

## EXPLANATORY STATEMENT

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

Issued by the Minister for Veterans' Affairs

### ***Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Laws) Declaration 2020***

#### **EMPOWERING PROVISION**

Subsection 119(7) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (the DRCA).

#### **PURPOSE**

The DRCA is the compensation legislation that applies to current and former members of the Australian Defence Force (ADF) with conditions linked to service prior to 1 July 2004.

The DRCA was created by the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017* as a re-enacted version of the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA) modified to apply only to members of the ADF and their dependants.

The DRCA commenced on 12 October 2017 and from then claims that would have previously been considered under the provisions of the SRCA have been considered under the DRCA.

Compensation is payable under the DRCA for injuries, diseases or deaths that can be linked to most peacetime ADF service between 3 January 1949 and 30 June 2004 as well as hazardous and peacekeeping service during the same period.

The DRCA also covers certain periods of operational service between 7 April 1994 and 30 June 2004, including warlike and non-warlike service.

Under the DRCA, liability to make compensation payments arises in respect of the following:

- an 'injury' suffered by a member of the ADF if that 'injury' results in death, incapacity for work or impairment (subsection 14(1)); medical treatment that is obtained in relation to that 'injury' (subsections 16(1) and 16(2)); household services or attendant care services obtained as a result of that injury (sections 29 and 29A); or
- loss of, or damage to, 'property used by an employee' (subsections 4(1) and 15(1)).

If compensation is payable under the DRCA, some or all of that compensation may have to be repaid, or offset against other compensation payments, in certain circumstances.

#### Purpose and effect of section 119 of the DRCA

The purpose of section 119 is to prevent members or their dependants from receiving both compensation under the DRCA and 'State compensation' in prescribed circumstances.

'State compensation' means compensation recoverable under a law of a State or Territory that provides for the payment of compensation (other than workers' compensation, which is covered by section 118 of the DRCA) and is declared by the Minister by legislative instrument to be a 'specified law' for the purposes of the DRCA under subsection 119(7).

The proposed instrument (Instrument 2020 No. M27), the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Laws) Declaration 2020* declares a list of State and Territory laws which are ‘specified laws’ for the purposes of section 119 of the DRCA.

Compensation must be repaid or offset in accordance with section 119 of the DRCA if:

- a member recovers ‘State compensation’ in respect of an ‘injury’ or the loss of, or damage to, ‘property used by the member’; or
- ‘State compensation’ is recovered by, or for the benefit of, a dependant of a deceased member.

The proposed instrument replaces the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* [F2017L01212] made under subsection 119(7) of the SRCA.

The SRCA declaration was carried over as a legislative instrument in force under the DRCA by virtue of transitional provisions in the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017*.

The SRCA instruments that were carried over for the purposes of the DRCA were in effect ‘frozen’ in that amendments to the SRCA instruments that have been made subsequent to the enactment of the DRCA are not applicable to those SRCA instruments that have been carried over for the purposes of the DRCA.

The need to remake the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* for the DRCA has arisen because for the purposes of the SRCA, that instrument was amended by the *Safety, Rehabilitation and Compensation (Specified Laws) Amendment Declaration 2019* [F2019L00304] to add the *Motor Accident Injuries Act 2017* (NSW) to the list of specified laws in the Declaration as set out in Schedule 1 of the Declaration.

The *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* was further amended by the *Safety, Rehabilitation and Compensation (Specified Laws) Amendment Declaration 2020* [F2020L01126] to add the *Motor Accident Injuries Act 2019* (ACT) to the list of specified laws in the Declaration as set out in Schedule 1 of the Declaration.

The power to remake the instrument is provided under subsection 33(3) of the *Acts Interpretation Act 1901*, which 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.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

## **CONSULTATION**

Consultation in remaking the equivalent SRCA instrument as a DRCA instrument was undertaken with the Attorney-General’s Department who now have administrative responsibility for the SRCA instruments and who were responsible for the 2020 amendments to the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017*.

The remade instrument includes the 2019 and 2020 amendments to the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017*. At the time the 2019 amendments were made to the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* the Department of Jobs and Small Business was responsible for the instrument.

In making that instrument that Department advised that they consulted with employer and employee representatives, Comcare and the Department of Veterans' Affairs.

## **REGULATION IMPACT STATEMENT**

In making the 2019 amendments to the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* the Department of Jobs and Small Business advised that the Office of Best Practice Regulation had confirmed that a Regulation Impact Statement was not required (OBPR ID 23941).

The Office of Best Practice Regulation was also consulted by the Attorney-General's Department for the purposes of making the 2020 amendments to the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* and they indicated that a Regulation Impact Statement was not required (OBPR ID: 42774).

## **DOCUMENTS INCORPORATED-BY-REFERENCE**

No.

## **FURTHER EXPLANATION**

Attachment A.

***Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Laws) Declaration 2020***

Section 1

This section provides that the name of the instrument is the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Laws) Declaration 2020*.

Section 2

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3

This instrument is made under subsection 119(7) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

Section 4

This section repeals the *Safety, Rehabilitation and Compensation Act (Specified Laws) Declaration 2017* in force for the purposes of the DRCA.

The note to the section advises that the *Safety, Rehabilitation and Compensation Act (Specified Laws) Declaration 2017* was in force for the purposes of the DRCA because of item 63 of Schedule 1 to the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017*.

This instrument will have no impact on the *Safety, Rehabilitation and Compensation Act (Specified Laws) Declaration 2017* in force under the *Safety, Rehabilitation and Compensation Act 1988*. That declaration will continue in force until its sunset date of 1 October 2027 or until earlier repealed.

The authority for this repeal provision is subsection 33(3) of the *Acts Interpretation Act 1901*.

Section 5

This section provides that for the purposes of subsection 119(7) of the DRCA, a law of a State or a Territory that is specified in the Schedule to the instrument, is a specified law for the purposes of the DRCA.

The specified laws listed in the Schedule are laws applicable to the provision of victims of crime compensation, transport injury compensation and other forms of compensation.

Specifying these laws means that if a member receives compensation for the injury under the DRCA, then any payment under these laws that are for the same injury may be recovered or offset. If the member establishes that the payment under a specified law was for an injury, loss or damage that did not relate to a loss for which compensation was payable under the DRCA, then there will be no offset or recovery.

## Schedule—Declaration

The Schedule to the *Safety, Rehabilitation and Compensation Act (Specified Laws) Declaration 2020* lists State and Territory laws under which compensation is recoverable for injury, or loss or damage to certain property.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Laws) Declaration 2020***

This legislative instrument is compatible with the human rights and freedoms recognised or declared by the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

The *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) is the compensation legislation applicable to current and former members of the Australian Defence Force (ADF) with conditions linked to service prior to 1 July 2004.

This legislative instrument replaces the instrument referred to as the *Safety, Rehabilitation and Compensation (Specified Laws) Declaration 2017* which has been applicable for the purposes of the DRCA since its enactment on 12 October 2017.

The purpose of both the existing and the proposed instrument is to prevent the double receipt of compensation under the DRCA and a State or Territory law. A person will not be able to receive compensation in respect of the same injury, loss or damage under both the DRCA and one of the specified laws listed in Schedule 1 of the proposed instrument.

#### **Human rights implications**

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* provides for the right of everyone to social security, including social insurance. General Comment 19 by the Committee on Economic, Social and Cultural Rights elaborates on Article 9, stating that the ‘States parties should ... ensure the protection of workers who are injured in the course of employment or other productive work’.<sup>1</sup> Workers’ compensation is analogous to social insurance in that it provides payment of wages and medical costs to employees for injuries occurring as a result of their employment.

The DRCA operates to ensure a member of the ADF (or a dependant of a member) is compensated for loss they suffer due to an injury, or the loss of, or damage to, certain property used by the member.

A member (or the dependant of a member) who chooses to recover an amount of compensation under a specified law will still be entitled to receive an amount of compensation at least equal to the amount that is payable under the DRCA.

Section 119 of the DRCA and this legislative instrument operate to ensure that a member (or the dependant of a member) cannot ‘double dip’ by being compensated twice under two different laws for the same injury, or loss or damage to certain property.

#### **Conclusion**

The legislative instrument is compatible with human rights because it does not negatively impact on human rights.

**Darren Chester**

Minister for Veterans’ Affairs

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security* (art. 9), U.N. Doc E/C.12/GC/19 (2008), [17].