

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE  
LEGISLATION COMMITTEE**

**SUBMISSION**

**Inquiry into aspects of the Veterans' Entitlement Act and the  
Military Compensation Scheme (MCRS)**

<b>Submission no</b>	<b>7</b>
Organisation making submission	N/A
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Location (if required)	
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18 May 2003

Senator Sandy Macdonald  
Chairman  
Senate Foreign Affairs, Defence and Trade Legislation Committee  
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Dear Senator Macdonald

I am a retired army officer and have had the offsetting provisions contained in the VEA applied to my DVA disability pension.

I would like to provide the attached submission to your Committee for consideration during the 'Inquiry into aspects of the Veterans' Entitlement Act 1986 and the Military Compensation Scheme (MCS)'.

I have been in dispute with the DVA for over three years in relation to the application of offsetting legislation which is detailed in the attachment. Whilst the issues that I raise may not be at the center of your terms of reference I believe they are still relevant to the offsetting issue and would appreciate you including my submission in your discussions.

I would like to say at the outset that I agree with the general principles of the legislation relating to offsetting however I believe that the application of the provision by DVA is neither fair nor reasonable in the situation described in the attachment.

I understand that there are a number of veterans and ex-serving defence members that are in a similar situation to me who would also appreciate this issue being raised.

Please contact me at the above address or phone number if I can clarify or add to my submission and I thank the committee for its time. I agree to the contents of my submission being made public. However I request that my personal details (name, address, contact details etc.) are kept confidential and withheld from public disclosure.

*Yours faithfully*  
*(Signed but name withheld)*

## **Senate Foreign Affairs, Defence and Trade Legislation Committee**

### **Submission to the Inquiry into aspects of the Veterans' Entitlement Act 1986 and the Military Compensation Scheme (MCRS)**

A veteran or ex serving member who suffers a service related injury or disease is entitled to compensation as either an ongoing disability pension or a lump sum, but not both. Section 74 outlines the offsetting provisions of the VEA and its application to a member of the forces who receives lump sum compensation in respect of the incapacity from injury or disease and also receives a pension in respect of the incapacity of the member from that injury or disease.

Incapacity, in subsection 5D(1) of the VEA, is defined as 'the effects of that disease or injury and not a reference to the injury or disease itself'. It comprises the combined effect of the medical impairment and the lifestyle impact of that impairment.

The application of the offsetting provision is described by DVA as an 'administrative decision/self-executing' and therefore allows no appeal rights other than directly to the Federal Court of Australia.

In practical terms the DVA is interpreting this legislation to apply offsetting in the following situation:

- An ex serving member is receiving a DVA disability pension for a defence related injury.
- That person suffers a new work related injury 10 years after discharge (whilst a public servant) which may have aggravated the existing defence related injury.
- As a result the person is on sick leave and is subsequently reimbursed lost wages through Comcare Australia.
- Those lost wages which have been paid by Comcare, are converted to a lump sum by DVA and the disability pension is then reduced in its entirety under offsetting provisions.

This interpretation of the VEA legislation discriminates against ex-serving members and is neither fair nor intended, for the following reasons:

- The rationale for offsetting is to prevent 'double dipping' ie a person should not receive two amounts of compensation for incapacity resulting from the same injury. A member can elect to receive lump sum compensation through the MCS for permanent impairment or for a disability pension through DVA also for impairment, but not both. Neither forms of compensation includes compensation for economic loss. Nor do they include compensation to cover costs of household services, attendant care, clothing, telephone or recreation transport.
- The aggravation of an existing injury is considered to be distinct from the existing injury and is an injury in itself. This has been noted by Justice Merkel of the Federal Court of Australia in the matter of Slattery vs Comcare 883 FCA 1 (9 October 1996). In this case it was determined that Mr Slattery was entitled to separate compensation for two injuries suffered during the collisions of HMAS Melbourne with HMAS Voyager and USS Frank E. Evans. This interpretation is also encompassed in the SR&C Act 1988. However, under VEA legislation an injury does not include the aggravation of an injury. This also appears to be at odds with numerous jurisdictions including the High Court of Australia as noted in the matter of C. E. Heath.
- The offsetting provisions should apply only to the measure of incapacity resulting from a specific service related injury and where compensation and disability pension is received for the same loss ie pain and suffering or medical impairment. It should not apply to a subsequent injury, not related to service, that aggravates the pre existing injury. Nor should it apply to compensation received under a different assessment ie economic loss. This is particularly relevant when a specific lifestyle rating assessed by DVA, which forms the basis for disability pension, does not include being unable to work.
- Compensation for injury in successful civil litigation cases generally results in three separate sums for medical expenses, pain and suffering (including the effects on lifestyle) and loss of wages. Compensation for pain and suffering is not reduced because compensation is also awarded for loss of income.
- Section 74 applies to a member of the Forces not an ex-serving member.

- Legal advice from Garry Robb and Associates (Barristers and Solicitors in Canberra) is that DVA have taken a much broader approach in relation to offsetting that was neither intended nor fair to DVA recipients and that DVA have acted wrongly in the situation as described above. Other legal firms have confirmed this advice.
- DVA has advised that no appeal rights exist through DVA/VRB/AAT against offsetting action and the only avenue of appeal is through the Federal Court. It is understood that the cost of such legal action would outweigh the value of the disability pension.
- DVA has also advised that their decision, which determines that the defence related injury and the injury suffered whilst in the Public Service are related, is also not appealable.
- DVA has provided conflicting advice in this matter. It would appear that there exists much confusion about this issue within DVA as each time an argument is mounted, a different reason for the application of offsetting is provided.

In light of the situation as described above it is requested that the Committee consider recommending the following:

1. Department of Veterans' Affairs immediately reassess their interpretation of the offsetting provisions in the VEA to ensure that compensation for economic loss is not considered the same as compensation for impairment provided as a disability pension or lump sum.
2. The VEA be amended to bring it in line with generally accepted compensation law that determines aggravation to a pre existing injury is recognised as a new and separate injury.
3. The VEA be amended to clarify the definition of injury.
4. The VEA be amended to bring it in line with generally accepted compensation law that allows separate compensation for an injury and an aggravation of that injury.
5. An avenue of appeal, other than direct to the Federal Court, be established for decisions taken in regards to offsetting.

(Submitter's name and address withheld.)