Department of Veterans' Affairs—answers to written questions

Schedule 2 of the Veterans' Entitlements Amendment Bill 2011 clarifies and affirms the policy intention of the offsetting provisions in the *Veterans' Entitlements Act 1986* (VEA). The policy intention of the offsetting provisions has always been to prevent duplicate compensation being paid for the same incapacity and the policy has consistently been implemented on this basis for almost 40 years.

The amendments will not and are not intended to change the operation of the offsetting provisions in any way. The provisions will operate prospectively, and following the passage of the legislation, a person whose disability pension is currently being offset by another payment for the same incapacity will continue to have his or her pension paid at exactly the same rate, unless there is another reason to change that rate.

1. Unintended consequences

1.1 The RSL has raised concerns about Schedule 2. Could you clarify the following matters?

Can you envisage any circumstances under the proposed legislation whereby a veteran could find him or herself at any time in the future receiving compensation payments that are not commensurate with his assessed level of incapacity?

Compensation *under the VEA* will continue to be commensurate with the assessed level of incapacity as a minimum. The situation under the current legislation will not change under the proposed legislation.

It should be noted that it is currently possible for compensation *from another source* to be more than an assessed level of incapacity under the VEA. For example, if a person receives a compensation payment from another source that exceeds the amount of the Special Rate of disability pension (the maximum amount of compensation payable under the VEA). In these circumstances the person's compensation payment from the other source will exceed his or her level of incapacity as assessed under the VEA. This is because the offsetting provisions of the VEA are only able to take into account compensation payments made under that Act. This will not change under the proposed legislation.

1.2 Is the RSL correct in stating that the proposed amendments go 'well beyond' the original intention in 1973 or even 1994?

No, the amendments do not go beyond the original intention or content of the 1973 or 1994 legislation. The original intention referred in the Explanatory Memorandum (EM) is not a reference to offsetting for pensions paid in respect of different types of service. It is a reference to the principle that offsetting should ensure that a person is not compensated twice for the same incapacity, which has been the policy intention since 1973.

In stating that the "amendments in the Bill go well beyond the original intention", the RSL's submission misinterprets the explanation of the reason for the amendments provided in the EM.

The RSL submission correctly recognises that in 1973 compensation coverage under the *Repatriation Act 1920* (the predecessor legislation to the VEA) was extended to include peacetime service. This creates a system of dual entitlement with the *Compensation (Government Employees Act 1971 -1973* (the predecessor to the SRCA), because that Act also provided compensation coverage for peacetime service. Offsetting ensured that a person could not be compensated twice for the same incapacity related to peacetime service under both Acts.

In 1994, compensation coverage for peacetime service generally ceased under the VEA. However, compensation coverage under the SRCA was extended to what is now known as warlike and non-warlike service (still sometimes called operational service). The VEA was subsequently amended to allow for offsetting to ensure a person could not be compensated twice for the same incapacity related to operational service under both Acts.

As stated above, the original intention of the legislation in the EM was to offset for the same incapacity.

1.3 Are you able to explain the concerns raised by the RSL, particularly in the example it provides to indicate that veterans may be disadvantaged by the proposed legislation?

Veterans will not be disadvantaged by the proposed legislation. The Department's understanding of the RSL's concern is it believes the proposed amendments will extend the offsetting provisions under the VEA and will result in a "double dip discount" in some cases. This is not the intention of the current or proposed legislation.

The RSL's submission to the Senate Inquiry states that the proposed legislation will require the Commonwealth to offset an entire compensation payment from another source for a condition not accepted under the VEA against any disability pension received under the VEA for a condition accepted under that Act in circumstances

where the non-accepted condition only results in a small overlap in incapacity with the accepted condition.

This is not the case – the proposed legislation will ensure that offsetting only same incapacity continues. This is explained in further detail below at 1.4.

The RSL's submission also states that this perceived extended offsetting requirement under the proposed legislation, in combination with an existing apportionment methodology under Chapter 19 of *Guide to the Assessment of Rates of Veterans' Pensions* Fifth Edition (GARP V), will result in a "double dip discount" in some cases.

This is not the case. If impairment from a non-accepted VEA condition is removed from the assessment under Chapter 19, then there will be no overlap in incapacity, and therefore no offsetting. Therefore, DVA does not agree that the proposed legislation as drafted will result in a "double dip discount".

1.4 Can you see any way to satisfy its concerns?

As stated above, DVA understands the RSL's concerns but does believe they are based in fact. The proposed legislation will simply clarify and affirm the policy intention of the legislation and does not require a change to the way the offsetting provisions are applied.

The offsetting provisions are administered with the view not to manufacture an overlap in incapacity. Generally, the Department would consider that for discrete conditions to have an overlapping incapacity, those injuries or diseases must at least affect the same system function and be assessable within the same system-specific chapter of GARP V.

Consider the example of a person receiving disability pension in respect of incapacity from emphysema under the VEA and has received lump sum compensation under the SRCA in respect of osteoarthritis of the knees. Both these conditions might have similar and overlapping effects, such as reducing the person's walking pace; however, the incapacity from either condition would not be considered to be the same. This is because the incapacity from the emphysema would affect the person's cardiorespiratory system and be assessable under Chapter 1 of GARP V, whereas the incapacity from the osteoarthritis would affect motor function low limbs and be assessable under Chapter 3 of GARP V.

Another example would be a person who suffers from tinnitus and post-traumatic stress disorder (PTSD). Though both conditions may have similar effects (disturbed sleeping patterns, etc.) they are not assessable under the same system specific chapters of GARP V. Tinnitus is assessable under Chapter 7 of GARP M (Ear, Nose and Throat Impairment), whereas PTSD is assessable under Chapter 4 of GARP V (Emotional and Behavioural Impairment) and therefore would not be considered to result in the same incapacity and would not be offset.

Alternatively, consider the example of a veteran who is receiving disability pension in respect of incapacity from chondromalacia patella (CMP) under the VEA and has received lump sum compensation under the SRCA in respect of osteoarthritis of the knees. The incapacity from both conditions would be considered to be the same if both the incapacity from the CMP and the incapacity from the osteoarthritis affected the veteran's motor function of the low limbs and were assessed under Chapter 3 of GARP V.

1.5 The RSL proposed a different amendment to the VEA. Could you comment on this proposal?

The Department considers that the proposed amendments in Schedule 2 of the Bill are the most appropriate way to clarify and affirm the policy intention of the offsetting provisions. It is arguable that the suggestions for amendment by the RSL go beyond the scope of the amendments contained within the proposed legislation.

The Department has concerns about the RSL proposal's reliance on the use of the apportionment methodology in Chapter 19 of GARP V and the 'but for' test. This process is not a valid substitute for offsetting.

Chapter 19 of GARP V applies "whenever an impairment is not due solely to the effects of accepted conditions" (for example, where impairment is also due to the effect of non-accepted conditions under the VEA, such as age related conditions).

Where the two different conditions contribute to the same incapacity, apportionment under Chapter 19 is not always feasible. Chapter 19 of GARP M requires relative contributions to be determined based on proper medical advice. It is frequently impossible for medical practitioners to assess the relative contributions of different conditions, particularly where the symptoms of the conditions substantially overlap. Indeed, the more closely incapacity from an accepted condition resembles incapacity from a non-accepted condition, the less feasible it is to make an assessment of the relative impairments for the purposes of Chapter 19.

For example, if a person had an accepted condition of PTSD and a non-accepted condition of generalised anxiety disorder, and both would cause a similar symptomatology in the absence of the other, no apportionment could feasibly be made. The 'but for' test proposed in the RSL's submission on apportionment does not resolve this problem. Current practice, which will not change under the Bill, is that the issue is not managed by making an apportionment under Chapter 19.

2. Costs of obtaining compensation

2.1 In its submission, the Vietnam Veterans' Federation state that the legal costs and disbursements should not be taken into account in the offsetting arrangements—they are not the compensation for injuries but the cost of obtaining that compensation.

Could you explain how the costs of, and other expenses incurred in, obtaining compensation which are then included in the compensation payment, are treated under the legislation?

'Party-party' legal costs are subtracted from a lump sum compensation payment before any offsetting occurs. 'Party-party' costs include all amounts specifically included in any Court judgement, settlement or other compensation payment as 'costs'. 'Party-party' costs are not regarded as being in the scope of the definition of compensation.

'Solicitor-client' costs are separate from 'party-party' costs and include all other costs that are not specifically included in a settlement or judgement. These costs are a private arrangement between the solicitor and the client and are not excluded from the compensation payment and are therefore offset.

This policy is aligned with the policy on legal costs in respect of compensation recovery applying to income support payments.

3. Need for change

3.1 The RSL states that the proposed amendments are unnecessary because the current legislation already requires discounting in the assessment of pensions if two different injuries contribute to the same impairment.

Is this statement correct? If so, why is there a need to make the proposed amendments?

The statement is not correct because the decision of the Full Federal Court in Smith has created some uncertainty about the policy intention of the offsetting legislation. The proposed legislation will confirm and affirm this policy intention.

As stated above, use of the apportionment methodology in Chapter 19 of GARP V is not a valid substitute for offsetting.

3.2 In its submission, DVA stated that if passed the amendments 'should avoid the likelihood that, on the basis of the Smith case, those seeking future compensation payments could circumvent the offsetting provisions by exclusion of specific injuries or diseases from the terms of the compensation settlements'.[1]

Could you inform the committee about previous examples of, and details on, cases where someone has circumvented the compensation offsetting provisions?

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1 *Submission* 2, p. 6.

The Department has not been able to identify any other offset cases that reflect Mr Smith's particular circumstances. The decision of the Full Federal Court is limited in application to the particular circumstances of Mr Smith's case and is contrary to way the offsetting provisions have been and are being administered in other cases.

The purpose of the proposed legislation is to prevent a person circumventing the intention of the legislation again in the future.

Furthermore, the proposed legislation will remove any doubt or uncertainty created by the Full Federal Court decision. The Department has received at least one inquiry from a legal firm seeking to rely on the decision of the Full Federal Court in Smith.

While this inquiry has been resolved, the proposed legislation will remove confusion about the application of the Smith decision and ensure that the offsetting provisions continue to be administered as intended, even where the same or similar particular circumstances arise again.

4. Consultation and communication with the ex-service community

4.1 Could you inform the committee about the level of consultation that took place with the ex-service community in respect of the changes contained in schedule 2?

The 14 national ex-service organisations (ESOs) were briefed about the purpose of the proposed legislation a number of times on Budget day and post-Budget. These 14 ESOs are:

- Australian Federation of Totally & Permanently Incapacitated Ex-Servicemen & Women (TPI Federation)
- Australian Peacekeepers & Peacemakers Veterans' Association (APPVA)
- Australian Veterans & Defence Services Council (AVADSC)
- Defence Force Welfare Association (DFWA)
- Legacy Co-ordinating Council
- Partners of Veterans Association (PVA)
- Returned & Services League of Australia (RSL)
- Vietnam Veterans Association of Australia (VVAA)
- Vietnam Veterans' Federation of Australia (VVFA)
- Naval Association of Australia
- Royal Australian Air Force Association (RAAF)
- Royal Australian Regiment Association (RAR)
- Australian Special Air Service Association (ASASA)
- War Widows' Guild of Australia

The Prime Ministerial Advisory Council on Ex-Service Matters (PMAC) was also briefed at the time of the Budget announcement. PMAC is an advisory body appointed

by the Minister to represent a broad experience and understanding of the issues affecting the ex-service and defence communities.

DVA Deputy Commissioners in each state and territory also briefed local ESOs about the proposed changes following the Budget announcement.

No concerns with the proposed legislation were raised at these briefings. Furthermore, no correspondence has been received expressing concerns with the proposed legislation.

4.2 The committee notes the statement in the Explanatory Memorandum that the High Court *[sic]* decision highlighted 'the need for greater clarity in the compensation offsetting provisions'. The committee also notes the observation of the Review of the Military Compensation Arrangements which found that:

> **Dual eligibility continues to be a key source of complexity, confusion and misunderstanding among administrators, claimants and their representatives. It was a central reason for the development and enactment of MRCA as a single piece of compensation legislation covering all forms of service.[2]**

In your view, is the intention of Schedule 2 to bring clarity to help the courts interpret the meaning of the legislation or to help veterans and/or their dependants better understand the offsetting arrangements?

Yes, these amendments are concerned with affirming the longstanding policy intention of the offsetting provisions and restoring clarity following the decision of the Full Federal Court in Smith. However, the amendments are separate to the Review of Military Compensation Arrangements (the Review).

The Review commented in its report that one of the reasons for the introduction of the *Military Rehabilitation and Compensation Act 2004* (MRCA) was to create a single system for injuries, diseases and deaths related to service rendered on or after 1 July 2004. The MRCA is prospective legislation and does replace the VEA and the SRCA for service rendered before 1 July 2004.

For example, an incident that was a major impetus for the development of the MRCA was the Black Hawk Helicopter accident of 12 June 1996. That accident drew attention to the differences in the form of compensation arrangements that applied to members of the Australian Defence Force (ADF) who were injured or killed. Depending on dates of enlistment and period of service, some of the members killed or injured in the accident had compensation coverage under both the SRCA and the

2 Review of Military Compensation Arrangements Report, p. 262.

VEA, whereas other members had compensation coverage under the SRCA only. This situation was not addressed retrospectively by the introduction of the MRCA. It was only addressed prospectively for service rendered after 1 July 2004.

The proposed legislation is intended to clarify and affirm the principle of offsetting for same incapacity following the Smith case, which has limited or no application to the arrangements for service rendered before 1 July 2004 and the offsetting provisions within the VEA. The Smith decision has no application to the MRCA in situations were service has been rendered after 1 July 2004.

The proposed legislation is unrelated to the examination of offsetting issues in the Review. This legislation addresses the issue of when offsetting is applied under the VEA, whereas the MRCA Review considered the amount of compensation that should be offset under the VEA, as well as some other issues related to offsetting under the MRCA.

Recommendations made as part of the Review are currently being considered by Government. The Government has not yet responded to any of the recommendations from the Review.

5. Request member to institute proceedings

5.1 The committee notes that there are a number of provisions that enable the Commission to request a veteran or dependant to institute proceedings against a person who appears legally liable to pay damages in respect of the same incapacity.

Could you explain the extent to which the Commission may compel a member or dependant to take such action? Should these provisions be understood to mean that if an incapacity has arisen from either a service related cause or a cause from another event (such as a motor vehicle accident), or both, that the Commission can compel a member to take action against another party rather than request compensation from DVA?

The Commission can only request a person to institute action against another party, it cannot compel a person.

Section 30E of the VEA applies where a pension is payable under Part II of the VEA in respect of an incapacity from a war-caused condition and a person other than the Commonwealth appears legally liable to pay damage in respect of that same incapacity. Section 30E provides that the Commission can only request the veteran or dependant to institute proceedings against another party.

Subsection 75(1) of the VEA provides the Commission with similar powers in relation to pensions payable under Part IV of the VEA.

5.2 What options are open to the Commission should a member or dependant decline such a request?

These circumstances are unlikely to arise in a veteran's compensation matter. For most compensation claims lodged under the VEA, the condition claimed will be related to activities undertaken while a person was on duty as member of the ADF. Therefore, it would be rare for another party to be liable to pay damages in respect of the same incapacity.

Examples of where a third party might be liable to pay damages may include a motor vehicle accident that occurs while the member is travelling to a place for the purpose of performing duty, or other similar travel scenarios such as journeying for the purposes of defence service on a commercial airline or ship.

In these circumstances, under s 30F of the VEA, where a person does not agree to a request under s 30E within a reasonable time, the Commission may, on behalf of the person, institute proceedings against the potentially liable person or take over the conduct of proceedings.

Subsections 75(2) and 75(3) make similar provision for pensions payable under Part IV of the VEA.

5.3 Could you provide the committee with some statistics on how often the Commission under the current legislation has made such a request and how often the request has been declined?

The Commission has not used these provisions in the last 10 years and no record has been found of them being used before then.