##### EXPLANATORY STATEMENT

**Military Rehabilitation and Compensation (Special Assistance) Instrument 2022**

(Instrument 2022 No. MRCC3)

**EMPOWERING PROVISION**

Subsection 424(1) of the *Military Rehabilitation and Compensation Act 2004* (the Act)*.*

**PURPOSE**

The purpose of the instrument is to enable grants to be made to assist dependants of members, former members and deceased members who would otherwise miss out on compensation or benefits due to mental illness or injury.

The Act provides a range of compensation and other benefits for certain dependants of members, former members and deceased members. This includes lump sum and periodic compensation payments, and medical treatment or compensation for medical treatment.

The Act defines the term ‘dependant’ to include an ‘eligible young person’. This covers dependants under 16 years, and dependants between 16 and 24 years who are receiving fulltime education at a school, college, university or other educational institution and who are not working fulltime.

A small number of dependants aged 16 to 24 may be unable to receive fulltime education because they have a diagnosed mental health condition. This inability may be for a period of time, or on a continuing basis. This prevents them from meeting the definition of an eligible young person, meaning there is no entitlement to compensation and benefits that would otherwise be payable under the Act.

The instrument ensures dependants in these circumstances are not disadvantaged. It does this by prescribing these particular circumstances for the purposes of section 424 of the Act. Thus, the instrument enables the Military Rehabilitation and Compensation Commission (the Commission) to exercise its discretion in section 424 to grant assistance or benefits of the kind, and the amount or value, that it considers reasonable to a member, former member, or to a dependant of a member, former member or deceased member.

It is intended that the Commission may, in its discretion, use section 424 to grant weekly compensation payments, and provide medical treatment for all conditions at Departmental expense, for dependants who would have been entitled to treatment and compensation as an ‘eligible young person’ but for their inability to carry out full time study due to a diagnosed mental health condition

It is anticipated that the assistance will only cover a very small cohort of persons.

**MERITS REVIEW**

This instrument empowers the Commission to make discretionary decisions to grant assistance or benefits to dependants of members, former members and deceased members. The person can be a dependant of, or previously a dependant of, members, former members and deceased members. As such a decision will, or is likely to, affect the interest of a person (in particular, an adverse decision), independent merits review is available.

Chapter 8 of the Act provides that certain determinations can be reviewed by the Veterans’ Review Board (the Board) and reviewed by the Administrative Appeals Tribunal (the AAT). Broadly, a claimant who has received notice of an original determination may request that the Board review the determination. If dissatisfied with the determination on review, the claimant can apply to the Administrative Appeals Tribunal for review of the reviewable determination.

Section 345 of the Act defines original determinations and reviewable determinations for the purposes of Chapter 8 of the Act.

Under subsection 345(1) an ‘original determination’ means a determination of the Commission under the Act that is not specified in subsection 345(2) or a determination of the Chief of the Defence Force under the Act that relates to rehabilitation for a person if the Chief of the Defence Force is the rehabilitation authority of the person.

Under subsection 345(1) a ‘reviewable determination’ means a determination under subsection 350(2) revoking, confirming or varying an original determination, a determination that has been varied under subsection 348(1) or a determination under Part 4 by the Board on review of an original determination (except a determination that has been varied under subsection 348(1)).

Relevantly, a decision of the Commission under subsection 424(1) of the Act to provide assistance or benefits to eligible persons in accordance with the prescribed circumstances set out in section 5 of the instrument is not listed in subsection 345(2). Therefore a determination of the Commission made under subsection 424(1) is an ‘original determination’ for the purposes of subsection 345(1).

Under section 352 of Part 4 of Chapter 8 of the Act, a claimant may make an application to the Board for review of an original determination, provided that the application is in writing, sets out the reasons for the application and is given to the Commission within 12 months after the day the notice of the determination was given to the person making the application.

Where an original determination has been reviewed by the Board in accordance with Part 4 of Chapter 8, that determination is considered a reviewable determination under subsection 345(1).

Under section 354 of the Act, an application may be made to the AAT for a review of ‘reviewable decisions’.

**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 considers appropriate and reasonably practicable has been undertaken.

This instrument has been created to cover an identified gap in the legislation that disentitles a person from compensation based on a mental health condition. In order to have this legislative oversight corrected expediently, no external consultation was undertaken. However, if future legislative change is proposed in this space it will be subject to consultation with external parties.

Accordingly, it is considered that the requirements of section 17 of the *Legislation Act 2003* have been met.

**REPLACEMENT EXPLANATORY STATEMENT**

This Replacement Explanatory Statement is required following consultation with the Secretariat of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Senate Committee).

The Senate Committee assesses legislative instruments against the scrutiny principles set out in Senate standing order 23. The Secretariat had identified potential scrutiny concerns in relation to the instrument, and had sought further information on behalf of the Senate Committee.

The information sought concerned the availability of independent merits review, specifically whether the instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests. This Replacement Explanatory Statement amends the Explanatory Statement to address the concerns of the Senate Committee by providing further clarification about the availability of independent merits review.

**RETROSPECTIVITY**

Not applicable.

**DOCUMENTS INCORPORATED BY REFERENCE**

No.

**REGULATORY IMPACT**

The Office of Best Practice Regulation (OBPR) has been consulted and a RIS is not required as it is unlikely to have more than a minor regulatory impact. The OBPR ID Number is OBPR22-01635.

**FURTHER EXPLANATION OF PROVISIONS**

See: Attachment A

**Statement of Compatibility with Human Rights**

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

 **Military Rehabilitation and Compensation (Special Assistance) Instrument 2022**

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 ICESCR. 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”. The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

*Overview*

The instrument will enable grants of assistance and benefits, including medical treatment, in relation to dependants of veterans who would otherwise miss out on compensation and benefits due to mental illness. The instrument will impact positively on the health and living standards of dependants 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 compatible with human rights.

**Attachment A**

**FURTHER EXPLANATION OF PROVISIONS**

**Section 1**

This section sets out the name of the instrument – the *Military Rehabilitation and Compensation (Special Assistance) Instrument 2022*.

**Section 2**

Thisis the commencement provision. It provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

**Section 3**

This section sets out the primary legislation that authorises the making of the instrument, namely subsection 424(1) of the *Military Rehabilitation and Compensation Act 2006*.

**Section 4**

This section defines terms used in the instrument, and provides that the expression “Act” means the *Military Rehabilitation and Compensation Act 2006*.

A note is included to alert readers to section 13 of the *Legislation Act 2003* which provides that expressions used in the instrument have the same meaning as in the Act. This includes the expression ‘medical practitioner’ used in section 5 of the instrument.

**Section 5**

This is the operative provision of the instrument. It prescribes circumstances for the purposes of subsection 424(2) of the Act. Each of the circumstances in paragraphs (a) to (e) must be present in a particular case to enable the grant power in section 424.

Paragraph (a) prescribes as a circumstance that a person is or was a dependant of a member, former member or deceased member. This person is referred to in section 5 as ‘the dependant’.

Paragraph (b) applies if the dependant has been diagnosed by a medical practitioner as suffering from a mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development) or a mental injury.

The term ‘medical practitioner’ is defined at section 5 of the Act to mean a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners.

Paragraph (c) applies if the dependant meets subparagraphs (b)(i) and (iii) of the definition of ***eligible young person*** in section 5 of the Act ie the dependant is aged 16 or more but under 25, and is not in full‑time employment or engaged in work full‑time on his or her own account.

Paragraph (d) applies if the dependant is unable to meet subparagraph (b)(ii) of the definition of ***eligible young person*** in section 5 of the Act solely because the mental ailment, disorder, defect or morbid condition, or mental injury, mentioned in paragraph (b), prevents the dependant from receiving full‑time education at a school, college, university or other educational institution.

Subparagraph (b)(ii) of the definition of ***eligible young person*** requires that the person is receiving full‑time education at a school, college, university or other educational institution.

Paragraph (e) applies if, but for the dependant’s inability to meet subparagraph (b)(ii) of the definition of eligible young person due to their mental illness or injury, the dependant would have been entitled to compensation or another benefit under the Act, or would be so entitled if a claim was made in respect of that compensation or benefit.

Paragraph (e) ensures that only dependants who would otherwise have been entitled to compensation or other benefit under the Act, but for the circumstance in paragraph (d), are able to be granted assistance or benefits under section 424.