##### EXPLANATORY STATEMENT

*Military Rehabilitation and Compensation (Special Assistance) Instrument 2023*

**EMPOWERING PROVISION**

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

**PURPOSE**

The instrument repeals and replaces the *Military Rehabilitation and Compensation (Special Assistance) Instrument 2022* (the ***2022 Instrument***). Under subsection 33(3) of the *Acts Interpretation Act 1901*, a power to make an instrument of a legislative character, such as the instrument, includes the power to repeal the instrument.

The instrument expands the classes of dependants and former dependants who may be granted special assistance in circumstances where they would otherwise miss out on compensation or benefits due to a mental illness or injury.

Section 424 of the MRCA allows the Military Rehabilitation and Compensation Commission, in its discretion, to grant special assistance to a dependant or former dependant of a member, former member or deceased member in prescribed circumstances.

The 2022 Instrument prescribed the circumstances of dependants and former dependants whose inability to receive full-time education due a diagnosed mental illness or mental injury meant they are not entitled to compensation and benefits under the MRCA Act as they are not an ‘eligible young person’ as defined in the MRCA.

The new instrument continues to prescribe these circumstances, however it also prescribes the circumstances of another group of vulnerable young people in a similar position. In particular, it includes dependants and former dependants whose inability to receive full-time education due a diagnosed mental illness or mental injury means they are not entitled to assistance or benefits under the *Veterans’ Entitlements Act 2004* (the ***VEA***) as they are not a ‘child’ as defined in the VEA.

The instrument ensures dependants and former dependants in both sets of circumstances are not disadvantaged.

It is intended that the Commission may, in its discretion, use section 424 of the MRCA to grant weekly compensation payments, and provide medical treatment for all conditions at Departmental expense, for dependants and former dependants who would have been entitled to treatment and compensation under the MRCA or the VEA but for their inability to carry out full time study due to a diagnosed mental health condition.

Section 106 of the VEA allows the Repatriation Commission, in prescribed circumstances, to grant special assistance to certain persons. However, the class of persons to whom special assistance can be granted under section 106 VEA is more limited than the class mentioned in section 424 of the MRCA. Section 106 is limited to granting special assistance to veterans or to dependants of veterans or deceased veterans. A child of a veteran or deceased veteran aged 16-24 who is unable to receive full-time education due to a mental illness or injury is unable to meet the VEA definition of ‘dependant’. It would not, therefore, be possible to grant special assistance to this cohort under the VEA. Section 424 of the MRCA, on the other hand, allows special assistance to be granted to a person who is or was a dependant of a member, former member or deceased member. This means that persons who previously were a dependant can be granted special assistance under section 424 of the MRCA. The instrument therefore prescribes both the VEA cohort and the MRCA cohort of vulnerable young people to ensure neither cohort is disadvantaged due to their mental illness or injury.

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

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

**MERITS REVIEW**

This instrument empowers the Commission to make discretionary decisions to grant assistance or benefits to dependants or former dependants, 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 MRCA 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 MRCA defines original determinations and reviewable determinations for the purposes of Chapter 8 of the MRCA.

Under subsection 345(1) an ‘original determination’ means a determination of the Commission under the MRCA that is not specified in subsection 345(2) or a determination of the Chief of the Defence Force under the MRCA 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 MRCA to provide assistance or benefits to eligible persons in accordance with the prescribed circumstances set out in sections 6 and 7 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 MRCA, 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 MRCA, an application may be made to the AAT for a review of a ‘reviewable decision’.

**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.

Owing to the urgent need to support these children expediently, no external consultation has taken place. Nonetheless, DVA will continue to explore the viability of other mechanisms to provide support for these students, at which stage external consultation would be undertaken.

**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**

**Part 1 Preliminary**

**Section 1** sets out the name of the instrument – the *Military Rehabilitation and Compensation (Special Assistance) Instrument 2023*.

**Section 2** is the commencement provision. It provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

**Section 3** 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** 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 unless otherwise indicated expressions used in the instrument have the same meaning as in the MRCA. This includes the expression ‘dependant’ used in sections 6 and 7 of the instrument.

**Section 5** is a standard provision used in instruments that amend or repeal other instruments. It provides that Schedule 1 has the effect that the instrument specified in Schedule 1 is repealed as set out in Schedule 1.

**Part 2 Prescribed circumstances**

**Section 6** prescribes circumstances for the purposes of subsection 424(2) of the MRCA. It replicates the circumstances prescribed in the *Military Rehabilitation and Compensation (Special Assistance) Instrument 2022*, which this instrument repeals and replaces.

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 6 as ‘the dependant’ (and is referred to in this way below, noting the person may be a former 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 MRCA 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 MRCA ie the dependant is aged between 16 and 24 years 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 MRCA 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 MRCA, or would be so entitled if a claim was made in respect of the dependant.

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

**Section 7** prescribes an additional set of circumstances for the purposes of subsection 424(2) of the MRCA. It enables the Commission to grant special assistance to another cohort of dependants and former dependants in similar circumstances to those in section 6 and in the *Military Rehabilitation and Compensation (Special Assistance) Instrument 2022*, which this instrument repeals and replaces.

Each of the circumstances in paragraphs 7(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 7 as ‘the dependant’ (and is referred to is this way below, noting the person may be a former dependent)

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 MRCA 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 subparagraph (b)(i) of the definition of ***child*** in section 5F of the ***VEA***ie the dependant has turned 16 but has not turned 25.

Paragraph (d) applies if the dependant is unable to meet subparagraph (b)(ii) of the definition of ***child*** in the VEA 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 or university. Subparagraph (b)(ii) of the definition of ***child*** in that Act requires that the person is receiving full‑time education at a school, college or university.

Paragraph (e) applies if, but for the dependant’s inability to meet subparagraph (b)(ii) of the definition of ***child*** due to their mental illness or injury, the dependant would have been entitled to assistance or a benefit under the VEA, or would be so entitled if a claim was made in respect of the dependant.

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

**Schedule 1 – Repeal**

**Item 1** repeals the *Military Rehabilitation and Compensation (Special Assistance) Instrument 2022*.

**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 2023**

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, compensation and benefits, including medical treatment, to dependants and former dependants of veterans who would otherwise miss out on assistance, compensation and benefits due to mental illness or mental injury that prevents them from receiving full-time education. The instrument will impact positively on the health and living standards of young people and their families.

*Conclusion*

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

**Military Rehabilitation and Compensation Commission**

**Rule-Maker**