



**RSL AUSTRALIA**  
**ROYAL COMMISSION INTO**  
**DEFENCE AND VETERAN SUICIDE**

HARMONISATION OF LEGISLATION

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## Introduction

1. The RSL strongly supports the need for harmonisation of veterans' entitlements legislation. Our experience in providing claims advocacy services for veterans means the organisation is very aware of the unintended consequences of the complex array of legislation administered by the Department of Veterans Affairs (DVA).
2. The RSL is equally aware that Ex-Service Organisations (ESOs) in the past have resisted any change to the legislation that could potentially have a negative effect on compensation outcomes. While this position has been taken with the best intentions (including by the RSL), there is overwhelming evidence something needs to change.
3. We must work together pragmatically to achieve an outcome that preserves benefits for veterans overall, but also achieves the goal of developing a simplified, 'user-friendly' system to provide timely assistance to those veterans in need.
4. The RSL urges the Government to involve ESOs in the consultation process to pursue this harmonisation. The RSL is keen to play a leading role in this.
5. The RSL supports the Royal Commission's call for the five recommendations made by the Productivity Commission to be given urgent attention.
6. Some of these recommendations require such complex legal consideration that we cannot provide the answers in this document – but we will provide our suggestions for the way forward. We will also provide our thoughts on 'quick fixes' that could be implemented quickly.
7. The RSL would also like to note that harmonisation of legislation must be the first step in a move towards greater harmonisation of the veterans' entitlements system. There is a need for a more holistic view towards reform of the system.

## Legislative reform and DVA policy

8. On 11 August 2022, the Royal Commission into Defence and Veteran Suicide handed down its Interim Report. Recommendation 1 of the report identified an urgent need for legislative reform of veteran compensation and rehabilitation processes.
9. The Royal Commission noted that Australia's veteran compensation and rehabilitation legislative system is so complicated that it adversely affects the mental health of some veterans.
10. In its Interim Report, the Royal Commission strongly recommended urgent action be taken by the Federal Government and DVA to simplify and harmonise the existing compensation and rehabilitation legislation.
11. The recommendation gave a date of 23 December 2022 for the Government and DVA to consider the way forward.
12. The recommendation states:

### **Royal Commission Recommendation 1: Simplify and harmonise veteran compensation and rehabilitation legislation**

The Australian Government should develop and implement legislation to simplify and harmonise the framework for veterans' compensation, rehabilitation, and other entitlements. To this end:

By no later than 23 December 2022, the Australian Government should:

- (a) accept or reject recommendations made by the Productivity Commission in its report, *A Better Way to Support Veterans*, that relate to reforming the legislative framework
- (b) if it rejects Productivity Commission recommendations 8.1, 8.4, 13.1, 14.1 and 19.1, adopt alternatives that will achieve similar or better levels of harmonisation and simplification of the legislative framework, and
- (c) identify and decide all other policy questions relevant to designing a harmonised and simplified legislative framework.

By no later than 22 December 2023, the Australian Government should complete drafting of the legislation.

By no later than early 2024, the Australian Government should present to the Parliament, and seek passage of, its Bill for the proposed framework.

If the legislation is passed, the Australian Government should, by no later than 1 July 2024, begin the process of implementing and transitioning to the new legislative framework.

If the legislation is passed, the Australian Government should ensure that, by no later than 1 July 2025, the new legislation has fully commenced and is fully operational. (This does not preclude setting later deadlines for any choices that might need to be made by veterans.)

The Australian Government should allocate to the Department of Veterans' Affairs (DVA), the Office of Parliamentary Counsel and other relevant agencies adequate resources to design, prepare, draft, and implement the proposed legislation within the timeframes above, and to administer the new legislation once it has commenced. The allocation of these resources to DVA should not be offset by reductions in other resourcing of DVA.

## Productivity Commission Findings – RSL Analysis

13. The Royal Commission's Recommendation 1 refers to five previous recommendations made in the Productivity Commission's 2019 report, *A Better Way to Support Veterans*. In the following section, the RSL will review these five recommendations, commenting on the Productivity Commission's proposals, and proposing possible actions for implementation.

### **Recommendation 8.1 - Harmonise the Initial Liability process**

- Making the heads of liability and the broader liability provisions identical under the *Veterans' Entitlements Act 1986* (VEA), the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and the *Military Rehabilitation and Compensation Act 2004* (MRCA)
- Applying the Statements of Principles to all DRCA claims and making them binding, as under the MRCA and VEA

### Comments

14. The RSL **agrees** with this recommendation.
15. The differences in heads of liability across the three Acts have been a source of confusion since DVA took over the administration of the SRCA (now DRCA) in 1999. This complexity and confusion were compounded with the introduction of the MRCA in 2004.
16. The current Statement of Principles (SOPs) should be retained and applied to DRCA liability claims. The SOPs have been applied as legislative instruments since their introduction in 1994, being used in the VEA decision making process since then. In 2004, the use of SOPs was extended to MRCA.
17. A review of the Repatriation Medical Authority and the Specialist Medical Review Council was conducted by Professor Dennis Pearce, Professor of Law, Australian National University and Professor D'Arcy Holman, Professor of Public Health, University of Western Australia in 1997. Their findings were released in 1998.
18. Professor Pearce concluded that the 1994 amendments to the Veterans' Entitlements Act (the VEA), which established the Repatriation Medical Authority (the RMA) and the Specialist Medical Review Council (the SMRC), had resulted in:
  - a more equitable system for the compensation of veterans
  - the system being more efficient and non-adversarial than previous
19. Improvements recommended by Professor Pearce addressed the following areas:
  - The transparency of RMA decision making
  - The basis upon which Statements of Principles (SOPs) are made
  - The quality and accessibility of SOPs
  - The basis upon which a formal review of a SOP can be sought
  - The functions of the SMRC

- The relationship between the Department and veterans
20. The RMA has regularly reviewed existing SOPs and included new SOPs where it is considered appropriate. The RMA also have an established process where reviews of SOPs can be requested.
  21. The RSL agrees the SOPs have provided a more equitable and transparent process.
  22. Under the existing process where SOPs are applied under the VEA and MRCA, but not under DRCA, any veteran who lodges a liability claim under DRCA and one of the other Acts can be confronted with confusing and often very frustrating outcomes. That is, a condition stemming from the same incident may be accepted under one Act, but not the other. This is an unnecessary complexity that should be removed as soon as possible.

### **Recommendation 8.4 - Move MRCA to a single standard of proof**

'The Australian Government should remove the distinction between types of service when determining causality between a veteran's condition and their service under the *Military Rehabilitation and Compensation Act 2004* (MRCA). This should include:

- amending the MRCA to adopt the reasonable hypothesis Statement of Principles for all initial liability claims
- requesting that the Australian Law Reform Commission conduct a review into simplifying the legislation and moving to a single decision-making process for all MRCA claims, preferably based on the reasonable hypothesis process.'

### Comments

23. The RSL **agrees in part** with this recommendation.
24. This recommendation was made only in relation to MRCA claims. The same standard of proof (Reasonable Hypothesis) should be applied across all current (or harmonised) Acts. To do otherwise would embed a further level of difference and confusion across the Acts.
25. The review of the Repatriation Medical Authority (the RMA) and the Specialist Medical Review Council (the SMRC) (referred to above) found that the Reasonable Hypothesis standard, as applied in the SOP factors, is a 'generous' decision-making process.
26. In the interests of simplification and consistency and in keeping with 'beneficial legislation' approach applied to veterans' benefits, the RSL urges that the one standard of proof be applied in relation to the application of SOPs across the three Acts.
27. Extending s196B(2) of the VEA to cover all service across all 'harmonised' Acts would not only simplify the decision process for both claimants and DVA delegates, but would also reduce the research burden on the Repatriation Medical Authority during their process of reviewing existing SOPs or creating new ones.



### **Recommendation 13.1 - Harmonise the DRCA with the MRCA**

The Australian Government should harmonise the compensation available through the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) with that available through the *Military Rehabilitation and Compensation Act 2004*. This should include harmonising the processes for assessing permanent impairment, incapacity, and benefits for dependants, as well as the range of allowances and supplements.

Existing recipients of DRCA permanent impairment compensation and benefits for dependants should not have their permanent impairment entitlements recalculated. Access to the Gold Card should not be extended to those eligible for benefits under the DRCA.

#### **Comments**

28. The RSL **agrees in** part with this recommendation.
29. This will be an extraordinarily complex legal process, during which the possibility of limited negative consequences for some veterans needs to be carefully considered and weighed according to the overall benefit of simplifying the process.
30. The RSL agrees with the Productivity Commission's comment that existing recipients of DRCA permanent impairment compensation and benefits for dependants should not have their permanent impairment entitlements recalculated.
31. Harmonisation would need to commence from a point in time, with existing benefits of all Acts preserved. Changes should commence from a point in time and only apply to claims that are lodged after that date.
32. Appeals in relation to decisions made prior to the implementation date would need to be considered under the legislation which was applicable at the time of the primary decision.
33. While transitional legislation in relation to compensation offsetting would be very complex and would require careful legal consideration to ensure veterans were not disadvantaged, the general principle of not being compensated twice for the same incapacity should be retained.
34. The RSL recommends that:
  - The benefits of applying the Statement of Principles across both Acts for liability claims has been discussed above
  - There may be an occasional negative impact where a DRCA claimant could achieve a more beneficial outcome by obtaining the opinion of an independent medical expert when considering the causation of a condition
  - GARP M could be used to calculate Permanent Impairment under the VEA, MRCA and DRCA (or any harmonised legislation), rather than applying the current Permanent Impairment Guide for DRCA assessments
  - Adopting a similar methodology for assessing permanent impairment payments would achieve consistency and clarity, however, the detrimental effects on DRCA assessments would have to be carefully considered

- The current application of *Canute v Comcare (2006) HCA47*: [discrete injuries to be assessed separately] and *Fellowes v Military Rehabilitation and Compensation Commission (2009) HCA 39* : [separate injuries resulting in separate impairments are assessed separately, even when under the same table in the Approved Guide] means that DRCA can be significantly more beneficial with regard to compensation payments
  - DRCA and MRCA Incapacity Payments should be aligned with the MRCA provisions. There is existing alignment between DRCA and MRCA Incapacity payments, rehabilitation, and other benefits
  - Access to Education Benefits for eligible children of veterans whose current entitlement is under DRCA should be extended. The RSL notes the Productivity Commission's recommendation that education benefits provided by DVA should cease at age 16. This is a practical approach to a situation, where similar benefits are provided under other jurisdictions
  - Similarly, the widows of DRCA veterans whose death is accepted as service related should be entitled to War Widow benefits, with the option to choose a pension or a lump sum payment
  - Adopting a 'Streamline Conditions' approach across claims for identified conditions across claims which are now considered under MRCA.
  - Adopting the same appeals process for DRCA appellants as is currently available to VEA and MRCA appellants. The benefits of the current VRB dispute resolution processes have been clearly demonstrated and is superior to the adversarial approach taken in relation to DRCA appeals to the AAT
35. The RSL **does not agree** with the Productivity Commission's recommended that access to the Gold Card should not be extended to current DRCA veterans. To achieve harmonisation, any new legislation should ensure all categories of veterans are treated equally in relation to all aspects of benefit entitlements.
36. It is inevitable that further differences between the Acts will be identified as work towards harmonisation progresses.
37. The RSL urges DVA to include the ESOs in workshops where these legal issues are being considered.

### **Recommendation 14.1 - A single rate of permanent impairment compensation**

The Australian Government should amend the *Military Rehabilitation and Compensation Act 2004* to remove the requirement that veterans with impairments relating to warlike and non-warlike service receive different rates of permanent impairment compensation from those with peacetime service.

The Department of Veterans' Affairs should amend tables 23.1 and 23.2 of the Guide to Determining Impairment and Compensation to specify one rate of compensation to apply to veterans with warlike, non-warlike and peacetime service. This should be achieved via a transition path, with the compensation factors merging to a single rate over the course of about 10 years.

Prior to setting the single rate the Australian Government will need to balance the lifetime fiscal implications of the change with the benefits needed by veterans, as well as the transitional arrangements that will be necessary to implement a single rate.

### **Comments**

38. The RSL **agrees** with this recommendation.
39. When MRCA was introduced, there was considerable discussion about the merits of having two-tiered compensation levels, determined by the type of service being experienced by the veteran when the incident or accident occurred.
40. This approach is inconsistent with both the VEA and DRCA. The reasoning behind the two-tiered approach is understood, but in the interests of simplicity and consistency, the Productivity Commission recommendation should be considered.

### **Recommendation 19.1 - Two schemes for veteran support**

The Australian Government should create two schemes for veteran support – the current *Veterans' Entitlements Act 1986* (VEA) with some modifications ('scheme 1') and a modified *Military Rehabilitation and Compensation Act 2004* (MRCA) that incorporates the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) ('scheme 2').

#### **Comments**

41. The RSL **agrees** with this recommendation.
42. The suggestions made by the Productivity Commission are complex and will be difficult to legislate. However, reducing and simplifying existing processes, with a view to eventually phasing out the VEA and working solely under a harmonised MRCA/DRCA system, has merit.
43. As with previous comments, the RSL urges the Government to consult widely with ESOs before proceeding with this change.

## Quick Wins

44. Further recommendation made by the Productivity Commission should be considered for 'quick wins' that can each make an immediate impact.
45. There should be significant benefit in removing or consolidating some of the Allowances which are inconsistent across the Acts.
46. The RSL holds the view that all the recommendations listed below should receive prompt consideration. If these issues are resolved, it will make the overall process of harmonising the Acts less complex.

### **Recommendation 15.3 - Consolidate supplements into underlying payments**

To help simplify the system, smaller payments should be consolidated where possible or removed where there is no clear rationale for them.

The Australian Government should remove the DRCA Supplement, MRCA Supplement and Veteran Supplement, and increase clients' payments by an amount equivalent to the removed supplement.

The Australian Government should remove the Energy Supplement attached to Department of Veterans' Affairs' impairment compensation, but other payments should remain consistent with broader Energy Supplement eligibility.

### **Recommendation 15.4 - Remove and pay out smaller payments**

To streamline and simplify outdated payments made to only a few clients, they should be paid out and removed. The Australian Government should amend the *Veterans' Entitlements Act 1986* to remove the recreation transport allowance, the clothing allowance and the decoration allowance and pay out those currently receiving the allowances with an age adjusted lump sum.

### **Recommendation 15.5 - Harmonise attendant and household services**

The Australian Government should amend the *Veterans' Entitlements Act 1986* (VEA) to remove the attendant allowance and provide the same household and attendant services that are available under the *Military Rehabilitation and Compensation Act 2004* (MRCA).

Current recipients of the VEA allowance should be automatically put on the same rate under the new attendant services program. Any further changes or claims would follow the same needs-based assessment and review as under the MRCA.

### **Recommendation 15.6 - Harmonise vehicle assistance**

The Australian Government should amend the *Veterans' Entitlements Act 1986* Vehicle Assistance Scheme and section 39(1)(d) (the relevant vehicle modification section) in the *Safety, Rehabilitation and Compensation (Defence related Claims) Act 1988* so that they reflect the *Military Rehabilitation and Compensation Act 2004* Motor Vehicle Compensation Scheme.

## Further Consideration

47. The Productivity Commission asked the question, 'Is access to compensation benefits fair and timely? In particular, are there challenges associated with the requirements in the MRCA and DRCA that impairments be permanent and stable to receive permanent impairment compensation? How could these provisions be improved?'<sup>1</sup>

### Comments

48. There is no doubt that the 'permanent and stable' component of Permanent Impairment (PI) causes significant concern for some veterans. The Veterans Payment has gone some way towards addressing this problem.
49. However, there are considerable ongoing issues regarding the assessment and payment of an interim permanent impairment amount pending the 'stabilisation' of an accepted condition.
50. The RSL believes consideration should be given to DVA adopting a new approach to Permanent Impairment, where a fortnightly pension is to be paid until the condition stabilises, at which stage the veteran is offered the option of a lump sum payment. The level of impairment should be assessed at an early stage and a pension paid to reflect that level of impairment.
51. This will ameliorate the significant cash-flow issues faced by veterans whose medical condition is such that they cannot work.
52. The veteran should be required to undertake reasonable medical treatment and rehabilitation. Once the condition had stabilised, a lump sum payment according to the stabilised impairment assessment could be offered.
53. DVA has previously opined that this process could be a disincentive for veterans to undertake rehabilitation. This view is not held by the RSL as:
- An early assessment of impairment would provide an acknowledgement of the severity of the condition and would pay fortnightly compensation accordingly
  - The level of impairment caused by the condition, and the success or otherwise of the treatment provided, could be regularly reviewed and the pension payment level reduced accordingly
  - Experience shows veterans entitled to MRCA permanent impairment payments overwhelmingly opt to receive a lump sum payment in preference to a fortnightly pension. This approach would be regarded as an incentive, rather than a disincentive to undertake rehabilitation
  - This approach is simpler than the existing poorly understood process of trying to make a realistic interim assessment, providing DVA with an excellent opportunity to examine the success of the rehabilitation program

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<sup>1</sup> Productivity Commission Issues Paper May 2018, page 16

## Conclusion

54. It is clear to anyone with any experience of Australia's veterans' entitlements legislation that there is a need for reform. But this will not be simple or without controversy.
55. Indeed, all the recommendations listed above are potentially contentious for various reasons.
56. Despite these challenges, the RSL believes there are significant long-term benefits to an approach that reduces the current complexities in dealing with multiple Acts.
57. Geopolitical uncertainty and the potential expansion of conflict or the role of the ADF in the coming years is uncertain. What is clear is that a repatriation system that is simple and responsive must be supported and developed as soon as possible.
58. The RSL looks forward to being a leader among the ESO community in having input into reviewing a process which has clearly been shown to be broken and in need of urgent repair.
59. Ex- service organisations should play a major part in this discussion and the Government also needs to refine its consultation process with these organisations to ensure they are being provided with a balanced majority view.
60. The harmonisation of legislation is the first step in the process towards a simplified, non-adversarial veterans' entitlements system. Areas of consideration for further reform include:
  - a positive set of conditions of service (COS) for the life of a Veteran
  - no prejudice based on class of veteran and/or service personnel
  - simple, yet robust, legislation
  - the implementation of enforceable performance metrics system-wide
  - a focus on quality of rehabilitation
  - the importance of the veterans' entitlements system to transition processes
  - the provision of face-to-face management of veteran health, where appropriate
  - consideration of which organisation provides related health services