

EXPLANATORY STATEMENT

Military Rehabilitation and Compensation Amendment (Transition to Civilian Work) Regulations 2021

EMPOWERING PROVISION

Section 440 of the *Military Rehabilitation and Compensation Act 2004*

PURPOSE

The *Military Rehabilitation and Compensation Act 2004* (MRCA) provides for compensation coverage and other benefits, and certain assistance (such as assistance to find suitable work, household services and child care) to current and former members of the Australian Defence Force (ADF) who suffer a service injury or disease, and to certain dependents.

Section 440 of the MRCA provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or that are necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Once it commences on 29 March 2021, Schedule 2 of the *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Act 2020* will insert section 268D of the MRCA.

Section 268D provides that the regulations under the MRCA may make provision for and in relation to the granting of assistance or benefits of a specified kind to former ADF members to assist them to transition into civilian work. Subsection 268D(2) provides for a non-exhaustive list of criteria for this assistance or benefits.

The Support for Employment (SFE) program was announced in the 2018 Budget and provides support to veterans who need additional services to secure appropriate employment (see Budget 2018-19, Budget measures, Budget Paper No. 2 page 193). This measure builds upon the 2017-18 Budget measure titled *Supporting Veterans' Employment Opportunities*.

The purpose of the Regulations is to insert a new Part into the *Military Rehabilitation and Compensation Regulations 2020* (Principal Regulations) to provide for the Employment support to former ADF members who are transitioning to the civilian workforce.

Former ADF members will be entitled to an allocation of up to ten hours of one-on-one service support through which they may access pre- or post- employment support assistance, or a combination of both. Pre-employment support available under the Regulations focuses on job-readiness skills and seeks to support former ADF members to find civilian employment. Post-employment support focuses on actual workplace issues that a former ADF member may be struggling to navigate, and help to identify strategies for managing those issues.

The new Part makes provisions for and in relation to:

- the eligibility criteria for the assistance or benefits;
- what a former ADF member has to do to get the assistance or benefits;
- the conditions on which the assistance or benefits are granted; and
- limits (whether financial or otherwise) on the provision of the assistance or benefits.

A former ADF member will automatically be granted access to employment related assistance if they meet the criteria set out in the Regulations. The criteria are either factual, or self-assessed by the former ADF member. There is no scope for the Military Rehabilitation and Compensation Commission to have any discretion whether or not the former ADF member meets the criteria.

As a consequence, the application of these criteria can be categorised in accordance with the Administrative Review Council's publication '*What decisions should be subject to merits review?*' as a type of decision that is, by its nature, unsuitable for merits review or which leaves no room for merits review.

The Administrative Review Council's document can be found at the following link:

www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications

Further, the operation of the SFE Program will not, at any level, whether in the application of objectively applicable eligibility criteria, or in the determination of what pre- or post-employment assistance will be provided to a former ADF member, result in disputable facts or involve discretionary factors which could be subject to merits review and assessed by a tribunal.

The Regulations commence the later of:

- (a) the day after this instrument is registered; and
- (b) the day Schedule 2 to the *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Act 2020* commences.

However, the Regulations do not commence at all if the event in (b) does not occur.

CONSULTATION

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

The need for external consultation was also recognised early in the process of developing the regulations. Information about the Regulations was provided to the Ex-Service Organisation Round Table (ESORT) following an update provided to ESORT on 12 May 2020.

The ESORT enhances the capacity of the Repatriation Commission and Military, Rehabilitation and Compensation Commission (MRCC) by addressing issues of strategic importance to the ex-service and defence communities and assist in setting directions for the medium to long term.

The Department of Veterans' Affairs has consulted the Department of Prime Minister and Cabinet and the Attorney-General's Department during both the development of the regulations and the development of the MRCA amendments in the *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020*.

The Department informed the Ex-Service Organisations Round Table about its intention to make the Regulations.

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

RETROSPECTIVITY

None.

REGULATORY IMPACT

None.

DOCUMENTS INCORPORATED BY REFERENCE

None.

HUMAN RIGHTS STATEMENT

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

The regulations engage the right to work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 6.1 of the ICESCR states that “*States Parties ...recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*”

Article 6.2 of the ICESCR further states that “*The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*”

These Regulations engage and promote the right to work through recognising that finding full and productive employment is central to a person successfully transitioning from the ADF to the civilian workforce.

The Regulations will enable former ADF members to be able to access additional services, such as resume writing, assistance translating ADF skills, job interview coaching and mentoring, which will ease the transition process and improve a veterans’ range of skills and confidence.

The Regulations will improve the employment opportunities for former ADF members, leading to technical and vocational guidance and training programs that provide veterans with the skills to find and maintain full and productive employment, and which will result in improved economic and psychological outcomes and support the right to work.

Conclusion

The Regulations are compatible with the right to work as they will provide technical and vocational guidance and training programs to provide veterans with the skills to find and maintain full and productive employment.

Darren Chester
Minister for Veterans’ Affairs
Rule-Maker

FURTHER EXPLANATION OF PROVISIONS See: Attachment A

FURTHER EXPLANATION OF PROVISIONS

Section 1 – Name of Regulations

This section provides that the name of the instrument is the *Military Rehabilitation and Compensation Amendment (Transition to Civilian Work) Regulations 2021*.

Section 2 – Commencement

This section provides that the whole of the instrument commences on the later of:

- (a) the day after registration on the Federal Register of Legislation; and
- (b) the day Schedule 2 of the *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Act 2020* commences.

However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.

Section 3 – Authority

This section provides that the instrument is made under the *Military Rehabilitation and Compensation Act 2004* (MRCA).

Section 4 – Schedules

Section 4 of the instrument provides that the instruments specified in a Schedule of the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule of to the instrument has effect according to its terms.

Schedule 1 — Amendments

Schedule 1 of the Instrument applies to the *Military Rehabilitation and Compensation Regulations 2020*.

Item [1] adds the term 'former member' as a term used in the Regulations which is otherwise defined in the *Military Rehabilitation and Compensation Act 2004* (MRCA).

Item [2] inserts a definition for '*initial planning session*' and '*transition day*' in the definition section (section 5) of the Regulations.

Item [3] inserts a new Part 3A after Part 3 of the Principal Regulations.

New Part 3A provides for, and in relation to, the granting of specified kinds of assistance to certain former ADF members to assist them to transition to civilian work.

Part 3A – Employment support to former ADF members

Division 1 – Preliminary

Section 18A states the purpose of Part 3A and identifies that the Part is made for the purposes of subsection 268D(1) of the MRCA. Part 3A provides for and in relation to the granting of

specified kinds of assistance to certain former ADF members to assist them to transition into civilian work.

Division 2 – Application and eligibility for assistance

Section 18B sets out the application criteria for seeking assistance. Subsection 18B(1) states that a person may apply to the Military Rehabilitation and Compensation Commission (Commission) for assistance under the new Part 3A if the person is a former ADF member (a defined term under the MRCA) and the **transition day** (defined in Item [2] above) for the person is at least 12 months, and no more than 5 years before the person makes the application.

Subsection 18B(2) provides that an application must be in a form approved in writing by the Commission and include any information, and be accompanied by any documents, required by the Commission.

Division 3 – Eligibility for assistance

Section 18C sets out the eligibility criteria for a person to be granted employment support assistance under Section 18D.

A person is required to have been a former member of the ADF (note that the term ‘former member’ is defined in the MRCA) and the **transition day** must have occurred at least 12 months, and no more than 5 years, before the person makes an application under Section 18B.

Under Subsection 18C(c) the person is also required to make a declaration in their application that the person is either unemployed, or underemployed because the person is employed for fewer hours than the person would like to work; or is seeking assistance in order to change careers or is seeking assistance in order to adjust to a civilian workplace.

Subsection 18C(d) requires that the person declare that they are not undertaking a rehabilitation program under the MRCA or the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*. The person must also declare that they are not receiving assistance under the Veterans’ Vocational Rehabilitation Scheme (within the meaning of the *Veterans’ Entitlements Act 1986*).

Subsection 18C(e) requires that a person has not previously been granted assistance under Section 18D. This provision ensures that persons that had previously been granted assistance under the program cannot seek further assistance if they have exhausted the maximum amount assistance available to them. Nevertheless, eligible persons continue to be eligible for assistance as long as they have not exhausted the 10 hours of employment assistance support available to them under Subsection 18F(2) as long as they are not also limited by the criteria in Subsection 18F(3).

Where an applicant is determined not to be eligible to receive assistance, the person will be provided with a statement of reasons to ensure they know why their application was unsuccessful, e.g. because they did not submit their application as required under the Regulations or did not meet eligibility criteria. Statements of reasons will be prepared in accordance with the Administrative Review Council publication *Decision Making: Reasons*.

Division 4 – Grant of assistance

Division 4 of the new Part 3A provides for the types of assistance available, as well as providing conditions and limitations to the assistance. Importantly no person is entitled to more than 10 hours of employment support assistance (not including the initial and final

sessions referred to in paragraphs 18D(3)(a) and 18D(3)(e)), under the Regulations and section 268D of the MRCA.

Subsection 18D(1) provides that the Commission *must* grant a person assistance to transition to civilian work of a kind that specified in Subsection 18D(3) where the person has made a valid application in accordance with Section 18B and also meets the eligibility criteria in Section 18C.

It should be noted that part of the purpose of this section is to make clear that eligibility is granted after satisfying certain conditions, rather than being subject to an administrative decision. This means that there is no reviewable decision, and therefore entitlement and eligibility to the assistance is not subject to merits review.

Subsection 18D(2) provides that a grant of assistance is subject to the conditions specified in Section 18E and limits on the provision of assistance specified in Section 18F.

Paragraph 18D(3)(a) should be read together with Section 18E. The intention of these provisions is to make clear that a person that is seeking employment support assistance must first participate in an initial planning session to identify what kinds of assistance is needed. When read together with Subsection 18F(2), it is intended that this planning session should not count toward the 10 hours of total assistance that is available to an eligible person.

Similarly paragraph 18D(3)(e) should also be read together with Subsection 18F(2), which also indicates that the final session with the provider to reflect on assistance provided and report to the Commission on that assistance does not make up part of the 10 hours of total assistance provided to the person.

In any case Subsection 18F(5) makes clear that the total time spent in the initial planning session described at paragraph 18D(3)(a), and at the final session described at paragraph 18D(3)(e), is limited to no more than two hours.

Paragraphs 18D(3)(b) to (d) and Subsection 18F(2) are read together to provide guidance as to what the extent of the employment support assistance is. The assistance is limited to pre-employment and post-employment assistance, or a combination of the two, up to a total of 10 hours. A person does not need to use all 10 hours of assistance available to them.

Subsection 18F(3) sets out the time limitation to the types of assistance available to a person.

Paragraph 18F(3)(a) states that a person cannot receive assistance the later of the day after the 5 years from the day of their **transition day**, or the day that is 12 months after the initial planning session for the person.

Paragraph 18F(3)(b) states that where assistance is granted to the person, and that person undertakes a program or assistance of the kind described under subsection 18F(4), that person will no longer be entitled to receive assistance after the earlier of the day that is 6 months after the person starts the program or receives assistance, or the day that is 5 years after the **transition day** for the person.

Subsection 18F(4) lists the types of assistance that will affect a person's eligibility to seek employment support assistance under the Regulations. If a person is undertaking an approved rehabilitation program under section 51 of the *Military Rehabilitation and Compensation Act 2004*, under section 37 of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, or under the Veterans' Vocational Rehabilitation Scheme (within the meaning of the *Veterans' Entitlements Act 1986*), then they will no longer be eligible for employment support assistance after the period described in paragraph 18F(3)(b).