 and who elected to claim under the VEA, rather than under the schemes covering injuries to Australian Government employees (which also covered injuries in peacetime military service).

The Repatriation Commission has general oversight of the VEA scheme.

The VEA's large existing client base (upwards of 250,000 veterans and dependants) includes World War I widows, veterans and widows from World War II, the British Commonwealth Occupation Force, Korea, Malaya/Malaysia, the Indonesian Confrontation and South Vietnam, and veterans and dependants from the First Gulf War, Timor-Leste, Iraq, Afghanistan (before 2004), and various peacekeeping commitments.

Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988

The *Commonwealth Employees' Compensation Act 1948* (Cth) provided for the inclusion of ADF members and cadets within the coverage of the *Commonwealth Employees' Compensation Act 1930* (Cth) ('1930 Act') on 3 January 1949, in respect of injuries sustained in peacetime service. This scheme had provided workers compensation coverage for Commonwealth Government employees since 1930. The 1930 Act was replaced by the *Compensation (Commonwealth Government Employees) Act 1971* (Cth) ('1971 Act') on 1 September 1971, and the 1971 Act was itself replaced by the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRCA') on 1 December 1988. Part X of the SRCA included transitional provisions which preserved elements of the 1930 and 1971 Acts, including the more limited entitlement to permanent impairment compensation under the predecessor Acts.

The *Military Compensation Act 1994* ('MCA'), which commenced on 7 April 1994, established a new 'Military Compensation Scheme' and closed off future access to dual entitlements under the VEA and the SRCA, except for ADF members who had operational service. The MCA also made some other, not very significant, changes to the application of the SRCA to ADF members, including the extension of cover to holders of honorary rank, members of philanthropic organisations providing services to the ADF, and discharged members involved in approved post-discharge resettlement training. As a result of anomalies in levels of compensation which were made very public by the Black Hawk helicopter training accident, additional benefits for severely injured members of the ADF and for the families of members killed in compensable circumstances were provided by Defence Determinations made under the *Defence Act 1903* (Cth).

On 12 October 2017, an entirely new Act, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) ('DRCA'), was enacted as a mirror of the SRCA and replaced that Act in its entirety in respect of ADF members, ex-members and their dependants. The Military Rehabilitation and Compensation Commission ('MRCC') was given general oversight of the DRCA scheme. Whilst the DRCA applies only to injuries suffered before 1 July 2004, the Department of Veterans' Affairs ('DVA') is still receiving a substantial number of claims under the DRCA from former members of the ADF, including new claims for injuries said to have occurred in national service, recruit training or general service in the 1960s, 1970s and 1980s.

The additional compensation under the *Defence Act 1903* continues to form part of the overall DRCA compensation scheme and is paid in respect of injuries sustained after 10 June 1997 and before 1 July 2004.

At March 2021, DVA had 57,506 DRCA clients, with 909 open rehabilitation cases and 4,039 clients on White treatment cards. Expenditure in 2019–20 was $291.1 million on compensation and support and $42.6 million on health.[3]

Military Rehabilitation and Compensation Act 2004

The MRCA received royal assent on 27 April 2004, and ss 1 and 2 and ss 360 to 385 (ch 9) commenced on that date. The remaining provisions of the Act commenced on 1 July 2004, which was the substantive date of commencement of the Military Rehabilitation and Compensation Scheme. The MRCC has general oversight of the MRCA scheme.

The MRCA has a similar structure to the DRCA, but took many important elements from the VEA, including the use of treatment cards and its framework for acceptance of initial liability for service injuries and diseases. Importantly, this framework included the required causal link with service, the two standards of proof, and the use of statements of principles ('SOPs'). Compensation for incapacity and for permanent impairment, and provision for rehabilitation, were taken from the SRCA/DRCA. Compensation for medical treatment and review processes were drawn from both schemes, and other complex interactions exist such as a one-off choice to take a Special Rate Disability Pension ('SRDP') for life (which is similar to the VEA TPI special rate pension), instead of receiving compensation for permanent impairment and incapacity for work.[4]

The transitional arrangements for the MRCA, which were introduced by the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (Cth) and by amendments to the VEA and the SRCA, are complex and sometimes uncertain in effect. A significant amendment to the transitional provisions for permanent impairment compensation was made by the *Military Rehabilitation and Compensation Amendment Act 2014* (Cth), after a significant anomaly was identified by the Review of Military Compensation Arrangements in 2011.

Significant events in military compensation: 2004 to 2022

This section of the article briefly describes four significant events which have affected military compensation arrangements since 1 July 2004, when the MRCA scheme commenced.

2011: MRCA Review report

The Minister for Veterans' Affairs established the Review of Military Compensation Arrangements ('the MRCA Review') in 2009. The terms of reference for the review focused

3 Department of Veterans' Affairs, *Initial Background Paper to the Royal Commission into Defence and Veteran Suicide* (includes annexures A–M), 1 September 2021.

4 Department of Veterans' Affairs, 2011, *Review of Military Compensation Arrangements*, report to the Minister for Veterans' Affairs, February 2011 (MRCA review report), ch 4 pt 6.

on the operation to date of the *Military Rehabilitation and Compensation Act 2004,* but also called for a review of the legislative schemes that governed military compensation prior to the MRCA and any anomalies that existed; the level of medical and financial care provided to members of the ADF injured during peacetime service; the implications of a compassionate payment scheme for the families of deceased ADF members; and the suitability of access to military compensation schemes for members of the Australian Federal Police ('AFP').

The MRCA Review reported in 2011. It concluded that the broad policy principles underpinning military compensation arrangements were accepted by the defence and veteran communities and that they were sound (such as an increased focus on vocational and non-vocational rehabilitation, while ensuring an appropriate level of compensation for both economic and non-economic loss), and identified some areas for improvement.[5]

The review confirmed the need to recognise the unique nature of military service through compensation arrangements that were specific to the ADF. That consideration led to the recommendation that the MRCA should not be extended to include members of the AFP who had been deployed on high-risk overseas missions.

The review supported the overall effectiveness of the MRCA scheme, including the use of the SOPs to resolve causation issues when determining initial liability (in alignment with the VEA), and the stronger focus of the scheme on vocational, medical and psychosocial rehabilitation than existed under the VEA. The review recommended improved transition arrangements, and that the existing two review pathways be refined to a single review pathway of internal review, Veterans' Review Board ('VRB') review and Administrative Appeals Tribunal ('AAT') review, with active case management at all stages.

2017: The Constant Battle report

The Senate Foreign Affairs, Defence and Trade References Committee established an inquiry into veterans' issues in September 2016. The committee held five public hearings and issued its report, *The Constant Battle: Suicide by Veterans*, in August 2017 ('*Constant Battle* report').[6]

The committee examined the framework of military compensation arrangements and their administration 'through the lens of the issue of suicide by veterans', which highlighted 'the burden of legislative complexity and administrative hurdles on veterans who are often seeking support at a vulnerable period of their lives'. The committee's consideration was informed by a number of previous parliamentary inquiries touching on aspects of the terms of reference. The report had the following structure:

- Chapter 1 — Introduction;
- Chapter 2 — Background;
- Chapter 3 — Suicide by veterans;

5 Ibid, Chair's introduction, [8].
6 Joint Standing Committee on Foreign Affairs, Defence and Trade, 2017, *The Constant Battle: Suicide by Veterans*, August 2017 ('*Constant Battle* report').

- Chapter 4 — The legislative framework;
- Chapter 5 — Administration issues;
- Chapter 6 — Transition issues;
- Chapter 7 — Other related matters.

In ch 4, the report discussed recent proposed legislative reform, including the Bill for the DRCA; key issues concerning compensation arrangements, including benefit levels and the relative generosity of the schemes; complexity and inconsistency; non-liability health care, which received significant positive feedback during the inquiry; and support for a review, including of the Repatriation Medical Authority and the SOPs. In Recommendation 6, the report proposed a reference to the Productivity Commission to simplify the legislative framework of compensation and rehabilitation for service members and veterans.

2019: Productivity Commission report

In March 2018, the Australian Government issued terms of reference for an inquiry by the Productivity Commission into the system of compensation and rehabilitation for veterans (serving and ex-serving ADF members). The government asked for 'a comprehensive examination of how the current compensation and rehabilitation system operates and should operate into the future'. The commission's final report, *A Better Way to Support Veterans,* was submitted to the Treasurer on 27 June 2019.

In its final report, the Productivity Commission made a telling observation on the history of the military compensation system:

> History explains, in part, why we have the system we have today. Some features of the system can be traced back to World War I and its after effects — a time when life expectancy, the economic position of women, service members' pay and motivations for enlisting, and the extent of the mainstream health and welfare system, were very different to what they are today. Since then, governments have added new features, often in an ad hoc manner and/or in response to particular incidents or pressure from veterans' groups. While a number of the original rationales for elements of the scheme have faded, a political desire to avoid reducing entitlements has meant that governments have not taken opportunities to remove duplication and redundancy.[7]

The Productivity Commission discussed at length the complexity of the various military compensation schemes and proposed legislative reforms which commenced with the improvement and harmonisation of the existing schemes and worked towards a simpler overall legislative structure. The emphasis of the commission was on practical, equitable reforms to the legislation such as simplifying the range of payments available (for example, recs 14.1, 14.4 and 14.9), removing the MRCA SRDP (rec 14.7), more closely aligning the DRCA and the MRCA (rec 13.1), closing off superannuation invalidity pensions (rec 13.3), improving rehabilitation for invalidity payment recipients (rec 13.4), and creating a single review path. The commission suggested that the process of incremental reform might ultimately lead to the creation of two legislative schemes (rec 19.1).

7 Productivity Commission, *A Better Way to Support Veterans*, inquiry report no 93, 27 June 2019 ('Productivity Commission Final Report'), 11.

The interim government response to the report noted that the Productivity Commission's proposed changes were intended to improve the experience of veterans and their families engaging with the system, and to support improvements in their long-term wellbeing:

> However, some of the Commission's solutions risk substantial disruption and the loss of some gains already made. The Government believes that major reform of the system, particularly the legislative framework and entitlements of veterans and their families, should be carefully considered and incrementally implemented. Any such legislative reform would need to be the subject of considerable consultation and collaboration with the Defence and ex-service communities.[8]

2021: Royal Commission into Defence and Veteran Suicide

On 8 July 2021, the Governor-General signed letters patent for the Royal Commission into Defence and Veteran Suicide addressed to royal commissioners Mr Naguib Kaldas APM (Chair), the Honourable James Sholto Douglas QC and Dr Peggy Brown AO. The royal commission was directed to provide an interim report by 11 August 2022 and a final report by 15 June 2023 (later extended to 17 June 2024). In its terms of reference, the royal commission was required to enquire into the following matters:

a. systemic issues and any common themes among defence and veteran deaths by suicide, or defence members and veterans who have other lived experience of suicide behaviour or risk factors (including attempted or contemplated suicide, feelings of suicide or poor mental health outcomes);

b. a systemic analysis of the contributing risk factors relevant to defence and veteran death by suicide, including the possible contribution of pre-service, service (including training and deployments), transition, separation and post-service issues, such as the following …

c. the impact of culture within the ADF, the Department of Defence and the Department of Veterans' Affairs on defence members' and veterans' physical and mental wellbeing;

d. the role of non-government organisations, including ex-service organisations, in providing relevant services and support for defence members, veterans, their families and others;

e. protective and rehabilitative factors for defence members and veterans who have lived experience of suicide behaviour or risk factors;

f. any systemic issues in the current availability and effectiveness of support services for, and in the engagement with, families and others …

g. any systemic issues in the nature of defence members' and veterans' engagement with the Department of Defence, the Department of Veterans' Affairs or other Commonwealth, State or Territory government entities (including those acting on behalf of those entities) about support services, claims or entitlements relevant to defence and veteran deaths by suicide or relevant to defence members and veterans who have other lived experience of suicide behaviour or risk factors, including any systemic issues in engaging with multiple government entities;

h. the legislative and policy frameworks, administered by the Department of Defence, the Department of Veterans' Affairs and other Commonwealth, State or Territory government entities, relating to the support services, claims and entitlements referred to in paragraph (g);

8 Department of Veterans' Affairs, 2020, *Interim Government Response to the Report of the Productivity Commission 'A Better Way to Support Veterans'*, 8 October 2020, 4.

i. any systemic risk factors contributing to defence and veteran death by suicide, including the following:

   i. defence members' and veterans' social or family contexts;

   ii. housing or employment issues for defence members and veterans;

   iii. defence members' and veterans' economic and financial circumstances;

j. any matter reasonably incidental to a matter referred to in paragraphs (a) to (i) or that you believe is reasonably relevant to your inquiry.

The royal commission was also directed to have regard (inter alia) to the Productivity Commission *A Better Way to Support Veterans* inquiry (para (k)), the work of the interim National Commissioner for Defence and Veteran Suicide Prevention (para (l)), and veterans' support in other countries, particularly Canada, New Zealand, the United Kingdom, and the United States of America (para (m)).

Current issues in military compensation law

'War and peace': the operational environment facing the ADF

Past overseas deployments of the ADF have shaped military compensation in Australia: the legislative framework; entitlements; government administration and services; advocacy frameworks; and overall financial liabilities.

It is possible to draw sensible conclusions about some of those effects, and to strive for a more coherent system overall. Ultimately, however, the legislative framework and cost of military compensation in Australia will be shaped by our strategic environment in the era of terrorism, the invasion of the Ukraine, and the growing geopolitical importance of China. One thing that can be achieved is to increase government and community awareness of the cost of military compensation and to factor that cost (and desirable early remedial interventions) into our decisions to deploy the ADF. Perhaps this is a cogent argument for some form of notional premium for the ADF — an issue which was considered by the Productivity Commission in 2019 and which is currently in substantial contention.

The 2020 Australian Government Actuary report *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019* ('AGA Report')[9] made a relevant observation on the link between ADF deployments and consequent compensation liabilities:

> 3.1.3 One factor that is likely to have influenced recent experience is the relatively high level of deployments on warlike operations.
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> 3.1.4 When ADF units were deployed in East Timor in 1999, it marked the start of a period of relatively intense activity for the ADF, which subsequently saw forces deployed in Iraq, Afghanistan and the Solomon Islands. Overall, more than 50,000 people have been deployed on warlike/non-warlike service over the period. This may have created a large pool of people who may have a higher probability of making a successful claim and, where they do make a claim, may be eligible for higher benefits.

9 Australian Government Actuary, 2020, *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019*, 26 June 2020 ('AGA Report').

> 3.1.5 The availability of deployment opportunities has almost certainly altered the pattern of discharges over the last decade and a half. Both DVA and Defence have advised that discharge rates fall when there are opportunities for deployment. This is because there is both a very strong financial incentive (in the form of substantial tax free allowances) and because it is an opportunity for Defence personnel to make use of their training.

The AGA Report also noted that compensation liabilities may be affected by new or unusual conditions in the operational environment:

> 3.1.8 Exposure to hazards that may not have been recognised as dangerous at the time is a further factor in the operational environment. Asbestos is an obvious example that has impacted on DRCA expenditure. It is possible that currently unrecognised hazards will be identified in future and give rise to claims.

One example of a deployment raising novel compensation issues is Operation Bushfire Assist 2019–2020 in January 2020, in which up to 3,000 Australian Army reservists were called out to assist with firefighting and infrastructure support in the bushfires in south-eastern New South Wales and north-eastern Victoria.[10] It is likely that those reservists and civilian volunteers were exposed to unusually high levels of airborne contaminants and that, at least in the case of the reservists, many were not trained or properly equipped to cope with the hazardous circumstances encountered. Other recent peacetime operations of this nature have included:

- Operation COVID-19 Assist: ADF members who undertook a support role to the NSW Police Force during the Sydney lockdown in 2021 received an additional allowance under pt 12 of Defence Determination 2016/19, Conditions of Service. Item 1 in sch 1 to the Defence Determination, Conditions of Service Amendment (Operation COVID-19 Assist allowance) Determination 2022 (No 5) identified a risk of exposure to disease in the operation.

  This part provides an allowance to members who are force assigned to Operation COVID-19 Assist in Australia, recognising the increased risk of exposure to the COVID-19 virus and the disruption to usual working patterns, the uncertainty and duration of the commitment, and additional unique pressures faced while duties are being undertaken by members during the operation.

- Operation Tonga Assist 2022: HMAS *Adelaide* sailed to Tonga in February 2022 on a relief mission following the Hunga Tonga volcanic eruption and tsunami. At least 23 cases of COVID-19 were recorded among the crew. Given that most of those cases were contracted during the voyage of the naval vessel to Tonga, compensation entitlements are likely to arise from this deployment. The unanswered questions are how many and how severe.

- Operation Flood Assist 2022: The ADF supported the Queensland and New South Wales governments by providing personnel and equipment to assist flood-affected communities. ADF assistance included helicopter support, the use of Bushmaster and other high-clearance vehicles, debris removal, and large-scale clearance of flood-damaged waste.

10 Department of Defence, 2020, 'Australian Defence Force Reserve Call Out', advertisement, *Canberra Times*, 6 January 2020.

Those deployments, and other similar civil society commitments, suggest that the ADF may increasingly be called upon to provide support in civil emergencies. This role is not necessarily covered by current ADF training and, if it continues and expands, may skew training away from the key role of the ADF: the military defence of Australia. A bifurcated focus for the ADF could have significant implications for military compensation, particularly if ADF training, materiel, and work health and safety ('WHS') do not adapt to this new role.

While the impact on military compensation of this developing new civilian role for the ADF is uncertain, it is, at least, estimable and quantifiable. The impact on military compensation of major new ADF deployments overseas is, at best, a 'known unknown'.

Unravelling legislative complexity

Military compensation in Australia is delivered through three main schemes established under the *Veterans' Entitlements Act 1986*, the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, and the *Military Rehabilitation and Compensation Act 2004*. There are, however, many other federal Acts supplementing and modifying the three main compensation Acts, and three distinct military superannuation schemes also provide income support and lump sums for injured veterans.

The legislative provisions governing military compensation in Australia are undoubtedly complex. The complexity arises from the manner in which compensation schemes emerged from, and were affected by, the various deployments of the ADF overseas, and from the overall legislative approach that this is beneficial legislation in which no veteran should be worse off because of amendment to the legislation or reform of any element of the various schemes. Many reviews have commented on the legislative complexity over the years, but all the legislative developments in military compensation since 1918 have compounded the problem.

Complexity: The current military compensation schemes

The complexity of military compensation arrangements in Australia is demonstrated by features of the main legislative frameworks:

- There are three distinct legislative schemes — the VEA, the DRCA and the MRCA — with significant differences in legislative structure and content.
- The *VEA* was established, and has remained, as a pension-based scheme with no access to lump sums, and provides medical treatment through treatment cards. It covers active service by ADF members in overseas deployments and, after 1972, some veterans with peacetime service only.
- The *DRCA* was created from the three compensation schemes covering Australian Government employees: the *Commonwealth Employees' Compensation Act 1930*, the *Compensation (Commonwealth Government Employees) Act 1971* and its successor, the *Safety, Rehabilitation and Compensation Act 1988*. The DRCA has a conventional workers compensation framework; namely, incapacity payments until age 67, lump-sum payments for permanent impairment, a focus on rehabilitation and return to work, and (initially) compensation for medical treatment by reimbursement of treatment

costs incurred by the member. It primarily covers peacetime service by ADF members, but some veterans with operational service have a dual entitlement with the VEA.

- The *MRCA* is an amalgam of the VEA and the DRCA and covers all injuries and diseases suffered by ADF members after 1 July 2004. The MRCA follows the VEA in its provisions for determination of initial liability (causal contribution, use of SOPs and two standards of proof). It is similar to the DRCA in its adoption of a compensation model with incapacity payments, compensation for permanent impairment and a focus on rehabilitation, and in the general legislative structure of the scheme. The MRCA includes an irrevocable election to receive a VEA-style special rate pension rather than compensation payments.

- The three main schemes relate to each other in very complex ways, including dual entitlements under each of the schemes for many ADF members, amendments and transitional provisions which maintain 'grandfathered' entitlements, and lack of legal certainty as to which scheme applies in many cases.

- Amendments to resolve anomalies often lead to further perceived anomalies and reactive legislative responses to further pressures by interest groups.

- Attempts at alignment between the schemes have on occasions been modestly successful; however, alignment is sometimes achieved by adopting an approach in which the most favourable element of each scheme is adopted, even though the relevant entitlements are not comparable due to fundamental differences between the schemes.

While there are three main legislative schemes within the military compensation framework, as discussed above, there are in fact at least nine pieces of federal legislation with overlapping application to ADF members, including the:

- *Veterans' Entitlements Act 1986*, which successfully consolidated many previous Repatriation Acts in 1986, and covers injuries and disease suffered in active service since WW I, and peacetime service between 7 December 1972 and 7 April 1994;

- *Commonwealth Employees' Compensation Act 1930*, which covered injuries in peacetime between 3 January 1949 and 31 August 1971, and which has been continued in effect by pt X of the DRCA;

- *Compensation (Commonwealth Government Employees) Act 1971*, which covered peacetime service between 1 September 1971 and 30 November 1988, and which has been continued in effect by pt X of the DRCA;

- *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, which replaced the *Safety, Rehabilitation and Compensation Act 1988* on 12 October 2017, with retrospective effect from 1 December 1988; the DRCA covers peacetime injuries between 1 December 1988 and 30 June 2004, and operational service from 7 April 1994 to 30 June 2004;

- *Military Compensation Act 1994*, which established the 'Military Compensation Scheme' by modification of the SRCA/DRCA, and applies to injuries to ADF personnel between 7 April 1994 and 30 June 2004;

- *Defence Act 1903*: Defence Determinations made under the Defence Act provide additional compensation for death and severe injuries to ADF members covered by the DRCA/SRCA from 7 April 1994, and also provides a basis for ex gratia compensation payments to injured ADF members in special circumstances, including veterans (and dependants) who were injured in peacetime service before 1949;
- *Military Rehabilitation and Compensation Act 2004* and the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*, which established a military compensation scheme for injuries suffered in ADF service on and from 1 July 2004;
- *Australian Participants in British Nuclear Tests (Treatment) Act 2006* (Cth), which provided medical treatment for diseases suffered by Australian military and civilian personnel who were exposed to radiation in the British nuclear tests in Australia between 1952 and 1963; and
- *Treatment Benefits (Special Access) Act 2019* (Cth), which provided medical treatment for members of Australian civilian surgical and medical teams that provided medical aid, training and treatment to local Vietnamese people during the Vietnam War.

This list does not include the three main military superannuation schemes,[11] which also interact with military compensation and which involve offsetting arrangements between compensation and superannuation entitlements.

One way to unravel this complexity might be by careful legislative change towards a unified scheme that has a clear conceptual basis. Another way might be to scrap the present complex, intertwined legislative schemes and create a single new compensation Act for all veterans which is simple in structure and expression and which meets community and veterans' expectations.

Hidden jurisprudence

The interactions between all of this legislation are legally complex and, in many cases, are not clear even to lawyers, let alone ex-service organisation ('ESO') lay advocates. There are Federal Court and AAT cases which give guidance on some issues; however, much still remains uncertain because many cases which might test the legislation are resolved in private by the VRB, or are settled during the AAT review process. The reasoning in such cases is not made public, but hopefully informs future decision-making by DVA. There is, however, no opportunity for the legal profession or ESO advocates to gain this knowledge, except through the imperfect mechanism of the 'bush telegraph'.

One example of this hidden jurisprudence is the fact that a veteran who is in receipt of VEA entitlements is able to make a claim under the DRCA for the same injury and, if the claim is successful, DRCA benefits will be paid and offset against VEA entitlements. When a claim of this nature was made several years ago (by a legally represented veteran), DVA

11 *Defence Force Retirement and Death Benefits Act 1973* (Cth), *Military Superannuation and Benefits Act 1991* (Cth) and the *Australian Defence Force Superannuation Act 2015* (Cth). Note also the effect of the *Australian Defence Force Cover Act 2015* (Cth).

did not oppose it, and apparently similar claims are now routinely accepted by DVA. This development in military compensation legal practice remains unpublicised.

One new Act?

Many ESOs are frustrated with the complexity of the current schemes and their interactions. They are attracted by the 'one new Act' approach, but have no clear idea how this could be achieved and what should be done about the existing legacy of accrued rights and individual entitlements.

The 2021 *Preliminary Interim Report* by Commissioner Boss, the Interim National Commissioner for Defence and Veteran Suicide Prevention ('Boss Report') essentially suggested a new Act approach, but the report's focus was on how to achieve a wellbeing model, rather than how to implement radical legislative change, as the following recommendation illustrates:

> **Recommendation 4.1**
>
> The Australian Government should fundamentally reconsider the purpose of the Department of Veterans' Affairs (DVA) rehabilitation and compensation legislative framework. The current framework, which is premised on a compensation model, should be replaced with a wellbeing model, which incorporates concepts of social insurance more aligned with the National Disability Insurance Scheme. This model should include safety net access to payments.[12]

The report's suggestion for a move from a compensation model to a wellbeing model, which incorporates concepts of social insurance as illustrated by the National Disability Insurance Scheme ('NDIS'), is, in my opinion, not practicable:

- The social insurance model of the NDIS was created out of a disparate range of disability services in which disabled Australians had very few accrued rights or legal entitlements (apart from discrimination law). The services they previously received often were not legal entitlements; they were simply an unfair and inadequate collection of discretionary government services and charitable provision. The NDIS started from (almost) a clean slate and did not engage a client base of more than 1 million Australian veterans, each of whom has an existing legal right to compensation payments, treatment cards, rehabilitation services, etc, and many of whom may, under the existing systems, have the right to make claims for additional entitlements for up to another 60 years.
- Even though the NDIS is in its early days, tensions are already emerging around the costs of the scheme, the quality and sensitivity of its administration, and problems in its review processes. Similar problems may quickly beset a veterans' social insurance scheme.

However, a wellbeing approach is not fundamentally inconsistent with a compensation model. A compensation model can deliver high-quality health and financial benefits, but that can be difficult to achieve due to factors such as the cost of the benefits under the scheme,

12 Interim National Commissioner for Defence and Veteran Suicide Prevention, 2021, *Preliminary Interim Report*, Commonwealth of Australia, 2021 ('Boss Report').

resentment by clients who are refused assistance because they do not meet liability or severity of injury criteria, administrative shortcomings, and accessibility problems.

Two legislative schemes — the Productivity Commission approach

The Productivity Commission, in its 2019 *A Better Way to Support Veterans* final report, proposed a conceptual basis for a reformed military compensation system: maintaining the VEA for its existing client base until that cohort reaches end-of-life (Scheme 1); improving the MRCA legislation and bringing the DRCA into alignment with the MRCA over time (Scheme 2); and recommendations to transition existing scheme members into the two new schemes, which would commence in 2025 (Recommendation 19.1).

This is an approach which I think may be achievable. It would, however, definitely face major challenges such as costs, maintaining reasonable equity while withstanding pressure by interest groups for 'more' and 'no one should be worse off', and drafting legislative amendments which navigate the shoals of accrued rights and withstand the impact of determined litigation. The long-term viability of our military compensation arrangements is likely to depend on successfully steering such a course.

Scheme 1 (the VEA) — Reducing the longevity of this residual scheme

In 2019, the Productivity Commission recommended that the VEA be continued in effect as a stand-alone military compensation scheme (Scheme 1) for existing members of the VEA scheme. It commented on the basis for maintaining Scheme 1 and how to offer choice to join Scheme 2:

- As noted earlier, Scheme 2 is the scheme better suited for the modern veteran, and it would be desirable to transfer veterans to this scheme where there would be no detriment to the veteran.
- There are unlikely to be benefits from switching older veterans to Scheme 2. It is expected that these veterans will be better off on the lifetime pension provided by Scheme 1, and are unlikely to benefit from the rehabilitation focus of Scheme 2. Veterans older than 55 years of age when the change is implemented who have been allocated to Scheme 1 should have all their future claims processed under this scheme, with no option to switch.
- However, younger veterans *may* be better off with the rehabilitation and income replacement focus of Scheme 2. Veterans 55 years of age or younger at the implementation date should be given the option to switch to Scheme 2 prior to, or at the time of, their next claim. If they elect to switch, the current benefits they are receiving would be recalculated based on Scheme 2, and all future claims would go through Scheme 2. They would receive support to help them make this decision, but the decision would be irrevocable.
- Most veterans receiving benefits under the VEA will be over 55 at the implementation date. About 4000 veterans receiving a VEA disability pension in December 2017 will be under 55 in 2025, and this is expected to decline over time. Offering financial advice and processing requests to switch schemes for this group should therefore be manageable.[13]

13 Productivity Commission Final Report (n 7) 830.

Under this scenario, Scheme 1 will continue in effect until at least the 2080s because it will cover the widow/ers of VEA special rate pensioners, who may not yet have been born. This is illustrated by the pension scheme for United States Civil War veterans, which lost its last pensioner in 2020 when Irene Triplett died.[14] She was the daughter of a Civil War veteran who married at 80 in 1924, and she lived until 90 years of age. She was receiving a pension of US$73.30 a month from the US federal Department of Veterans Affairs at the time of her death. The last remaining widow of a Civil War veteran is believed to have died in 2021, having married a 93-year-old veteran in 1936 at the age of 17.[15] She did not ever seek a pension under the US Government scheme. The VEA might not show the same extreme longevity as the US Civil War scheme, but it will last for at least 60 more years if not curtailed.

In order to achieve an earlier closure of Scheme 1, two actions could be considered:

- moving the younger cohort of VEA veterans to Scheme 2 on a compulsory basis, rather than an optional election basis; and
- from the date of the amending legislation, closing access to VEA pension entitlements and treatment entitlements for widows and widowers who were not married to, or in a domestic partnership with, the veteran at the time of the compensable injury (or possibly the date of grant of special rate pension).

These options may affect accrued rights and would affect expectations of future entitlements. However, there probably would not be an acquisition of property in constitutional terms, and the changes could be found to be legally valid as an alteration to statutory entitlements. I suggest that the movement of the younger cohort into Scheme 2 could be beneficial for many of them, particularly if the transfer was well constructed, with more 'carrots' than 'sticks'. In addition, an earlier closure of Scheme 1 would reduce overall complexity in the military compensation system and should reduce the frictions that arise when particular groups in the community have differing sets of entitlements, without a clear and equitable basis for that differentiation.

Improving Scheme 2 (the MRCA) — Incapacity provisions

One area for early legislative attention should be the incapacity compensation provisions in MRCA ch 4, pts 3, 4 and 5. These provisions are greatly 'over drafted', taking 90 pages and more than 110 sections to provide entitlement to compensation for incapacity. This must be contrasted with the 18 pages and 17 sections covering incapacity payments in the *Safety, Rehabilitation and Compensation Act 1988*, upon which the MRCA provisions were based. The major drafting problems are length and unnecessary complexity, which occurred because the MRCA sections attempted to legislate in 2004 what was essentially detailed policy created by the Military Compensation and Rehabilitation Service within Defence for the administration of incapacity entitlements (particularly in relation to reservists). Those provisions in the MRCA could have repetition removed and could be refined to express essential principles rather than exhaustively legislate processing steps.

14 Martin Pengelly, 'Irene Triplett, last person to collect an American civil war pension, dies at 90', *The Guardian*, 7 June 2020 < https://www.theguardian.com/us-news/2020/jun/07/irene-triplett-last-person-american-civil-war-pension-dies>.

15 'Woman believed to be last remaining widow of US civil war soldier dies', *Associated Press*, 9 June 2021.

A further issue arising in relation to MRCA incapacity payments is that, in my opinion,[16] the level of payment is too generous after 45 weeks of incapacity. This is probably a disincentive to return to work by injured members after discharge from the ADF — an outcome which is fundamental to the future wellbeing of those members who still have capacity for paid employment. One contributor to this problem is the additional amount added to incapacity payments under MRCA ss 104(1), 109(1), 141(1), 144(1), 164(1) and 168(1), which was set at $100 per week in 2004 and is now $178.11 per week. The conceptual basis for this payment was compensation for the loss of non-pay-related allowances; however, in the MRCA, the Service Allowance is added to normal earnings for the calculation of incapacity compensation for full-time members, and this allowance is intended to compensate for the rigours of service life. I suspect that the additional amount was one of the compromises between DVA and stakeholders to get the new 2004 Act 'over the line'. Perhaps the removal of this additional payment could be compensated by introducing superannuation guarantee payments on top of MRCA incapacity payments to ensure that seriously injured members have superannuation savings when their incapacity benefits cease at pension age.

Improving Scheme 2 (the MRCA) — Review of decisions

A right of appeal has existed in veterans' legislation since 1915, and the first external appeal tribunals were established in 1929. From the 1930s, a three-tier system existed for some 40 years: (i) Repatriation Boards; (ii) the Repatriation Commission; and (iii) appeal tribunals for entitlement and assessment. Following the Toose Report in 1975,[17] the Repatriation Review Tribunal was established, with a right of further review by the AAT. In 1985, the Repatriation Review Tribunal was replaced by the VRB.[18] An entirely different review system emerged for the SRCA: reconsideration by a more senior internal review officer within the determining authority, and a right to merits review by the AAT.

Initially, the MRCA offered both appeal paths (possibly reflecting the compromises necessary to achieve the MRCA); however, a single review path was recommended by the MRCA Review in 2011 and was finally implemented in 2017: (i) internal review on own motion by the MRCC or the Chief of the Defence Force (s 347), but no right for a claimant to require internal review; (ii) merits review by the VRB, including an enhanced case-management and ADR process; and (iii) AAT merits review, which includes case-management and settlement processes before a formal hearing process.

The DRCA continues to provide the review process which has been in operation since the commencement of the SRCA: (i) reconsideration of decisions by a person other than the original decision-maker (s 62); (ii) merits review by the AAT (s 64), with the applicant able to receive legal costs if the application for review is successful (s 67); and (iii) an appeal from the AAT to the Federal Court on matters of law or by judicial review.

16 An opinion which I expressed in the deliberations of the Review of Military Compensation Arrangements in 2011, as the Legal Member of the steering committee for the review.

17 PB Toose, *Report of the Independent Enquiry into the Repatriation System*, Australian Government Publishing Service, Canberra, 1975 ('Toose Report').

18 MRCA Review report (n 4) 222–223.

Over the life of the MRCA, there have been surprisingly few concluded decisions by the AAT on that Act: 20 between 2007 and 2011; 27 between 2012 and 2016; 30 between 2017 and 2021; and two in the first six months of 2022. This can be contrasted with the SRCA/DRCA, where the Military Compensation and Rehabilitation Service and later the MRCC have been very active and assertive litigants in the AAT in the compensation jurisdiction. The number of concluded AAT decisions on the DRCA has, however, significantly reduced in the past two years, numbering 11 in 2020, seven in 2021 and two in the first six months of 2022. This is probably because of a higher rate of settlement at the VRB and the AAT, and a less litigious approach by the MRCC.

There are many sensitivities in relation to reviews of military compensation decisions, including the role and operation of the VRB, how to support informed advocacy, the existence of different review arrangements for each of the main schemes, and the alleged adversarial approach taken by the DVA. It is beyond the scope of this article to attempt to resolve those contradictory currents; however, several observations are apposite:

- If the Productivity Commission's proposal for a two-scheme solution to legislative complexity is adopted, it may be desirable to accept that the review arrangements for each scheme could be different. It may be preferable to continue the review arrangements for Scheme 1 (the VEA) more or less as is, adopting any improvements that have wide support from stakeholders.

- The review arrangements for Scheme 2 (an improved MRCA, including the DRCA) should be developed with a view to best practice, but taking into account unique features of military compensation and the history of review in that jurisdiction. In my opinion, this would involve: (i) an internal review of the original decision which is conducted expeditiously, and which provides (inter alia) the basis for written submissions by the MRCC to the VRB; (ii) review by the VRB, building upon its strengths and improving upon any current weaknesses; and (iii) merits review by the AAT, with a mechanism for support of informed advocacy funded by the Australian Government (perhaps through the community legal centre / legal aid area of the Attorney-General's Department, rather than directly from DVA).

- The recent reduction in the number of AAT reviews going to a final hearing suggests that the DVA (through the Repatriation Commission and the MRCC) is adopting a less litigious approach to reviews of military compensation decisions. It is important, however, that test cases and claims that have no merit continue to be taken by the DVA to the AAT. Without this, there is no accessible jurisprudence and a consequent lessening of accountability. An appropriate balance needs to be struck between each individual's understandable desire for a positive outcome of their application for review and the overall integrity of the scheme, which relies on a fair application of known rules to the whole of the veteran community. Any adversarial attitudes by the department's advocates should be addressed by reinforcing a positive, veteran-centric culture and by ensuring that those advocates are well trained and well supported. This would be in line with the Model Litigant Policy (Cth) under the *Legal Services Direction 2017* (Cth) Appendix B.

- In my opinion, it would also be desirable to avoid briefing out AAT matters to private lawyers in a 'panel' system. In whatever manner those firms are briefed, it is in the nature of their business to 'win', and to value, justify and price their work within that cultural framework. This is the opposite of what the DVA should be seeking to achieve. Briefing to external firms may be necessary in appeals to the Federal Court, because of the specialist skills required in that field of litigation.

Service delivery for ADF members, veterans and their families

DVA administration

The consensus of reports since 2017, commencing with the *Constant Battle* report by the Joint Standing Committee on Foreign Affairs, Defence and Trade, is that DVA has fallen short in its administration of the military compensation system. I think that this must be balanced against the failures of the ADF in transition management and in WHS (for example, the entrenched culture of bullying, and difficulties in addressing sexual harassment), the delays by the Commonwealth Superannuation Commission ('CSC') in meeting its superannuation determination obligations, and the disinclination of the Department of Finance to fund necessary reforms in DVA administration, including a long overdue replacement of its claims-processing information technology ('IT').

A pathway out of these problems is emerging, and it is important to pursue administrative reforms with vigour, and in consultation with the ex-service community and other stakeholders. In turn, ESOs need to be demanding of change, but realistic about the fact that DVA has a responsibility to be fair and to act in the broader community interest, which at times is not necessarily compatible with the personal interests of individual veterans.

In particular, I suggest that the three major paths to administrative reform are improved transition from ADF to civilian life, expeditious claims processing, and improved communication with clients. This would provide a solid foundation for other, veteran-centric, reforms and should contribute to the prevention of suicide by ADF and ex-serving members.

Veteran-centric reform

Veteran-centric reform ('VCR'), initiated by the DVA, attracted an interesting comment in the 2020 AGA Report on its effect on the rate of permanent impairment claims:

> 10.1.8 The administrative changes made within DVA have increased the accessibility of services and benefits to the veteran community and policy initiatives such as Veteran Centric Reform have encouraged veterans to claim early for DVA benefits and increased awareness of these benefits amongst existing ADF members and the veteran population. This may have a short term effect in bringing forward claimants who may otherwise have claimed for a benefit in later years and captured existing veterans who may have faced barriers to claiming in previous years. The exact impact of these changes will not be known for a number of years and there is currently not enough data to help determine what the magnitude or length of the impact could be.[19]

19 Australian Government Actuary, 2020, *Actuarial Investigation into the Costs of Military Compensation as at 30 June 2019*, 26 June 2020 ('AGA report').

The VCR also received an endorsement by the Commonwealth Ombudsman in 2022:

> DVA has been implementing a Veteran Centric Reform (VCR) program since 2017 to deliver on the Government's vision for improved service delivery, person-centred design, and digital transformation. One of the main initiatives under the VCR program is to improve services for veterans and their families through better claims processing. Good communication with veterans is essential to this initiative. In particular, good communication through the provision of clear and regular information to veterans throughout the claim process can help to manage veterans' expectations and reduce feelings of uncertainty, anxiety or frustration while waiting for their claim to be assessed …
>
> Our investigation did not identify any significant concerns about DVA's policy and procedural framework for managing communication with veterans during the claim process. We observed that DVA's policy and procedural framework is relatively mature, and DVA is progressing several positive initiatives to further improve its approach to service delivery, including better communication with veterans throughout the claim process.
>
> We acknowledge that DVA is currently implementing some initiatives as part of the VCR program and this is likely to further improve DVA's approach to communicating with veterans …[20]

I concur with the strong community support for veteran-centric reform identified by the Senate Committee in the *Constant Battle* report.

Transition management

Progress has been made in relation to one important matter — transition from the ADF into civilian life — which was the subject of considerable discussion and recommendations by the 2011 MRCA Review,[21] the 2017 the *Constant Battle* report,[22] the 2019 Productivity Commission final report),[23] and the 2021 Boss Report.[24]

The Joint Transition Authority ('JTA') was established in October 2020. It sits within the Department of Defence and works in partnership with the DVA and the CSC. The JTA conducted a JTA Consultation Forum in September 2021 and is working on a transition strategy for publication in the first quarter of 2022. The early priorities of the JTA are stated to be the collection, analysis and sharing of transition data; collection and analysis of insights in a JTA Insights Register; development of a single ADF *Transition Manual* to unify the approach to transition across the three services; a review of separation health examination ('SHE') procedures; operational improvements in transition in each service, for example with the Royal Australian Navy to improve the process for personnel transition while posted to operational units at sea; and identification of, and prioritisation of support for, vulnerable transitioning members.[25]

There is little doubt that improved transition arrangements will have a positive impact on the military compensation system.

20 Commonwealth Ombudsman, 2022, *The Department of Veterans' Affairs communication with veterans making claims for compensation*, report 01/2022, January 2022, 1.
21 MRCA Review report (n 4) ch 7, recs 7.1–7.11.
22 *Constant Battle* report (n 6) ch 6, recs 14–19.
23 Productivity Commission Final Report (n 7) ch 7, recs 7.1–7.3
24 Boss Report (n 12) ch 7.
25 Department of Defence, *Joint Transition Authority Annual Progress Report*, 2021.

A financial time bomb is ticking!

The financing of veterans' entitlements and military compensation in Australia has features which lead to opaqueness in the cost of the system to the Australian community. They include the following:

- Appropriations for the costs of compensation are built into the entitling legislation. This means that scheme administrators cannot control or modify benefit expenditures except through legislative change which reduces either the quantum of individual benefit levels or the number of veterans who can access an entitlement.
- Necessarily, reductions in benefit levels or reductions in access are politically difficult, as financial support for veterans has wide and non-partisan community support. When changes to legislation are considered, the political reality is that the change will often be achieved only if a guarantee is given that no individual will be worse off. This approach militates against a reduction in expenditures, even if the measure has a strong justification.
- The administrative cost of benefit delivery through the DVA and Defence is subject to annual Budget processes. The outcomes of those processes can be arbitrary, as they are usually focused on the administrative cost and not on the increased cost of benefits which may occur because of inadequate administration. Arguably, an example of this was the repeated failure of DVA Budget bids after 2010 for the costs of a new, integrated, claims-processing IT system, until the furore surrounding the *Constant Battle* report highlighted the human and financial cost of delays and inadequacies in claims processing.
- The financial cost to the community of veterans' entitlements and military compensation is poorly recorded and poorly understood. In particular, it is difficult to establish the financial linkage between ADF actions (for example, deployments, and cultural failures such as bullying) and the ultimate long-term cost to the Australian community of those actions. This has been one impetus for the consideration of a 'notional premium' for ADF employment in successive reviews, including the 2011 MRCA Review and the 2019 Productivity Commission Final Report.

The 2020 report by the Australian Government Actuary, *The Costs of Military Compensation as at 30 June 2019*, is an informative window into the costs of the military compensation system, and a frightening prospect of future cost escalation.

The AGA Report considered only military compensation (DRCA and MRCA) and did not consider veterans' entitlements under the VEA. At present, the costs of VEA veterans' entitlements are high, particularly in respect of age-related health costs; however, this group is essentially closed and largely comprises widows from all conflicts up to Vietnam and a rapidly decreasing group of WW II and Korean War veterans. The future cost pressures in veterans' entitlements are more uncertain for two other groups of veterans: those who served in Vietnam and now are almost all past pension age; and veterans who served in operational areas prior to 1 July 2004 (for example, peacekeeping, the First Gulf War, Timor-Leste and Iraq) and have a dual entitlement under the VEA and the DRCA.

The AGA Report at tables 19.8 and 19.9 sets out estimates of a notional military compensation premium for 2019–20 for the ADF of $2,333.6 million,[26] compared with a notional premium of $1,448 million at the previous valuation. This premium amount translates to a notional insurance premium of 37.2 per cent of ADF salaries: 56.5 per cent for the Army, 21.5 per cent for the Navy, and 16.7 per cent for the Air Force.

An upward trend in military compensation liabilities is marked. The AGA Report at Table 1.2 estimated an outstanding claims liability at 30 June 2019 of $19,689.1 million, compared with an estimated liability at 30 June 2018 of $14,426.8 million in the previous actuarial report.[27] That increase was partly due to changed assumptions and partly due to increased compensation costs. The report also observed that MRCA permanent impairment claims increased more than ninefold over the past six years, and doubled year on year from 2017 to 2019 (from $200 million to $750 million), driven by an increase in both the average size of claim payments and the number of claimants.[28]

Throughout the whole of the AGA Report there is a story of increasing compensation costs in recent years. The military compensation cost-escalation picture between 2004 and 2010 was relatively reassuring, as the MRCA showed a relatively low level of take-up, particularly in the first few years of the new scheme. However, that is now changing, and both DRCA and MRCA benefit costs are increasing rapidly in both incapacity payments and compensation for permanent impairment. The report discusses the causes of that increase:

> 1.5.4 While the increase of $4.4bn in the estimate of the liability as at 30 June 2019 is substantial, it is my best estimate having regard to current experience; that is, I have not been intentionally conservative. The increase in the liability has been primarily driven by:
>
> - An increase in the number of medical recipients
> - An increase in the utilisation and average cost of medical benefits
> - An increase in the number of claimants in incapacity
> - An increase in the number of claimants and average size of benefits for permanent impairment.

26 This premium estimate is affected by the exclusion of Defence liabilities for the Additional Death Benefit, the Severe Injury Adjustment and common law claims. It is also understated because other uncertainties, including, for example, the near impossibility of ascertaining the potential liability arising from the provisions in the MRCA that entitle all veterans who have rendered warlike service on or after 1 July 2004 to a Gold Card at age 70. This liability will commence in around 10 years, but significant numbers are unlikely for another 30 years or so. AGA Report (n 9) [12.1.10].

27 This estimate of total liabilities does not include the liability in relation to additional benefits payable on death and severe injury under the *Defence Act 2003*, as those costs are borne by Defence and not by DVA (see AGA Report (n 9) [1.2.2]). This has the effect of understating the DRCA liability, but does not affect the MRCA liability as these enhanced benefit levels are incorporated into the MRCA. The report also notes, at [2.4.3], that the estimates do not include liabilities arising from common law claims against Defence, which include asbestos liabilities and common law actions by surviving spouses of common law plaintiffs, who were themselves barred from actions for damages by s 44 SRCA and s 388 MRCA.

28 AGA Report (n 9) [10.2.1].

The AGA Report makes a sobering comment on future trends:

> 2.2.1 Figure 2.1 shows total outlays on the MCS since 1996–97. Prior to 2004, expenditure had grown at a steady but moderate pace, averaging around 5 per cent per annum. The introduction of MRCA from 1 July 2004 led to a significant disruption in experience with an initial drop in outlays followed by a return to growth. Experience from 2012 accelerated at a much higher rate than had been seen previously in the scheme. From 2012 to 2019, outlays increased at a rate of 25 per cent per annum with an even more significant shift in experience over the last 4 years. Growth from 2015 to 2019 has been extremely rapid, increasing year on year to a 61 per cent increase from 2018 to 2019.
>
> 2.2.2 There are a number of possible interpretations of this data. An earlier view was that the growth from 2011 to 2015 was, in part, compensating for the very low growth in the years after the introduction of MRCA. However the more rapid increase in recent years challenges this view. Whilst there are differences in the benefits provided under MRCA, there has also been changes in the environment in which the schemes operate, including changing attitudes and modifications to DVA administrative practices. It now seems more likely that the most recent experience is part of the schemes transition to a 'new normal' that could be expected to persist indefinitely into the future. This latter interpretation would imply that the behaviour of MRCA claimants is fundamentally different from that observed for DRCA claimants prior to the scheme's closure. This 'new normal' that we have seen in recent experience is still changing year on year and currently far from a stable, mature state. As such, there is considerable uncertainty when interpreting this experience for long term future projections.
>
> 2.2.3 Continued increases in recent experience has led us to believe that we are not dealing with a temporary anomaly but rather a genuine shift in experience that needs to be taken into account in setting valuation assumptions. The change from a regime where claims could be made under either the DRCA or the VEA to one where all claims must come through the MRCA is likely to be playing some part, but so is the introduction of the single claim process, the availability of online claim facilities and the increasing involvement of ex-service organisations in supporting veterans' claims under DRCA and MRCA. The deviation of experience from pre-DRCA closure has persisted into the most recent year and has exhibited the highest difference seen to date.

The DVA claims that processing delay is a relevant factor in the cash-flow projections for the DRCA and MRCA, discussed in relation to Figure 1.3 of the AGA Report:

> 1.4.2 The cashflows have increased from the previous valuation, most noticeably from 2020–21 onwards. This step change is due to additional growth projected to account for the current rate of lodged permanent impairment claims and the existing backlog of unprocessed claims. It is important to note that there is substantial uncertainty as to the timing and magnitude of this impact as it is partially subject to processing constraints where funding decisions are outside of DVA's control. However, the current rate of processing appears unsustainable if experience in permanent impairment continues at its current pace with a continuing build-up of the existing backlog of unprocessed claims.

Putting it all together: personal observations

As the history of military compensation in Australia shows, reviews and reports are thick on the ground. Their legacy appears to be increased legislative complexity, increased benefit costs, and service delivery which has not met the expectations of ESO stakeholders.

Legislative reform

I consider that the two-scheme approach proposed by the Productivity Commission offers a reasonable chance of achieving substantial legislative reform, although undoubtedly the process will be highly contested and painful for all involved.

An approach of consolidating the whole system into a single Act (whether an entirely new Act or some development of the MRCA) is unlikely to succeed because:

- the VEA is conceptually different from the MRCA/DRCA;
- there is a very large number of elderly veterans who are embedded in the VEA system and are unlikely to cope well with significant change; and
- an entirely new legislative framework could not disassociate itself from accrued rights, entitlements and expectations within 20 years (or more).

A wellbeing approach

There is an undoubted need for a shift towards a wellbeing approach to military compensation. This would require informed policy proposals and practical, hard-headed reform of ADF transition and DVA service delivery. The Royal Commission into Defence and Veteran Suicide may be able to play a lead role in mapping a path for this transformation.

DVA administration

The *Constant Battle* report showed the depth of community concern about the administration of military compensation in Australia, and the significant impact of poor administrative practices on the rate of suicide of young ex-ADF members. The report, and a number of other recent reports on scheme administration, have mapped a path for administrative reform. The challenge is to implement those reforms with a focus on the wellbeing of veterans and their families. The reforms must extend beyond the DVA to the ADF, the CSC and other military compensation stakeholders.

Previous reports, such as the 2011 MRCA Review report, outlined the need for reform in transition, rehabilitation and claims management; however, the pace of change has been slower than is necessary. Much of this undoubtedly can be sheeted home to the DVA, which has the primary responsibility for implementation. However, it appears that the DVA has been subjected to substantial attrition over the past 10 years through the application of the efficiency dividend, and through difficulties in achieving Budget bids for necessary administrative reforms (including the need to replace its outdated claims-management IT). Real improvement in the situation of veterans and their families will not be achieved without an appropriate level of investment in the DVA, and in military compensation administration generally.

Scheme costs

The cost of the VEA is very high, particularly in respect of medical treatment costs, which reflect the large number of Gold Cards on issue and the increasing cost of what are, essentially, age-related diseases. This, however, might not be of great concern, as the future path of VEA costs is relatively predictable, and those costs will decline in future years as the WW II, Korea and Vietnam cohorts reach end-of-life. It may be desirable to move later veteran cohorts (such as peacekeepers and veterans of the First Gulf War, Timor-Leste and Iraq) out of the VEA into a reformed MRCA, but this may be less for cost reasons

and more for improved rehabilitation and return-to-work outcomes, and the opportunity to close down the VEA earlier than 2080 (or later). If the VEA is reopened in the face of a major international conflict involving hundreds of thousands of ADF members (as has been mooted as a possibility by some policymakers), cost projections would change significantly.

The increasing cost of the MRCA scheme is very worrying and is likely to affect choices for reform of the military compensation system. If, for example, military compensation were to move away from a causal threshold for acceptance of liability for compensation and simply introduce a scheme of medical treatment and financial support for all veterans according to personal need, the long-term financial cost to the Australian community could become unsupportable, and community pressure for significant restrictions on benefits and services could emerge. This problem would be compounded if the definition of a 'veteran' were widely drawn (for example, as a person with one day of service in the permanent forces).

The costs of the DRCA will become merged with those of the MRCA if Scheme 2 is implemented.

The best hope for containment of MRCA/DRCA scheme costs may rest with the following actions:

- Early intervention during ADF service, well-structured transition, a focus on rehabilitation and return to work, and a wellbeing approach. Non-liability health services immediately after discharge and interim financial support until claim determination would assist positive outcomes.
- Improved WHS in the ADF, in particular in respect of systemic problems of culture and bullying, and suicide prevention.
- An improved understanding of the compensation cost drivers in ADF activities. A notional premium for the ADF might be helpful to this understanding.
- Improved scheme administration by the DVA, including in particular the removal of delays in claim processing; improved communication with members, veterans and their families; and a supportive approach by the Department of Finance in relation to scheme administration costs.
- Reduction in legislative complexity, while maintaining the liability-based framework of military compensation.

Conclusion

The military compensation scheme is facing a crisis of confidence. To address this, I consider that there has to be a measured, careful approach to legislative reform and a thorough and rapid reform of scheme administration and service delivery to ADF members, veterans and their families.

An attempt to address the crisis of confidence by radical legislative change is fraught with danger. A veteran-centric, wellbeing approach to the administration of the scheme by the ADF and DVA, to address community concerns about problems in military compensation, has better prospects of success.