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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION
COMMITTEE

Veterans' Entitlements Amendment Bill 2011

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SENATE
FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE
Thursday, 11 August 2011

Senators in attendance: Senators Bishop, Eggleston, Fawcett, Stephens and Wright

Terms of reference for the inquiry:

To inquire into and report on:

Veterans' Entitlements Amendment Bill 2011

WITNESSES

BROWN, Mr Luke Trevor, Director, Costing and Implementation Section, Department of Veterans' Affairs 8

DOOLAN, Rear Admiral Kenneth Allan (Retired), National President, Returned and Services League of Australia Ltd 1

FARRELLY, Mr Sean, Acting General Manager, Support Division, Department of Veterans' Affairs 8

HODGES, Mr John Michael, National Veterans Affairs Adviser, Returned and Services League of Australia Ltd 1

LUCKHURST, Mr Adam, National Manager, Rehabilitation and Entitlements Policy Group, Department of Veterans' Affairs 8

SPIERS, Ms Carolyn, Acting General Manager, Executive Division, Department of Veterans' Affairs 8

DOOLAN, Rear Admiral Kenneth Allan (Retired), National President, Returned and Services League of Australia Ltd

HODGES, Mr John Michael, National Veterans Affairs Adviser, Returned and Services League of Australia Ltd

Committee met at 10:30

CHAIR (Senator Stephens): Welcome. I declare open this public hearing of the Senate Foreign Affairs, Defence and Trade Legislation Committee. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

This morning the committee is hearing evidence on the committee's inquiry into the provisions of the Veterans' Entitlements Amendment Bill 2011. The committee notes that, in recommending this bill, the Selection of Bills Committee stated that the purpose should be to seek further information about changes proposed by schedule 2 in relation to compensation offsetting and to hear the views of the veteran and ex-service community.

Today's hearing is intended to give the RSL the opportunity to voice its concerns with regard to the bill and for the Department of Veterans' Affairs to provide further information to the committee in response.

The committee has received your submission as No. 3. Do you wish to make any amendments or alterations to your submission?

Rear Adm. Doolan: We do not.

CHAIR: Would you like to make a brief opening statement?

Rear Adm. Doolan: The Returned and Services League appreciates the opportunity of providing further explanation of our reasons for opposing schedule 2 of the Veterans' Entitlements Amendment Bill 2011. We wish to make it clear that we support the other schedules in the bill. The philosophy underpinning current legislation about veterans' disability pension entitlements stems from legislation enacted by the parliament in 1973. This philosophy was to compensate for accepted disease or injuries resulting from Defence Force service and included offsetting arrangements for non-service related diseases or injuries.

The philosophy in the Veterans' Entitlements Amendment Bill 2011 is different. It seeks to compensate for overall incapacity and, in so doing, introduces something new. That is, the concept that a veteran's disability pension entitlement already discounted by application of chapter 19 of the *Guide to the assessment of rates of veterans' pensions*, otherwise referred to as GARP, for a non-service related injury or disease can be further reduced or even eliminated in circumstances where the veteran subsequently receives a lump sum payment from a civilian employer or insurance company for his or her non-Defence Force caused disease or injury. The RSL considers this fundamental change in the philosophical approach to compensating veterans diminishes existing veterans' entitlements. In effect, we believe it would authorise the Commonwealth to double dip into veterans' disability pensions. As explained in the Returned and Services League of Australia's written submission, sufficient provision already exists in chapter 19 of the *Guide to the assessment of rates of veterans' pensions* to discount the assessment of disability pensions for the effects of non-service related disabilities.

During discussions, the league's national veterans affairs adviser, Mr John Hodges, held with the officers of the Department of Veterans' Affairs since the forwarding of our written submission to this Senate committee, we have gained the impression that it was not the intention of the Department of Veterans' Affairs that this proposed legislation should result in a double dip discount, in combination with chapter 19 of the aforementioned *Guide to the assessment of rates of veterans' pensions*. We understand that officers of the Department of Veterans' Affairs

agree with the RSL that, under chapter 19 of that guide, if both the accepted condition and a non-accepted condition give rise to the same impairment, medical opinion is obtained to determine the relative contribution to the impairment for both conditions. The impairment rating is reduced on the basis of that medical opinion to reflect the proportion of contribution from the accepted condition. This understanding further reinforces the RSL's view that there is no need for schedule 2 of the proposed legislation. As explained in detail in our written submission, current legislation and chapter 19 of the *Guide to the assessment of rates of veterans' pensions* satisfactorily meets the longstanding policy intentions and reflects an established and well-recognised practice.

CHAIR: Thank you. Mr Hodges, do you wish to add anything?

Mr Hodges: Not at this stage.

CHAIR: Let us proceed to questions. Rear Admiral Doolan, you said there had been consultations with the Returned and Services League after you had made the submission to this inquiry?

Rear Adm. Doolan: Yes.

CHAIR: Can you tell us what consultations occurred between the department and the RSL prior to the legislation being brought forward?

Rear Adm. Doolan: I will pass to Mr Hodges to respond to that.

Mr Hodges: There was no consultation prior to the bill being introduced into parliament.

CHAIR: As a new member of this committee, can you tell me whether that is the usual practice of the department not to consult on issues like this?

Mr Hodges: If it is a real contentious issue or a real major change to any of the three acts that are administered by the department, consultation with the ex-service community normally is a norm. Of course, the RSL would be involved in that. But the first we knew about this one was in this year's budget. We thought something might happen after the Smith case, but we were not quite sure.

Rear Adm. Doolan: May I add to that answer that, on a range of legislation that comes before this parliament, there is sometimes consultation with the ex-service community; sometimes there is not consultation. There is no norm.

Senator FAWCETT: Did the department brief you or discuss with you the Smith case? Even if they had not mentioned the legislation, did they ask you for your opinion on the Smith case, as to whether you thought that was going to be a frequent event, whether you agreed with it—

Mr Hodges: No.

Rear Adm. Doolan: It was not discussed with me.

CHAIR: You are suggesting in your submission that this introduces a new concept and that, in the consultations with the department since your submission, it has actually reaffirmed your position that there is no need for schedule 2. It would help the committee if you could actually respond to two questions. The first one is: do you think veterans who are taking compensation payments for non-service related injuries or illnesses are being unfairly targeted by these measures?

Rear Adm. Doolan: As explained in detail in our written submission, the potential for that to happen is there. That is our stance.

CHAIR: Can you give some practical examples of veterans who perhaps could be disadvantaged under the proposed amendments?

Rear Adm. Doolan: I will invite Mr Hodges to respond to that question.

Mr Hodges: Certainly, Senator. Let us take, for example, a veteran who is covered under the Veterans' Entitlements Act—perhaps he is still serving, but he is still covered under the Veterans' Entitlements Act—and on the weekend he rides his trail bike and crashes and busts his knee. The diagnosis is internal derangement of the left knee. That gets better. In actual fact he sues the manufacturer of the dirt bike and wins a \$10,000 payout for the lack of care on the dirt bike trail, so he has got \$10,000 cash. A year later he is on board a ship and he falls down a ladder in the rough seas and bangs the left knee again. But this time the diagnosis is not internal derangement of the knee; it is something else. So we have got two discrete injuries of the knee. The department, rightly so, would accept the second condition as being service related, so the medical treatment for that will be paid for once he leaves service, through a white card. Then it comes to the avenue of compensation, a disability pension. What then happens is this chapter 19 of the GARP, where a form is sent to the treating doctor and the doctor apportioned how much of the impairment is because of the accepted service related disability. In our

submission we just picked a figure of 50 per cent. So the disability pension that he gets for his accepted condition is now discounted by the 50 per cent.

Under the bill that is going through at the moment, there could be the possibility that because of the offsetting rules, because it is all one knee and one sort of condition, the money that he got from the insurance company, the \$10,000, is also taken into account. The department cannot actually get that money, because that is already being paid to the veteran, but they can further reduce the disability pension to offset the amount that the veteran has already received from the insurance company. I hope that is clear.

CHAIR: That is very clear, thank you. Apart from the recommendations that are in your submission, are there any other measures or assurances that you would want to see in any new provisions?

Mr Hodges: The department has many avenues open to it if this bill is actually passed. They share our concerns—I know that—and so do you. There is one thing that can happen. The Repatriation Commission can issue guidelines, instructions—whatever means—to the delegates of the Repatriation Commission who make these decisions on compensation, advising them that they should not take this into account and there should be no offsetting. The RSL's fear with that is that, with due deference to my learned friends behind me, in 20 years time they are not going to be here. In 20 years time the current secretary of the department is not going to be here. So there is nothing really to stop the new regime in 20 years time looking at this instruction to delegates and to say, 'Well, we don't really need this anymore. Nothing has really happened, so we'll just cancel it.' What we would like is something in the legislation so that this double-dipping does not occur.

CHAIR: I see. Have you formally expressed that to the department other than here in the public hearing today?

Mr Hodges: They note that.

CHAIR: Good. That is important.

Rear Adm. Doolan: If I could just add to that particular point, the RSL view is that it is much better to have the legislation being the basis for all these matters than to have it by regulation.

Mr Hodges: We asked that—and you may or may not be aware of this—because of the anger, dismay and untrustworthiness, I suppose, in the veteran community about the topic of offsetting. 'Offsetting' to anyone in the veteran community at the moment is a big, bad word, mainly because of what is happening with the Military Rehabilitation and Compensation Act and how that treated offsetting with the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act. I feel it behoves the RSL to make sure that when the word 'offsetting' is mentioned in any context, it is in an act of parliament and if it needs to be changed later in life, we will come back here as opposed to having the stroke of a pen.

CHAIR: Is there a sense that there is an emotional response to the timing of the introduction of this bill because of the review?

Mr Hodges: Probably there would be, because of the review and because of the expectations of the veteran community after the review has come out and the veteran community has had a chance to reply to it. There is an expectation in that that the offsetting problem within the Military Rehabilitation and Compensation Act will be fixed. It is still an emotive word in the veteran community that is for sure.

CHAIR: I understand from your opening statement that you agree with schedule 1, which creates the new prisoner of war recognition supplement?

Rear Adm. Doolan: Yes, we do.

CHAIR: And schedule 3, which rationalises the temporary incapacity allowance.

Rear Adm. Doolan: Yes.

Senator EGGLESTON: I am trying to work out the background to this. What is the scale of the problem that the Commonwealth government is seeking to address here? How much of a problem is it?

Mr Hodges: The actual number of people who may come through?

Senator EGGLESTON: Yes.

Mr Hodges: I would not know. There could be quite a lot. Quite a few boys and girls in the Defence Force do risky things and break limbs in their time off and get compensated by civilian entities.

Senator EGGLESTON: These amendments have come about as a result of the Smith case. Did the Commonwealth take the view in this case that the court's decision went against the intention of the offsetting policy?

Rear Adm. Doolan: I think we would be guessing in answering that question. We do not really know. That question perhaps should be put to the department.

Senator EGGLESTON: Does that mean that you have not had discussions with the department about this and they have not explained what the rationale for this is to you?

Mr Hodges: No.

Rear Adm. Doolan: The point we made earlier on was that the first we knew of this was when the legislation was brought forward. When we became aware of the legislation, we were on a short timescale to provide input to this Senate committee, which we did. We have subsequently engaged in discussions, but those discussions have been not on the basis of the rationale for the legislation but rather on the basis of what was contained therein.

Senator EGGLESTON: As I said at the beginning, I find it a little bit hard to understand the driving force for this legislation if you are unsure of the scale of it and the department has not discussed the rationale with you. Thank you.

Senator FAWCETT: I would like to go to a couple of points of clarification then some points of principle and then a few more points of detail. You talk in your submission about double dipping and you mention that you have had some discussions with the department since your submission was provided to the committee. What I took out of that was that the department actually agreed with your position that somebody could actually suffer disadvantage through an effective double dipping. Did I understand that correctly?

Rear Adm. Doolan: Yes, that was the understanding that Mr Hodges gained from those discussions.

Senator FAWCETT: I will ask the department this later, but they have given the committee a written response about your submission in which they say that they do not agree and that they do not think it is double dipping, that the RSL is wrong. Was there any indication in your discussions at the time that that was where they were heading?

Rear Adm. Doolan: I will ask Mr Hodges to answer that question because he engaged in the discussions.

Mr Hodges: The discussions I had with the department last Monday led me to believe that it was not the department's intention to double dip. I will not say it was not the bill's intention. I specifically say it was not the department's intention to double dip and that they would issue policy guidelines in an appropriate form for the claims assessors delegates of the Repatriation Commission to make sure that, if chapter 19 had been applied, the civilian compensation payout is off limits.

Senator FAWCETT: In your experience, when there is legislation that enables a punitive course of action, does the good intent and more temporary nature of regulation and policy survive the test of time, or over time do people default back to the most punitive course?

Mr Hodges: That is what I alluded to a couple of minutes ago, in the fact that we may all change. Just to put it in context, there are things called commission guidelines that are pushed out by the Repatriation Commission that give guidance to delegates of the commission who make the decisions on whether or not to award pensions and everything. They are guidelines. So it would be a foolish if not naive delegate to actually ignore it, but the delegate makes the decision on the evidence that is available to him or her and cannot be guided by any other person. That is what it says in the act. So my concern goes back to the 20-year, 30-year thing: what is going to happen then? The RSL would like it written.

Senator FAWCETT: In lawyer speak—and I am not a lawyer—'for the avoidance of doubt' is the term they use, which I think in this case would be quite apt. To the matter of principle, can I assume from your submission that you support the principle of offsetting?

Rear Adm. Doolan: The answer to that is yes, and we know that that has been ongoing for a very long time. We are not challenging that in any shape, way or form, because that has been part of the process for decades. What we are saying is that we seek clarity, and we see schedule 2 as bringing a degree of lack of clarity. As I said in my opening remarks, we see the current status as allowing for offsetting and being reasonable and we have no difficulty with the current arrangements.

Senator FAWCETT: I would be interested in your understanding of the original intent going back to 1973, where, to be honest, it was not a large focus of the speeches and second readings at the time. But my understanding is that the intent was to remove a situation where the Commonwealth was exposed twice to liability for the same injury. My reading of the way it was worded was actually to try to give the veteran the benefit of the doubt—that rather than say, 'You had a nick, and it is only a nick,' if that nick happened to cut a nerve and the effect of that was to lose the limb or to lose the use of that limb, then that was the worst case: 'Let's give him the benefit of the doubt and award accordingly.' That principle was 'give the veteran the benefit of the doubt', and if there are two overlapping Commonwealth subsidy or compensation schemes then they will be offset. That has been extrapolated now to include any source of income, and your example of a motorbike accident or motor

vehicle accident or whatever is a classic case in point. Do you believe that the principle of offsetting should only be limited to two Commonwealth schemes which were aimed at compensating an employee of the Commonwealth or a serving member of the Defence Force, or do you believe the principle of offsetting should apply to third-party non-defence related compensation received?

Rear Adm. Doolan: I think the current arrangements give the answer. The current arrangements are the ones with which the Returned and Services League is comfortable. We have lived with those and explained them to our members. That is why we do not see the need for schedule 2.

Mr Hodges: We are very happy with offsetting as it stands and how it all happened in 1973 with the Safety, Rehabilitation and Compensation Act and the Veterans' Entitlements Act. As senators will be aware, some people, if they stayed on as full-time Army after the end of the Vietnam War, were covered under the Veterans' Entitlements Act like they were in Vietnam as well as the Safety, Rehabilitation and Compensation Act, the workers comp act. That flowed on to the other three services, myself included as a full-time member of the Royal Australian Navy at that stage. If I got injured on board a ship, fell down this mythical ladder and busted my knee, I could claim under both acts. I could get a payout from the Safety, Rehabilitation and Compensation Act of, say, \$20,000 and medical treatment under that act. I could also get a disability pension and medical treatment under the Veterans' Entitlements Act. Because as you mentioned, Senator Fawcett, they are both Commonwealth acts, this SRCA money would be offset—and rightly so, because it was for the same injury, the same impairment.

Senator FAWCETT: With the increasing number of people deployed in operational service at the moment, obviously there is potential for an increasing number of people to require compensation. Is it your opinion that these changes to the legislation could disadvantage any currently serving members in years ahead?

Rear Adm. Doolan: That is what we have said.

Senator FAWCETT: You mentioned the overlap with the rehabilitation focus. Quite rightly there is a focus on getting people back into the workforce and restoring their function where we can. Is it your understanding that if somebody did opt to take support in terms of rehabilitation, but then 20 years down the track the symptoms from that original injury manifested once again, that person would be eligible for the full rate of compensation in terms of a disability pension without offsetting for moneys spent as part of rehabilitation?

Mr Hodges: Let me take you back a step. When the condition was accepted under the Veterans' Entitlements Act and the disability pension was paid, under the Veterans' Entitlements Act there is no rehabilitation. It is only under either SRCA or MRCA. The amount of compensation that the veteran gets depends on how bad the condition is—that is, the medical impairment points which come from a form that is sent by the department for the doctor to fill in. Knee: how far can you bend it; do you have resting joint pain; how far can you walk before you have to stop? All that is given a number and those are the medical impairment points.

At the stage when the claim goes in, the medical impairment points are married to a lifestyle rating and that is the percentage of disability pension. If 30 years down the track it flares up again and the condition worsens, the veteran can put in an application for increase because the condition has got worse. He goes back to the doctor and the medical impairment points are assessed. Where he had five medical impairment points for resting joint pain 30 years ago, now he has 10. The medical impairment points go up and the disability pension increases. That is how it works.

Senator FAWCETT: In your mind there would be nothing in the offsetting provisions that would dissuade members from actively seeking support from Defence or the Department of Veterans Affairs for rehabilitation out of fear that that may disadvantage them down the track?

Mr Hodges: There is no rehabilitation factor, unfortunately, within the Veterans' Entitlements Act. The word 'rehabilitation' does not exist within that act. It does not happen. You can go and do your own rehabilitation and get better, so the need is not as bad as it was. If you are a nice and honest person, you could say, 'I need a reassessment of my disability pension' and your disability pension could come down. Normally what would happen is that the department only really investigates disability pensions if there is fraud. I have accepted disabilities of arthritis in my left and right knees from climbing up and down ladders on ships. I know it is not going to get any better, but one day I may have to have two knee replacements. What do I do then? If my hearing loss gets worse I can put in an application for my hearing loss. With my two new knees I can now flex and bend and I have no more resting joint pain, so my medical impairment points for my knees go down and my hearing impairment points go up. I may get an increase in pension or I may get a decrease.

Senator FAWCETT: I guess part of my concern is that, as I read through some of the details of various submissions, it appears that at times principles are applied that I think disadvantage the veteran. For example, party-to-party legal costs are considered but the costs of a veteran's own lawyer are not considered. If there is a

review of a pension down the track, my concern is whether this new legislation will enable people to look at any moneys that have been transacted over injuries. If the mindset that said, 'We will penalise a veteran for the legal costs he has had to pay to his lawyer' would that mindset also go to, 'We paid thousands of dollars for rehabilitation for this person' even though it was outside VEA? My concern is that that mindset of not going outside the principle could disadvantage veterans.

Mr Hodges: I think I know where you are coming from. You are saying that the guy is still serving. Because the Army, Navy or Air Force are responsible for his medical treatment they give him the rehabilitation to get him back to sea, and that costs \$2,000. Would that be taken into account?

Senator FAWCETT: Yes.

Senator WRIGHT: I am interested in following up a question that my colleague Senator Fawcett was asking about: the costs that are currently taken into account for the offsetting when there has been a payment of compensation. I think you probably know the background, but in its submission, the Vietnam Veterans Federation was concerned that legal costs and disbursement should not be taken into account in the offsetting arrangements—if they were to go ahead as proposed—as they are not compensation for injuries but the actual cost of obtaining the compensation through the legal system. The Department of Veterans' Affairs has explained that party-party costs are subtracted from the lump sum compensation before any offsetting occurred, but solicitor-client costs are included in that figure that would then be used to offset. I guess I am speaking from my experience as a lawyer in that sometimes those solicitor-client costs can be quite substantial. They are rarely able to be excluded. They are additional costs that are directly linked to the cost of obtaining the compensation payment. I would be interested in whether the RSL has a view on that particular arrangement?

Mr Hodges: I do not have the Vietnam Veterans Federation submission. Was that to do with the lawyers' costs for the civilian case?

Senator WRIGHT: That is right. It would often be the civilian case being referred to there. So it is where there has been some kind of litigation and, ultimately, a payment has been made in compensation for an injury. What would happen ordinarily is that there would be agreed party-party costs, usually in terms of the agreement, and then, additional to that, there would be extra solicitor-client costs. Usually the party-party costs are very clearly defined and they would be subtracted from the sum that was considered to be the compensation for the injury, but usually the client would get significantly less than the compensation payment for the injury because they have to pay solicitor-client costs as well.

Mr Hodges: Without having delved into it too deeply I have to admit that my concern is the compensation payout, the actual amount of money that the veteran is left with. If the court awarded him \$20,000 for his trail bike accident but he is left with only \$5,000 after all the court fees, lawyers' fees et cetera, I would hope that if any offsetting did occur it would be only the \$5,000 not the \$30,000. He did not get \$30,000; he got \$5,000.

Rear Adm. Doolan: It is fair to say that we did not discuss or consider this particular issue.

Senator WRIGHT: Thank you. I understand that you have not necessarily had the advantage of looking at the submission. From what you are saying your view would be that, if offsetting were to occur, it would be appropriate to offset only the amount that is reflected as the actual compensation for the injury that the client ends up with in their hand, as opposed to a figure some of which they have to pay back to their solicitor and they do not get the advantage of that themselves.

Mr Hodges: The money paid into their bank account.

Senator WRIGHT: Yes.

Mr Hodges: That is our position.

Senator FAWCETT: You are saying that you have not seen the Vietnam veterans submission; have you seen the department's submission?

Mr Hodges: But we cannot find any mention of lawyers there.

Senator FAWCETT: My question is actually about DVA. Have you read DVA's submission?

Mr Hodges: Yes.

Senator FAWCETT: In their submission they say:

The amendments will not and are not intended to change the operation of the offsetting provisions in any way.

What do you think that means?

Rear Adm. Doolan: Far be it from me to delve into the minds of the department, all I can say is that everyone recognises that the Veterans' Entitlements Act 1986 is a beneficial legislation. It would be unwise of any

department of veterans' affairs to attempt to curtail any entitlements that a veteran might have. From where I am sitting, the intent of this legislation is to protect government money, and rightly so. I pay taxes too, as does every veteran. The fact is that you get compensated for a war or defence caused injury or disease, and you cannot get another source of stuff for that. It is just not fair. So in answer to your question, I am sure that the department has the veteran at heart and is also looking after government monies.

Senator FAWCETT: The department also says:

It is considered that the decision of the Full Federal Court that offsetting should not have occurred applies only to the unique circumstances in Mr Smith's case.

What is your position on that statement?

Mr Hodges: The unique circumstances in Mr Smith's case do raise an issue. Knees, backs, legs and everything—fine. Go to a doctor. He can actually work out what part of the compensation relates to that service related injury or disease. When it comes to mental conditions, we have a bit of a problem. We have a guy that has been diagnosed with general anxiety disorder through a civilian incident not related to service. He is also then diagnosed with post-traumatic stress, which is related to service and which is an accepted disability. He gets a payment from an insurance company or whatever because of his general anxiety disorder, which he got in a motor car accident type of situation. The department then has to look at chapter 19 of the guide. He has this mental disorder. There are two conditions. Chapter 19 of the guide says: 'Which bit is service related and which bit is not service related?' It is very difficult. However, may I suggest that this theoretical guy has post-traumatic stress disorder from a service related disease or injury. He has also got general anxiety disorder, which is civilian orientated. But he still has a mental illness that—some of it, most of it, all of it; we will never know—was caused by his service. Give him a break. Treat it all as service related. He has got a mental illness.

Senator FAWCETT: Can I put forward the proposition that we should not be saying, 'Give him a break.' I would say, if we have accepted his service and put him in a situation where he has received that disability, that we have an obligation to provide the support.

Mr Hodges: Thank you.

Senator FAWCETT: I have no further questions.

CHAIR: Are there any further questions?

Senator EGGLESTON: No, but I must endorse what was just said. I would have thought that an anxiety disorder might well be consequent upon or in some way contributed to by post-traumatic stress disorder.

Mr Hodges: Very much so, yes.

Rear Adm. Doolan: We could sum it up by saying that we believe we are not seeking to put forward something unique. We are not putting forward something that is trying to gain further benefit. As we have explained, we accept offsetting. We have done for a long time. We are putting forward that we believe there is the potential in schedule 2 for something to be perpetrated upon veterans which is to their disadvantage. As Mr Hodges has explained in a number of instances there, that potential, we believe, exists in schedule 2. We would far prefer to see legislation protecting the rights of veterans, particularly those who suffer from the sorts of things we have just been discussing.

CHAIR: Thank you very much for the evidence. Thank you for the submission. In representing veterans and returned service personnel, you are uniquely positioned to provide these kinds of insights and we rely on you to do it. Thank you very much for your appearance today.

Mr Hodges: Thank you.

Rear Adm. Doolan: Thank you.

BROWN, Mr Luke Trevor, Director, Costing and Implementation Section, Department of Veterans' Affairs

FARRELLY, Mr Sean, Acting General Manager, Support Division, Department of Veterans' Affairs

LUCKHURST, Mr Adam, National Manager, Rehabilitation and Entitlements Policy Group, Department of Veterans' Affairs

SPIERS, Ms Carolyn, Acting General Manager, Executive Division, Department of Veterans' Affairs

[11:13]

CHAIR: Welcome. Do you have any comment to make on the capacity in which you appear?

Ms Spiers: I am the principal legal adviser for the Department of Veterans' Affairs.

Mr Brown: I am director of the costing and implementation section.

CHAIR: Thank you. I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanation of policies or factual questions about when and how policies were adopted. The officers of the department are reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. The committee has received your submission as submission No. 2. Do you wish to make any amendments, alterations or additions to your submission?

Mr Farrelly: No.

CHAIR: Would you like to make a brief opening statement?

Mr Farrelly: Thank you for the opportunity to appear. I will focus on schedule 2 of the bill. The intention of the offsetting provisions has always been to ensure that compensation is not paid twice for the same incapacity. These provisions provide equity between veterans with eligibility under more than one scheme as compared to those with eligibility under only one scheme. The proposed amendment to the compensation offsetting provisions in schedule 2 of the bill are intended to clarify and affirm the offsetting provisions in the VEA. They have been in place since they were introduced in 1973 retrospective to 1972. It is not intended to change those provisions in any way.

The existing provisions do need to be clarified and affirmed as a consequence of a single full Federal Court decision, namely the Smith case. The proposed legislation will remove any doubt or uncertainty created by that particular case and ensure that future cases do not build on the Smith case in such a way as to go against the original intention of the legislation. Again, the proposed amendment will not and is not intended to change the offsetting provisions. The provisions will apply prospectively. Therefore, a person whose disability pension is currently being offset by another payment for the same incapacity will continue to have that pension paid at the same rate unless there is a change for other reasons.

The department has noted the submissions from the ex-service organisations and welcomes their view on the bill. I would like to address very briefly some of the points made by the RSL about the double-dip discount. There are two scenarios. Firstly, if a medical opinion is able to determine the relative contribution of an accepted condition and a non-accepted condition to an impairment under GARP 5, chapter 19 is used to apportion the relative contributions. We are agreed on that. However, it is not always possible for medical opinion to make that apportionment. If medical opinion is not able to determine the relative contribution, chapter 19 is not used at all. It is one or the other, not both. We agree with the RSL, by the way, that, if in the latter case both were used, that would be inequitable. I think we are agreed on that point. It is not the intention, though, to do it that way; that is not the way it is done at the moment. In summary, I think the department and the RSL are not that far apart. We

submit that the current drafting of schedule 2 will not result in the double-dip discount that the RSL is concerned about.

I will make one last point, around the applicability of the amendment to current deployments. The amendment applies only to VEA and SRCA and not to MRCA, but I am sure we will get to that soon.

CHAIR: Thank you. If there are no additional comments and remarks, let's move now to some questions. I suppose the very obvious first question, taking the point made by Senator Eggleston at the beginning, is: what is the quantum of the problem that we are seeking to address here?

Mr Luckhurst: Obviously, through a financial year, we have people offsetting arrangements for various reasons, but in the 2010-11 financial year there were 10,400-odd DVA clients who were receiving a VEA payment which was offset.

Senator EGGLESTON: Ten thousand?

Mr Luckhurst: About 10,400. The average disability pension offset is about \$99 per fortnight.

CHAIR: So quite a significant proportion of the veteran community, you would consider? Ten thousand cases is a significant number.

Mr Luckhurst: It is a reasonable number.

CHAIR: The second issue that I want to pursue with you straightaway is the lack of consultation and the fact that it actually took the RSL's submission for you to engage with them on this issue. Can you enlighten us as to why that came about?

Mr Farrelly: As the RSL have said, we regularly provide a prebudget briefing, and that is on the day of the budget. In that briefing we explained a whole range of measures coming through in the budget, including offsetting, and explained that the intention of the amendment was merely to clarify and affirm the original intention, nothing more or less than that. Several weeks later we also had a postbudget briefing where the purpose of the amendment was again clarified and explained. But it is true that there was no extensive prebudget consultation about the amendment itself. Having said that, I think it is true to say that the Smith case was discussed in a number of forums.

Mr Luckhurst: Absolutely. When the court decision was first handed down we obviously wanted to look closely at the implications of the decision, and within the department we decided to cease processing offsetting temporarily until we knew the full implications of the decision. As part of that we did talk at some of the forums that we hold with ex-service organisations, saying that we had taken the decision to cease processing those payments until we really understood the implications of the court decision.

We of course worked with the ex-service organisations where there were particular cases of hardship that veterans were experiencing and we looked at what we could do to ensure that they were not disadvantaged. But once the commission had considered the matter we started processing those cases.

There were questions that came up at various ex-service forums that we have—I do not have the minutes of those with me—where we explained what we were doing and that we were trying to understand the implications of the decision.

I guess what I am trying to say is that there certainly was some discussion with organisations about the implications, but in terms of the amendments themselves I think Sean has covered those.

CHAIR: Okay. I will just go back to the 10,400 current offsetting arrangements. Has the department actually assessed, given the outcome of the High Court case, how many of those who are currently receiving an offset payment might fall into a similar category to that of Mr Smith if they decided to go that route to the High Court?

Mr Luckhurst: We have done a couple of things to look at that. We have certainly looked through cases as much as we can. Unfortunately, given the magnitude of cases and the data systems that we have, we cannot easily pull out information on the nature of every case. I can say that, since the Smith decision, we have been looking for cases that match the circumstances of Mr Smith, including in those cases that were put on hold. But once the commission made a decision to start processing cases we provided advice to staff saying, 'If you find a case which looks remotely like the circumstances of Mr Smith we need to consider that before any action is taken.' To date, we have not had any cases with those circumstances, but we continue to look for them.

Ms Spiers: If it helps: if we identified another case like Smith we would be obliged to apply the principles established in the decision of the full Federal Court for the Smith case, so the individual would not have to litigate as such. That is why it is very important that we are very clear about knowing whether there are any cases that fit the mould, so to speak, of the Smith case.

Senator FAWCETT: A quick supplementary question: have you found any at this point in time?

Mr Luckhurst: No.

Mr Farrelly: I think the number of cases that would have been looked at in that way were around 200.

CHAIR: Is that because of the particular circumstances of Mr Smith's case and the vessel that he was on? Are those 200 related to that?

Ms Spiers: You are mentioning the *Melbourne-Voyager* incident. No, we would not limit our search for cases to that particular incident. The unique circumstances for Smith are not the event itself. To set the scene a bit: the way the single court judge looked at the Smith case was that Mr Smith had a Veterans' Entitlements Act entitlement and that he had also sued Defence, because he was on the *Melbourne-Voyager*. The VEA does not cover the *Melbourne-Voyager*. The period of service for *Melbourne-Voyager* is covered by the Safety, Rehabilitation and Compensation Act and not the VEA. Mr Smith's service was such that he had service during only that *Melbourne-Voyager* and then continuing post that, where the VEA did pick up. The unique circumstances of Smith are that there was a common law settlement against the Commonwealth, so the Commonwealth was a party to the settlement, and the terms of the settlement quite deliberately excluded the operation of the VEA offsetting provisions. So it was not the incident and it was not the fact that it was SRCA versus VEA; it was all about a common law settlement to which the Commonwealth was a party. As we understand from the Federal Court decision, because we have not seen the terms of settlement, there was an exclusion of the Commonwealth's right under the VEA to apply the offsetting provisions. So there is quite a narrow group of people who are impacted by the decision. It is not the mental health condition—it could equally have been a physical condition. The unique circumstances are those two facts.

Senator WRIGHT: I think this is a relevant time to ask this question because we are asking about perhaps determining the potential size of the problem that is to be rectified by these amendments. One of the things I noticed in the DVA submission was a concern that there has been at least one inquiry from a legal firm seeking to rely on the decision in the Smith case. Is one concern that there may be prospective cases that might be caught by this particular court decision that the amendment seeks to prevent occurring?

Ms Spiers: Sorry, Senator, was it 'prospective' you said?

Senator WRIGHT: Yes, prospective, as in the future, because of the way perhaps settlements might be worded or litigation might occur.

Ms Spiers: That is exactly the issue. With those unique circumstances, there is the potential for future cases to follow that path. If you take that to its next conclusion you do get inequity, because you then have a case where someone has conditions accepted under the Safety, Rehabilitation and Compensation Act and the VEA for the same incapacity. We would use the offsetting provisions to offset and then someone chooses instead to sue the Commonwealth, to follow the unique circumstances model that I have just outlined and to attempt to circumvent the offsetting provisions. So there is inequity between those two very similar service environments.

CHAIR: Does that clarify your question, Senator Wright?

Senator WRIGHT: It does. I would like to ask a further one on that. Just from looking at the information I have about that particular case, it seems to me that part of the result was that the Commonwealth agreed in the settlement to actually exclude one of the conditions for the purposes of the settlement. Given what the effect of the decision has been, I am trying to work out what the size of the problem is that the amendments are seeking to deal with and how likely it is that the Commonwealth would be party to a settlement that would actually do that in the future. Can you hazard a guess about that, Ms Spiers?

Ms Spiers: I want to take your question in two ways. I will probably look to Mr Luckhurst because he is better on the numbers in terms of the mix between those that apply offsetting between statutory compensation schemes versus those that are offsetting between a common law and the VEA. He is best placed to do that. Can you just reflect your question again? I have got caught in the middle of my answer, sorry.

Senator WRIGHT: That is all right. I have not looked at the case in great detail but it seemed to me that one of the particular issues was the nature of the settlement that was actually agreed to. My understanding is that it was not imposed by a court and was actually an agreed settlement, whereby the Commonwealth agreed to specifically exclude one of the conditions from the settlement, and that is why the offsetting was not required. I am just wondering how likely it would be that a party to a settlement, the Commonwealth, would be prepared to do that again in the future given that it is now clear what the outcome of that has been.

Ms Spiers: It is a bit difficult to answer that question because, while the Commonwealth is a party to the agreement, it is not the Department of Veterans' Affairs that representing the Commonwealth in those matters; it

is actually the case that the Attorney-General and Defence are doing those common law settlements. While we have raised this issue with the Department of Defence that there are quite deliberate provisions in the legislation to prevent double compensation, in effect, we are not party to the settlement discussions in any of the common law cases that occurred.

Senator WRIGHT: Thank you. I appreciate that it was a difficult question to put to you. I suppose I am just thinking that there is a concern that lawyers will perhaps seek to exploit this case—'exploit' is probably too hard a word—or to act in their client's best interest by relying on this discrepancy, and I was just trying to work out the size of that potential problem.

Mr Luckhurst: I would just add that around 80 per cent of the offsetting cases relate to primarily SRCA and VEA offsetting arrangements. The other 20 per cent are made up of a range of things, such as common law actions.

Senator WRIGHT: Thank you.

Mr Farrelly: With the chair's agreement, perhaps I could provide some clarification or add a few things about numbers, so that the committee has a complete view. As of 2010-11 the total number of those with offsetting arrangements in place, as Mr Luckhurst mentioned, is around 10,400. Of those, disability pensioners make up 9,450. So the 10,400 is not all disability pensioners. The balance is made up of war widows, for example, which certainly are not affected by the amendment—nor are disability pensioners, for that matter. The other thing I would add is that the committee might want to note that the number of disability pensioners in payment overall is 118,000. So that gives you a sense of the number of disability pensioners affected by offsetting.

CHAIR: Thank you. That is helpful.

Senator EGGLESTON: Is that the total number of disability pensioners or does it relate only to veterans?

Mr Farrelly: That is the number of VEA clients with a disability pension—118,000 in round numbers.

Senator WRIGHT: Mr Farrelly was saying that the department and the RSL are not all that far apart in that there is a shared desire that these amendments do not actually disadvantage people who are currently not disadvantaged. It is the department's view that the amendments do not have the effect that is the concern of the RSL because chapter 19 would not apply where these offsetting arrangements will apply. That is my understanding. Given that the RSL consider that there is some capacity for ambiguity, is there any possibility of a clarifying amendment that could put their concerns to rest without affecting the integrity of the amendments being proposed?

Mr Farrelly: Ms Spiers will have a view on this, I am sure. Our view is that the potential for this can be satisfactorily addressed by a commission policy document. The commission exists in perpetuity, I think.

Ms Spiers: Yes, it does.

Mr Farrelly: People might come and go but the commission exists in perpetuity.

Ms Spiers: While respecting the view of the RSL, I have a question. The chapter 19 provisions in the *Guide to the assessment of rates of veterans' pensions*, GARP, have been in place since about the 1980s—and I am happy to clarify that date. My point is that GARP is a mature document that has been around for 20-odd years. Equally, the offsetting provisions have been around in one form or another since 1973. We really have had a period since the eighties when GARP was in play and the offsetting provisions were in play where we have dealt with the issue of how chapter 19 works and how the offsetting provisions work. Mr Farrelly and I have been around in the department for a number of years, I cannot recall a problem someone has raised about chapter 19 and the offsetting provisions in that context. At one level, my answer to this is: bringing the amendments to the offsetting provisions forward because we are addressing the issue of Smith does not in any way impact, in my view, how we have been administering the operation of the offsetting provisions and chapter 19 of GARP for the better part of 20-odd years.

Senator WRIGHT: Thank you.

Mr Farrelly: Mr Brown can clarify the precise year.

Mr Brown: According to my copy of GARP I have here, we have been using GARP since the first edition was published in 1986.

Senator WRIGHT: Thank you. I have no other questions.

CHAIR: The start date of this is intended to be 20 September.

Ms Spiers: Yes.

CHAIR: The RSL representatives generally expressed concerns about retrospectivity or reassessment of existing provisions. How are those concerns being addressed by the department?

Ms Spiers: We just want to clarify that 20 September start date. I think we have the schedule two amendments starting from the date of royal assent. I think it is the POW supplement that is the 20 September date. We are double-checking that. As to what we think will happen, assuming the amendment goes through in its current format and it attains royal assent, what we think will be the position from day one in the new world is no change at all, so we will not be going back to looking at any existing offsetting. We believe that the offsetting approach that has been adopted is all appropriate. Future cases will be dealt with in the same way. The only difference ever that will happen is that Mr Smith, because of his Federal Court decision, has not had offsetting applied. But once the amendments go through then if we had a Smith-type case it would be caught by the changes to the legislation. So I suppose that is a long way of saying that would be the only change.

CHAIR: Thank you. It is very important, I think, for the veterans community to hear that quite clearly and specifically.

Senator FAWCETT: I would like to come again to some matters of principle before I come back to points of detail. As a matter of principle, one of the roles of government is to consult with stakeholders on many issues where they can and certainly the word 'consult' has been used a number of times. Common dictionary definitions generally include consulting as meaning to seek advice, as opposed to give information; there are both aspects but generally it includes the seeking of advice and input. Would the department like to comment on whether you agree that consultation normally means that you are actually seeking the input of stakeholders to help form opinion on something like new legislation, as opposed to just delivering them the news of what has actually been decided?

Mr Farrelly: I think it is true to say that in budget matters sometimes there is consultation beforehand in depth and at other times it is not always possible to do that. It also depends to an extent on whether the government believes and the department believes that it is a significant issue that requires in-depth consultation. Rightly or wrongly, the department formed the view, seeing this was simply a matter of clarifying and affirming what currently exists, that it was more appropriate to explain pre budget what the changes were about.

Senator FAWCETT: Can I confirm one thing that needs to be explained, 'pre budget'.

Mr Farrelly: Budget eve, to explain the rationale, which was to not change the current arrangements either retrospectively or prospectively but merely to clarify and affirm those arrangements in the light of the Smith case.

Senator FAWCETT: So an accurate summation, if I can get your agreement or not, is that because you felt it was not a significant change there was no widespread consultation prior—as in days or weeks ahead—of the legislation but there was essentially an information briefing given to some stakeholders on budget eve.

Ms Spiers: Senator, can I tackle your question slightly differently, and I will answer it. I know that sounds like a lawyer's answer and I apologise for it being like that. First of all, we are of the view that we have consulted with the ex-service community initially about the Smith decision—as Mr Luckhurst went through some detail on—

Senator FAWCETT: I accept that.

Ms Spiers: and that was that at a national level with our key stakeholders and also at state levels. I suppose at that time it was really trying to identify cases that fitted the mould of Smith and while there might have been some discussion broadly about compensation offsetting it was in the context of everyone understanding what it meant, not getting concerned about the effect of offsetting, if I could put it that way. In terms of legislation, we are required, as the parliament would know, to consult with key stakeholders. The pre-budget briefing—and this has been in place in my memory for a number of years—is the department's ability to share with the representatives of the key ex-service organisations what is going to come out at budget. And that is whether it is a legislative amendment or whether it is a policy or program change. That is a fairly well entrenched process here.

It is also an opportunity for them to clarify what is coming out in budget. The timing is not right to say, 'We object and we want you to stop it going out in budget.' Obviously the timing is not right there, but it gives an opportunity if there are issues raised that the department can take those issues to the minister and ask whether there is a need to think about this issue further?

In addition to that pre-budget consultation we then brought together the key ex-service community again, the same types of representatives again, to specifically deal with the discussion of the offsetting. I believe we have had genuine consultation with the group. One of the tricky things with compensation offsetting—and it has been reflected sometimes in the dialogue that we have heard this morning—is there can be confusion about what is covered and what is not covered, because it is a topic you could write a thesis on. We tried, particularly with that

supplementary consultation, to make it very clear that it was business as usual. That was the intent of the amendment. It was to ensure we had clarity of legislation. It was to ensure that we did not have, as Senator Wright has mentioned, cases with common law settlements where people tried to circumvent the operation of it. So my answer to your question is: we did have genuine consultation.

Senator FAWCETT: Okay. We now have a difference of opinion from DVA, because we had a very clear statement from Mr Farrelly before that there was some discussion at various forums about the Smith case but there were no specific consultations with people about the legislation. Can you give me now, if you have information, or provided on notice, the dates and the names of the representatives of the service organisations that you had consultations with in advance—as in, weeks or months in advance—of budget eve as opposed to what I would call an information briefing on budget eve. Specifically, having sat and watched the RSL rep shake his head behind you Ms Spiers as you were talking, I would like to know when you first had detailed consultations with the RSL, the nature of those consultations and who it was that was involved, because what I am hearing from service organisations and what I am hearing in terms of the different stories from DVA is that this has not in fact been an effective consultation process with the ex-service organisation in terms of this particular legislative change.

Mr Farrelly: I do not believe that Ms Spiers and I are contradicting each other. We are talking about pre-budget engagement versus post-budget engagement, but we will take your question on notice and provide you with those details that you asked for.

Senator FAWCETT: Another point of clarification if I can. You talked around the fact that some 80 per cent of offsetting provisions are to do with overlapping Commonwealth schemes, and there is around 20 per cent that include things such as civil actions—the case that Mr Smith may have been caught up with except for the court's direction. Within that 20 per cent, are you able to give an indication of how many of those are other Commonwealth funded sources of income that are offset and how many come from complete third parties—for example, a motor accident commission for somebody who was injured in a motor vehicle accident?

Mr Luckhurst: I do not think we have easy access to that information. I think we would have to go back to paper based files to get you an accurate answer on that. We could certainly talk to our staff and get an estimate from the experience of the people who are involved in processing these cases. Without going through paper files I do not know that we could give you an accurate picture.

Senator FAWCETT: That is fine. I accept that. I do not expect you to have encyclopedic memories for that sort of detail. But what that leads me to is another matter of principle, in that my reading of the background of this whole offsetting provision is that it removes the situation where the Commonwealth is twice liable for compensating somebody for an injury. What I am hearing from the fact that you even think within that 20 per cent there could potentially be motor accident commissions or other people is that you actually believe on principle that if somebody has a service related injury and is eligible for compensation that should then in the course of time be treated in exactly the same manner as any other member of the public who has, for example, a car crash and has some loss of ability and that you will essentially wash out the value of that person's service to the Commonwealth by saying, 'We will encourage you. In fact if you won't do it we'll do it on your behalf. Go and sue someone else so that they pay for the fact that you've now lost the use of a limb', as opposed to recognising that you were entitled to that because of your service and we will honour that commitment throughout the rest of your natural life. In principle, does DVA believe that this is no longer about overlapping Commonwealth schemes, which was the origin, but that this should apply to any potential source of compensation?

Ms Spiers: Senator, I might have a go at that one. You have already alluded to the fact that the explanatory note that was written at the time of the 1973 amendments was lacking a little of the detail that might have helped to give parliament a full understanding of what the impact of the provisions were. You would also appreciate that legislation is drafted always—unless it is very specifically drafted in a very narrow sense—to try and take account of any potential changes in the future. I am talking about a general principle here. So, while the timing of the 1973 amendments is clearly linked to when there was dual eligibility for claiming compensation under statutory schemes, it is my understanding of the Repatriation Commission's broad view that this has always been intended to cover any other circumstances where there is an overlap in incapacity from service related conditions with compensation received from another source.

Senator FAWCETT: Thank you for your opinion. I beg to differ. Going right back to the days when local parishes were ordered by the king or queen to take care of the soldiers who had served His or Her Majesty, I think the intent of the Westminster system of government is that we look after those people who have served the nation. We do not try to shift that responsibility onto someone else. I accept we differ on that, but certainly my

understanding of the original intent, and the public's understanding, I believe, would be that the Commonwealth has an obligation to care for those people who have rendered service to it.

Senator WRIGHT: This is a question in relation to an issue that was raised in the submission of the Vietnam Veterans Federation about the offsetting of legal costs. I am not sure who would be the appropriate person to answer this. There is something I was taken by in their submission, which was that, for the purposes of determining what the compensation amount is to be offset, party-party costs would be excluded from that amount but solicitor-client costs would not be. Certainly the RSL representatives indicated that their view would be that if the offsetting were to occur it would be more appropriate to offset the amount that actually goes into the person's bank account, which is arguably the amount that is then available to support them, as opposed to the full amount, which they will not necessarily have access to. Can I ask for a view from the Department of Veterans' Affairs about that, please.

Ms Spiers: There are a couple of issues in this. When you raised this with the RSL I was trying to reflect on my memory of other jurisdictions and the use of cost orders. From my memory—and I am happy to take on notice to clarify this—is a general practice with cost orders to do party-to-party costs not solicitor-to-party costs. That is my first comment. This is in keeping with a broader principle of how costs are handled.

I will also answer it in another way to help senators understand another aspect of costs. When both Veterans' Entitlements Act matters and Safety, Rehabilitation and Compensation Act matters go to the Administrative Appeals Tribunal there are different rules as to whether they are cost jurisdictions or not. You might think this is a long bow but I will round it back for you if I can. VEA matters are a non-cost jurisdiction, so if an applicant were to take their matter to the AAT and were not successful, for instance, the commission would not be awarded costs for attendance at the AAT. It is the reverse with Safety, Rehabilitation and Compensation Act matters. It is a cost jurisdiction, so if an applicant were to take a matter to the AAT and were successful, the lawyer representing the individual could seek costs. The issue of costs is not very simple to answer. I would say it is partly to do with the environment in which some of these matters get raised and it is partly to do with a convention from my memory where only party-to-party costs are used.

Senator WRIGHT: I appreciate what you are saying about the general practice. I understand the purpose of the amendment is to prevent double dipping so a person does not receive additional compensation for the same incapacity for which they have already been compensated or there is offsetting to take that into account. How appropriate is it to apply a general practice in the general community to conditions that have been experienced by persons who have been injured in the service of their country, which is a little different? Essentially it is a matter of fairness. If the offsetting is because there is an understanding that a person has received a certain amount of money to support them and yet they actually do not receive that full amount of money because they have to pay solicitor client costs, which are almost always unavoidable and often substantial in terms of a proportion of their ultimate settlement figure, then it is not necessarily fair because it is assumed that they have a certain amount of money at their disposal to assist them when in fact they will not have access to that money. I am thinking particularly I suppose about a Smith type scenario where it is a common law settlement, so there would potentially be significant solicitor client costs there.

Ms Spiers: I will deal with the Smith type case first and then I will clarify something in case I have unintentionally confused the matter with my sidebar comments. I have just thought of something in terms of what I said about SRCA. We encourage any of our clients who are planning to sue the Commonwealth—and it is Defence if we are talking about a Smith like case—to get their solicitor to contact the Department of Veterans' Affairs as early as possible during those settlement negotiations to get clarification from the department about the impact of the settlement on their VEA payments. I draw a distinction here between payments and entitlements, because, whether we do offset the rate of pension, we do not resile from the position that the condition has been accepted by the department and that health care under the VEA continues to be available under the department. I am drawing out something that Senator Fawcett was talking about before. We would encourage early consultation so that we can give them the figures so that, as part of their negotiation strategy with the Commonwealth—being the other arm of the Commonwealth, Defence—they have a true understanding of the fiscal impact of what they are agreeing to. I would just continue to encourage that approach, obviously. If they are very clear that only party-to-party costs are being factored in then they need to look at whether they attempt to gross up the settlement in some way to take account of any other costs that they think should be offset. That is something we do not get involved with, because obviously we are not party to the discussion in the settlement, but we are there to provide expert opinion on what will be the impact of a potential settlement on their VEA payments.

I will just go back to something that I said on the SRCA and the cost jurisdiction. I was very clearly trying to give an example of how costs are not very clear when you are looking at AAT, because it is a cost jurisdiction. I

do not want the Senate to be left with the view that SRCA matters when we are doing primary level determinations have any legal costs associated with them. Clearly, as a primary level delegate that is making a decision on a SRCA claim, we examine the claim, evaluate the evidence and accept the claim. You do not have to have a lawyer assisting someone in making that claim. So I just want to make sure I was not adding to the burden of the Senate in terms of the detail that compensation offsetting can lead to.

Senator WRIGHT: Thank you for that. I have just one follow-up. I understand what you are saying, and it is the case in any settlement that a client would be well advised to seek advice about the effects on their finances of agreeing to the settlement figure that is being negotiated, but there is always a limit to the capacity of a person to ultimately negotiate the settlement amount that they would like to have. I am just exploring, I suppose, whether there is any possibility of clarifying that in terms of the amount that would be offset and whether or not it would be possible to exclude agreed solicitor client costs from that amount so that essentially the offsetting amount would indeed be the amount that the person actually received in their bank account and had available to them in terms of the incapacity that they then have to live with or deal with.

Ms Spiers: The answer to that question is that it would always be possible. None of us here today as departmental representatives can actually give that guarantee, simply because it would be a decision of the Repatriation Commission. While we represent the department, I think it would be overstepping our remit to actually say we are representing the commission in a change in policy.

Senator WRIGHT: So that would be a policy matter; that would not be something that could actually be included in legislation? So it was clarified?

Ms Spiers: Anything can be included in legislation. Sorry; I did not mean to make that sound flippant. Yes, it could be included in legislation. At present the commission has formed a policy about what costs it would exclude. All I was putting on the table was that we are not in a position, because we are not representing the commission, to extend that policy. But you are right in identifying that as an alternative. It could be legislated to remove any doubt. That is not a commission decision then; it is clearly parliament's decision.

Senator WRIGHT: All right. Thank you for your help with that.

Senator EGGLESTON: Those questions covered the areas that I was thinking of asking for additional information about.

Senator FAWCETT: I have a couple more questions. Continuing on the subject of costs, you say in your submission:

The amendments will not and are not intended to change the operation of the offsetting provisions in any way.

My reading of the budget papers, though, identifies some \$2.7 million for the implementation of this change. I may be completely wrong—please let me know if I am—but that seems an extortionate amount of money for something that has no impact.

Mr Farrelly: That relates not necessarily to any change in the way that the legislation is applied but to improving our own systems. The majority of that money is for building a better information technology system to do the work behind the scenes. At the moment it is largely manual. We need to automate those business rules and processes. We need to do better at automating the production of advice for individuals. For example, we hope to include something like a bank statement for people in the future so that they can see with even more clarity the impact of making a choice one way or another. That \$2.7 million is to do those sorts of things, and certainly not to change the way that the provisions operate.

Senator FAWCETT: If that is linked in the budget to this legislation, has the department been underfunded in that you have not been able to improve your IT systems? The functions you are talking about surely apply across the whole range of information and processing of veterans' personal information, entitlements et cetera. That says either you have not received adequate funding or your own internal quality improvement processes have failed to identify in the past and then bid for appropriate funding to keep your IT systems up to date such that you can provide the level of service that veterans are entitled to.

Mr Farrelly: I would not agree with that. No real attempt has been made in the past to automate offsetting. To the extent we put our resources into information technology, it tends to go to automating other really high-volume areas like income support and so on. We recognise that we need to put effort into automating and improving the offsetting area.

Senator FAWCETT: You are looking to spend \$2.7 million to automate an area, although you do not believe you have identified any other veterans who fall into the unique circumstances of Mr Smith?

Mr Luckhurst: We are looking at a systems approach for all the individuals who are subject to the offsetting arrangements. We obviously need to look at those cases that have the same circumstances as were highlighted in the Smith case, but we are talking broadly about how we manage our offsetting responsibilities under the legislation. As Mr Farrelly said, we are not looking to change the way that we interpret the legislation. We are seeking to clarify and amend the legislation so there is clarity for all concerned around what is being offset. The \$2.7 million is really about making sure that when we are doing our offsetting cases we have as much of that process as automated as possible.

Senator FAWCETT: If we accept the RSL's position and, in fact, your own position that this legislative change will not change the operation nor intent if the bill were not passed or that part were amended or not there, then that \$2.7 million would not be spent?

Mr Farrelly: No, I do not believe that is the case.

Senator FAWCETT: Are you saying that it is there specifically?

Mr Farrelly: It is there to improve the way we do business and the services we deliver. If it were going to affect individual disability pensioners in terms of their funding then you would see an effect against administered funding. This is departmental funding.

Senator FAWCETT: I have a final question—the chair is giving me a hard time because we are over time. You talk about the fact that this legislation will have no impact. Somebody is already receiving a disability pension that may have some offsetting, but the level of pension will not change unless there is some other reason for it to change. That is a little ambiguous. That could be taken as meaning there is a completely separate reason why the level of their pension may change and therefore in net terms it may change and have nothing to do with the offsetting. Or you could interpret it to mean that, in the example the RSL provided, I now have two new knees, but my hearing has declined a bit so I submit myself for a new review. Will the new legislation be applied to somebody who is already on a pension, in which case it is retrospective in that whenever a review comes up somebody will be under this proposed section? Could you clarify that for me?

Mr Farrelly: I understand your difficulty. I think it is true to say that sometimes we are overly cautious in the way we talk about pensions. The comment was simply meant to leave on the record that people's pensions can and do change. We are not saying that pensions will never change. So there is indexation, for example—

Senator FAWCETT: We understand that. All I am seeking to clarify is this: is the statement that says 'prospective only' accurate or will an existing pensioner come under the new legislation if they have to submit their case for a review?

Mr Farrelly: It is prospective.

Senator FAWCETT: I am happy to take that on notice. What I am hearing is that you are uncertain about that, so the comment that it is prospective is in fact in doubt.

Ms Spiers: No, Senator. Why I am looking slightly quizzical is that I am trying to give you an absolute answer in an environment where, fundamentally, the legislative change will not be the reason there is a change to someone's pension. I think that is what I wanted to—

Senator FAWCETT: It could be any number of triggers. What I am saying is: if there is another trigger, will this new legislation be applied to the person in calculating how the offset works?

Ms Spiers: But the amendment is not designed to change how we currently calculate. We might be having a semantic discussion here, and it is not intended to be that. All I am saying is that, under the legislation as it currently is, if there were a change in someone's circumstances prior to the legislation being amended then there could be multiple effects of that depending on whether we were offsetting something they had already claimed for another condition or they had now made a new claim. There are so many variations that it is very difficult to contain that. The new legislation will not change the fact that there can be effects on pension, but it is not the impact of the legislation that is affecting the pension; it is the other event, whatever that is.

Senator FAWCETT: I understand your interpretation of the future life of this legislation—that is completely accurate. But the RSL in, you know, that 20-year comment says with respect to the future life—and that is what you have to consider; we are not just talking about this year and next year—that there are still people who could be caught. So it is actually retrospective in that those who are currently on a pension may have their future pension assessed under this new legislation and, if the RSL is correct, that could potentially disadvantage them. I do not need you to respond; I understand your position.

Ms Spiers: It is worth clarifying that even without the amendment you could view offsetting as a retrospective function. What I am trying to get is your issue that, if a pension is assessed today and in 20 years time someone

does something that then triggers the offsetting, in effect you do have that sense of retrospectivity. All I am suggesting is that that is not being impacted by the legislative amendment because the inherent provisions of the offsetting is designed that way. It is designed so that when two events occur, whether they occur now or separately, no matter what the time period is, the impact will be assessed at that point in time. I do not know if that has helped clarify it.

Mr Farrelly: And that is the position now.

Ms Spiers: Yes, exactly.

CHAIR: And the position remains unchanged?

Ms Spiers: Exactly

CHAIR: Thank you. On that basis, and 15 minutes over time, I conclude today's public hearing and thank all the witnesses who have appeared. You have agreed to take one question on notice. We require that response by five o'clock tomorrow, please. The committee now stands adjourned. Thank you very much.

Committee adjourned at 12:14