

# Chapter 3

## The issues

3.1 The ex-service organisations, and individuals, who made submissions to the inquiry and appeared before the Committee, consistently agreed on three basic principles:

- the need to restore the pension once the ‘offset’ amount has been fully repaid with interest;<sup>1</sup>
- the need for procedural fairness; and<sup>2</sup>
- the need for current and potential future recipients to receive comprehensive financial counselling and advice from experts on VE Act and SRC Act entitlements.<sup>3</sup>

### *Perceived inequities within the system*

#### **Advocating to restore pensions**

3.2 One of the common themes raised in submissions and evidence to the inquiry was the perceived unfairness of the operation of the actuarial model. This is perhaps due in part to a lack of information or advice being made available to veterans and widows about the impact of the offsetting provisions at the time applications for benefits were being made. It is clear that a number of recipients were not fully aware at the time they accepted a lump sum that their pension would be offset to take account of the lump sum for the remainder of their life, no matter how long they lived.

3.3 At its hearing on 23 June 2003, the Committee asked the Regular Defence Force Welfare Association (RDFWA), to outline its views on the current offsetting

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1 *Submission 1*, pp. 5–6 (Regular Defence Force Welfare Association (RDFWA)) and *Committee Hansard*, 16 June 2003, pp. 21–23; *Submission 2* (RSL); *Submission 3* (Mr Wheatley); *Submission 4* (Mr Gabriel); *Submission 6* (Mr Budworth); *Submission 8* (Legacy Coordinating Council) and *Committee Hansard*, p. 12; *Submission 14* (Members of Associations and Clubs for Veterans Inc (MACV)), pp. 2–4; *Submission 16*, pp. 1–2 (The Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women Ltd (AFTPIESW))

2 *Submission 4* (Mr Gabriel); *Submission 7* (Name withheld); *Submission 12*, p. 5 (Australian Peacekeepers and Peacemakers Association (APPA)); *Submission 13*, p. 9 (Armed Forces Federation of Australia (ArFFA)) and *Committee Hansard*, pp. 18–20; *Submission 16*, pp. 1–2 (AFTPIESW)

3 *Submission 1*, p. 7 (RDFWA) and *Committee Hansard*, p. 25; *Submission 3* (Mr Wheatley); *Submission 5* (Mr Howe); *Submission 8* (Legacy); *Submission 12*, p. 3 (APPA) and *Committee Hansard*, p. 15; *Submission 13*, p. 9 (ArFFA)

arrangements. Air Vice Marshal Paule, National Secretary, opened his remarks to the Committee with the comment that:

...We are not trying to do anything in retrospect ... there are some people out there who have already had their pension offset to a level which more than equates to the lump sum. What we would suggest is that at least their pension should be reverted to what it was in the first place.

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There is a long-held view that veterans legislation is beneficial. The current offsetting arrangements which are in place for many people out there today are detrimental to veterans and war widows.<sup>4</sup>

3.4 The RDFWA, in its written submission to the Committee, explained in practical terms the principle of ‘offsetting arrangements’ when a lump sum and pension is claimed for the same injury, disease or death:

A calculation is made to equate the compensation lump sum to a fortnightly pension and the ‘current’ pension payable [from DVA] is then reduced by this amount for the life of the recipient.<sup>5</sup>

3.5 The RDFWA also referred to correspondence it received from Department of Veterans’ Affairs on June 2000, which cited the Actuary’s tables to further explain the rationale for ‘whole of life’ payments. It included the comment that:

For those who have life expectancies of 20 to 40 years this approach means that the sum of the indexed instalments will be far greater than the original principal to lump sum. Applying this concept to veterans affected by compensation offsetting, the sum of indexed fortnightly limitation amounts will eventually total more than the original lump sum.<sup>6</sup>

3.6 The Returned and Services League of Australia (RSL) explained in similar terms the situation that many veterans found themselves in after being injured:

Following the lodging of dual claims the Veterans’ Affairs decision usually came first and, if successful, a fortnightly disability pension at the then General Rate was granted. Generally later, Defence offered a lump sum payment to successful claimants. In many cases claimants opted to take the lump sum and accepted the fact that this would significantly reduce their fortnightly Veterans’ Affairs pension in the compensation offsetting process. Perhaps they did not fully realise that this reduction was for life no matter how long they were to live.

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4 *Committee Hansard*, 23 June, 2003, p. 21 (Air Vice Marshal John Paule, RDFWA)

5 *Submission 1*, p. 4 (RDFWA)

6 *Submission 1*, p. 4 (RDFWA)

The essence of the problem is that veterans' legislation is meant to be beneficial and no amount of lecturing on actuarial mathematics will convince affected veterans that the current offsetting arrangements are beneficial, particularly as they affect those who have successfully survived into old age when sympathetic treatment is really appreciated<sup>7</sup>

3.7 The RSL advocated the restoration of the full pension as 'an act of grace' once offsetting action has 'paid off' the amount of the lump sum.<sup>8</sup>

3.8 Mr J Gabriel recommended in his submission to the inquiry that section 74 of the VE Act be amended to allow a mechanism be put in place to restore the veteran's pension once the lump sum has been repaid.<sup>9</sup>

3.9 The Legacy Coordinating Council indicated strong support for the RDFWA's submission and similarly recommended full restoration of the pension for those who have 'repaid with interest' the lump sum.<sup>10</sup> ArFFA submitted that the DVA's interpretation and administration of the VE Act has led to many inequities and ultimately erodes the legislative intent of providing just compensation for those who are injured or suffer from diseases as result of serving in the defence forces.<sup>11</sup>

3.10 In its submission, the Australian Peacekeepers and Peacemakers Association (APPA) referred to several case studies of younger veterans for whom the system of offsetting can operate in a particularly inequitable manner. If these veterans live to their expected age, it was submitted that their disability pension could be offset by an amount which is double or more of the value of the original lump sum received. APPA recommended that the government amend the VE Act to make the Act fair and equitable, to provide adequate compensation without penalty to Australia's veterans.<sup>12</sup>

### **Indexing the offset amount**

3.11 While accepting the principle of 'offsetting' the fortnightly equivalent of a fixed lump sum against the pension for the life of the recipient, the RDFWA argues against what it says is the hidden inequity of indexing in the application of offsetting, which continues to cause concern to recipient veterans and veterans' widows:

Official correspondence refers to an actuarial calculation which determines the value of the *offset* in any particular case and this calculation is done at the point of time in which the pension was granted. Although one could be expected to believe that the calculation would be a once-off calculation to

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7 *Submission 2*, p. 1 (RSL)

8 *Submission 2*, p. 2 (RSL)

9 *Submission 4*, p. 2 (Mr J R D Gabriel)

10 *Submission 8*, p. 3 (Legacy)

11 *Submission 13*, p. 2 (ArFFA)

12 *Submission 12*, p. 6 (APPA)

*offset* the lump sum over the expected life of the recipient, that is not the case. In practice, as the pension being received by the recipient increases (for whatever reason), so also does the *offset* amount even though the lump sum earlier has not altered. This means that the amount of pension reduction which is supposedly calculated to *offset* a fixed lump sum is increased as the pension increases over time and begs the question of why this occurs.<sup>13</sup>

3.12 Mr Alan Wheatley confirmed this scenario in his submission to the inquiry. During 2002, as a result of indexing the offset amount, the amount taken out of his pension has increased from \$58.67 to \$64.31. He estimated that over his remaining lifespan ... ‘this indexing will mean that the pension gap is going to get bigger and bigger until it reaches an amount that is going to be really out of context with what I have’.<sup>14</sup>

3.13 The Committee appreciates the concerns raised by the RDFWA and others in regard to indexation. However, the disability pension is indexed in line with the CPI, as is any amount offset to account for a lump sum. As the amount offset from the pension is the fortnightly equivalent of a lump sum compensation payment, the offset amount is indexed to ensure that this amount retains its value.

3.14 The Committee understands that a ‘fixed’ offset amount (the alternative to an indexed offset amount) would be affected by interest rates, and would result in larger amounts being deducted from the pension earlier on. Indexed offset amounts result in a smoother net pattern of deductions from the pension, and a more predictable payment pattern.

### **A question of procedural fairness**

3.15 Mr Greg Isolani, representing the Armed Forces Federation of Australia (ArFFA), raised the issue of the right of review:

Given that there is no avenue for appeal to either the Veterans Review Board or the Administrative Appeals Tribunal regarding compensation offsetting the only recourse that members have is the costly administrative review pursuant to the *Administrative Decisions (Judicial Review) Act 1977*.

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The right of review to the Federal Court or Federal Magistrates’ Court depending on the quantum, is costly, complicated and may result in an adverse cost order against a member who seeks to review the arbitrary discretion by the Department.<sup>15</sup>

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13 *Submission 1*, p. 4 (RDFWA)

14 *Submission 3*, p. 1 (Mr Alan Wheatley) and *Committee Hansard*, 16 June 2003, p. 16.

15 *Submission 13*, p. 7 (ArFFA)

3.16 ArFFA concluded that there should be some degree of flexibility by DVA to enable a member the right to request a reconsideration of the current and future systems for compensation offsetting through the avenue of appeal to the Veterans' Review Board and the Administrative Appeals Tribunal. In its view... "for a veteran to be referred to in the life table and to experience an offsetting and reduction of pension and/or repayment retrospectively without reference to their particular circumstances is inequitable".<sup>16</sup>

3.17 During hearings, after a discussion on compensation values and offsetting, the Committee asked Mr Isolani "...you assert that rough justice is being done to these individuals... Is it really possible to unravel the scheme and set in place a process of reasonably accurate assessment that would take the complexity of the differences in account?" Mr Isolani replied:

...it is not a matter of technical unravelling, but perhaps I am simplifying it. If you categorise the definition by the Department of Veterans' Affairs, when it comes to lump sum payment they consider an award of damages for incapacity as falling within the criteria. If the definition were narrowed to make specific reference to a lump sum or that part of the lump sum under the military compensation scheme that only relates to the pain and suffering that is comparable to what the disability pension is being paid for, I would suggest that it is not so much unravelling but making clear to a person at the outset that their lump sum payment—or the second part of it, for pain and suffering—will be offset.<sup>17</sup>

3.18 Mr Bill Maxwell, of the Department of Veterans' Affairs, acknowledged in evidence to the Committee that a decision to offset a pension is not one which can be taken to the Veterans Review Board or the Administrative Appeals Tribunal, but as a decision made under a statute, it can be taken to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.<sup>18</sup> Mr Maxwell added that the Ombudsman is another potential avenue for someone aggrieved by a decision made by DVA.

3.19 The Veterans Review Board and the Administrative Appeals Tribunal are set up as bodies which review the merits of a decision. The Committee accepts that the offsetting of compensation against a disability pension is not a question of merit as such but a self executing or legislative decision. Any appeal from such a decision could be an appeal on the legal issues only. Therefore, the appropriate body for such an appeal is the Federal Court.

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16 *Submission 13*, pp. 8–9 (ArFFA)

17 *Committee Hansard*, 23 June 2003, p. 18–19 (ArFFA)

18 *Committee Hansard*, 16 June, 2003, p. 9 (Mr Bill Maxwell, DVA)

## Lack of information and misinformation

3.20 The Committee received several submissions that complained about the lack of information, and misinformation, given to veterans and veterans' widows at the time of applying for, or receiving benefits. Ex-service organisations made the point in their submissions that potential recipients, at a time in their lives when they were most vulnerable, were often presented with documents and 'told to sign'.<sup>19</sup>

3.21 Mr Wills, from the Legacy Coordinating Council, in evidence to the Committee, cited a common situation in the past, where widows were encouraged by officials to test their eligibility by applying for both forms of compensation, without a full explanation of the consequences.<sup>20</sup>

3.22 Mr Alan Wheatley described in his submission the ongoing problems and confusion caused by both incorrect and conflicting information he has received about his compensation entitlements and responsibilities. In evidence to the Committee he described how he had received information from DVA that indicated only that his pension 'would be a reduced payment from the time of the lump sum'. Mr Wheatley then asked the MCRS about the lump sum repayment arrangements to clarify the situation before actually signing for the lump sum. He was told that the offsetting would continue only until the lump sum had been repaid and that then he would revert to a full pension.<sup>21</sup>

3.23 Mr Paul Copeland (APPA), was asked by the Committee to outline the nature of complaints from members of his organisation. Mr Copeland explained that the problem was recipients not receiving appropriate information:

We are waiting on some documentation from three veterans whose cases I have handled in the last two months. There was not much said about how much they were going to pay back and how they were going to pay it... They were basically given a compensation limitation from their TPI pensions and that was that. The veterans do not really know. They understand that they cannot double dip, and that is fine... However, they are not really conversant with how the actuarial figures that are being used are arrived at; they are not sure. In a number of cases this has not been displayed in the decision handed back to them from the DVA.<sup>22</sup>

3.24 APPA cited another example of an offer for compensation to a recently widowed woman in the form of a 'plethora of pages'. In the offer there was no definitive comparison between the MCRS and the provisions she might be entitled to under the VE Act:

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19 *Submission 3*, p. 1 (Mr Alan Wheatley); *Submission 5*, p. 1 (Mr Dave Howe); *Submission 12*, pp. 4–5 (APPA)

20 *Committee Hansard*, 16 June 2003, p. 11 (Mr Wills, Legacy)

21 *Submission 3* (Mr Alan Wheatley) and *Committee Hansard*, 16 June 2003, p. 16.

22 *Committee Hansard*, 16 June 2003, pp. 14–15 (Mr Paul Copeland, APPA)

...She had to take it [the offer] to a financial advisor, who is not conversant with the Veterans' Entitlement Act or the SRCA. So it is causing a bit of confusion. Although people get \$1,000-odd to seek financial advice, even the financial advisors outside are confused by the DVA and MCRS systems.<sup>23</sup>

3.25 APPA also made the point that in most of the cases in which it advocated on behalf of lump sum/VE Act pension recipients '...younger veterans do not receive a detailed schedule of costs, along with CPI increases and how much they are required to pay back the lump sum compensation payment made to them'. The organisation recommended that Government provide the intended recipient of an MCRS lump sum and VE Act pension, with a complete cost schedule, including the rate of payback, along with potential CPI increases.<sup>24</sup>

3.26 Mr Wills, from Legacy, referred to the situation in which a widow could still find herself today when trying to make the right choice for herself and her family:

... the war widows pension is basically the age pension plus \$25 ...and... that \$25 has not been indexed at all since 1986. There has been a steady erosion of the war widows pension. A new widow making a decision now would perhaps take that into account and think that she could do better with a lump sum.<sup>25</sup>

3.27 Mr Wills noted another factor in the decision-making process for war widows is that:

More importantly, for a widow, who may be living in a married quarter, who has just lost her husband and who has no money in the bank, that lump sum looks pretty attractive because she has got to get out of that married quarter and find accommodation. One of the unfortunate anomalies of the Veterans' Entitlement Act is that those who are most needy find that they cannot get rental assistance like a person in the general community can.<sup>26</sup>

3.28 Brigadier Mellor of the Regular Defence Force Welfare Association, pointed out that part of the problem with regard to the administration of the compensation schemes in the past was that there was no 'trigger point'. That is, a point in the process at which a decision can be made whether or not to accept a lump sum which has been claimed.<sup>27</sup>

3.29 In response to a question about incorrect advice being given to veterans, the Department of Veterans' Affairs acknowledged the problem:

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23 *Committee Hansard*, 16 June 2003, pp. 14–15 (Mr Paul Copeland, APPA)

24 *Submission 12*, pp. 3–4, 6 (APPA)

25 *Committee Hansard*, 16 June 2003, p. 12 (Mr Wills, Legacy)

26 *Committee Hansard*, 16 June 2003, p. 12 (Mr Wills, Legacy)

27 *Committee Hansard*, 23 June 2003, p.25 (Brigadier Mellor, RDFWA)

It would be fair to say that I have been made aware, in a number of instances, by assertions from the veterans concerned or their legal advisers. I said at the outset that this is one of the least understood sections within the Veterans Entitlements Act, both by our veteran clients and by our staff. So I would not be prepared to put my hand on my heart ... and say, 'No, we've never done that.' I think the weight of evidence clearly indicates that the understanding—less than perfect as it has been—has possibly led to some advice being issued to individuals which is wrong.<sup>28</sup>

3.30 The Department of Veterans' Affairs pointed out that most of the cases which have been raised as examples of poor practice, providing misleading or inadequate advice, reflect the fact that in the past, the claims for compensation were handled by different agencies and at different points in time. There could potentially be quite a long delay between the date of the injury and the date of the claim under the VE Act. Because the claims were processed separately, it was possible that the question of financial advice never arose in many cases.<sup>29</sup>

3.31 The Committee accepts that administration of these compensation schemes by different departments may have contributed to a number of instances of maladministration, and that an incomplete understanding of the complicated nature of the offsetting arrangements amongst departmental staff may have resulted in misleading or incorrect advice being given to veterans and widows.

3.32 The Committee appreciates that the Department of Veterans' Affairs has not always had responsibility for the administration of this scheme, and therefore cannot be held responsible for all instances of incorrect advice or misinformation which may have been given to veterans and widows in the past.

3.33 Further, the Committee notes that the Department's standard letter to veterans and widows who have applied for a compensation lump sum. The letter includes a paragraph alerting the recipient to the fact that accepting a lump sum may affect their pension. This would seem to address the problem identified by the RDFWA as occurring in the past, whereby there was no point at which a decision could be made about whether to accept a lump sum. A copy of this letter is included at appendix 6.

3.34 However, the fact remains that there are a number of recipients who have been disadvantaged as a result of maladministration, lack of advice, or incorrect advice. A number of these recipients were not in a position to make a decision about whether to accept additional compensation, and were certainly not aware of the impact the lump sum would have on their pension.

3.35 Bill Maxwell was asked by the Committee about how improvements could be achieved in both the process and the quality of advice given to veterans. Mr Maxwell replied that:

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28 *Committee Hansard*, 16 June 2003, p. 6 (Mr Bill Maxwell, DVA)

29 *Committee Hansard*, 23 June 2003, p. 28 (Mr Bill Maxwell, DVA)



... this is an area in which knowledge is so specialised and where expertise is required and so maybe we should look to contract the application of section 74 to a central location<sup>30</sup>

3.36 Related to this is the issue of financial advisors not being familiar with the details of the offsetting processes, and the entitlements due to veterans. Given that this is an area which requires specialist knowledge, the Committee supports the proposal to centralise within the Department of Veterans' affairs the provision of advice to veterans and widows about their entitlements under the SRC Act and the affect offsetting will have on their pension.

### **Recommendation**

The Committee recommends:

- that the Department of Veterans' Affairs ensures that all staff responsible for providing advice on offsetting have access to up to date information and appropriate training;
- that the Department creates a centre of expertise for delivery of expert advice to staff, veterans and widows about the operation of sections 30C and 74 of the *Veterans' Entitlements Act 1986*, and for quality assurance on the final calculations of offsets. This will ensure that appropriately trained staff, with the required specialised knowledge, are responsible for making veterans and widows fully aware of their entitlements under the Act; and
- that the Department must ensure that all potential recipients of lump sum compensation understand the implications for their pension of accepting a compensation lump sum; that upon accepting a lump sum, their pension will be offset for life.

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30 *Committee Hansard*, 16 June 2003, pp. 6–7 (Mr Bill Maxwell, DVA)

