Review of Changes to ADF Modes of Separation for Superannuation Purposes

11 September 2009
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SINCLAIR KNIGHT MERZ
LIMITATION STATEMENT

The sole purpose of this report and the associated services performed by Sinclair Knight Merz ("SKM") is to review the processes used in determining whether circumstances existed, at the time of separation, for former Australian Defence Force (ADF) members to be retired on the grounds of invalidity or physical or mental incapacity in accordance with the scope of services set out in the contract between SKM and the Client. That scope of services, as described in this report, was developed with the Client.

In preparing this report, SKM has relied upon, and presumed accurate, any information (or confirmation of the absence thereof) provided by the Client and/or from other sources. Except as otherwise stated in the report, SKM has not attempted to verify the accuracy or completeness of any such information. If the information is subsequently determined to be false, inaccurate or incomplete then it is possible that our observations and conclusions as expressed in this report may change.

SKM derived the data in this report from information sourced from the Client (if any) and/or available in the public domain at the time or times outlined in this report. The passage of time, manifestation of latent conditions or impacts of future events may require further examination of the project and subsequent data analysis, and re-evaluation of the data, findings, observations and conclusions expressed in this report. SKM has prepared this report in accordance with the usual care and thoroughness of the consulting profession, for the sole purposes described above and by reference to applicable standards, guidelines, procedures and practices at the date of issue of this report. For the reasons outlined above, however, no other warranty or guarantee, whether expressed or implied, is made as to the data, observations and findings expressed in this report, to the extent permitted by law.

This report should be read in full and no excerpts are to be taken as representative of the findings. No responsibility is accepted by SKM for use of any part of this report in any other context.

This report has been prepared on behalf of, and for the exclusive use of, SKM's Client, and is subject to, and issued in accordance with, the provisions of the agreement between SKM and its Client. SKM accepts no liability or responsibility whatsoever for, or in respect of, any use of, or reliance upon, this report by any third party.
1. Introduction

The Department of Defence (represented by the Directorate of Transition Support Services (DTSS)) issued a request for quotation and tasking statement (RFQTS) seeking a comprehensive review of the processes used in determining whether circumstances existed, at the time of separation, for former ADF members to be retired on the grounds of invalidity or physical or mental incapacity for superannuation purposes.

The review was initiated by the former Minister for Defence Personnel and Science, Mr Warren Snowdon MP, following representations made to him by an advocate.

Under the *Defence Force Retirement and Benefits Act 1948* (DFRB Act) and the *Defence Force Retirement and Death Benefits Act 1973* (DFRDB Act), there is provision for former ADF members who were not separated for medical reasons, to have their separation mode reconsidered to determine whether circumstances existed, at the time of their separation, for them to be retired on the grounds of invalidity or physical or mental incapacity to perform duties. If, after assessment of records and supplementary information, circumstances did exist for the member to be separated on medical grounds, then for the purposes of the relevant Act, the member can be treated as medically (invalidity or physical or mental incapacity) retired.

The DFRB and DFRDB Acts only relate to, and have an impact on, a former ADF member’s superannuation entitlement. There is no linkage between an outcome under the DFRB or DFRDB Acts and decisions made by the Department of Veterans’ Affairs (DVA) concerning medical benefits relating to a medical condition sustained during ADF service.

SKM were engaged to undertake the review.
2. **Statement of Work**

The Official Order required that the Service Provider produce a comprehensive report analysing the process used by the Department of Defence in determining a change of separation case. Analysis of the process was to include, but not limited to:

a. Familiarisation with *sub-section 51(6) of the DFRB* and *section 37 of the DFRDB*;

b. Development of process maps; and

c. Examination of procedural fairness, including the supply of information to applicants by the Department of Defence.
3. Executive Summary and Recommendations

Overall, the current process while cumbersome in some areas, does afford an applicant substantial opportunities to provide further information in support of their application. Claims by advocates and applicants of bias and procedural unfairness appear to reflect frustration with their expectations not being met or their misunderstanding of the intent of the legislation and role played by the Department. The Full Court of the Federal Court in Defence Force Retirement and Death Benefits Authority and Brit (1984) 4 Federal Court Report 306 at 309 confers on Service Chiefs a specific function which is to determine whether a former ADF member could have been retired on the ground of invalidity and to inform the Authority (ComSuper). It does not confer upon them the power to decide whether, in the whole of the circumstances of the case, the former member should be treated as if he had been retired on the ground of invalidity or even the power to request that he be so treated. The process followed by the Department is a pre-condition prior to the ‘discretionary’ power of ‘should have been retired’ is exercised by ComSuper.

Based on the assessment of the current process and consideration of other issues such as those raised by applicants or advocates, the following recommendations are made:

a. The Department develop a comprehensive information kit inclusive of a standard application. It is recommended that the kit be aligned and developed in consultation with Joint health Command (JHC), ComSuper and perhaps DVA. ComSuper require similar information as part of their assessment process, so it would be prudent to involve them to ensure a level of consistency should an application be supported. It will also serve to focus the applicant’s attention to the type and source of relevant information ready for the Department’s and ComSuper’s consideration. The information kit could include but not be limited to:

   a. An application form mirrored on the ComSuper form;
   b. An overview of the process, roles and responsibilities;
   c. Identify key information an applicant should include such as contemporaneous medical information;
   d. A checklist for applicants to ensure they have taken steps to inform themselves on key matters such as:
      i. The implications for their superannuation such as will a successful claim impact on their commutation; and
      ii. How do they access their Service records?

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e. Key points of contact in CorSuper, DVA and the Department;

f. A summary of the differences between DVA and DFRB/DFRDB legislation;

g. Advice about an applicant's review rights should their application not be supported; and

h. Advice about the Department's 'Service Charter'.

b. The information kit should be available in hard copy or via the Department's internet site;

c. The removal of the step to provide an applicant with the JHC assessment prior to consideration by the Service Chief or his/her delegate. In the current process this step only serves to invite further iterations, often protracted in nature, from applicants or their advocate. There is no legal imperative for the JHC assessment to be provided at such an early stage and prior to a Service Chief's or their delegate's consideration and advice;

d. The provision of the JHC assessment as an attachment to the Service Chief's or their delegate's advice provided to an applicant. The inclusion of the JHC assessment at this time still meets the requirement of procedural fairness. The removal of the earlier step (c) will ensure a speedy outcome subject to an applicant's adherence to the provision of information set out in the Information Kit;

e. JHC consider the introduction of a peer review of the medical assessment. While there is a resourcing issue associated with this recommendation, a peer review has potential to remove the view of 'bias' labelled against JHC by applicants and advocates;

f. JHC document their knowledge and experience of the medical classification system and employment specifications, as they may have applied since the introduction of s51 (6) of the DFRB Act and s37 of the DFRDB Act. This is essential as there is a high likelihood that the casework generated by these clauses will remain longer than those currently working or likely to work in JHC; and

g. Army reconsider its policy with regard to the release of original service records to other parts of the Department. The practice of photocopying documents is not only time consuming but is a wasteful consumption of consumables and an individual's time.

In addition to the above, it was noted during the review that the single Services exercise a similar delegation to that of the DFRB Act and DFRDB Act under Defence (Personnel) Regulations 2002, Reg 99. Reg 99 provides that:

"(2) The Chief may:

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(a) at the request of the member; or

(b) with the member’s consent;

ensure that the member’s service is treated as having been terminated for the other reason."

While this review did not explore the reasons why a member would seek to change their status under Reg 99 it is reasonable to assume that the process followed to assess the matter would be similar. This prompts the question of whether the Department sees wisdom in consolidating all matters relating to former ADF members in one area. Such a move would provide efficiencies and is directly supporting the Department’s broader strategic reform program.
4. The Schemes

The Defence Force Retirements Benefit Scheme (DFRB), established in 1948 by the DFRB Act, was closed to new contributors from 30 September 1972. It continues to provide for the benefit entitlements for those Members who ceased to be contributors before 1 October 1972 and for reversionary benefits to their spouses.

The Defence Force Retirement and Death Benefits Scheme (DFRDB) was established by the DFRDB Act and came into operation with effect from 1 October 1972. The Scheme provides occupational superannuation for ADF members who became contributors on or after 1 October 1972, and for members who were contributors to the DFRB Scheme on 30 September 1972 and were compulsorily transferred to the DFRDB Scheme on 1 October 1972.

With the commencement of the Military Superannuation and Benefits Scheme (MSBS) on 1 October 1991, the DFRDB Scheme was closed to all new entrants.

The 2007-2008 DFRDB Annual Report to Parliament indicates that there were 5,600 contributors in the DFRDB Scheme as at 30 June 2008.

At 30 June 2008 57,174 persons were receiving pensions under DFRB and DFRDB legislation (Table 1).

<table>
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<tr>
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<th>DFRB</th>
<th>DFRDB</th>
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<td>4,417</td>
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Table 1 - Pensions in force by type and Scheme at 30 June 2008

Under the DFRB Act and the DFRDB Act, there is provision for former ADF members who were not separated for medical reasons, to have their separation mode reconsidered to determine whether circumstances existed, at the time of their separation, for them to be retired on the grounds of invalidity or physical or mental incapacity to perform duties. If after assessment of records and supplementary information, circumstances did exist for the member to be separated on medical grounds, then for the purposes of the relevant Act, the member can be treated as medically (invalidity or physical or mental incapacity) retired.
The DFRB Act and DFRDB Act were amended in 1973 to include a safety net provision to cover National Servicemen, many of whom were separated on non-medical grounds despite the existence of medical conditions which could have led to an invalidity separation. The amendments provided invalidity cover where an invalidity separation would have been the more appropriate course.

Since 1973 the safety net provisions have remained and have the effect of providing a retrospective invalidity benefit over a time span of some 30-40 years. The time span means that if the youngest DFRDB contributor remained a DFRDB contributor and did not transfer to MSBS, the Department will continue to undertake case assessments until this person’s death. For example, if the youngest DFRDB contributor was age 20 at the time of the scheme’s closure (1991) and they remain a contributor, the Service Chiefs will continue to exercise their responsibilities until approximately 2050 (assuming an 80 year life span).

The DFRB and DFRDB Acts only relate to, and have an impact on, a former ADF member’s superannuation entitlement. There is no linkage between decisions made under the DFRB or DFRDB Acts and decisions made under legislation administered by DVA concerning medical benefit entitlements relating to a medical condition sustained during ADF service.
5. Current Process

As mentioned in the introduction, s51(6) of the DFRB and s37 of the DFRDB provide an avenue for a former ADF member to seek a review of the reason for their separation on the grounds of invalidity or physical or mental incapacity. Under the respective Acts the Chiefs of Navy, Army and Air Force or a delegate authorised by them may, after investigation of a former ADF member’s claim, submit to the to the Defence Force Retirement Benefits Authority (ComSuper) that the member could have been retired those grounds.

Sub section 51(6) and section 37 of the respective legislation (attached) confer upon single Service Chiefs a specific function. While the wording is slightly different the intent of the sections remains the same. The Full Court of the Federal Court in Defence Force Retirement and Death Benefits Authority and Britt (1984) 4 Federal Court Report 306 at 309 sets out the respective function of service Chief of Staff under s37:

"The section confers a specific function upon the Chiefs – of – Staff, that is, the function of determining whether the member could have been retired on the ground of invalidity and informing the authority of that fact. This is a function properly imposed on the Chiefs – of – Staff for they are aware of the requirements of service and therefore able to determine whether the member’s medical condition was such as to justify his retirement on the ground that he was unable to perform his duties. But that is the only function which s37 confers upon the Chiefs – of – Staff. It does not confer upon them the power to decide whether, in the whole of the circumstances of the case, the former member should be treated as if he had been retired on the ground of invalidity or even the power to request that he be so treated. The section makes the advice of a Chief – of – Staff a precondition to the exercise of the discretion which the section confers and not in itself an exercise of that discretion."

It is worth noting that the DFRB Act and DFRDB Act provide the DFRDB Authority and its delegates a discretionary power to either agree or disagree with the advice from the relevant Service Chief.

To assess whether grounds existed under the respective Acts the Department follows the process outlined in Figure 1. Essentially the process is:

a. The former ADF member makes application,

b. Receipt of the application is acknowledged. At the same time the former member is requested to provide authorisation for the Department to access their service, medical and physiological records;
c. If the application contains insufficient information the applicant is advised to provide further information. (This is the first part of the process which may involve much iteration until the application includes relevant information. (Figure 1 - red);

d. If the application contains sufficient information it is submitted to the JHC for their assessment in their capacity as the primary medical advisor to the ADF. In this process JHC makes an assessment of a former ADF member’s medical status at the time of separation based on service records and any supplementary information provided by applicants in support of their claim. The assessment is primarily ‘paper’ based but does assess factors such as dysfunctional behaviour, social or physical impairment against the employment categories and health standards which applied at the time of a member’s separation.

e. The JHC submit their findings to DTSS. At this stage the applicant is advised of the JHC findings including a copy of the JHC assessment which, in the event of non-supportive outcome, may initiate a resubmission by the applicant. (This is the second part of the process which may involve much iteration as an applicant faced with an adverse outcome often contests the JHC assessment. Figure 1 - blue)

f. Finally, the respective Service Chiefs or their delegates are provided with a succinct and informed brief supporting or not supporting a member’s claim. Following consideration by the Service Chief or their respective delegate, the former member is advised of the outcome. A supportive outcome is advised to ComSuper who in turn commence their own process to assess each case on its merits. In the event of a non-supportive outcome it is likely the applicant will recommence the process.
Figure 1 - Current Process

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5.1. Issues with the current process

While the process is relatively straightforward and offers an applicant substantial opportunities to prove their case, the following issues were identified:

a. Applications are often made without or with limited supporting information. The clear onus is on the applicant to provide as much information as possible to allow JHC to recreate what may have been the medical status at the time of separation. The lack of information provided by the applicant initiates many protracted iterations with the Department as the onus is on the applicant to provide relevant information in support of their claim. (See Figure 1)

b. At the completion of the JHC review, the applicant is advised of their assessment and provided with a copy of the JHC brief. An applicant faced with an adverse finding is (will) likely to contest the JHC assessment, reinitiating the process.

c. The Service Chiefs or their delegates are not advised of the outcome of the JHC review until such time as the applicant has exhausted further opportunities to provide additional information.

d. An applicant is not informed, prior to the commencement of the process, of the level and detail of information required in order to permit a Service Chief or their delegate to make an informed assessment.

e. The process is not timely. Largely this is due to an applicant not containing relevant information at the beginning of the process and the number of iterations following assessment by JHC. From a procedural fairness perspective the Department provides many opportunities for an applicant to provide further information in support of their application; however, the timeframe for provision of the additional information can lead to very protracted exchanges.

f. The information that an applicant seeks may or may not be contained in their Service medical file, or in some cases an applicant’s service files are unable to be located. Navy and Air Force original records are easily obtained and accessed as they are managed by DSG, normally within 1-2 days. Army records are maintained by the Central Army Records Office which continues with the practice of photocopying the original records. The Army’s practice is inefficient adding time to an already lengthy process, consumes resources such as staff time and consumables; all of which could be alleviated by the transfer of the original records.
g. An applicant is unlikely to be advised of a timely outcome until after there have been many iterations following assessment by JHC. The provision of the JHC assessment at such an early stage serves to invite further dialogue between the applicant and the Department. It is acknowledged that for administrative law provisions an applicant should receive a copy of information considered as part of the assessment process it does not necessarily need to be provided at such an early stage. It would seem reasonable that the JHC assessment accompany the Service Chief's or their respective delegate's advice.

h. JHC are in part limited by resources to undertake these case assessments. Discussions with JHC revealed that despite having one person dedicated to the assessments they have commenced to involve other staff in an effort to share the knowledge of the medical classification systems, employment specifications and departmental policies and guidelines which applied at the time of the former member's separation. This is essential given the longevity of this case work.

It was also revealed that there is no peer review of the assessment made by the medical practitioner who undertakes the assessment. The JHC representatives commented these cases take substantial time to recreate a medical record and 'picture' of the applicant at the time of separation and while peer review would be acceptable it is restrained by available resources.

A peer review has potential to remove the view of bias expressed by applicants and advocates.

i. The level of information provided to applicants about Defence requirements is not consolidated or readily accessible at the beginning of the process. There is no information 'kit' available in hard copy or which a former member can access via the internet which addresses the Department's requirements or outlines the process. A 'kit', which would only provide information and not advice, would serve to speed up the process and provide a timely outcome to the applicant.

5.1.1. Applicant and Advocate Issues

While the process is relatively straightforward applicants and advocates have expressed the following concerns:

5.1.1.1. Timeliness of the process

The issue of timeliness is one for both the Department and an applicant. The applicant initiates the process by an application often without supporting or limited information while the Department has limited resources to assess these cases (particularly in JHC). The process is
made lengthy by the many iterations and repeated attempts by some former ADF members to achieve a favourable outcome. The process will be made timelier by the introduction of an ‘information kit’ mentioned in 5.1.1(i).

5.1.1.2. Bias (JHC)

Bias is a term used to describe a tendency or preference towards a particular perspective, ideology or result, especially when the tendency interferes with the ability to be impartial, unprejudiced, or objective. In other words, bias is generally seen as ‘one-sided’.

Advocates and applicants consider that JHC displays bias in their assessment of the available information but largely their concerns are directed at the person who has assessed their application. Much of an applicant’s claim of bias is the result of their own expectation that their application will be supported or they fail to understand that the onus of proof remains with them. A review of ministerial correspondence supports a view that applicants and advocates appear not to understand the meaning of the respective clauses under which they seek a review or they conveniently forget the meaning and intent of ‘at the time the member was retired’.

The Department, in particular JHC, can only recreate the ‘point in time a former member was retired’ through an applicant’s ADF records, from suitable contemporaneous records post separation provided by the applicant, by reference to the employment categories and health standards which applied at the point in time. If the information is not available it would be unwise for the Department to consider a supportive outcome based on limited information. Similarly, the Authority who holds the discretionary power in these matters would be highly unlikely to make a favourable decision with limited information.

5.1.1.3. Review of decisions

This raises the issue of merits review which is an administrative reconsideration of a case. The principal objective of merits review is to ensure that the correct or preferable decision is reached: correct in the sense that the decision made is consistent with the law, and preferable in the sense that, if there is an area of discretion in making a correct decision, the decision made is the most appropriate in the circumstances.

As mentioned earlier in this section, the DFRB Act and DFRDB Act confer upon single Service Chiefs a specific function which is to determine whether a former ADF member could have been retired on the ground of invalidity and to inform the Authority (ComSuper). It does not confer upon them the power to decide whether, in the whole of the circumstances of the case, the former member should be treated as if he had been retired on the ground of invalidity or even the power to request that he be so treated.
It follows that the outcome determined by a Service Chief or their respective delegate is not a decision subject to merits review by a merits review body.

The Federal Court decision in DFR & DBA and Britt (1984) makes it clear that in matters considered by this review, the Authority (ComSuper) is the decision maker and it is their decision which is subject to merits review. Given the intent of the Federal Court decision there is no room to introduce the standard ‘28 day rule’ in which applicants have time to seek a review of a decision. The function performed by the Single Service Chiefs or their delegates is a pre-condition step (‘could have been retired’) to the discretionary power exercised by the Authority (‘should have been retired’).

Should an applicant be dissatisfied with the outcome advised by the Department to the Authority, the applicant’s only recourse is to initiate Federal Court proceedings. While some parts of the current Departmental assessment process can be refined, it does take account of the potential legal action which may arise from its assessment. Where an applicant provides further information, the Department is obliged to reconsider the case based on the fresh information. At all times an applicant is provided with the relevant information and briefing material from which a Service Chief or their respective delegate determines an outcome.

5.1.1.4. Procedural fairness (natural justice)

Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. Simply stated it means that decision-making is fair and reasonable. Procedural fairness involves decision-makers informing people of the case against them or their interests, giving them the right to be heard (the ‘hearing’ rule), not having a personal interest in the outcome (the rule against ‘bias’), and acting only on the basis of logical probative evidence (the ‘no evidence’ rule). Probative has the meaning of tending to prove something.

In the cases made to the Department for a review of a former ADF member’s mode of separation the Department’s process while requiring some refinement is accommodating to ensure that an applicant is kept informed of progress of their application and that all information is considered in the Department’s assessment. The onus of proof rests with the applicant and it is perhaps they who do not understand that unless there is substantial ‘evidence’ relating back to the ‘time of separation’ the Department is unable to provide supportive advice to the Authority. Where the Department is not provided with sufficient information an applicant is requested to provide further information.

The Authority in turn requires an applicant to provide the same, if not further information, such as skill/qualifications, civil employment types and details of employment that may have been undertaken since separation.
5.1.1.5. Access to 'specialist advice' (JHC)

Advocates and applicants have and continue to raise the issue that there is no referral to 'Specialists' as part of the JHC assessment. As part of this review JHC were asked to comment on this specific issue.

JHC advised that obtaining another specialist opinion some time after separation of a member does not contribute to information available on the member's medical and psychological files at the time of separation. JHC role is to define if there was sufficient contemporaneous evidence available at or around the time of a member's separation from the ADF, along with evidence of dysfunction, that would mean the member could/should have been medically separated.

Specialist opinions have not been helpful as they generally accept assumptions about the past status of ex-members and base their opinion on these assumptions rather than the facts known at the time. For current serving members, when assessing their fitness for continued service JHC does not rely on the opinion about fitness for service given by specialists. Rather what JHC seeks from the Specialist is a clear diagnosis, the prognosis and current capacity limitation (Specialists cannot give this level of prescription about personnel who separated many years ago). The ADF (career managers with input from medical) then make the decision about fitness for continued service.

JHC further advise that another specialist opinion is usually not helpful, due to their lack of understanding of ADF and single-Service medical standards and employability/deployability standards which applied at the time of the former member's separation.

In keeping with the Federal Court decision in DFR & DBA and Britt (1984) it seems reasonable that access to 'Specialist advice should be the exception rather than the rule to be considered on a case by case. JHC acts in its capacity as medical advisor to the ADF and the assessment they undertake is purely to determine if the available information supports whether the former member could have been separated for medical reasons at the time of discharge. There is no merit in creating an expense on the Department where the information provided by an applicant is so weak that the sourcing of a 'Specialist' opinion would not add value to an applicant's case.

5.1.1.6. DVA decisions

A review of ministerial correspondence reveals that applicants and advocates question why the Department does not abide by decisions made by DVA regarding their medical status and claims.

Inherent in this issue is that an applicant or advocate does not understand that a determination made by DVA to accept liability for an injury sustained during ADF service may not necessarily impact on a members ability to perform their duties whilst continuing to serve as an ADF member. At the same time the symptoms of the accepted injury or illness may not have been prevalent at the time.

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of their 'final' medical board prior to separation. At the same time a post service injury or illness for which a former member seeks a retrospective assessment may not have been prevalent at the time of their 'final' medical board.

There is no link between an outcome under the DFRB or DFRDB and decisions made by the DVA concerning medical benefits relating to a medical condition sustained during ADF service. For medical conditions arising post separation for which a former ADF member seeks a retrospective assessment under the DFRB or DFRDB, the onus of proof rests with the applicant.
6. Future Process

Overall the current process while cumbersome in some areas, does afford an applicant substantial opportunities to provide further information in support of their application. The process outlined in Figure 2 is not substantially different but includes:

a. The development and provision of a robust and comprehensive ‘information’ kit at the beginning of the process. The information kit should be designed to assist the former member make informed decisions and guide them to make a comprehensive application without providing ‘advice’ as to the merits of their application. It could include but not be limited to:

   a. An application form mirrored on the ComSuper form;

   b. An overview of the process, roles and responsibilities.

   c. Identify key information an applicant should include such as contemporaneous medical information;

   d. A checklist for applicants to ensure they have taken steps to inform themselves on key matters such as:

   e. The implications for their superannuation such as will a successful claim impact on their commutation; and

   f. How do they access their Service records?

   g. Key points of contact in ComSuper, DVA and the Department;

   h. A summary of the differences between DVA and DFRB/DFRDB legislation;

   i. Advice about an applicant’s review rights should their application not be supported; and

   j. Advice about the Department’s ‘Service Charter’.

b. The removal of the step to provide the applicant with the JHC assessment prior to consideration by the Service Chief or their delegate. In the current process this step only serves to invite further iterations, often protracted in nature, from applicants or their advocate. There is no requirement for the JHC assessment to be provided at such an early stage and prior to a Service Chief’s or their delegate’s consideration and advice; and
c. The provision of the JHC assessment as an attachment to the Service Chief’s or their delegate’s advice provided to an applicant. The removal of the earlier step (b) will ensure a speedy outcome subject to an applicant’s adherence to the provision of information suggested in the information kit and their undertaking to seek advice prior to the lodgement of an application.
Figure 2 - Proposed Process
Defence Forces Retirement Benefits Act 1948

51 Classification in respect of incapacity

(1) Subject to subsection (3), where:

(a) a member who is a contributor has been retired before attaining the retiring age for the rank held by him;

(b) an officer who is a contributor has been granted an extension of service for a period that does not extend beyond the period of 2 years after the attainment by him of the retiring age for the rank held by him and has been retired before the expiration of the period of the extension;

(c) a member (not being an officer) who is a contributor has been engaged for a period of service extending beyond the date on which he will attain the retiring age for the rank held by him and has been retired before the expiration of a period of 2 years after that date and before the expiration of the period of the engagement; or

(d) the age for compulsory retirement of a member (not being an officer) who is a contributor has been extended and the member has been retired before the attainment by him of the extended age and before the expiration of a period of 2 years after the attainment by him of the retiring age for the rank held by him;

on the ground of invalidity or of physical or mental incapacity to perform his duties (not in the opinion of the Authority, due to wilful action or his part for the purpose of obtaining pension or other benefit), he is entitled to benefit in accordance with sections 52, 52A and 53, but, subject to section 60, is not otherwise entitled to benefit under this Act.

(2) Where a person (not being a person to whom section 52A applies) is, or is about to become, entitled to benefit by virtue of subsection (1), the Authority shall determine the percentage of total incapacity of the person in relation to civil employment and shall classify the person according to the percentage of incapacity as follows:

<table>
<thead>
<tr>
<th>Percentage of Incapacity</th>
<th>Class</th>
</tr>
</thead>
<tbody>
<tr>
<td>60 or over</td>
<td>A</td>
</tr>
<tr>
<td>30 or over but less than 60</td>
<td>B</td>
</tr>
<tr>
<td>Less than 30</td>
<td>C</td>
</tr>
</tbody>
</table>

(2A) Where:

(a) a person (other than a person to whom section 52A applies) who is entitled to benefit by virtue of subsection (1) dies; and

(b) at the time of his or her death, the Authority has not made a determination in respect of the person under subsection (2);

the Authority may:

(c) determine what was, immediately before the person’s death, his or her percentage of incapacity in relation to civil employment; and
(d) classify the person under subsection (1) according to that percentage of incapacity, as if the person had not died.

(2B) Where a deceased member of the scheme is classified under this section, the classification is taken to have had effect at all times on and after his or her retirement.

(3) Where:
(a) a member, within 3 months after becoming a contributor, is retired on the ground of invalidity or of physical or mental incapacity to perform his duties; and
(b) the Authority is satisfied that:
   (i) the invalidity or incapacity was caused, or was substantially contributed to, by a physical or mental condition that existed at the time he became a contributor; and
   (ii) the condition was not aggravated, or was not materially aggravated, by his service as a member;
subsection (1) does not apply in relation to him.

(4) Where a person who has ceased to be a member again becomes a member (other than a person referred to in Part VIA as a re-instated candidate to whom this Part applies), subsection (3) applies in relation to him as if he had become a contributor at the time he commenced to make contributions after again becoming a member.

(5) This section does not apply to a person who retires on or after 1 October 1972.

(6) Where a member who is a contributor has, before 1 October 1972, been retired otherwise than on the ground of invalidity or of physical or mental incapacity to perform his duties but the Chief of Navy, the Chief of Army or the Chief of Air Force or a person authorized in writing by the Chief of Navy, the Chief of Army or the Chief of Air Force, as the case requires, informs the Authority that, at the time the member was retired, grounds existed on which he could have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties, he may, for the purposes of this Act, be treated as if he had been retired on that ground.
Defence Force Retirement and Death Benefits Act 1973

37 Service Chief may inform authority of grounds of retirement

Where a contributing member has been retired otherwise than on the ground of invalidity or of physical or mental incapacity to perform his duties but, after his retirement, the Chief of Navy, the Chief of Army or the Chief of Air Force or a person authorized in writing by the Chief of Navy, the Chief of Army or the Chief of Air Force, as the case requires, informs the Authority that, at the time the member was retired, grounds existed on which he could have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties, he may, for the purposes of this Act, be treated as if he had been retired on that ground.
Defence (Personnel) Regulations 2002 - REG 99

Change of reason for termination

(1) This regulation applies if:

(a) the service of a member has been terminated; and

(b) the Chief of the member's Service is satisfied that the member's service could properly have been terminated for a reason other than the reason for which the service was terminated; and

(c) treating the service as having been terminated for the other reason would not change the status of the member.

(2) The Chief may:

(a) at the request of the member; or

(b) with the member's consent;

ensure that the member's service is treated as having been terminated for the other reason.
Ms Nicole Curtin  
A/ Director Transition Support Services  
Department of Defence  
Campbell Park Offices (CP1-6-012)  
CAMPBELL PARK ACT 2600

Dear Ms Curtin,

INVALIDITY CONSIDERATIONS UNDER THE DFRB AND DFRDB ACTS (G72132e)


I apologise for the delay in responding.

I have attached a paper summarising the background to the relevant provisions and our procedures for managing such claims.

If you have any questions, or if you or your consultants would like to discuss this matter further, please contact me on (02) 6272 9512.

Yours sincerely

[Redacted]

Christine Svarcas  
Chief Operations Officer  
Military Schemes and Pensions  
5 August 2009
Invalidity considerations under sub section 51 (6) of the Defence Forces Retirement Benefits Act 1948 (the DFRB Act) and Section 37 of the Defence Force Retirement and Death Benefits Act 1973 (the DFRDB Act)

Background

The DFRDB Act received Royal Assent on 1 October 1972 but it was not until later in 1973 that Section 37 was added. Section 37 was inserted expressly as a safety net provision to cover National Servicemen - numbers of whom had apparently been discharged on non-medical grounds despite the existence of medical conditions which could have led to an invalidity discharge. The same amending piece of legislation inserted sub-section 51(6) into the DFRB Act. The amendments provided invalidity cover where an invalidity discharge would have been the more appropriate course.

Since 1973, these safety net provisions have remained and now have the effect of providing a retrospective invalidity benefit over time spans involving 30 to 40 years.

At the inception of the MSBS in 1991, the Minister (then Gordon Bilney) coined the phrase “iron clad guarantee” when he stated that benefits available under the DFRDB Scheme would in no way be changed when the MSBS began. The “iron clad guarantee” has since been raised by those opposing any proposed (arguably detrimental) changes to the DFRDB Act.

Processing of claims under section 37 and sub section 51(6)

ComSuper continues to process regular claims for invalidity benefits pursuant to the relevant sections of the DFRB and DFRDB Acts.

Both pieces of legislation provide the DFRDB Authority and its delegates a discretionary power to either agree or disagree with the advice from the relevant service Chief.

On receipt of advice from the relevant service Chief, each case is examined on its merits. The majority of cases received result in positive outcomes as far as exercising the discretionary power goes. In these cases ComSuper must apply the initial invalidity classification provisions in the legislation. (Refer sub section 51(2) of the 1948 Act and section 30 of the 1973 Act)

If the relevant section is applied to a member and the member is deemed to have been retired on invalidity grounds, the invalidity classification process that follows presents some administrative difficulty. In applying the initial invalidity classification provisions the administrator is restricted in considering the situation as it was as at the date of discharge. It is always difficult to get an accurate picture of the medical situation as it might have stood at a member’s discharge date – potentially 40 years ago. There is invariably little in the way of useful primary documents.

Additionally, if a pensionable level of benefit is achieved (Class A or B), extensive (and usually complex) manual calculations of both the initial rate of benefit and the many years of arrears need to be undertaken. This process take days/weeks to perform.

Requests from members relating to s.51(6) of the DFRB Act and s.37 of the DFRDB Act averaged 10-15 per annum.
If the Authority receives advice from the relevant service Chief that a former member should be deemed to have been retired on invalidity grounds, and the Authority exercises its discretion to apply the relevant invalidity provisions to the member, the processing steps are:

- Advise the member of the retrospective decision and request them to complete and return an application for benefit. The application contains necessary information relating to skills/qualifications and resultant civil employment types for assessment purposes. The member is also requested to provide details of employment they may have undertaken since discharge. Initial invalidity classifications at a pensionable level (Class A or B) fall under the review provisions of the Acts (section 53 [DFRB Act] and section 34 [DFRDB Act]) and the administrator is entitled to apply the review provisions in such cases. For instance, a member who is initially classified as Class B, may have many years of stable employment, before the retiring condition deteriorates. The scenario might be – Class B from discharge with a reduction to Class C at a point in time and then a consequent upgrade back to either Class B or Class A. As mentioned, such cases would involve further complex manual calculations.

- In accordance with current processes, the case is remitted to an appropriate medical specialist for an opinion as to the degree of incapacity or otherwise as it might have been as at the day of discharge.

- On receipt of specialist opinion, a DFRDB Authority delegate will take a formal decision to classify either Class A, B or C.

- The case is then remitted to ComSuper’s payment area for processing of the benefit to be paid.

- If a member is dissatisfied with any of the above decisions they can request formal internal reconsideration of the decision with the DFRDB Authority. If they are not satisfied with that decision they may proceed to the AAT and then to the Federal Court (i.e. standard administrative law provisions).

**Rule 30 of the MSB Rules.**

It should be noted that the MSB Rules contain a provision under Rule 30 that is similar to the DFRB and DFRDB provisions discussed above. Unlike the provisions in the DFRB/DFRDB Acts as outlined, the operation of Rule 30 does not require statutory advice from the relevant Defence Force Chief. Requests from members relating to Rule 30 since 1995 have averaged 15-20 per annum.

ComSuper

5 August 2009
PSS (CP3-7-061) Attention: Assistant Secretary – Mr W. Traynor

OUTCOMES OF THE REVIEW INTO THE PROCESS TO CHANGE THE MODE OF SEPARATION FOR SUPERANNUATION PURPOSES

Reference:
A. DSG Minute ASPSS/OUT/2009/605 dated 28 Sep 09

1. My staff and I have examined the Review forwarded under cover of reference A. The report generally covers the areas of concern to Joint Health Command (JHC)/Joint Health Support Agency (JHSA), and the following comments are offered:

   a. Recommendations a, b, c and d are agreed. It is accepted that these would streamline the application and initial assessment process while meeting the legal and procedural fairness requirements.

   b. Recommendation e is not agreed. I am of the opinion that applicants and advocates will take the same view of the JHSA/JHC response no matter how many personnel within JHC have reviewed the case. Although “peer review” is not precisely defined, I believe that such a formal requirement would limit the options for JHC personnel available for the review of appeals and further submissions should applicants request such action after notification of the initial decision by the Service Chief or his Delegate.

   c. Recommendation f is agreed and a Standard Operating Procedure (SOP) will be developed for guidance in the review process and to reference appropriate past policy documentation necessary for the review process.

   d. Recommendation g does not appear to relate directly to JHC.

2. My point of contact for this matter is GpCAPT Michael Seah, DJHSA (Tel. 02 6266 3344 or e-mail: michael.seah@defence.gov.au).

R.M. WALKER
CDRE, RAN
A/CJHLTH

Tel: (02) 6266 4897

07. Oct 09
OUTCOMES OF THE REVIEW INTO THE PROCESS TO CHANGE THE MODE OF SEPARATION FOR SUPERANNUATION PURPOSES

1. This Minute is in response to your Minute ASPSS/OUT/2009/605 dated 28 September 2009, and the enclosed Review into the Change Mode of Separation for Superannuation Purposes Process completed by Sinclair Knight Merz.

2. I note the contents of the Report, and that you have reviewed and agree with the recommendations put forward in the Report. I seek to provide some additional comments with respect to one of the recommendations.

3. During the preparation of the report, a legal officer in the Directorate of Litigation was interviewed by Sinclair Knight Merz. I am advised that the Legal Officer indicated that Defence could not provide legal advice to the applicants. This included any advice on their avenues of redress in circumstances where their application was not supported. This was for a number of reasons, but mostly due to the liability that Defence would face if any legal advice is given to the applicants.

4. Page 5 and Page 18 of the SKM Report includes a recommendation that Defence should develop and provide to applicants a "robust and comprehensive information kit at the beginning of the process. The information kit should be designed to assist the former member make informed decisions and guide them to make a comprehensive application without providing ‘advice’ as to the merits of their application. It could include but not be limited to:

   i. advice about an applicant’s review rights should their application not be supported.
5. The disclosure intent underpinning this recommendation is consistent with other review options disclosed in the course of Government and Departmental business. However, care needs to be taken to ensure that the information included is correct and relevant. Perhaps the use of the word "advice" is unfortunate as it does imply something beyond the conveying of standard review information.

6. I understand that the recommended information kit is currently being developed in response to this recommendation. The Director of Litigation is available to assist in this task if required and I would appreciate the opportunity to review the information kit once it is in a final form and prior to its release for general use.

Yours sincerely

[Redacted]
Michael Lysewycz
Assistant Secretary
Legal Services

5 November 2009
PSP (Attn: Assistant Secretary)

CCMA FEEDBACK – OUTCOMES OF THE REVIEW INTO THE PROCESS TO CHANGE THE MODE OF SEPARATION FOR SUPERANNUATION PURPOSES

Reference:
A. ASPSS/OUT/2009/605 dated 28 Sep 09

1. As requested in ref A, I fully support the Review’s recommendations as detailed in the ‘future process’. Thank you for the opportunity to comment.

G. REYNOLDS
COL
CCMA

R8-9-024

Tel: (02) 6265 2541

10Oct 09
OUTCOMES OF THE REVIEW INTO THE PROCESS TO CHANGE THE MODE OF SEPARATION FOR SUPERANNUATION PURPOSES

References:
A. ASPSS Minute ASPSS/OUT/2009/605 dated 28 Sep 09
B. Sinclair Knight Merz - Review of Changes to ADF Modes of Separation for Superannuation Purposes dated 11 Sep 09

1. Reference A requested comment and concurrence to the recommendations proposed at Reference B. The proposed recommendations contained in the report are agreed without comment.

2. My point of contact is CMDR Stephen Cornish, Director of Navy Employment Conditions who can be contacted on 02 6265 3227.

M.D.HILL
CAPT, RAN
DGNP

R8-1-016
6265 3251

21 Oct 09
OUTCOMES OF THE REVIEW INTO THE PROCESS TO CHANGE THE MODE OF SEPARATION FOR SUPERANNUATION PURPOSES

References:
A. ASPSS Minute ASPSS/OUT/2009/605 of 28 Sep 09
B. Sinclair Knight Merz – Review of Changes to ADF Modes of Separation for Superannuation Purposes of 11 Sep 09

1. Ref A requested comment and concurrence to the recommendations contained within the Report on the Review of Changes to ADF Modes of Separation for Superannuation Purposes (ref B refers). The proposed recommendations are agreed without comment.

2. My point of contact is WGCDDR Andrew Ratz, Deputy Director Military Administration – Air Force who can be contacted on 6266 5141.