

EXPLANATORY STATEMENT

Military Rehabilitation and Compensation (Family Support) Instrument (No. 2) 2018

(Instrument 2018 No. MRCC 69)

EMPOWERING PROVISION

Section 268B of the *Military Rehabilitation and Compensation Act 2004* (MRCA).

PURPOSE

The *Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No.1) Act 2018* inserted a new Chapter 5A – Family Support into the MRCA to establish the legislative framework for providing support to eligible members, former members and their families. Chapter 5A prescribes some of the detail of the new framework and enables a legislative instrument to specify further details of the assistance and benefits that may be made available.

Initially, the *Military Rehabilitation and Compensation (Family Support) Instrument 2018* (Instrument 2018 No. MRCC 39) (F2018L00474) was enacted and it commenced on 1 May 2018. The purpose of that instrument was to provide for the granting of assistance and benefits to members and former members of the Australian Defence Force (ADF) who have rendered warlike service, post 1 July 2004, and to related persons of such members and former members. Partners of deceased members and deceased former members could also be granted assistance and benefits where the member or former member rendered warlike service, post 1 July 2004, and had suicided and the death was related to their service, or had died in service. The benefits and assistance available were childcare, counselling and household services.

The attached instrument (Instrument 2018 No. MRCC 69) revokes the *Military Rehabilitation and Compensation (Family Support) Instrument 2018* (revoked instrument) and remakes it to clarify the eligibility criteria for assistance and benefits under Part 2 of the instrument. Further, the attached instrument changes the basis for determining amounts of child care services from a calendar year to a financial year. The eligibility criteria for assistance and benefits under Part 3 of the instrument remain unchanged.

The benefits and assistance provided under the attached instrument continue to support the implementation of recommendation 19 of the Senate Foreign Affairs, Defence and Trade Reference's committee report *The Constant Battle: Suicide by Veterans*.

Part 2—Eligibility criteria for members, former members and their family groups

Section 8 of the attached instrument sets out the eligibility criteria for the granting of assistance and benefits to members, former members and their family groups under Part 2, namely:

- a) the member or former member has rendered warlike service on or after 1 July 2004; and

- b) the Commission is the rehabilitation authority for the member or former member; and
- c) the Commonwealth is liable to pay incapacity payments, namely, compensation to the member under section 85 of the MRCA or the former member under section 118 of the MRCA, and
- d) the member or former member has an approved rehabilitation program; and
- e) the member, former member or family member is in need of the assistance or benefits.

Paragraphs (b) and (c) are the eligibility criteria that have been added by the attached instrument. The effect of the additional criteria is to exclude members and former members who do not have the *Military Rehabilitation and Compensation Commission* (“Commission”) as their rehabilitation authority, for example, where the Chief of the Defence Force is the rehabilitation authority. Further, members and former members must at least be eligible to receive incapacity payments under the MRCA. The criteria in the other paragraphs remain unchanged.

Part 2 of the attached instrument provides for the following kinds of additional assistance and benefits to be provided to members, former members and their family groups:

- Childcare for each child of the member or former member who is under school age and for each child who is of primary school age which could include child day care, and before and after school care.
- Counselling for current and former ADF members with an approved rehabilitation program, and their related persons of up to a total of 20 sessions (in addition to any ‘treatment’ provided under the DVA Health Card system) over a 5 year period.

Monies for childcare and counselling are to be paid to the providers of those services. Such monies cannot be paid by way of reimbursement to members, former members or members of their family groups. Childcare providers must be approved by the Commonwealth and counselling providers must be professionally accredited.

Child care services—financial year

Under Parts 2 and 3 of the attached instrument child care services may be granted by the Commission. The maximum amounts payable for child care services are determined by reference to a financial year. Under the revoked instrument they were determined by reference to a calendar year. The change from a calendar year to a financial year means that payments of child care services will align with other child care payments made by the Commonwealth which are also determined on a financial year basis.

The maximum amounts of child care services that may be payable remain unchanged. They are up to \$10,000 per child per financial year (for children under primary school age) and up to \$5,000 per child per financial year (for primary school children).

Part 3—Eligibility criteria for partners of certain deceased members

Section 14 of the attached instrument sets out the eligibility criteria for the granting of assistance and benefits to partners of deceased members under Part 3, namely:

- a) the person was the partner of the deceased member at the time of the deceased member's death; and
- b) the deceased member rendered warlike service on or after 1 July 2004; and
- c) the deceased member's death:
 - (i) was death by suicide related to his or her service; or
 - (ii) was a service death.

Part 3 of the instrument relies on the definition of 'deceased member' in the MRCA. The definition has a particular meaning, namely a person who was a member or former member before his or her death.

The eligibility criteria remain unchanged in the attached instrument. By way of policy clarification, paragraph c)(i) will apply in pre-liability circumstances, and does not require the Commission to establish conclusively that the deceased member's death was a suicide related to service. For example, confirmation of death should be evidenced by a certificate of death, police report or hospital report. However, if the partner is experiencing difficulties obtaining one of them in a timely manner and is in urgent need of support, a signed statutory declaration may be sufficient to satisfy the eligibility criteria in paragraph c)(i). Paragraph c)(ii) will apply in post-liability circumstances, and does require a formal determination of service death by the relevant delegate.

Situations can arise where it is determined that a death is not a service death under paragraph c)(ii), even though the Commission has until then been satisfied that the death was a death by suicide related to service under paragraph c)(i). In such a situation, provided the deceased member's death has some connection to service, any assistance or benefits that have been granted under Part 3 to the partner of the deceased member will not be affected. Paragraph c)(i) applies to a broader range of circumstances than paragraph c)(ii) and is intended to deal with these kinds of situations.

Part 3 of the instrument specifies that the following kinds of assistance and benefits may be provided to the partners of deceased members:

- Childcare for each child of a deceased member who is under school age and for each child who is of primary school age which could include child day care, and before and after school care.
- Counselling may be provided to the partner of a deceased member of up to 4 counselling sessions per calendar year for a period of 2 years from the date of death.
- Household services may be provided to the partner of a deceased member for a period of 2 years from the date of death. Household services include garden maintenance and home help/domestic support to provide assistance in their adjustment to life after the death of their partner. Household service limits are indexed annually.

Monies for childcare and counselling are to be paid to the providers of those services. Such monies cannot be paid by way of reimbursement to the partner of a deceased member. Childcare providers must be approved by the Commonwealth and counselling providers must be professionally accredited.

Household services are to be provided by household services providers who must have an Australian Business Number and public liability insurance, and be in the business of providing household services. The monies for household services are to be paid to the household services provider. However, if the Commission is satisfied that there are exceptional circumstances, monies for household services may be paid by way of reimbursement to the partner of a deceased member for services rendered by a household services business. For example, the partner of a deceased member may find it necessary to pay a plumber for urgent plumbing repairs, and he or she will be able to be reimbursed the cost of those repairs.

Merits review

Chapter 8 of the MRCA provides for the review of determinations ('original determinations') made under the Act by the Commission and the Veterans' Review Board (VRB). Applications may be made to the Administrative Appeals Tribunal (AAT) for review of a determination revoking, varying or confirming an original determination. It follows that decisions of the Commission under section 8 in Part 2 and section 14 in Part 3 of the instrument, being original determinations, would be subject to the full range of merits review by the Commission, the VRB and the AAT.

In addition to the power to make this instrument under 268B of the MRCA, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

CONSULTATION

Section 17 of the *Legislation Act 2003* requires a rule-maker to be satisfied, before making a legislative instrument that any consultation the rule-maker considered appropriate and reasonably practicable, has been undertaken.

On 24 October 2017, the Government announced its response to the Foreign Affairs, Defence and Trade Committee's Report on the Inquiry into suicide by veterans and ex-service personnel. The response included several measures to be put in place to reduce suicide and self-harm in the veteran community, with a package of new measures to deliver better support for veterans and their families, including additional family support.

Consultation has taken place with the Department of the Prime Minister and Cabinet, the Department of Finance, Health and Community Services Division and Legal Services Branch.

The measure implemented by this instrument is entirely beneficial in nature in terms of its impact on members.

In these circumstances it is considered that the requirements of section 17 of the *Legislation Act 2003* have been met.

RETROSPECTIVITY

None.

DOCUMENTS INCORPORATED BY REFERENCE

None.

REGULATORY IMPACT

None.

HUMAN RIGHTS STATEMENT

The attached instrument makes provision in relation to extended family support by way of additional childcare arrangements, counselling and household services to eligible members, former members and their partners.

Human rights implications

The instrument engages the Right to Health under article 12(1), and the Right to Social Security under article 9, of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Right to Health

The Right to Health is contained in article 12(1) of the International Covenant on Economic Social and Cultural Rights. The Right to Health is the right to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic Social and Cultural Rights has stated that health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.

Right to Social Security

Article 9 of the ICESCR states “States Parties ... recognize the right of everyone to social security, including social insurance”. General Comment 19 by the Committee on Economic, Social and Cultural Rights sets out the essential elements of the right to social security, including “States parties should ... ensure the protection of workers who are injured in the course of employment or other productive work”.

Overview

The provision of additional family support by way of additional childcare arrangements, brief intervention counselling, and additional household services will impact positively on the mental health and living standards of veterans and their families.

Conclusion

The attached instrument engages positively with the Right to Health and the Right to Social Security, and is considered to be “human rights compatible”.

Military Rehabilitation and Compensation Commission
Rule-Maker

FURTHER EXPLANATION OF PROVISIONS

See: [Attachment A](#)

Military Rehabilitation and Compensation (Family Support) Instrument (No. 2) 2018

Part 1 - Preliminary

Section 1

This section provides that the name of the instrument is the *Military Rehabilitation and Compensation (Family Support) Instrument (No. 2) 2018*.

Section 2

This is the commencement provision and provides that the instrument is to commence on the day after it is registered on the Federal Register of Legislation.

Section 3

This section sets out the empowering provision in the primary legislation that authorises the making of this instrument, that is, section 268B of the MRCA. This instrument also revokes the *Military Rehabilitation and Compensation (Family Support) Instrument 2018 (Instrument 2018 No. MRCC 39) (F2018L00474)*.

Section 4

This section is a purpose provision. It outlines the policy intent behind the instrument, namely, to provide additional assistance and benefits for eligible persons (see sections 8 and 14).

Section 5

This is the interpretation section. It defines terms that are used in the instrument. Explanations of the key definitions are set out below.

child care provider is a person approved (however described) to provide child care services by the Secretary of the Commonwealth Department responsible for education.

counselling provider is a person accredited (however described) to provide counselling by the professional body of which the person is a member.

counselling is any form of brief intervention counselling, including, but not limited to, mental health counselling, financial counselling, life skills counselling, counselling to provide mental health first aid and counselling focusing on caring for veterans with specific disabilities.

household services is any service conducted within or around the principal place of residence of the partner of a deceased member to assist with the proper functioning or maintenance of the environment of the residence that will assist the partner to adjust to life after the deceased member's death, including, but not limited to, home cleaning, gardening services and home maintenance services.

household services provider is a person with an Australian Business Number and public liability insurance who is in the business of providing household services.

nominated person of a member or former member is a person listed by the member or former member in his or her approved rehabilitation program, see section 9. The nominated persons are entitled to the assistance and benefits outlined in Part 2 (child care services and counselling). A nominated person must be a related person of the member or former member.

partner of a deceased member is the person who was the partner of the deceased member at the time of the deceased member's death.

related person of a former member covers the same persons as the definition of related person of a member in section 15 of the MRCA. This definition is required because the definition of related person in section 15 of the MRCA does not extend to former members.

Also defined are ***primary school age*** and ***school age***, and these definitions are used to set the financial limits for child care services, see sections 11 and 16. The other definition in section 5 is technical in nature. Other terms used have the same meaning as in the MRCA, including deceased member, approved rehabilitation program, service death and warlike service. The definition of deceased member has a particular meaning, namely a person who was a member or former member before his or her death.

Section 6

This section confirms that additional assistance or benefits must not be granted unless the member, former member or deceased member rendered warlike service after 1 July 2004 in accordance with subsection 268B(2) of the MRCA.

Part 2 – Assistance or benefits to members, former members and nominated persons

Section 7

This section provides that Part 2 applies to members and former members, and their nominated persons (see section 9).

Section 8

This section sets out the eligibility criteria for the additional assistance or benefits, namely:

- the member or former member has rendered warlike service on or after 1 July 2004; and
- the Commission is the rehabilitation authority for the member or former member; and
- the Commonwealth is liable to pay incapacity payments, namely, compensation to the member under section 85 of the MRCA or the former member under section 118 of the MRCA; and
- the member or former member has an approved rehabilitation program; and
- the member, former member or nominated person is in need of assistance or benefits.

Section 9

This section allows a member or former member to list any of their related persons for inclusion in the member's or former member's approved rehabilitation program. The intention of this section is that the related person is nominated to provide support to the member or former member to achieve their rehabilitation plan outcomes.

‘Related persons’ are defined in section 15 of the MRCA. Consequently, a nominated person of a member or former member can be any of the following:

- the partner of the member or former member,
- a parent or step-parent of the member or former member,
- a parent or step-parent of the member’s or former member’s partner,
- a grandparent of the member or former member,
- a child or stepchild of the member or former member,
- a child or stepchild of the member’s or former member’s partner,
- a grandchild of the member or former member,
- the member’s or former member’s brother, sister, half-brother or half-sister,
- a person in respect of whom the member or former member stands in the position of a parent, or
- a person who stands in the position of a parent to the member or former member.

The definition of related persons is purposefully broad to reflect the different family structures accepted as family in contemporary Australian society.

Section 10

This section provides that childcare services or counselling, or both, may be granted under this Part.

Section 11

This section provides that a member or former member, or a nominated person, may be provided with childcare services for a child of the member or former member. Child care services are available for infants and young children (pre-schoolers) as well as for older children (primary schoolers).

The financial limits on the amount of childcare services are:

- If a child is under school age, the limit is set at \$10,000 per child per financial year.
- If a child is of primary school age, the limit is set at \$5,000 per child per financial year.

School age is defined (see section 5) as the age at which a child is required by a law of the State or Territory in which the child lives to attend school. Primary school age is defined (see section 5) as any of the ages at which a child in the State or Territory in which the child lives would usually attend a primary school.

Child care services are to be provided by a child care provider and amounts for child care services are to be paid to them. Monies for child care services cannot be paid by way of reimbursement.

Section 12

Counselling to members and former members and their nominated persons (family group) are to be provided by counselling providers. Amounts for counselling are to be paid to the counselling provider. Monies for counselling cannot be paid by way of reimbursement.

The limit is four counselling sessions per family group per year over a five year period starting on the date of the first counselling session.

A counselling session may be provided to an individual member of a family group, or to more than one or all of the family group. A family group may also comprise just the member or former member.

Part 3 — Assistance or benefits to partners of certain deceased members

Section 13

This section provides that Part 3 applies to partners of certain deceased members. They may be granted assistance or benefits listed in section 15.

Section 14

This section sets out the eligibility criteria for assistance or benefits to partners of deceased members, namely:

- the person was the partner of the deceased member at the time of the deceased member's death; and
- the deceased member rendered warlike service on or after 1 July 2004; and
- the deceased member's death:
 - (iii) was death by suicide related to his or her service; or
 - (iv) was a service death.

Section 15

This section provides that childcare services, counselling and household services may be granted under this Part.

Section 16

This section provides that the partner of a deceased member may be provided with childcare services for a child of the deceased member. Child care services are available for infants and young children (pre-schoolers) as well as for older children (primary schoolers).

The financial limits on the amount of childcare services are:

- If a child is under school age, the limit is set at \$10,000 per child per financial year.
- If a child is of primary school age, the limit is set at \$5,000 per child per financial year.

School age is defined (see section 5) as the age at which a child is required by a law of the State or Territory in which the child lives to attend school. Primary school age is defined (see section 5) as any of the ages at which a child in the State or Territory in which the child lives would usually attend a primary school.

Child care services are to be provided by a child care provider and amounts for child care services are to be paid to them. Monies for child care services cannot be paid by way of reimbursement.

Section 17

This section specifies that household services for the partner of a deceased member must not exceed \$482.50 per week. Household services cease to be available on the second anniversary of the deceased member's death.

The household services are to be provided by a household services provider chosen by the partner, and the amounts for household services are to be paid to the household services provider. However, if the Commission is satisfied that there are exceptional circumstances, monies for household services may be paid by way of reimbursement to the partner of a deceased member. For example, the partner of a deceased member may find it necessary to pay a plumber for urgent plumbing repairs, and the partner will be able to be reimbursed the cost of those repairs. The amount reimbursed cannot exceed the weekly limit of \$482.50.

The maximum amount of \$482.50 per week for household services is to be indexed annually in accordance with the Consumer Price Index (CPI) as provided for by section 404 of the MRCA.

Section 18

This section provides that the partner of a deceased member may be provided with up to four counselling sessions per calendar year. Counselling ceases to be available on the second anniversary of the deceased member's death. Counselling is to be provided by a counselling provider and amounts for counselling are to be paid to the counselling provider. Monies for counselling cannot be paid by way of reimbursement.