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No. 112 2003–04

Military Rehabilitation and Compensation Bill 2003

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INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 112 2003–04

Military Rehabilitation and Compensation Bill 2003

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25 March 2004

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Military Rehabilitation and Compensation Bill 2003

Date Introduced: 4 December 2003

House: House of Representatives

Portfolio: Veterans' Affairs

Commencement: Most provisions of the Bill will commence on a date fixed by Proclamation or, if this is not within six months of Royal Assent, the first day after that period. Chapter 9 of the Bill, which deals with the establishment of the Military Rehabilitation and Compensation Commission, commences on Royal Assent.

Purpose

The purpose of the Military Rehabilitation and Compensation Bill 2003 (the MRC Bill) is to establish a single, self-contained legislative scheme governing compensation for injuries or conditions arising from service in the Australian Defence Force (ADF) subsequent to the commencement date of the legislation and recognising the different nature of military service from civilian employment.

The Bill also establishes a more integrated approach to the management of safety, rehabilitation, resettlement and compensation that includes an appropriate emphasis on prevention and rehabilitation.

Background

On 12 June 1996 a training accident at the Training Area near Townsville involving the collision and destruction of two Black Hawk helicopters resulted in the deaths of 18 members of the Australian Army and injuries ranging from minor to very serious to a further 12 members.¹

A Review of the Military Compensation Scheme (the Tanzer Review) was conducted by Mr Noel Tanzer AC to develop options for a single, self contained military compensation scheme for peacetime service. The review recommended the adoption of a new integrated military specific scheme for military compensation.²

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The MRC Bill represents the Government's response to the recommendations in the Review. It follows the release of an exposure draft of the Bill in June 2003, and subsequent consultation with the veteran and defence force communities.

The current Military Compensation Scheme

The entitlement of members of the ADF to compensation and rehabilitation is currently affected by four pieces of legislation:

- the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA) (which also applies to other Commonwealth employees);
- enhancements to the SRC Act for the ADF only, made by the *Military Compensation Act 1994*;
- the *Veterans' Entitlements Act 1986* (the VEA); and
- additional benefits under Defence Determination 2000/1 made under the *Defence Act 1903*.

These pieces of legislation combine to provide a complex structure of eligibility for compensation.

In general, the legislation which determines the compensation available in relation to a particular injury is currently determined by a combination of the date of the injury and the nature of the service being performed. Under the MRC Bill compensation available will generally be determined by reference to a single piece of legislation although there will still be some situations of dual eligibility and some cases in which it is necessary to refer to other legislation in order to determine a person's entitlements.³ The amount of compensation to be received by a person or their dependants will still in some circumstances be dependent upon the nature of the service being performed, as may whether the Commonwealth's liability to pay compensation can be established.

To whom does the MRC Bill apply?

The provisions of the MRC Bill will apply to members of the Defence Force, cadets, and persons who are declared by the Defence Minister to be members (**clauses 5 and 8**). It will have no application to people who have ceased to be members of the Defence Force prior to the commencement date (who may be either currently receiving compensation under either the VEA or the SRCA or subsequently establish an entitlement to receive compensation under either or both of those Acts). It will apply to persons who have ceased to be members of the Defence Force after the commencement date (i.e. it will in future apply to both past and serving members).

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To what will the MRC Bill apply?

The provisions of the MRC Bill will apply to service injuries, service diseases and service deaths (defined in **Part 3 of Chapter 2**) occurring after the commencement of the Bill. It will not apply to injuries, diseases or deaths occurring before that date, even where the entitlement to compensation is not established until after the commencement of the MRC Bill. This means that the provisions of the VEA and the SRCA will continue to be relevant in determining compensation entitlements of affected veterans for many years.

Principal issues

There are a number of issues arising out of the Bill, some of which are of particular concern to the Defence community. It is notable that most concern has been expressed by representatives of the veterans' community,⁴ although the provisions of this Bill will apply only in relation to service injuries sustained, service diseases contracted, or service deaths occurring after the commencement of the Bill. It therefore has significance to current and future members of the ADF rather than to members of the veterans' community.

The following issues that may be of concern will be noted here:

- the distinction between warlike service, non-warlike service, and peacetime service, and the effect this may have on the amount of compensation payable
- concerns about the provisions of the Bill relating to rehabilitation, particularly the obligation to undergo rehabilitation programs in some circumstances
- the tying of an ADF member's pay for compensation purposes to the rank at which he or she left the service, to the exclusion of probable subsequent promotions
- the set-off against compensation payments in some circumstances of amounts contributed by the Commonwealth to a Commonwealth superannuation scheme, and
- a number of matters are to be determined by reference to other documents. This means that, for example, it is not clear on the face of the Bill how the indexation of civilian earnings is to be calculated where this is relevant to the calculation of an amount of compensation, it is not clear how a member or former member's degree of impairment is to be determined and it is not clear in what circumstances it will be accepted that a particular injury, disease or death is attributable to military service.

Nature of service – concepts of warlike, non-warlike and peacetime service

An important concept that has been developed in military compensation is the distinction between various types of service. The distinction originated subsequent to World War II,

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when the position was taken that those veterans ‘who suffered the rigours of service that exposed them to harm from enemy forces’ should receive additional assistance to those who did not.⁵ More recently this view has been expressed as ‘there is widespread belief that those veterans who were thus exposed have been affected by that service in ways not quantifiable and should be provided with additional assistance where they cannot work because of age or disability, and do not have sufficient resources to provide a standard of living comparable to community norms’.⁶

The Tanzer Review recommended that ‘to take account of the unique nature of military service, the element of exposure to risk of injury/disease arising out of, or in the course of, employment should, as a guiding principle, be recognised in the remuneration arrangements’.⁷ That is, that exposure to additional risk should be recognised by means of allowances payable regardless of whether an injury, disease or death has occurred. This approach has not been adopted in the Bill.

Currently there is a process by which the Minister for Defence, in consultation with the Prime Minister and on advice from the Chief of Defence Force, is responsible for the declaration of service with a deployment as warlike or non-warlike service. The definitions of what constitutes warlike and non-warlike service are defined in Defence Industrial Manual, Instruction 4010.⁸

In summary, Instruction 4010 defines warlike operations as ‘those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties’. Non-warlike operations are defined as ‘those military activities short of Warlike operations where there is risk associated with the assigned task(s) and where the application of force is limited to self defence. Casualties could occur but are not expected’.⁹ Peacetime service is defined as all remaining service, particularly service within Australia. Overseas service may be classified as peacetime service where the conditions for declaration of the service as warlike or non-warlike are not met. The compensation currently applicable in relation to a service injury is dependent primarily on the date on which the injury occurred and the category of service.

Such distinctions are continued in the MRC Bill, with the definitions contained in **clause 6** of the Bill.

Under the MRC Bill, the level of entitlement to some aspects of compensation for a service injury, disease or death will continue to be dependent upon the category of service. In essence, compensation that may be thought of as referable to the loss of amenities of life caused by a service injury or disease will be dependent upon whether service is, on the one hand warlike service or non-warlike service, or, on the other hand peacetime service. Compensation payable to a partner or dependants in respect of a service death will also be dependent upon the category of service. In this case the distinction is between, on the one hand, warlike service and on the other non-warlike service or peacetime service. Compensation that is akin to compensation for loss of income will not be so dependent. The standard of proof to be met in order to establish an entitlement to compensation or

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other benefits will also vary depending upon the category of service in relation to which an injury, disease or death occurred. Some claims that relate to warlike or non-warlike service are subject to a more beneficial standard of proof.

Recent press commentary in relation to veterans' affairs has focussed on the situation in relation to existing veterans, the level of benefits received by them, and perceived anomalies in relation to different veterans suffering the same condition but receiving different payments – which will continue to occur under the MRC Bill because of the distinction between different categories of service.

For example, an article in the *Australian* on 19 February 2004 titled 'War scars need fair treatment' referred to a soldier who 'hurt his back in a training accident [and] estimates he loses 40 per cent of his service pension because of the way his [Totally and Permanently Incapacitated] payment is treated'. Another veteran stated that '[t]hey should be looking at compensating everyone equally for the same disability'.¹⁰ The opportunity for such perceived anomalies is perpetuated under the Bill, with the maintenance of the distinction between warlike service, non-warlike service and peacetime service. This means that future servicemen and veterans will continue to be compensated differently in respect of the same injury.

It has been argued that this distinction is justified as exposure to hazardous circumstances is recognised by providing access to increased compensation benefits in the event that injury or death occurs. It should be noted that in submissions made to the Department of Defence Inquiry following the Black Hawk disaster the Returned and Services League supported the approach of providing access to increased compensation benefits for those involved in operational training in peacetime that is of a more hazardous nature.¹¹

Rehabilitation

Integration of rehabilitation measures with safety, prevention and compensation measures is a feature of most modern compensation systems. The Government has stated its intention to emphasise rehabilitation in the new Military Compensation Scheme.¹² Currently the VEA provides for medical and vocational rehabilitation. However, participation in the rehabilitation scheme is voluntary. Furthermore, provisions to reduce pension and offset treatment costs in certain circumstances can operate as a disincentive to seeking rehabilitation in some circumstances.¹³ Under the SRCA the ADF has developed a policy on rehabilitation and return to work. However the special circumstances of the ADF, particularly the need to maintain a highly fit force, mean that the opportunities for return to work within the ADF are often limited. The MRC Bill attempts to provide a rehabilitation system which is 'aimed at providing injured members with the support they need to make a full recovery and to return to work where possible'.¹⁴

Concerns in relation to the proposed rehabilitation scheme primarily focus on its compulsory nature and on the belief that its focus is on vocational rehabilitation (that is,

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rehabilitation designed at facilitating return to the workforce) rather than on other aspects of rehabilitation, such as social and psychological rehabilitation.

Failure to take account of probable promotion

Where the amount of compensation which the Commonwealth is liable to pay a person is in part determined by the pay and allowances they were receiving as a member of the ADF before they were incapacitated for such service then the pay and allowances to be taken into account will remain, for whatever period that person is in receipt of compensation, those of a member of the Defence Force at the level and performing the service that that person performed. It has been argued that because the Defence Force is a highly structured service where promotions are to be expected on a regular basis then 'expected promotions' should be taken into account.¹⁵

Set-off of superannuation contributions made by the Commonwealth

Concern has been raised in relation to the set off of superannuation contributions made by the Commonwealth against amounts of compensation. However, this concern appears to be largely based on a misunderstanding of the meaning of 'Commonwealth superannuation scheme' under the Bill. The definition of 'Commonwealth superannuation scheme' in clause 5 of the Bill has the effect that contributions made by the Commonwealth to a scheme such as the Public Sector Superannuation Scheme where a previously full-time member of the ADF has subsequently obtained employment with the Commonwealth outside the ADF will not be affected.

Matters determined by reference to other documents

A number of matters that are crucial to the operation of the compensation scheme are to be determined by reference to other documents. For instance, the degree of impairment of a person is to be determined by reference to a guide to be determined by the Commission under clause 67. A person's degree of impairment is relevant to determining his or her, and, in the event of death, his or her dependant's, entitlement to various elements of compensation. Whether or not liability for an injury, disease or death is to be accepted will frequently be dependent upon the operation of a Statement of Principles determined by the Repatriation Medical Authority under the VEA. In a scheme of legislation of this size it may well be necessary to have recourse to such mechanisms, and in general they have been made disallowable instruments for the purposes of the *Acts Interpretation Act 1901*, which ensures an opportunity for parliamentary scrutiny.

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Main Provisions

Chapter 1 – Introduction

Clause 3 of the Bill comprises a simplified outline of the Act. It states that the Act provides for compensation and other benefits to be provided for current and former members of the Defence Force who suffer a service injury or disease, and that the Act also provides for compensation and other benefits to be provided for the dependants of some deceased members.

What are the significant defined terms and where are they defined?

Terms are defined in **clause 5**. Many of these terms are defined by reference to other provisions of the Bill.

The ‘**Commission**’ is the Military Rehabilitation and Compensation Commission to be established by **clause 361**.

‘**Commonwealth superannuation scheme**’ in most cases means a scheme to which the Commonwealth makes contributions on behalf of members of the Defence Force. In the case of some part-time Reservists it includes any scheme to which the Commonwealth makes contributions on behalf of employees. This means, for instance, that where a member of the ADF subsequently joins the Australian Public Service the Commonwealth’s contribution to his or her superannuation as a member of the APS is not taken into account under the MRC Bill.

The terms ‘**defence service**’, ‘**warlike service**’, ‘**non-warlike service**’ and ‘**peacetime service**’ are defined by reference to **clause 6**.

An ‘**eligible young person**’ is a person who is aged under 16, or is aged under 25 and is both receiving full-time education and not in full-time work.

‘**Incapacity for service**’ relates to service in the ADF, and means incapacity to engage in service at the level the person was working at before the onset of the incapacity. It includes inability to work at this level for the person’s normal weekly hours.

‘**Incapacity for work**’ relates to work in the civilian work force, and means incapacity to work at the level the person was working at before the onset of the incapacity. It includes inability to work at this level for the person’s normal weekly hours.

‘**Member**’ means a member of the ADF, a cadet, or a declared member.

‘**Former member**’ means a person who has ceased to be a member. It is notable that this term replaces the term ‘veteran’ used in previous legislation.

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The terms ‘**service injury**, ‘**service disease**’ and ‘**service death**’ are defined by reference to **clauses 27, 28, 29 and 30** (in **Chapter 2** of the Bill).

How is it determined whether particular service is warlike, non-warlike or peacetime?

Clause 6 of the Bill continues the distinctions between warlike, non-warlike and peacetime service. The classification of a service as warlike or non-warlike service will be dependent on a determination by the Minister (**paragraphs 6(1)(a) and (b)** of the Bill). Peacetime service means any other service with the ADF (**paragraph 6(1)(c)** of the Bill). Presumably the definitions in Instruction 4010 will continue to be utilised under the MRC Bill.

Clause 7 has the effect that where a pre-existing (non-service related) injury or disease is aggravated by defence service the provisions of the Act will apply to the injury or disease.

Clause 8 provides that the Defence Minister may make a determination that will have the effect that specified people are taken to be members of the ADF for the purposes of the MRC Act, and thus may become entitled to compensation or other benefits under the Act. It is expected that declarations under this section may relate to people such as entertainers, construction experts, and those working for welfare agencies where the work performed is of benefit to the ADF.

Clause 12 relates to deceased members. It applies to a member if the Commission has accepted liability for the member’s death, if prior to his or her death the member was eligible to receive a Special Rate Disability Allowance (or would have been eligible if he or she were not aged 63 or over), or if the Commission has determined that prior to his or her death the member’s impairment constituted at least 80 impairment points. Certain benefits under **chapter 5** are only payable to a dependant of a deceased member to whom clause 12 applies.

Chapter 2 - Accepting liability for service injuries, diseases and deaths

What is the significance of the Commission ‘accepting liability’ for an injury, disease or death?

Clause 21 provides a simplified outline of Chapter 2. In most cases to receive benefits under the MRC Act it is first necessary for the Commission to have accepted liability for an injury, disease or death. Although the Bill is drafted in terms of the Commission accepting liability, this does not mean that it has a choice whether or not to accept liability. If an injury, disease or death is a service injury, disease or death, and none of the exclusions in **Part 4 of Chapter 2** apply, the Commission must accept liability.

The process for accepting liability is explained in the outline. First, the person makes a claim for acceptance of liability. Then, the Commission decides whether the injury,

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disease or death is a service injury, disease or death, in accordance with **Part 3 of Chapter 2**. Then, the Commission decides whether it is prevented from accepting liability because of an exclusion under **Part 4 of Chapter 2**.

When does the Commission have to accept liability for a service injury, disease or death?

Part 2 of Chapter 2 deals with when the Commission must accept liability for a service injury, disease or death. **Clause 22** provides a simplified outline of the Part. The Commission must accept liability if a claim for acceptance of liability has been made under **clause 319**, the injury, disease or death is a service injury, disease or death, and no exclusions in **proposed Part 4** apply. Differing standards of proof apply to the decision of whether an injury, disease or death is a service injury, disease or death depending on whether it relates to warlike service, non-warlike service or other service. In some circumstances the standard of proof can only be met if the injury, disease or cause of death is covered by a Statement of Principles, which sets out factors relating to defence service that have been found to cause specific injuries, diseases and deaths. A Statement of Principles is an instrument made under the VEA.

Clause 23 deals with when the Commission must accept liability for service injuries and diseases, for service injuries and diseases arising from Commonwealth treatment, and for service injuries and diseases arising from aggravation of signs and symptoms. **Clause 24** deals with when the Commission must accept liability for service deaths.

Clause 25 provides that an acceptance of liability only has effect for the purposes of the MRC Act, so that a person cannot rely on the acceptance of liability in an action against the Commonwealth.

What is a service injury, a service disease or a service death?

Part 3 of Chapter 2 contains definitions of service injury, service disease and service death. Under **Clause 27** there are five situations in which an injury is a service injury. If it resulted from an incident that occurred whilst a person was performing defence service, if it arose out of defence service, if it would not have occurred had the person not been performing defence service, if the person's defence service has aggravated an injury which had occurred prior to enlistment in the ADF (but compensation is only payable in respect of the aggravation), and if it occurred whilst a member whilst travelling to or from duty.

Any injury that occurs whilst on warlike or non-warlike service is considered to satisfy **paragraph 27(a) or (c)**. In other words any injury suffered or disease contracted by a person whilst on warlike or non-warlike service will be a service injury or a service disease. Questions as to whether an injury or disease is actually a service injury or a service disease will only arise in relation to peacetime service.

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When is the Commission not able to accept liability for a service injury, a service disease or a service death?

Part 4 of Chapter 4 sets out five situations in which the Commission is prevented from accepting liability, even if a service injury, disease or death is established. These five situations are outlined in **clause 31** as relating to serious defaults or wilful acts, counselling about a person's performance as a member of the ADF, false representations, travel during peacetime service, and the use of tobacco products. **Clauses 32 to 36** deal in turn with each of these exceptions.

The exclusion in relation to an injury or disease that relates to a person's serious default or wilful act does not apply to an injury or disease resulting in serious and permanent impairment. In such a case the Commission must accept liability unless another exclusion applies. There is no definition of serious and permanent impairment.

Where an injury, disease or death is connected to service only by relation to the use of tobacco products, the MRC Act will not provide an entitlement to compensation where the injury, disease or death occurs after the commencement date. Where the injury, disease or death occurs before the commencement date liability is excluded under the VEA and in the application of the SRCA.

Chapter 3 – Rehabilitation**What is the objective of rehabilitation for members and former members of the ADF?**

Clause 37 provides a simplified outline of Chapter 3. The chapter establishes a scheme for the provision of rehabilitation programs for current and former members suffering a service injury or disease, assistance in finding suitable work (either defence or civilian), and, where required, assistance in moving from defence to civilian life. Where a person has been assessed under Part 2 as capable of rehabilitation he or she may be required to undertake a rehabilitation program.

Clause 38 states the aim of rehabilitation as being to maximise the potential to restore a person to at least his or her pre-injury or disease physical and psychological state and social, vocational and educational status.

Clauses 39 to 41 provide definitions relevant to rehabilitation. In particular, **clause 39** provides that where a person is likely to continue as a member of the Defence Force his or her **rehabilitation authority** is the person's service chief; where the person is likely to be discharged for medical reasons his or her **rehabilitation authority** is the Commission.

Who will the legislation relating to rehabilitation apply to?***Warning:***

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Part 2 of Chapter 3 makes provision in relation to rehabilitation programs. **Clause 42** provides a simplified outline of the Part.

Clause 43 provides that the Part applies to a person if they are incapacitated for service or work, or have an impairment, because of a service injury or disease for which the Commission has accepted liability. **Incapacity for service, incapacity for work, and impairment** are terms defined in **clause 5**. **Clause 43** also provides that the Part applies where the incapacity or impairment is the result of an aggravated injury or disease even though the incapacity or impairment is the result of the original injury or disease. So, even where the Commonwealth is not liable in relation to the original injury or disease (e.g. because it occurred prior to the person commencing defence service), if military service has aggravated the injury or disease the Part will apply to the incapacity or impairment.

How is a person's capacity for rehabilitation determined?

Clause 44 provides that the rehabilitation authority may carry out an initial or further assessment of a person's capacity for rehabilitation and must carry out an initial assessment if a person so requests. **Clauses 45** and **46** specify how an assessment is to be carried out. **Clauses 47** to **49** relate to compensation in relation to an assessment. **Clause 50** provides that if a person is required to undergo an examination and the person does not do so the person's right to compensation under various provisions of the Bill may be suspended.

How are rehabilitation programs provided?

Clause 51 provides that the rehabilitation authority for a person may determine that the person is to undertake a rehabilitation program. The authority is to have regard to a number of factors, including any reduction in the Commonwealth's future liability to pay compensation and any improvement in the person's opportunity to undertake work after completing the program. **Clause 52** provides that if a person is required to undertake a rehabilitation program and the person does not do so, the person's right to compensation under various provisions of the Bill may be suspended.

What other assistance can be provided to a person?

Part 3 of Chapter 3 makes provision in relation to alterations, aids and appliances. Although the heading of the Part refers to **alterations, aids and appliances relating to rehabilitation** provision of alterations, aids and appliances need not relate to rehabilitation where a person has been assessed as not having the capacity for rehabilitation (**subparagraph 55(1)(c)(ii)**).

Clause 55 provides that the Part applies to a person if the person has an impairment because of a service injury or disease for which the Commission has accepted liability and the person is undertaking a rehabilitation program, or has completed a rehabilitation program, or has been assessed as not having the capacity for rehabilitation.

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Clauses 56 to 59 provide that the Commission may provide assistance to an impaired person by way of alterations, aids and appliances, and may pay compensation in relation to the costs incurred in obtaining such. **Clause 58** specifies the matters to which the Commission must have regard in determining whether an alteration, aid or appliance is reasonably required. Some of these matters relate more to the fairness of the assistance being paid for by the Commonwealth than to the person's need. For instance, **paragraph 58(2)(d)** requires the Commission to have regard to whether the person has previously received assistance in relation to an alteration of his or her home and has, on the sale of that home, received a financial benefit because of the alteration. The Explanatory Memorandum to the Bill states that such an increase in value 'might' be considered; in fact **clause 58** states that it must be considered.¹⁶

How will an incapacitated member or former member be helped to find suitable work?

Part 4 of Chapter 3 provides that a person's rehabilitation authority must assist the person to find suitable work, within the Permanent Forces if the person is a Permanent Forces member who has not been identified as likely to be discharged, as a continuous full-time Reservist if the person is a continuous full-time Reservist who has not been identified as likely to be discharged, and as a civilian in any other case. Under **Part 5 of Chapter 3** a person who has been identified as likely to be discharged is entitled to have a case manager appointed. The role of a case manager is to assist the person in the transition to civilian life.

Chapter 4 - Compensation for members and former members

Chapter 4 deals with the provision of compensation for members and former members. **Clause 65** provides a simplified outline of the chapter. The most significant Parts are **Part 2**, which provides for compensation to be provided in relation to a permanent impairment, **Part 3**, which provides for compensation to be provided to current members of the Defence Force in relation to a loss of earning capacity, **Part 4**, which provides for compensation to be provided to former members of the Defence Force in relation to a loss of earning capacity, and **Part 6**, which provides for a safety net pension.

How does the Bill provide for compensation for loss of amenities of life?

Part 2 provides for the payment of compensation to current and former members who have suffered a permanent impairment. This is essentially a compensation for the loss of the general amenities of health which result from such things as loss of use of part of the body or damage to a body system. Compensation is only payable if the degree of impairment is above a minimum level. The amount of compensation is also dependent on the degree of impairment (subject to a maximum rate set out in **clause 74**). The degree of impairment of a person is to be decided by reference to a guide determined by the Commission under **clause 67**. The Repatriation Commission currently prepares a Guide to

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the Assessment of Rates of Veterans' Pensions (GARP) under section 29 of the *Veterans' Entitlements Act 1986*. The Explanatory Memorandum envisages that the guide to be determined under **clause 67** will be based on the current GARP.¹⁷

Subclause 67(2) provides that the guide must provide different methods for determining the relationship between a person's impairment points and the level of compensation payable to the person dependent on whether the service injury or disease relates to warlike or non-warlike service or to other service, and a method of determining the compensation payable where a person has both a service injury or disease that relates to warlike or non-warlike service and a service injury or disease that does not relate to warlike or non-warlike service. **Clause 67(4)** provides that the guide is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. This means that it must be laid before each House of the Parliament and may be disallowed by either House.

Clause 68 sets out the circumstances in which the Commonwealth is required to pay compensation to a person in relation to a service injury or disease. Compensation is only payable under this section where a person's compensable condition has stabilised; however interim compensation is payable under **clause 75** in certain circumstances.

Clauses 69 and **70** set out minimum levels of impairment before compensation will be payable. Determination of whether an impairment satisfies these minimum requirements will require reference to the guide to be determined under **clause 67**.

Clauses 71 and **72** provide that additional compensation may become payable where a person who is currently receiving compensation suffers a further service injury or service disease or an aggravation of an existing injury or disease. It will be necessary to establish a minimum level of additional impairment.

Clause 74 specifies a maximum amount of weekly compensation payable to a person under **Part 2** of **Chapter 4**. The guide determined under **clause 67** by the Commission will include a method by which the impairment points of a person can be used to determine the compensation payable to the person by reference to the maximum amount of weekly compensation payable to a person under **clause 74**. The maximum amount payable is to be indexed by reference to the Consumer Price Index (under **clause 404**).

Under **clause 78** a person may choose to convert a weekly amount payable to the person under **Part 2** into a lump sum, either totally or, in certain circumstances, in part. The amount of the lump sum will be determined by reference to the weekly amount payable to the person and advice from the Australian Government Actuary.

Under **clause 80** where the degree of impairment suffered by a person has been determined to be at least 80 impairment points (which may not result in the payment of maximum compensation, as suggested by the section heading) the Commonwealth is required to pay the person \$60 000 in relation to each dependant of the person who is an eligible young person (as defined in **clause 5**). This figure is indexed by reference to the

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CPI. It is notable that the requirement of 80 impairment points is absolute, so that, for example, no proportion of \$60 000 is payable where a person's degree of impairment is 75 points.

Under **clauses 81 and 82** the Commonwealth is liable to pay compensation for the cost of financial advice, up to a maximum of \$1200.

How does the Bill provide for compensation for a loss of income-earning capacity?

Part 3 provides for the payment of compensation to current members who have suffered a **service injury or disease** (defined in **clause 5**) which has resulted in an **incapacity for service** (also defined in **clause 5**). A person has an **incapacity for service** if he or she is unable to perform the defence service he or she previously performed at the level at which he or she previously performed. The compensation provided under this Part is essentially a compensation for economic loss, with the basic formula being that a member is entitled to be paid the difference between the amount he or she would have earned were it not for the relevant service injury or service disease and the amount he or she actually earns.

Clauses 85 to 87 provide an entitlement to compensation for full-time members (including continuous full-time Reservists), part-time Reservists, incapacitated cadets and declared members.

Clause 88 provides that the Commonwealth is only required to pay compensation in relation to an aggravation if the aggravation causes a person's incapacity for work. So, for example, if a person has a pre-existing injury which would cause them to be unable to work regardless of an aggravation caused by military services, the Commonwealth is not liable to pay compensation for economic loss. This contrasts with the situation in regard to rehabilitation, as the Commonwealth would be required to provide rehabilitation in such a case.

Clause 89 sets out the sections by reference to which the actual earnings and normal earnings of various types of members are to be calculated.

How is the amount of compensation determined?

Division 2 of Part 3 sets out the method of calculating normal and actual earnings for full-time members (both Permanent Forces members and continuous full-time Reservists). Normal earnings are the total of normal ADF pay and normal pay-related allowances. 'Normal' pay and allowances means those amounts that the member would have earned if he or she were not affected by a service injury or disease. Actual earnings are the total of actual ADF pay and actual pay-related allowances.

Division 3 of Part 3 sets out the method of calculating normal and actual earnings for part-time Reservists. Generally, the amounts the person would have earned as a Reservist and in civilian work are totalled to give normal earnings; the amounts he or she actually

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earned as a Reservist (if any) and in civilian work (if any) are totalled to give actual earnings. The situations where a person is incapacitated for service as a Reservist but is able to continue civilian work, or is able to continue service as a Reservist but unable to perform civilian work, are dealt with in **clauses 96 to 99**.

Under **clause 101**, in working out actual civilian earnings for a week the Commission is able to determine the amount that the Reservist could earn in suitable work, where this is greater than the amount he or she actually earns.

Division 4 deals with the calculation of the amount of compensation payable to a part-time Reservist who is incapacitated for service as a Reservist or work as a civilian due to an injury or disease that occurred when the person was a Permanent Forces member. In such cases normal earnings will be worked out by reference to the amount the person would have earned had he or she continued to be a Permanent Forces member (not taking into account promotions that the person may have expected to receive but had not actually received).

Division 5 deals with the calculation of the amount of compensation payable to a part-time Reservist who is incapacitated for service as a Reservist or work as a civilian due to an injury or disease that occurred when the person was a continuous full-time Reservist. The person has a choice between two ways of calculating normal earnings. He or she may choose to have them calculated on the basis of the amount he or she would have earned if still a continuous full-time Reservist. Alternatively, he or she may have them calculated on the basis of income earned from civilian work prior to becoming a continuous full-time Reservist.

Normal and actual earnings for cadets and declared members are, under **clause 116**, to be worked out under the regulations.

Part 4 of Chapter 4 deals with compensation for incapacity for work for former members of the ADF. **Clause 117** provides a simplified outline of the Part. Compensation is payable where a person is incapacitated for work as a result of a service injury or disease for which the Commission has accepted liability, and the person has made a claim for compensation. The amount of compensation for a week is, generally, the difference between the person's normal and actual earnings for the week. Normal earnings are calculated under whichever Division of Part 4 applies. The Division that applies is determined by the person's status when he or she left the Defence Force and, in the case of a person who left the Defence Force as a part-time Reservist, other factors such as the person's status when the service injury or disease occurred.

The Commonwealth's liability to pay compensation is established by **clause 118**. **Subclause 118 (1)** provides that compensation is payable to a person who is a former member (as defined in **clause 5**), where the Commission has accepted liability for a service injury or disease which results in the person's incapacity for work (as also defined in **clause 5**) and a claim for compensation has been made. **Subclause 118(2)** provides that

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the amount of compensation is either the Special Rate Disability Pension worked out under Part 6 of Chapter 4 (the ‘safety net pension’), or the amount worked out under Division 2 of Part 4 of Chapter 4.

Clause 119 provides that the Commonwealth is only liable to pay compensation in respect of an aggravated injury or disease where incapacity for work is wholly or partly due to the aggravation. This means that if a former member joined the Defence Force with a pre-existing injury or disease, and that has been aggravated by defence service, the Commonwealth is not liable to pay compensation where the incapacity for work is solely due to the original injury or disease and would have occurred regardless of the aggravation.

Clauses 120 and **121** limit compensation for persons aged 63 or over, and prevent compensation from being paid to anyone aged 65 or over.

Division 2 (clauses 123 to 139) provides how to work out the amount of compensation a person will receive for a week during which he or she is entitled to compensation (unless the person has chosen to receive a Special Rate Disability Pension).

Subdivision B (clauses 124 to 127) set out which sections apply to the calculation of compensation in particular circumstances. The main distinction is between persons who are not receiving Commonwealth superannuation (where the amount of compensation is worked out under **subdivision C (clauses 128 to 132)**) and persons who have retired and are receiving Commonwealth superannuation (where the amount of compensation is worked out under **subdivision D (clauses 133 to 136)**). Special provision is also made for those who are maintained in hospitals or similar institutions on a long-term basis (**clause 127**) and those who are receiving only small amounts of compensation (**subdivision E** allows for compensation payments of not more than \$150 a week to be converted to a lump sum in certain circumstances).

The most common situation is expected to be that where the person is not receiving Commonwealth superannuation, where the amount of compensation is worked out under **subdivision C (clauses 128 to 132)**. In this situation the Commonwealth will be liable to pay the difference between the person’s normal earnings for the week (worked out under **clause 132**) and the person’s actual earnings for that week for at least 45 weeks. After 45 weeks (or, if the person is not incapacitated for work for all of his or her normal weekly hours, as defined in **clause 132**, a longer period), the amount of compensation will be reduced in accord with **clause 131**). **Actual earnings** are determined by reference to **subclause 132(1)**; the provisions by reference to which **normal earnings** are determined are set out in **subclause 132(2)**.

Where a person to whom the Commonwealth is liable to pay compensation has retired and is receiving a Commonwealth superannuation pension (defined in **clause 5**) the amount of compensation payable is reduced under **subdivision D (clauses 133 to 136)**. Essentially the Commonwealth will be liable to pay the amount determined under **subdivision C** less

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the amount of superannuation that the person is receiving attributable to the Commonwealth's contribution.

Clause 141 provides how the normal earnings for a person who left the Defence Force as a Permanent Forces member are to be worked out. Normal earnings constitute **ADF pay plus allowance component plus \$100 (subclause 141(1))**. **ADF pay** is the amount the person would have earned if he or she was still a Permanent Forces member and was not incapacitated for service. **Allowance component** is, essentially, the amount of allowances that the person would have been paid if he or she was still a Permanent Forces member and was not incapacitated for service. The additional payment of \$100 (indexed) is intended to compensate for additional elements of the ADF payment package, such as free medical care and subsidised housing. The amount of **ADF pay** that a person would have earned does not take into account any possible promotions that the person may have received if he or she had remained in the Defence Force.

The normal earnings for a person who left the Defence Force as a continuous full-time Reservist are to be worked out under **Division 4 of Part 4 (clauses 142 to 150)**. Such a person may choose to have normal earnings calculated on the basis of the amount that the person would have earned if he or she were still a continuous full-time Reservist. The normal earnings of the person will be then calculated under **clause 144** on a corresponding basis to that on which the earnings of a person who left the Defence Force as a Permanent Forces member are worked out (including the additional amount of \$100). Alternatively, the person may elect under **clause 143** to have normal earnings and normal weekly hours calculated on the basis of his or her work engaged in before beginning his or her last period of continuous full-time service (referred to as choosing **pre-CFTS earnings**).

Where the person chooses pre-CFTS earnings their normal earnings and normal weekly hours will be worked out under **subdivision D of Division 4 (clauses 145 to 150)**. Generally the amount the person was earning from employment (or combinations of employment) immediately prior to commencing his or her last period of service as a continuous full-time Reservist will be his or her normal earnings, and the hours worked in that employment (or combinations of employment) will be his or her normal weekly hours.

The normal earnings and normal weekly hours of a person who was a part-time Reservist when the service injury or disease occurred and was still a part-time Reservist when he or she left the Defence Force are worked out under **Division 5 (clauses 151 to 158)** if he or she was working in civilian work before leaving the Defence Force and under **Division 6 (clauses 159 to 161)** if he or she was not working in civilian work before leaving the Defence Force. Under **Division 5** the person's normal earnings are the total of the amount the person would have earned as a part-time Reservist if he or she were still a part-time Reservist and the amount he or she was earning from civilian work before ceasing to be a member of the Defence Force. The person's normal weekly hours are the total of hours he or she was serving in the Reserve and working in civilian work before ceasing to be a

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member of the Defence Force. Under **Division 6** the person's normal earnings are 7 times the daily rate that the person would be paid if he or she were still a part-time Reservist.

The normal earnings and normal weekly hours of a person who was a Permanent Forces member or a continuous full-time Reservist when the service injury or disease occurred and a part-time Reservist when he or she left the Defence Force are worked out under **Division 7 (clauses 162 to 164)** if his or her last period of full-time service was as a Permanent Forces member and under **Division 8 (clauses 165 to 174)** if his or her last period of full-time service was as a continuous full-time Reservist. Under **Division 7** the normal earnings of the person are calculated under **clause 164** on a corresponding basis to that on which the earnings of a person who left the Defence Force as a Permanent Forces member are worked out (including the additional amount of \$100).

Under **Division 8** the person may choose to have normal earnings calculated on the basis of the amount that the person would have earned if he or she were still a continuous full-time Reservist. The normal earnings of the person will be then calculated under **clause 168** on a corresponding basis to that on which the earnings of a person who left the Defence Force as a Permanent Forces member are worked out (including the additional amount of \$100). Alternatively, the person may elect under **clause 167** to have normal earnings and normal weekly hours calculated on the basis of his or her work engaged in before beginning his or her last period of continuous full-time service (referred to as choosing **pre-CFTS earnings**).

Where the person chooses pre-CFTS earnings their normal earnings and normal weekly hours will be worked out under **subdivision D of Division 8 (clauses 169 to 174)**. Generally the amount the person was earning from employment (or combinations of employment) immediately prior to commencing his or her last period of service as a continuous full-time Reservist will be his or her normal earnings, and the hours worked in that employment (or combinations of employment) will be his or her normal weekly hours.

Clause 175 provides that the normal and actual earnings and normal weekly hours for cadets or declared members are to be worked out in accordance with the regulations.

Part 5 makes provision for the adjustment of normal earnings and actual earnings in specified circumstances. Of principal significance is the provision that an amount of civilian pay that contributes to the determination of the amount of compensation to which the Commonwealth is liable in respect of a person is to be indexed in accordance with a method to be set out in the regulations.

Clause 179 provides that the minimum that a person's **normal earnings** can be is the federal minimum wage (even if the person's normal earnings are actually less than that minimum).

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Clause 180 provides that normal earnings do not include amounts earned as a bonus, or any expected increase in earnings due to the expectation of a bonus, promotion or posting.

Where it is necessary to determine actual civilian earnings the Commission is in some circumstances required to determine the amount that a person is able to earn in suitable work. **Clause 181** specifies the matters that the Commission may consider in making such a determination, including matters such as a failure to accept an offer of suitable work. In some cases the amount of compensation to which the Commonwealth is liable in respect of a person is determined in part by the amount of the person's civilian pay prior to a period of continuous full-time service. **Clause 182** provides that in these cases the amount of civilian pay is to be indexed in accordance with a method to be set out in the regulations. **Clause 183** provides that the amount of \$100 included in calculation of the amount of compensation payable in some cases is also to be indexed in accordance with a method to be set out in the regulations.

Division 3 (clauses 184 to 190) provide for the adjustment of ADF pay and pay-related allowances. Of principal significance is the provision that an amount of ADF pay that contributes to the determination of the amount of compensation to which the Commonwealth is liable in respect of a person is to be increased in line with increases in the pay as a result of the operation of a law or the operation of an award. This essentially means that the amount of compensation payable to a person will be determined by reference to the pay and pay-related allowances currently payable to a person of the rank the person was when he or she left the Defence Force.

Increases in pay due to actual promotions are included under **clause 186**, but not increases due to promotions that may have been expected to occur had a person not been injured.

Calculation of civilian earnings under this Bill is usually to be performed by reference to an example period (generally the last period of two weeks before a person left the relevant employment). **Division 4 (clauses 191 to 194)** makes provision for adjusting the amount of civilian earnings where a person's earnings vary during the example period or it is impracticable to work out such an amount.

How does the Bill provide a safety net?

Part 6 of Chapter 4 (clauses 197 to 210) provides for a Special Rate Disability Pension. Severely impaired people who are unable to work more than 10 hours per week may choose to receive a pension under this Part instead of compensation under **Part 4**. **Clause 198** provides that the rate of pension is the same as that payable under the VEA. **Clause 199** provides that a person is only eligible to choose to receive a Special Rate Disability Pension if the person is receiving compensation under Division 2 of Part 4, has suffered an impairment that is likely to continue indefinitely, has suffered a substantial impairment and is unable to perform paid work for more than 10 hours per week (and this is unlikely to be increased by rehabilitation).

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Clauses 200 to 203 make provision in relation to the making of the choice to receive the Special Rate Disability Pension by a person, and in relation to a determination by the Commission that a person is to receive the Special Rate Disability Pension.

Clause 204 provides that an amount of Special Rate Disability Pension payable to a person is offset where a person is receiving compensation under Part 2 (that is compensation in the nature of compensation for loss of amenities of life resulting from an injury or disease) or where the person is receiving Commonwealth superannuation.

Clauses 205 to 207 make provision in relation to financial advice obtained by a person before choosing whether to receive a Special Rate Disability Pension.

If a person's impairment is reduced, or the person becomes able to undertake more than 10 hours per week paid work, **clause 209** provides that a Special Rate Disability Pension is no longer payable.

Clause 210 provides that the Commission may establish a Return to Work scheme that applies where a person who was receiving a Special Rate Disability Pension becomes able to undertake more than 10 hours per week paid work, and may determine amounts of compensation payable in such circumstances.

Compensation is payable under **Part 7** in respect of various additional matters. Under **Division 2 (clause 212)** compensation may be payable where a person's impairment resulting from a service injury or disease means they have special requirements in relation to a motor vehicle. Compensation may, for example, relate to payment of the cost of modifications to a motor vehicle. Under **Division 3 (clauses 213 to 220)** the Commonwealth is liable to pay for the cost of household services and attendant care services in certain circumstances. Under **Division 4 (clauses 221 to 225)** persons who are eligible to receive a Special Rate Disability Allowance (or would be eligible if they were not aged over 63) may be eligible to receive a telephone allowance. Under **Division 5 (clauses 226 to 230)** the Commonwealth may be liable to pay compensation for loss of, or damage to, medical aids.

Chapter 5 – Compensation for dependants of certain deceased members, members and former members

Part 1 (clause 231) provides a simplified outline of Chapter 5. Most benefits payable under the Chapter are provided to dependants of deceased members to whom **clause 12** applies (that is, the person's death was a service death or prior to the person's death he or she suffered a serious impairment from a service injury or disease). There is also provision for a scheme to provide education and training for children and young dependants of deceased members and some current and former members.

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Under **Part 2** compensation is provided for the wholly dependent partners of deceased members to whom **clause 12** applies. The amount of compensation is determined by reference to the provisions of **Division 2 (clauses 234 to 238)**. It has two components. The first is worked out by applying the **partner's age-based number** to, in the case of a death relating to warlike service, the amount of \$100 000, and, in the case of a death relating to non-warlike or peacetime service, the amount of \$40 000. **Subclause 234(7)** provides that a **partner's age-based number** is the number advised by the Australian Government Actuary by reference to the partner's age at the date of the member's death. The second is a weekly amount that is equivalent to the pension payable under paragraphs 30(1)(a) and (b) of the *Veterans' Entitlements Act 1986*, which the partner may elect to take as either a pension payable until death or as a lump sum calculated, under **subclause 234(4)** by reference to the weekly amount and to the **partner's age-based number**.

Under **Division 3 (clauses 239 to 241)** the Commonwealth is liable to compensate the partner for the cost of obtaining financial advice.

Under **Division 4 (clauses 242 to 244)** the Commonwealth is also liable to pay to a wholly dependent partner an amount equal to 12 weeks' continuing payments where the deceased member was receiving compensation as a result of permanent impairment or incapacity for service or work. The member must have received compensation for the week before he or she died (so if the member was not paid compensation for that week because he or she was in prison no compensation will be payable under this clause). Where a deceased member had no wholly dependent partner this amount may be payable under **Division 4 of Part 3 (clauses 255 to 256)** to a dependant of the deceased member who is an eligible young person.

Part 3 provides for compensation and other benefits for the children (or other dependants aged under 25) of certain deceased members, members and former members. Under **Division 2 (clauses 251 to 252)** compensation of \$60 000 is payable for an eligible young person who was a dependant of a deceased member to whom **clause 12** applies. Under **Division 3 (clauses 253 to 254)** weekly compensation of \$66 is payable for an eligible young person who was a dependant of a deceased member to whom **clause 12** applies.

Under **Division 6** the Commission may establish a scheme to provide education and training for eligible young persons who are dependants of members or former members suffering substantial impairment, or who were dependants of deceased members to whom **clause 12** applies.

Under **Part 4 (clauses 261 to 264)** the Commonwealth is liable to pay compensation to a person who was a dependant of a deceased person other than a wholly dependent partner of an eligible young person. The amount payable is the amount that the Commission determines reasonable, but it must not exceed \$60 000 for a dependant and the total amount payable under this Part for all dependants must not exceed \$190 000.

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Chapter 6 – Treatment for injuries and diseases

Chapter 6 makes provision for treatment of injuries and diseases for some current members, former members, and dependants of deceased members. Provision for compensation for treatment costs is made under **Part 2 (clauses 270 to 277)**. Compensation for the cost of treatment of a person's service injury or disease will generally be payable under **clause 271** or **272** (dependent on whether or not the person is a current member of the Defence Force) where the Commission has accepted liability for the service injury or disease, it was reasonable for the person to obtain the treatment. Under **clause 276** the amount of treatment compensation payable is the amount that the Commission considers reasonable.

Part 3 (clauses 278 to 287) makes provision for treatment to be provided for service injuries and diseases of some current members and former members. Treatment for current members is generally provided under the *Defence Force Regulations 1952* but may instead be provided under **clause 279**. Treatment for former members and members who are not entitled to treatment under the *Defence Force Regulations 1952* may be provided under **clause 280**. **Clauses 281** and **282** provide that a person who has an impairment of 60 or more impairment points or is entitled to a Special Rate Disability Pension is entitled to be provided with treatment under **Part 3**. **Clause 284** provides that certain dependants of deceased members are eligible for treatment under **Part 3**.

Division 4 (clauses 285 to 287) sets out how the Commission is to administer the provision of treatment under the Part.

Part 4 (clauses 288 to 303) deals with the provision of other compensation relating to treatment, such as compensation for travel costs (**clause 290**), compensation for transportation costs of an attendant (**clause 297**), and the payment of a pharmaceutical allowance (**clause 300**).

Offences are created under **Part 5** in relation to treatment provided or compensated for under **Chapter 6**. These offences principally relate to the behaviour of medical service providers and practitioners. Some of the offences created are offences of strict liability (for example, the offences created by **clause 306** relating to making a statement or issuing a document that is false or misleading and is capable of being used in connection with a claim under **Chapter 6**).

Under **clause 315** where an amount is paid under **Chapter 6** which is, as a result of a false or misleading statement, greater than the amount that should have been made, the excess is recoverable from the person by or on behalf of whom the statement was made. **Clause 317** provides that if an amount has previously been paid to a person that exceeded the amount payable to that person the Commission may, with the agreement of the person, reduce the amount of a subsequent payment to the person.

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Chapter 7 – Claims

The rules that deal with the making of a claim for compensation or treatment under the Bill are set out in **Chapter 7 (clauses 318 to 343)**. Most benefits under the Bill are not payable unless a claim has been made under **clause 319**. This clause makes provision for the making of a claim for acceptance of liability by the Commission for a service injury, a service disease, a service death, or loss of or damage to a medical aid or for compensation. **Clause 319** and the other provisions of **Division 2 (clauses 319 to 323)** provide for how a claim is to be made and who can make a claim.

Division 3 (clauses 324 to 331) sets out what happens after a claim is made. Provision is made for investigation of a claim (**clause 324**), a needs assessment in relation to a claim (**clauses 325 to 327**), medical examinations and the consequences of a failure to have an examination (**clauses 328 to 329**) and the obligation of claimants and the Commission to provide information or documents (**clauses 330 to 331**).

Part 2 (clauses 332 to 343) makes provision in relation to the determination of claims under the Bill. **Clause 334** provides that the Commission is not bound by any technicalities but must act according to the substantial merits of a case. In particular, it must take account of the effect of such matters as the passage of time and the absence of official records (including an absence that resulted from a failure to report an incident to the relevant authorities). **Clause 335** sets out the standard of proof required for a determination by the Commission. Generally the standard of proof is one of reasonable satisfaction. However, where a claim for acceptance of liability for a person's injury, disease or death relates to warlike or non-warlike service then a more beneficial standard of proof applies. That is, the Commission is required to make the relevant determination unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making the determination. It is to be so satisfied if it is of the opinion that the material before it does not raise a **reasonable hypothesis** connecting the injury, disease or death of a person with the person's service.

Clause 338 provides that whether or not the material raises a **reasonable hypothesis** is generally to be assessed by reference either to a **Statement of Principles** determined under either the VEA or a determination under **clause 340**. **Clause 339** provides that in certain cases whether or not the Commission is to be reasonably satisfied of a matter is also to be determined by reference to a Statement of Principles or a determination.

Chapter 8 – Reconsideration and review of determinations

Part 1 of Chapter 8 (clauses 344 and 345) provides an outline of the chapter and a number of definitions relating to reconsideration and review.

Clause 346 provides that where the Commission makes an original determination in relation to a claim it must notify the claimant of the terms of the determination and the

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reasons for the determination. It must also set out the claimant's rights to request a reconsideration of the determination or, in some circumstances, request a review.

Part 3 (clauses 347 to 351) sets out the procedure for reconsideration of determinations.

Where a determination relates to warlike or non-warlike service the claimant may elect whether to ask the Commission to reconsider the determination or apply to the Veterans' Review Board for review of the determination. It is not possible for a claimant to seek review of such a determination by the Veterans' Review Board after it has been reconsidered by the Commission. **Part 4 (clauses 352 and 353)** deals with review by the Board.

Where a determination has been reconsidered by the Commission or reviewed by the Board a claimant who is still unsatisfied can apply to the Administrative Appeals Tribunal for review of the determination. The procedure for review is set out in **Part 5 (clauses 354 to 359)**.

Chapter 9 – The Military Rehabilitation and Compensation Commission

Chapter 9 of the Bill deals with the establishment and operation of the Commission. It is established by **clause 361** and its functions are set out in **clause 362**. Provision is also made in relation to membership of the Commission (**clauses 364 to 372**) and to meetings and resolutions of the Commission (**clauses 373 to 381**).

Chapter 10 – Liabilities arising apart from this Act

Chapter 10 of the Bill deals with the situation where a person entitled to compensation under the Bill for an injury, disease, death or loss may also have a right to recover damages in relation to the matter. **Clause 388** provides that generally a person does not have an action against the Commonwealth or another member in relation to a service injury or service disease. A dependant of a deceased member may bring an action in respect of a service death but, if successful, will be required to pay to the Commonwealth the lesser of the damages received and compensation received under the Bill.

Clause 389 provides that a person may choose to bring an action against the Commonwealth for damages for non-economic loss. If the person so chooses, generally further compensation will not be payable under the Bill, and the amount of damages is limited to \$110 000.

Part 3 (clauses 391 to 403) deals with the liability of third parties. In particular, **clause 393** provides for the Commission to institute or take over a claim against a third party and **clause 398** provides that where damages are payable in a claim made or taken over by the Commission the damages are payable to the Commonwealth and will be set off against amounts of compensation paid or payable to the claimant. **Clause 402** provides that where

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a claim was not instituted or taken over by the Commission and damages are recovered compensation under the Bill is generally not payable after the day on which the damages were recovered.

Chapter 11 – Miscellaneous

Chapter 11 deals with a number of miscellaneous matters. In particular, **clause 404** provides for indexation of various amounts and **clause 415** provides for recovery of amounts of compensation wrongly paid.

Technical flaws

The reference in **clause 50** to ‘an examination under section 45’ should be to an examination under section 46.

References to the partner’ in **clause 221 (subclauses (1) and (2))** should be to ‘the person’.

Concluding Comments

The provision of differing amounts of compensation to a member, a former member or a dependant of a deceased member of whether the service injury, service disease or death related to warlike, non-warlike or peacetime service is controversial. It is notable that the ‘dividing line’ differs in relation to compensation for different matters. That is, where compensation in the nature of compensation for loss of amenities of life is payable under Chapter 4, the distinction is between on the one hand ‘warlike service’ or ‘non-warlike service’, and on the other hand ‘peacetime service’. Where compensation to the partner of a deceased member is payable under Chapter 5, the distinction is between on the one hand ‘warlike service’, and on the other hand ‘non-warlike service’ or ‘peacetime service’. Even if it is accepted that differing amounts should be provided in relation to differing types of service, it is difficult to see why the distinction should be at a different point in relation to different circumstances giving rise to a liability to compensation.

It is apparently presumed that no member would deliberately act so as to cause an injury or disease that resulting in serious and permanent impairment.¹⁸ It is not clear what forms the basis for this presumption. Unfortunately there are instances of veterans committing suicide as a result of defence service, and there seems no cogent reason to believe that this would never happen in relation to serving members.

The provisions of Chapter 5 relating to the payment of compensation to the partners of certain deceased members are structured on the basis that the normal situation will be that the partner of a deceased member was wholly dependent on the member. It would seem

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that this is continually becoming less likely to be the situation. Although compensation is payable to a partly dependent partner it may be seen to be unsatisfactory and likely to give rise to dispute that in such a case the amount of compensation is determined by reference to what the Commission considers reasonable rather than by reference to a generally available set of criteria.

A number of calculations under the Bill can only be performed by reference to external information, either in regulations or other sources. For example, the amount of compensation payable under Division 5 to the wholly dependent partner of a deceased member is dependent upon a number that is advised by the Australian Government Actuary. This lack of transparency will make it difficult for potential claimants to be aware of their entitlements under the legislation.

Most decisions to be made under the Bill can be reconsidered by the Commission. Decisions that relate to warlike or non-warlike service can also be reviewed by the Veterans' Review Board. After a decision has been reconsidered or reviewed it can be reviewed by the Administrative Appeals Tribunal. This effectively continues the position established under the current legislation.

Endnotes

- 1 Black Hawk Board of Inquiry, Documents for Public Release, 1997, p. 1.
- 2 *The Review of the Military Compensation Scheme*, Department of Defence, March 1999, p. 74 (Recommendation 27).
- 3 For example, the amount of the Special Rate Disability Pension (which can be paid in certain circumstances under Part 6 of Chapter 4) is determined by reference to the pension payable under section 24 of the *Veterans' Entitlements Act 1986*.
- 4 Bodies represented at the public hearings held by the Senate Foreign Affairs Defence and Trade Legislation Committee on 23, 24 and 25 February 2004 included, amongst others, the Australian Federation of Totally and Permanently Incapacitated Ex Servicemen and Women, the Injured Service Persons Association, and the Vietnam Veterans Association.
- 5 *Review of Veterans' Entitlements*, conducted by the Hon. John Clarke QC, Air Marshal Doug Riding AO DFC and Dr David Rosalky, January 2003, Vol. 2 p. 279.
- 6 *ibid.*
- 7 *The Review of the Military Compensation Scheme*, *op. cit.*, p. 63 (Recommendation 24).
- 8 This instruction is reproduced as Annex G to the *Review of the Military Compensation Scheme op. cit.*
- 9 *ibid.*

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- 10 Belinda Hickman 'War scars need fair treatment' *The Australian* 19 February 2004, p. 2.
- 11 *The Review of the Military Compensation Scheme*, op. cit., p. 63.
- 12 *Review of Veterans' Entitlements* op. cit., p. 142.
- 13 *ibid.*, p. 48.
- 14 The Hon. Dana Vale, MP, Minister for Veterans' Affairs, 'Military Rehabilitation and Compensation Bill 2004, Second Reading Speech', House of Representatives, *Debates*, 4 December 2004, p. 23806.
- 15 For instance, in speaking to the Senate Foreign Affairs, Defence and Trade Legislation Committee by the Naval Association referred to the Navy as a 'very structured career' and argued that the 'reasonable expectation of promotion must be included in any calculation of compensation entitlements', Submission of 25 February 2004 p. 4, and the Australian Federation of Totally and Permanently Incapacitated Ex Servicemen and Women stated that 'there should be provision for an increase that would reasonably correspond with [his]reasonable expectations of promotion', Mr Bodey, speaking to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 23 February 2004, p. 3.
- 16 Explanatory Memorandum, Note to clause 58, p. 31.
- 17 Explanatory Memorandum, Note to clause 67, p. 35.
- 18 Explanatory Memorandum, Note to clause 32, p. 19.

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