Veterans' Entitlements Amendment Bill 2011 Coalition Senators' Dissenting Report

The *Veterans' Entitlements Amendment Bill 2011* seeks to implement three measures announced by the Gillard-Brown Labor Government in their 2011-12 Budget.

The Bill contains three schedules:

- Schedule One provides a $500/fortnight supplement to former Prisoners of War. The *Prisoner of War Recognition Supplement* is supported by the Coalition.
- Schedule Two 'clarifies' arrangements affecting compensation offsetting under the *Veterans' Entitlements Act 1986* (VE Act). Specifically, the Schedule seeks to amend the VE Act following the *Smith* case.
- Schedule Three rationalises temporary incapacity allowances. The Coalition supports Schedule Three.

The Bill passed the House of Representatives on 20 June 2011 and the Coalition did not oppose its passage and noted concerns with the application of Schedule 2, reserving the right to amend the legislation pending the outcome of a Senate Inquiry into Schedule 2. That Inquiry has sought submissions from the veteran and ex-service community and held a public hearing.

In relation to Schedule 2 of the Bill, this Dissenting Report notes as follows:

It is clear from the submissions received and the evidence given at the public hearing that this is a complex area of Commonwealth policy. As a consequence, it is incumbent upon the Parliament to carefully scrutinise complex changes to already complex legislation.

It is not clear, however, that these amendments are in the best interests of veterans and ex-service people. As a consequence, the Coalition does not believe the changes are justified and will seek to oppose Schedule 2 in the Senate.

The Coalition will oppose Schedule 2 of the *Veterans' Entitlements Amendment Bill 2011* on the following grounds:

- The Government has failed to fully justify the need for the change;
- There are already established mechanisms under the *Veterans' Entitlements Act 1986* and the *Guide to the Assessment of Rates of Veterans' Pensions (GARP)*, which the Department has acknowledged, which provide sufficient scope to achieve this policy objective;
- The Government did not consult with the ex-service community prior to incorporating these amendments into the 2011-12 Budget; and
- The Government believes that no one will be negatively impacted by the proposed amendments, but will only update computer software to confirm this after changing the legislation.

The Coalition accepts the principle of compensation offsetting and supports the principles underpinning the way the present system operates. The Coalition has already raised concerns about the method used to offset payments under the *Military Rehabilitation and Compensation Act 2004*, and notes that these have been addressed

in the Campbell Review of Military Compensation Arrangements, and notes that this is beyond the scope of this Inquiry and of this Bill.

In accepting the principle of offsetting, however, the Coalition believes that the Parliament's initial *intent* was for offsetting only to apply with respect to dual/multi eligibility for compensation under Commonwealth compensation schemes. It is not clear that Parliament's original intention was to extend this to third party compensation, which the Department advises these amendments may have the ability to do.

The Coalition is concerned that, should these amendments pass, 'the best possible outcome' for the veteran cannot be guaranteed. The Coalition is concerned that the Repatriation Commission has indicated it will need to provide clarifying guidelines or instructions to Delegates to ensure the 'intent' of the amendments is followed. This is not a desirable outcome.

Amendments not fully justified

In the submission from the *Department of Veterans' Affairs* to the Senate on this Bill, the Department writes:

> *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 as to prevent duplicate compensation being paid to veterans for the same incapacity.*

Further, the Department writes:

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

The Department has been unable to justify the reasons for the change.

The Department has identified the outcome of the *Commonwealth of Australia v Smith (2009)* case as the justification for seeking 'clarification' of the legislation. But, in doing so, the Department has identified the 'unique' nature of Mr Smith's case and its limited application to other clients of the Department of Veterans' Affairs. In fact, the Department has indicated that no other client fits the profile of Mr Smith's case:

> *"...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**." (emphasis added)*
> (FADT Legislation Committee Proof Hansard, 11 August 2011, p9)

During evidence to the Committee, the Department said that, of 118,000 veteran disability pensioners (under the VE Act), 10,400 compensation pensions were 'offset' by an average of $99 per fortnight. Further, of this 10,400 pensioners, only 9,450 were disability pensioners, with the balance being war widow(er)s.

The Coalition does not believe that the *Smith* case is a Trojan Horse that will expose the Commonwealth to additional financial liability. The Department's own figures show that

the circumstances of Mr Smith's case are unique and, on the basis that these amendments will not apply to Mr Smith, there is no justification to amend the legislation simply on the basis of the Commonwealth losing the case against Mr Smith.

Established mechanisms under the Act

On 20 June 2011, the Minister for Veterans' Affairs told the House of Representatives that:

> *The compensation offsetting provisions, despite the comments which have been made, are not about changing the current arrangements; they are about ensuring that the principles of offsetting, which have been in place since 1973, are clear and unambiguous. These measures, quite simply, maintain the status quo. (...) These amendments do not deny or change any existing veterans' entitlements. Let us be very clear about it: these amendments simply clarify and affirm existing arrangements that have been operating under all governments since 1973.*
> (House of Representatives Hansard, Monday 20 June 2011, pp6478-9)

The Minister claims that the amendments do not do anything, yet the submissions of ex-service organisations make it clear that this is not the case. The Returned and Services League of Australia (RSL), for example, points to the potential for 'double-dipping' by the Commonwealth. The RSL describes 'double dipping' as:

> *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 apportions 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.*
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> *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.*
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> (FADT Legislation Committee Proof Hansard, 11 August 2011, pp2-3)

The Department has advised that the Repatriation Commission intends to provide 'clarifying advice' to Delegates in the interpretation of the law, post-Parliamentary approval of the legislation.

Senator WRIGHT: *...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: *... Our view is that the potential for this can be satisfactorily addressed by a commission policy document.*

(FADT Legislation Committee Proof Hansard, 11 August 2011, p11)

On the other hand, the RSL states in their evidence to the committee:

CHAIR: *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. (...) 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.*

(...)

RADM Doolan: *(...), 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.*

(FADT Legislation Committee Proof Hansard, 11 August 2011, p3)

The Coalition believes the current regulations support the intention of the legislation. Further, the need to issue 'clarifying' instructions for 'clarifying' amendments is not a desirable outcome.

The Coalition commends the RSL's analysis of the GARP arrangements, arrangements which were also accepted by the Department of Veterans' Affairs.

The submission from the RSL notes this point:

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

On the basis that there is already provision for offsetting under the Act and the GARP, the Coalition does not believe there is a reason to clarify the operation of the law.

Consultation

The Coalition recognises the close relationship between the Department of Veterans' Affairs and the leadership of Australia's veteran and ex-service community organisations.

However, the admission by the Department that they did not conduct detailed consultation with the ex-service community is troubling for the Coalition.

The Department admitted to holding an 'information briefing' with national ex-service organisation leaders on the day of the Federal Budget. This confidential briefing provides information and advice about measures contained in the Budget. It is not designed as a 'feedback' session, but an information session only.

The Coalition is disappointed that this measure, which should not be considered a 'budget' measure, did not attract greater consultation with the veteran and ex-service community. The ex-service community has known of the outcome of the Smith case for some time. Further, the Department refers to the Smith case on page 72 of the 2009-10 Annual Report. In the Annual Report, the Department states:

> Commonwealth vs Smith. *This Full Federal Court matter considered the operation of compensation offsetting provisions in the case of Mr Smith. The court held that these provisions operate in respect of the same injury or disease and not the same incapacity but also commented on the peculiar facts of Mr Smith's case. There remain different views on the extent and application of the Smith decision. Work continues on clarifying the operation of the law in light of this decision.*

The decision in Smith was made on 16 December 2009. The Annual Report was tabled in October 2010. These legislative amendments were tabled in the House of Representatives on 1 June 2011, after being 'announced' in the Budget on 10 May 2011. The Department, and the Government, had ample time to discuss the outcome of the Smith decision with the veteran and ex-service community, to advise them about the nature of the legislative changes they viewed as being required prior to tabling the amendments in the Parliament (or including them as a Schedule to another, separate, Bill). That they chose not to do so is regrettable.

The Coalition is deeply disappointed by the Department of Veterans' Affairs response of 12 August 2011 to questions taken on notice during the public hearing about consultation. If nothing else, the response proves that the Department did not hold consultations on the proposed legislation *prior* to the tabling of that legislation in the House of Representatives, or the announcement of the measures in the Budget. The letter even states that discussion of offsetting with the Operational Working Party and the Prime Ministerial Advisory Council on Ex-Service Matters (PMAC) about offsetting involved, firstly, discussions about the costs of addressing compensation offsetting under the *Military Rehabilitation and Compensation Act 2004*, and then of the matters under discussion by the Campbell Review of Military Compensation Arrangements. The legislative amendments were not discussed until 4-5 July 2011, more than one month after the legislation was tabled and after the Coalition referred this provision to this Senate Inquiry.

Notwithstanding the oft-repeated assurances that the changes 'will have no impact on the application of Departmental policy regarding offsetting rules that have been applied since 1973', the Department's apparent unwillingness to discuss these changes openly is a cause for concern.

Potential negative side effects

On page 327 of Budget Paper No. 2, the Government states:

> *Compensation offsetting under the Veterans' Entitlements Act 1986*
> *The Government will clarify offsetting rules for veteran compensation under the veterans' Entitlements Act 1986 (VEA), at a cost of $2.7 million over four years. Compensation offsetting under the VEA involves a reduction in the level of a disability pension where another compensation payment has been made for the same incapacity. This clarification will ensure that offsetting continues to be applied on the basis of a person's level of incapacity.*
> *The Department of Veterans' Affairs will also improve the administration of offsetting cases through case manager training and enhanced systems support. The cost of this proposal will be met from within the existing resources of the Department of Veterans' Affairs.*

This statement in Budget Paper No 2 is ambiguous and is made no clearer by evidence given at the hearing.

When asked about the cost of this initiative, the Department made the following statements:

Senator FAWCETT:	*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.*
(...)	
Senator FAWCETT:	*You are looking to spend $2.7 million to automate an area, although you do not believe that 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 cases, 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.*

(FADT Legislation Committee Proof Hansard, 11 August 2011, pp15-16)

It remains unclear why the Government needs to use the Smith case to update IT systems inside the Department – the Full Federal Court did not find that DVA systems were unacceptable. If the Department believes that IT systems are inadequate, it should address this problem independently of changes to legislation.

The Coalition would prefer the Department fully investigated the scope of the problem they seek to address, through the use of up-to-date IT systems, before changes to the legislation in this area are made.

Conclusion

The Coalition is disappointed that the Gillard-Brown Labor Government has chosen to include this complex, technical and potentially punitive measure in a Bill with two other measures designed to provide greater amenity to the veteran and ex-service community.

The Coalition supports the establishment of a Prisoner of War Recognition (POWR) Supplement. The POWR Supplement builds on lump-sum payments made by the previous Coalition government to former Prisoners of War. This is a welcome measure which the Coalition fully endorses.

Further, rationalisation of temporary incapacity allowances will ensure assistance under the VE Act continues to be relevant to the contemporary needs of the veteran and ex-service community. This change recognises a societal shift in the way medical services are provided to people, particularly where short periods of incapacity or convalescence is required. The Coalition supports these changes and notes the support of the veteran community for these changes.

However, the Coalition is not comfortable with the changes proposed by Schedule 2 of the Bill. This Inquiry process has failed to answer the concerns of the veteran and ex-service community, and of the Coalition.

The RSL succinctly summed up the issue of 'offsetting' during the hearing. Mr Hodges stated:

> *'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.
(FADT Legislation Committee Proof Hansard, 11 August 2011, p3)

The Coalition agrees.

The amendments give the Repatriation Commission greater power than presently exists to determine the 'offset' of compensation payments made by the Commonwealth. The Government has not been able to adequately explain the need for the change, but has instead sought to use the change to make other systems adjustments which, by rights, should be done before legislative change is sought.

Notwithstanding the Department's intention to provide Delegates of the Repatriation Commission with interpretive 'guidelines' about the 'intention' of the amendments presently before the Parliament, the Coalition does not believe this is in the best interests of the veteran community. The Coalition believes the present measures, which the RSL argues have stood the test of time well, are adequate.

The Coalition acknowledges the Department's concerns with the outcome of the Smith case. The facts of Mr Smith's case are unique and the Department has not shown that these amendments are necessary to prevent future similar claims. By the Department's own figures, of 200 cases closely examined, not one comes close to the particular circumstances of Mr Smith's case.

Further, the Coalition is disappointed with the Department's lack of consultation with the veteran and ex-service community about the measures proposed. 'Information sessions' are not a substitute for meaningful dialogue and consultation, which seeks feedback and input into legislative changes. The Coalition recognises the significant level of understanding in the veteran and ex-service community about legislation affecting veterans and their families; the Department is well placed to use this significant resource to meaningfully seek advice on proposed legislative changes.

On the basis of the veteran and ex-service community's ongoing opposition to the Schedule, the Coalition will recommend Schedule 2 of the Bill be omitted. Should the Government feel this amendment is critical to the operation of the VE Act, they should bring the Schedule back in a new Bill of its own following genuine consultation and feedback with the veteran and ex-service community.

RECOMMENDATION:

That Schedule 2 of the *Veterans' Entitlements Amendment Bill 2011* be omitted from the Bill.

SENATOR ALAN EGGLESTON
DEPUTY CHAIR