

Chapter 5

Purpose and unintended consequences of the proposed offsetting provisions

5.1 The amendments in the bill are designed to ensure that in the future, the compensation offsetting provisions will apply in respect of the same incapacity and do not require that the incapacity results from the same injury or disease. Before considering the provisions covering offsetting, the committee looks at the reasons for amending existing legislation.

Purpose of provisions in schedule 2

5.2 During his second reading speech, the Minister noted that offsetting is intended to prevent double payments of compensation for the same incapacity. He made clear that the bill was not about changing the principles which have been in operation in the repatriation system since 1973.¹ The Minister explained that the measures 'maintain the status quo': that they 'simply clarify and affirm existing arrangements that have been operating under all governments since 1973'.² In his words, the legislation intends to:

...ensure that veterans cannot get compensated twice for the same incapacity...these amendments do not deny or change any existing veterans' entitlements.³

5.3 DVA reinforced this message. It stated that the amendments seek to affirm and give clarity to the original intention of the legislation—that 'offsetting occurs where a person receiving a disability pension under the VEA for an incapacity receives duplicate compensation for the same incapacity'.⁴ It stated:

Broadly, the policy objective of the amendments is to provide some certainty that the offsetting provisions in the VEA can continue to be administered as they have been for nearly 40 years, so to prevent duplicate compensation being paid to veterans for the same incapacity.⁵

1 The Hon Warren Snowdon, Minister for Veterans' Affairs, Minister for Defence Science and Personnel, Minister for Indigenous Health, *House of Representatives Hansard*, 20 June 2011, p. 6479.

2 The Hon Warren Snowdon, Minister for Veterans' Affairs, Minister for Defence Science and Personnel, Minister for Indigenous Health, *House of Representatives Hansard*, 20 June 2011, p. 6479.

3 The Hon Warren Snowdon, Minister for Veterans' Affairs, Minister for Defence Science and Personnel, Minister for Indigenous Health, *House of Representatives Hansard*, 20 June 2011, p. 6479. See also, Mr Bruce Scott, *House of Representatives Hansard*, 16 June 2011, p. 6355.

4 *Submission 2*, p. 6.

5 *Submission 2*, p. 6.

5.4 The legislation is also intended to ensure 'equity between a claimant who is entitled to compensation for a level of incapacity under two schemes, compared to a claimant who is entitled to compensation for the same level of incapacity under only one scheme'.⁶

Reasons for change

5.5 The decision to amend the VEA in this way stems from a decision of the Full Federal Court in the case of *Commonwealth v Smith*. The committee considers briefly the Court's decision.

Commonwealth v David Ronald Smith

5.6 The main issue before the court was the interpretation of section 30C of the VEA in respect of 'incapacity from that injury'.

5.7 Mr Smith had served in the Royal Australian Navy and was on HMAS *Melbourne* on 10 February when she collided with HMAS *Voyager*. He also served in Vietnam between October 1969 and October 1970. This service was accepted as 'operational service' within the meaning of the Act. In 1993, the Repatriation Commission accepted his claim for a disability pension, with effect from 26 August 1991, on the ground that he was suffering from a duodenal ulcer and from post traumatic stress disorder (PTSD). It found that there was a reasonable hypothesis connecting Mr Smith's duodenal ulcers and PTSD with his war service. Mr Smith was assessed with a 40% incapacity due to these war caused injuries and was granted a pension under Part II of the Act.

5.8 In December 2007, Mr Smith won a settlement for damages against the Commonwealth on the basis that the collision between *Melbourne* and *Voyager* had been caused by the negligence of Commonwealth officers and as a result he had suffered injury, loss and damage. The Court noted, importantly, that in this case the particulars of injuries included only 'severe shock'. It stated:

As a matter of construction, it is plain that the common law action was settled on the footing that the plaintiff's injury was 'Severe Shock' and that did not include PTSD or duodenal ulcer.⁷

5.9 The Repatriation Commission argued that the amount of pension paid to Mr Smith under the Act was repayable from the moneys he had received in the settlement of the common law action citing section 30C in support of its claim.

5.10 The court noted that section 30C(1) of the Act could be seen to apply in the following way:

6 Mr Rob Mitchell, *House of Representatives Hansard*, 16 June 2011, p. 6346.

7 *Commonwealth of Australia v Smith* [2009] FCAFC 175, Court Order, 16 December 2009, at para. 9.

As to the pension, the Commission found that there was a reasonable hypothesis connecting the duodenal ulcers and the PTSD with Mr Smith's war service on the basis they were causally linked to or aggravated by his service.

The pension was paid in respect of the incapacity arising from the injuries of ulcers and PTSD. The compensation payment, however, was made in respect of 'severe shock' and not in respect of the injuries of duodenal ulcers and PTSD.

5.11 The court found:

On this basis, whether or not the compensation payment (referred to in s 30C(1)(b)) and the pension received and granted (referred to in s 30C(1)(c)) were in respect of the same incapacity, as to which the parties were in dispute, they were not of the same injury.

As a matter of ordinary language, the injury identified in subs (b) and (c) must be the same. Therefore, common to both the compensation payment and the pension is the underlying injury for which both payments for incapacity are made. The clear dichotomy between 'incapacity' and 'injury' or 'disease' reinforces the deliberate emphasis placed upon the need for there to be a common injury.⁸

5.12 The court found in favour of the respondent, Mr Smith. It formed the view that the Commonwealth's submissions failed 'to give sufficient weight to the complete operation of section 30C, in particular the reference to 'incapacity from **that** injury' as found in section 30C(1)(c)' (emphasis added).⁹ The court decided that in Mr Smith's case, it had not been appropriate to offset 'because the condition for which he was granted disability pension was a different condition from that compensated at common law'.¹⁰

5.13 The government was of the view that this decision of the Full Federal Court underlined the need to clarify this aspect of the legislation.¹¹ In its Portfolio Budget Statements for 2011–12, the government indicated that following this decision it intended to amend the offsetting provisions in the VEA.¹² In its submission, the department explained further:

8 Commonwealth of Australia v Smith [2009] FCAFC 175, Court Order, 16 December 2009, at paras. 26, 27.

9 Commonwealth of Australia v Smith [2009] FCAFC 175, Court Order, 16 December 2009, at para. 22.

10 *Submission 2*, p. 5.

11 The Hon Warren Snowdon, Minister for Veterans' Affairs, Minister for Defence Science and Personnel, Minister for Indigenous Health, *House of Representatives Hansard*, 20 June 2011, p. 6479.

12 Portfolio Budget Statements 2011-12, *Budget Related paper No. 1.5B, Defence Portfolio (Department of Veterans' Affairs)*, p. 16.

It is considered that the decision of the Full Federal Court that offsetting should not have occurred applies only to the unique circumstances of Mr Smith's case. These included that, with the agreement of the Commonwealth, the common law claim for compensation was expressly changed to remove the two conditions that were being compensated under the VEA.

Nevertheless, the Government decided to amend the offsetting provisions of the VEA to ensure that the legislation is clear in its intent.¹³

5.14 It stated further that if passed the amendments 'should avoid the likelihood that, on the basis of the Smith case, those seeking future compensation payments could circumvent the offsetting provisions by exclusion of specific injuries or diseases from the terms of the compensation settlements'.¹⁴

The committee now examines the proposed changes.

The amendments

5.15 The proposed changes to the VEA affect:

- Division 4 of Part II—Rates of pensions payable to veterans;
- Division 5A of Part II—Effect of certain compensation payments on rate of pension; and
- Division 4 of Part IV—Pension and other compensation.

5.16 Under the VEA, a pension under Part II or IV is payable for incapacity resulting from war or defence-caused injury or disease. Pensions under Part II are payable to veterans, while pensions under Part IV are payable to current or former defence force members with certain peacetime service. If a person is receiving a pension under Part II or IV of the VEA and receives additional compensation from another source, in respect of the incapacity or death from that injury or disease for which that person is being paid under Part II or Part IV, the amount of the VEA pension is reduced on a dollar for dollar basis by the amount of additional compensation.

5.17 Schedule 2 substitutes the words 'the incapacity from that injury or disease or the death,' contained in the VEA, with the phrase 'the same incapacity of the veteran from that or any other injury or disease or in respect of that death' to make clear that:¹⁵

...the compensation offsetting provisions are to apply where pension under Part II and IV of the VEA and compensation from another source are

13 *Submission 2*, p. 6.

14 *Submission 2*, p. 6.

15 Mrs Karen Andrews, *House of Representatives Hansard*, 16 June 2011, p. 6352.

payable in respect of the same incapacity and do not require that the incapacity result from the same injury or disease.¹⁶

5.18 For example, section 30C of the VEA, which applies the compensation offsetting rules in relation to lump sum compensation payments, will be amended. Currently it states:

(1) If:

- (a) A lump sum payment of compensation is made to a person who is a veteran or a dependant of the veteran; and
- (b) The compensation payment is paid in respect of the incapacity of the veteran from injury or disease or the death of the veteran; and
- (c) The person is receiving, or is subsequently granted, a pension under this Part in respect of the incapacity from that injury or disease or the death;

The following provisions have effect:

- (d) The person is taken to have been, or to be, receiving payments of compensation at a rate per fortnight determined by, or under the instructions of, the Commonwealth Actuary;
- (e) The person is taken to have been, or to be, receiving those payments for the period of the person's life determined by, or under the instructions of, the Commonwealth Actuary;
- (f) The period referred to in paragraph (e) begins:
 - (i) on the day that lump sum payment is made to the person; or
 - (ii) on the day the pension becomes payable to the person;

whichever is the earlier.

5.19 Under proposed amendments, the underlined phrase in paragraph 30C(1)(c) noted above, that is, 'the incapacity from that injury or disease or the death', will be omitted and the subsection amended to read:

- (c) The person is receiving, or is subsequently granted, a pension under this Part in respect of the same incapacity of the veteran from that or any other injury or disease or in respect of that death;

5.20 The Explanatory Memorandum stated:

For the purposes of the compensation offsetting provisions, lump sum compensation payments are converted to a fortnightly amount as determined or instructed by the Commonwealth Actuary. The amendments make it clear that pension payable under Part II of the Veterans' Entitlements Act is to be reduced by the converted fortnightly amount of lump sum compensation where lump sum compensation and pension under

16 Explanatory Memorandum, p. 9.

Part II are paid, or are payable, in respect of the same incapacity. The incapacity that entitles the veteran to both pension under Part II and a compensation payment from another source may be from the same injury or disease or a different injury or disease.¹⁷

5.21 For consistency, the same amendments are proposed for subsections 30C(2) and (3). These subsections apply specifically to lump sum payments made under sections 137 and 30 of the SRCA respectively.

Commission may request veteran to institute proceedings

5.22 Section 30E allows the Repatriation Commission to request a person, other than the Commonwealth, who appears to be legally liable to pay damages, to pay to the Commonwealth an amount no greater than the total amount of pension paid under Part II up to the date of the damages payment. The Repatriation Commission was established on 1 July 1920 by proclamation of the *Australian Soldiers' Repatriation Act 1920*. When this Act and several other related Acts were replaced in 1986 by the *Veterans' Entitlements Act 1986* (VEA), the Repatriation Commission was retained.

5.23 The current section reads:

If:

- (a) a pension is payable or has been paid under this Part [II] in respect of:
 - (i) the incapacity of a veteran from a war-caused injury or disease; or
 - (ii) the death of a veteran; and
- (b) a person other than the Commonwealth appears legally liable to pay damages in respect of the incapacity of the veteran from that injury or disease or the death of the veteran; and
- (c) the veteran, a dependant of the veteran or a person on behalf of the dependant has:
 - (i) not instituted proceedings against the person for the recovery of damages for the incapacity or death; or
 - (ii) not properly prosecuted proceedings that have been instituted; or
 - (iii) discontinued proceedings that have been instituted;

The Commission may, by written notice, request the veteran or dependant;

- (d) to institute proceedings or new proceedings against the person; or
- (e) properly to prosecute proceedings against the person.

17 Explanatory Memorandum, p. 10.

5.24 The words underlined above in paragraph 30E(b) are to be omitted and the following inserted: 'the same incapacity of the veteran from that or any other injury or disease or in respect of that death'.

5.25 The words underlined in subparagraph 30E(c)(i) are to be omitted and the following words inserted: 'in respect of the same incapacity of the veteran or in respect of that death'.

5.26 Similar changes apply to sections 30G and 30H—where a third party has agreed to pay damages or damages have been awarded to a veteran.

5.27 Section 30L operates so that the Commonwealth may recover from a veteran who has been paid compensation from another country or international organisation, an amount equal to the total amount of pension paid to the veteran under Part II

5.28 Subsection 30P makes clear that any overpayment of pension because of the operation of sections 25A, 30C or 30D is recoverable from any amount of pension payable under Part II.

5.29 The same principle regarding compensation offsetting applies to Part IV. Section 74 operates so that in cases where a member receives compensation from a source other than the VEA, for the same incapacity, a pension received under the VEA will be offset by that compensation. Amendments are made to this section to make clear that this section 'applies where the compensation and the pension paid or payable under Part IV of the VEA are in respect of the same incapacity'.¹⁸

5.30 Amendments to paragraphs 74(3) (3A) and (3B) are intended to make clear that:

The lump sum compensation payments will be converted to a fortnightly rate if the lump sum compensation and pension under Part of the VEA are payable in respect of the same incapacity.¹⁹

5.31 The Explanatory Memorandum states that the incapacity that 'entitles the member to both pension under Part IV and a compensation payment from another source (including section 30 and 137 of SRCA) may be from the same injury or disease or a different injury or disease'.²⁰

5.32 The amendment to subsection 74(8) is designed to make clear that:

...if a member is receiving either a converted lump sum or a periodic compensation payment for an incapacity and the amount of that compensation equals or exceeds the amount of pension payable under Part

18 Explanatory Memorandum, items 15–17, p. 13.

19 Explanatory Memorandum, items 18–23, p. 13.

20 Explanatory Memorandum, items 15–26, pp. 13–14.

IV of the Veterans Entitlements Act to the member in respect of the same incapacity, then pension under Part IV is not payable to the member.²¹

5.33 Again, the Explanatory Memorandum states that the incapacity that entitles the member to both a pension under Part IV and a compensation payment from another source (including section 30 and 137 of SRCA) may be from the same injury or disease or a different injury or disease.

5.34 Subsection 75(1), which deals with proceedings against a third party, is also amended and is consistent with the intention reflected in the amendment to section 30E considered above. The intention is to make clear that the Commission may request a member entitled to a pension under the VEA to institute or prosecute proceedings against a person, other than the Commonwealth, who may be legally liable to pay damages to the member where the damages and the pension entitlement are in respect of the same incapacity.

5.35 According to the Explanatory Memorandum, this amendment enables the Repatriation Commission to request a member who is entitled to a pension under Part IV of the VEA 'to institute or prosecute proceedings against a person, other than the Commonwealth, who may be legally liable to pay damages to the member'.²² It stated that the amendments make it clear that:

...the Commission may request a member entitled to pension under Part IV to institute or prosecute proceedings against a person, other than the Commonwealth, who may be legally liable to pay damages to the member where the damages and the pension entitlement under Part IV are in respect of the same incapacity. The incapacity that entitles the member to both pension under Part IV and a compensation payment from another source may be from the same injury or disease or a different injury or disease.²³

5.36 For consistency, amendments similar to those already considered are contained elsewhere in the bill.

5.37 The department stated that the proposed amendments will not affect:

- the formula used for calculating the amount of offsetting to be applied once a decision has been made to offset;
- the offsetting of Commonwealth superannuation payments against certain payments made under the SRCA or the MRCA; and
- the effect of VEA or SRCA payments on the quantum of permanent impairment payments made under the MRCA.²⁴

21 Explanatory Memorandum, items 24 and 25, p. 13.

22 Explanatory Memorandum, p. 14.

23 Explanatory Memorandum, items 27 and 28, p. 14.

24 *Submission 2*, p. 6.

5.38 It recognised that some veterans may be concerned that the amount of disability pension they are receiving will be affected by the proposed amendments. In this regard, as noted earlier, the department noted that the amendments 'will not and are not intended to change the operation of the offsetting provisions in any way'. In other words, 'a person whose disability pension is currently being offset by another payment for the same incapacity will continue to have his or her pension offset at exactly the same rate, unless there is another reason to change that rate'.²⁵

The ex-service community

5.39 Three ex-service organisations (Legacy, the Vietnam Veterans' Federation and the Returned and Services League (RSL)) made submissions to the inquiry raising issues with the offsetting arrangements as they currently stand as well the proposed amendments.

Legacy

5.40 Legacy did not argue against the principle of offsetting. It was concerned with the way in which offsetting arrangements were applied. The committee considered this matter in 2003.

5.41 In its report the committee expressed its sympathy to those veterans and widows who found themselves in difficult circumstances as a result of the offsets applied to their pensions.²⁶ In light of the complexity of the offsetting arrangements, the difficulty inherent in reassessing the large number of relevant cases and the cost of restoring offset pensions to their original value, the committee was unable, at the time, to make any recommendations in favour of those affected by the offsetting arrangements.²⁷

Committee view

5.42 The committee notes the evidence heard during the 2003 inquiry indicating that many of the issues with offsetting arrangements arose from the lack of advice, or incorrect advice, provided to compensation recipients.²⁸ It believes that the availability of clear and correct information in regards to offsetting arrangements is necessary to minimise any possible negative effects on pension recipients (see the section below on communication and information).

25 *Submission 2*, p. 7.

26 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Aspects of the Veterans' Entitlements Act 1986 and the Military Compensation Scheme*, September 2003, p. 26.

27 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Aspects of the Veterans' Entitlements Act 1986 and the Military Compensation Scheme*, September 2003, p. 26.

28 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Aspects of the Veterans' Entitlements Act 1986 and the Military Compensation Scheme*, September 2003, p. 22.

Vietnam Veterans' Federation

5.43 The Vietnam Veterans' Federation submitted that the amendments were too broad and offsetting should only occur in cases where compensation is paid for the same injury as pension is being paid.²⁹ This view was similar to that put forward by the RSL (see below).

5.44 The Federation was also concerned that legal costs and disbursements included in compensation payments would be considered part of the total payment amount used for calculating offsetting amounts. The Federation argued that these costs 'are not the compensation for injuries but the cost of obtaining that compensation'.³⁰ The RSL agreed with this view. It argued that the amount to be counted as compensation for offsetting purposes should be only that amount that the veteran actually receives.³¹

5.45 DVA informed the committee that 'party-party' legal costs—which include all amounts specifically included in a court judgement, settlement or payment as 'costs'—are subtracted before any offsetting occurs.³² Solicitor-client costs are considered separate from these party-party costs and include any costs not specified in the settlement, judgement or payment. These costs are a private arrangement and are not excluded from the compensation payment and are therefore offset.³³ DVA stated that the policy in regards to legal costs is aligned to that applying to other income support payments in regards to compensation recovery.³⁴

Committee view

5.46 The committee notes the issue raised by the Vietnam Veterans' Federation and supported by the RSL in regards to the inclusion of solicitor-client costs in offsetting calculations. It believes that the issue is worthy of consideration by government to ensure that veterans are not being adversely affected by the inclusion of unspecified costs and other disbursements in the total sum used in offsetting arrangements.

29 *Submission 5*, [p. 2].

30 *Submission 5*, [p. 1].

31 Mr Hodges, *Proof Committee Hansard*, 11 August 2011, p. 6.

32 Department of Veterans' Affairs, answers to written questions, received 5 August 2011.

33 Department of Veterans' Affairs, answers to written questions, received 5 August 2011.

34 The department explained further that this was standard policy in regards to compensation recovery and offsetting. It also suggested that details of costs not specifically included in a court judgement, settlement or payment was a private issue and parties should seek appropriate amounts to cover both their costs and required compensation. Ms Spiers, *Proof Committee Hansard* 11 August 2011, p. 14.

The RSL's opposition to the proposed amendments

5.47 The Returned & Services League of Australia (RSL) opposed the proposed amendments in Schedule 2 on the grounds that:

- the proposed amendments are too far-reaching and unnecessary because current legislation already requires discounting in the assessment of pensions if two injuries contribute to the same impairment;
- sufficient provision already exists in Chapter 19 of the Guide to the Assessment of Rates of Veterans' Pensions (GARP) to discount the assessment of disability pension for the effects of non-service-related disabilities, injuries and illnesses;
- the proposed amendments would effectively allow the Commonwealth to 'double dip' into veterans' disability pensions; and
- the proposed amendments go far beyond the Government's stated intention that the amendments would restore the original intention of the 1973 offsetting legislation.³⁵

5.48 The RSL was of the view that the amendments, if passed, would have 'a far more widespread impact on veterans than could ever have been intended when offsetting was first introduced into the Repatriation legislation in 1973'.³⁶ It argued that if the government's intention was to ensure that veterans are treated equitably and are neither over-compensated nor under-compensated, the legislation should be amended to ensure that any offsetting of compensation payments against disability pension should apply to:

- only that portion of the compensation payment that can be said to represent the compensation directly related to the particular aspect of incapacity for which disability pension is paid; **and**
- only that portion of disability pension that can be said to represent the particular aspect of incapacity that has been compensated by other compensation and that has been assessed as contributing to the overall rate of disability pension (taking into account the fact that application of Chapter 19 of GARP may have already removed part of the compensation incapacity from the assessment of incapacity).³⁷

5.49 In explaining its position, the RSL restated the Explanatory Memorandum's description of the introduction of provisions for offsetting in 1973 as being intended to 'avoid the payment of double compensation by the Commonwealth'.³⁸ The RSL

35 *Submission 3*, [p. 1].

36 *Submission 3*, [p. 2].

37 *Submission 3*, [p. 5].

38 Explanatory Memorandum, p. 8.

argued that the amendments proposed by the legislation 'go well beyond that original intention' by applying offsetting not only in regards to:

compensation received in respect of any war-caused or defence-caused injuries but to compensation received for *any* injuries at all from any other source...so long as there is some aspect of the compensation that can be traced to an aspect of incapacity for which pension is also being paid.³⁹

5.50 The RSL argued that the amendments will result in the application of offsetting arrangements in cases where double compensation is not occurring.⁴⁰

5.51 It maintained that existing provisions ensure that pensions are only paid in respect of the service-related aspect of a veteran's or member's incapacity. Non-service related injuries or illnesses contributing to that same incapacity are accounted for through the rate assessment process. The GARP sets out how pensions should be reduced according to the proportion of the incapacity that is contributed by non-service related injuries or illnesses and ensures that the Commonwealth only provides a rate of pension commensurate with the service-related aspect of the incapacity.

5.52 The RSL's position was that if a veteran or member is only receiving their pension in respect of the service-related aspect of their incapacity, offsetting should only apply to any compensation received in regards to the same, service-related aspect of their incapacity. It held that it is inequitable for offsetting to occur where compensation is being paid for an aspect of the incapacity for which a pension is not being paid.⁴¹

5.53 The RSL pointed out that different injuries and illnesses are likely to have the same incapacitating effects on 'various aspects of a person's personal relationships, mobility, recreational and community activities, employment activities and domestic activities'.⁴² It noted that the proposed amendments require compensation to be paid "'in respect of" the same incapacity', however, the legislation:

does not require any assessment of whether or not only part of the compensation might be attributable to a particular aspect of incapacity that happens to be identical to a particular aspect of incapacity for which pension is being paid.⁴³

5.54 According to the RSL, the proposed amendments will mean that once compensation is paid 'in respect of' the same incapacity for which a pension is being paid (notwithstanding that this incapacity may be the result of a number of different illnesses, injuries or circumstances) then 'all of that compensation must be taken into

39 *Submission 3*, [p. 5].

40 *Submission 3*, [p. 4].

41 *Submission 3*, [p. 5].

42 *Submission 3*, [p. 4].

43 *Submission 3*, [p. 4].

account in offsetting that compensation against the pension on a dollar-for-dollar basis'.⁴⁴

5.55 The RSL gave the example of a veteran whose only accepted incapacity results from a war-caused right shoulder injury but suffers a new right shoulder injury in a civilian workplace accident which exacerbates their existing incapacity.⁴⁵ Under the GARP, both injuries can be seen to be contributing to the same incapacity but the disability pension will only be paid in regards to the proportion of that incapacity contributed to by the war-caused injury.

5.56 The RSL held that if the veteran in this example were to receive compensation for the workplace injury, offsetting would not occur under existing provisions, despite the compensation being paid for the same incapacity.⁴⁶ The RSL argued that 'there would not be any offsetting under the current law because there were two separate and distinct injuries (the effect of *Smith's case*)'.⁴⁷

5.57 In its view, under the proposed amendments, the Commonwealth will 'double dip' in discounting pensions.⁴⁸ By this it meant that, under the GARP, the veteran in the example will have their pension rate set according to the proportion of their incapacity which is related to their service related injury. The RSL considers this the first 'dip'.

5.58 The RSL stated that the Commonwealth will then offset the pension being provided to the veteran by the amount of compensation being received for their civilian injury, as it is paid in regards to the same incapacity for which they are being paid a pension: a loss of movement in the veteran's shoulder.⁴⁹ This is what the RSL considers the second or 'double dip'.

5.59 In summary, the RSL maintained that if a disability pension is only being paid in regards to a particular aspect of an incapacity, then only that portion (if any) of a compensation payment directly related to the same aspect of the incapacity should be offset. In the same way, offsetting arrangements should only apply to that portion of the pension which can be said to represent the particular aspect of the incapacity that is been compensated for through another source.

44 *Submission 3*, [p. 4].

45 *Submission 3*, [p. 2].

46 *Submission 3*, [p. 2].

47 *Submission 3*, [p. 2].

48 *Submission 3*, [p. 3].

49 *Submission 3*, [p. 3].

The Department of Veterans' Affairs response to the RSL's objections

5.60 The department told the committee that the RSL had, in its submission, misinterpreted the intent of the proposed amendments and their effect on veterans. It stated that veterans will not be disadvantaged by the proposed legislation and that it is not the intention of the proposed or current legislation for a 'double dip discount' to occur through the offsetting provisions.⁵⁰

5.61 The department argued that the proposed amendments will not result in offsetting occurring where compensation is paid for a condition which has a small overlap with the accepted condition for which pension is being paid. It states that offsetting will continue to occur only in cases where compensation is paid for the same incapacity for which pension is being paid. The department stated that offsetting provisions are 'administered with the view not to manufacture an overlap in incapacity' and that, generally, it 'would consider that for discrete conditions to have an overlapping incapacity those injuries or diseases must at least affect the same system function'.⁵¹

5.62 The department gave the example of a person receiving pension in respect of incapacity from emphysema who receives lump sum compensation in respect of osteoarthritis of the knees. Both conditions could have similar or overlapping effects such as reducing the person's walking pace but would be not considered to be the same incapacity.⁵² This is because the conditions affect different system functions as understood in the assessment methodology contained in the GARP. The incapacity from the emphysema affects the person's cardio-respiratory system while the osteoarthritis affects the motor function of lower limbs (see Appendix 3 for further information and more examples).

5.63 The department also rejected the RSL's recommendations that only the portions of a compensation payment and a pension which relate to the same incapacity be offset. It argued the apportionment methodology proposed by the RSL was not always feasible and it was frequently impossible 'for medical practitioners to assess the relative contributions of different conditions, particularly where the symptoms of the conditions substantially overlap'.⁵³ It stated that 'this process is not a valid substitute for offsetting'.⁵⁴

50 Department of Veterans' Affairs, answer to written question on notice no. 1.3, received 5 August 2011, see Appendix 3.

51 Department of Veterans' Affairs, answer to written question on notice no. 1.4, received 5 August 2011, see Appendix 3.

52 Department of Veterans' Affairs, answer to written question on notice no. 1.4, received 5 August 2011, see Appendix 3.

53 Department of Veterans' Affairs, answer to written question on notice no. 1.5, received 5 August 2011, see Appendix 3.

54 Department of Veterans' Affairs, answer to written question on notice no. 1.5, received 5 August 2011, see Appendix 3.

5.64 The RSL based its concerns in regards to the proposed changes on the Full Federal Court's interpretation of the offsetting provisions in the Smith case. However, the department states that the decision of the court is:

limited in application to the particular circumstances of Mr Smith's case and is contrary to [the] way the offsetting provisions have been and are being administered in other cases.

The purpose of the proposed legislation is to prevent a person circumventing the intention of the legislation again in the future.⁵⁵

5.65 The department states that it has not been able to identify any other offset cases that reflect Mr Smith's particular circumstances.⁵⁶ It made clear that the proposed amendments will not change the operation of the offsetting provisions in any way but that the changes will 'remove confusion about the application of the Smith decision and ensure that the offsetting provisions continue to be administered as intended'.⁵⁷

Committee view

5.66 The committee notes the RSL's concerns in regards to the proposed amendments. Both the minister and the department have given assurances that the proposed amendments will not change the operation of the offsetting provisions. They state unambiguously that the proposed amendments simply clarify and affirm existing arrangements. The proposed amendments provide certainty as to how these provisions have been and will be administered.

5.67 Even so, the committee recognises that the RSL was concerned that, over time, the way in which these provisions have been administered could change. It suggests that the Explanatory Memorandum make clear that the current practices in regards to administering offsetting will remain the same.

5.68 The committee is concerned that the existing provisions in the GARP for taking into account the effect of non-service related injuries on a pension recipient's incapacity were not detailed in the Explanatory Memorandum. The committee believes that this aspect of the rate assessment methodology and the provisions for offsetting in the VEA are related. The committee is of the view that detail on chapter 19 of the GARP, the way it operates in relation to offsetting arrangements and the possible impacts on veterans arising from the interaction of these two different provisions under the VEA be detailed in the Explanatory Memorandum.

55 Department of Veterans' Affairs, answer to written question on notice no. 3.2, received 5 August 2011, see Appendix 3.

56 Department of Veterans' Affairs, answer to written question on notice no. 3.2, received 5 August 2011, see Appendix 3.

57 Department of Veterans' Affairs, answer to written question on notice no. 3.2 and introduction, received 5 August 2011, see Appendix 3.

Communication and information

5.69 In its 2003 inquiry into *Aspects of the Veterans' Entitlement Act 1986 and the Military Compensation Scheme*, the committee found that a number of recipients of compensation who had been affected by the offsetting arrangements had been disadvantaged as a result of 'maladministration, lack of advice, or incorrect advice'.⁵⁸ The committee recommended, at the time, that:

- comprehensive and expert information be given to potential recipients once claims have been accepted, detailing the MCRS lump sum and VE Act pension, with a complete cost schedule, including the rate of offset; and
- that this information should [be] provided to potential recipients before they are required to make a decision about whether to accept a lump sum or pension. It should also include any other likely payments that will impact on recipients future payments (for example, CPI increases).⁵⁹

5.70 The *Review of Military Compensation Arrangements Report*, released in March 2011, again noted that the complexities of offsetting arrangements make information difficult for many claimants to fully understand and that 'it is important that the advice given to potential claimants is comprehensive, accurate and clear'.⁶⁰ The review committee recommended that 'ongoing efforts' by DVA aimed at improving advice to clients regarding the effect of offsetting on their entitlements be continued.⁶¹

5.71 In its 2010–11 Portfolio Budget Statements, the department has undertaken to continue 'to improve the way veterans and their dependants communicate with the Department and will significantly develop its current online services and provide clients with more choice and convenience in the way they interact with the Department'.⁶²

5.72 In announcing the budget measure, the government also noted that it would 'improve the administration of offsetting cases through case manager training and enhanced systems support'.⁶³

58 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Aspects of the Veterans' Entitlements Act 1986 and the Military Compensation Scheme*, September 2003, p. 22.

59 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Aspects of the Veterans' Entitlements Act 1986 and the Military Compensation Scheme*, September 2003, p. 29.

60 Department of Veterans' Affairs, *Review of Military Compensation Arrangements Report*, February 2011, p. 32.

61 Department of Veterans' Affairs, *Review of Military Compensation Arrangements Report*, February 2011, p. 271.

62 Portfolio Budget Statements 2011–12, *Budget related paper no. 1.5B, Defence Portfolio (Department of Veterans' Affairs)*, p. 16.

63 Australian Government, *Budget Paper no. 2, Budget Measures 2010–11*, 'Part 2: Expense Measures, Veterans' Affairs', p. 327.

Committee view

5.73 The committee believes that the communication of clear and accurate information between the department and claimants is essential to minimise the stress and uncertainty faced by veterans and their families in making important financial decisions. The committee supports continued efforts by the department to develop the expertise of staff providing advice to claimants regarding offsetting and to ensuring accurate and accessible information is communicated to veterans and their families.

Keeping the ex-service community informed

5.74 In his second reading speech, the Minister stated that the budget measures in the bill:

...were the subject of wide consultation with the ex-service community. Post-budget briefings of heads of ex-service organisations, or ESOs, were held; an ex-services roundtable, including a separate briefing on the measures in this legislation, was held; PMAC, the Prime Ministerial Advisory Council, was briefed, and the ESO deputy commissioners in each state and territory discussed the issues with their ESO community. There was widespread discussion and consultation with the veteran community about the budget measures raised in the bill.⁶⁴

5.75 In answer to a question on notice on the consultation undertaken by DVA in regards to the legislation, the department stated that briefing sessions were held before and after the budget announcement as well as a separate briefing session on the details of the legislation with a roundtable of ex-services organisations.⁶⁵ These sessions were characterised as providing information on the proposed measures as opposed to seeking feedback or opinions on the changes and any possible amendments.

5.76 The department informed the committee that no concerns with the proposed legislation were raised at any of the briefings with ex-service organisations and that, furthermore, no correspondence has been received expressing concerns with the proposed legislation.⁶⁶ Departmental officials were satisfied that they had consulted adequately with the ex-service community.⁶⁷

5.77 On the other hand, the RSL had a different perspective. In its view there was little, if any genuine consultation.⁶⁸ It informed the committee that the department had

64 The Hon Warren Snowdon, Minister for Veterans' Affairs, Minister for Defence Science and Personnel, Minister for Indigenous Health, *House of Representatives Hansard*, 20 June 2011, p. 6479.

65 Department of Veterans' Affairs, answer to question on notice, 11 August 2011 (received 12 August 2011).

66 Department of Veterans' Affairs, answer to written question on notice no. 4.1, received 5 August 2011, see Appendix 3.

67 Ms Spiers, *Proof Committee Hansard*, 11 August 2011, p. 12.

68 RADM Doolan, *Proof Committee Hansard*, 11 August 2011, p. 2.

not consulted with it or its members in regards to the legislation. Rear Admiral Ken Doolan (Retired), RSL National President, suggested that the first RSL knew of the details of the legislation was at the pre-budget briefing.⁶⁹

Committee view

5.78 The committee is of the view that the department's consultative process could have allowed more time and opportunities for officials and the ex-service community to discuss the proposed changes with regard to the offsetting provisions. While DVA ensured the ex-service community was aware of the budget measures at the time they were announced, it did not provide a consultative process which enabled the community's representatives to assess the detail of the legislation, put their views, and suggest or advise on whether any changes might be considered.

5.79 Offsetting has long been an issue of concern amongst veterans and the committee believes that the department should have made a greater effort to engage with the ex-service community in the development of this measure.

Conclusion

5.80 The committee supports the measures contained in Schedules 1 and 3. The committee has focused its inquiry on Schedule 2 of the bill which relates to compensation offsetting, a longstanding contentious issue for veterans.

5.81 The committee notes the concerns of those in the ex-service community who believe that the proposed amendments are unnecessary, are too broad or will result in unintended consequences. The committee notes, however, that the amendments are intended only to clarify how the offsetting provisions have been administered to date, and are not intended to change the operation of these provisions in any way.

Recommendation

5.82 The committee recommends that the Senate pass the bill.

SENATOR THE HON URSULA STEPHENS
CHAIR

69 RADM Doolan, *Proof Committee Hansard*, 11 August 2011, p. 2.