The Senate

Foreign Affairs, Defence and Trade Legislation Committee

Veterans' Entitlements Amendment Bill 2011 [Provisions]

August 2011

ISBN 978-1-74229-501-5

Printed by the Senate Printing Unit, Parliament House, Canberra.

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Acronyms and Abbreviations

AAT	Administrative Appeals Tribunal
ADF	Australian Defence Force
GARP	Guide to the Assessment of Rates of Veterans' Pensions
LOE	Loss of Earnings Allowance
MRCA	Military Rehabilitation and Compensation Act 2004
POW	Prisoners of War
PTSD	Post Traumatic Stress Disorder
RSL	Returned and Services League Ltd.
SRCA	Safety, Rehabilitation and Compensation Act 1988
T&PI	Totally and Permanently Incapacitated
TI	Temporary Incapacity Allowance
VEA	Veterans' Entitlement Act 1986

Chapter 1

Introduction

Background

1.1 On 1 June 2011, the Veterans' Entitlements Amendment Bill 2011 (the bill) was introduced into the House of Representatives. By resolution of the Senate, the provisions of the bill were referred to the Foreign Affairs, Defence and Trade Legislation Committee on 15 June 2011 for inquiry and report by 16 August 2011.

Purpose of the bill

1.2 The bill has three schedules which amend the *Veterans' Entitlement Act 1986* (VEA).

- Schedule 1—creates a prisoner of war recognition supplement. It defines who is eligible for this supplement and sets down the rate of payment and the procedures for claiming and determining eligibility for the supplement.
- Schedule 2—clarifies and affirms the original intention of the compensation offsetting policy in relation to disability pensions, it is intended to prevent double payments of compensation for the same incapacity.[1]
- Schedule 3—rationalises temporary incapacity allowance and loss of earnings allowance through the abolition of temporary incapacity allowance with effect from 20 September 2011. Thereafter, veterans will be entitled to seek access to the loss-of-earnings allowance.

1.3 The committee notes that, when recommending an inquiry into the provisions of the bill, the Selection of Bills Committee focused on Schedule 2. It stated that the purpose for the inquiry would be 'to seek further information about the changes proposed by Schedule 2 and to enable feedback from the veteran and ex-service community about the changes'.[2] This approach is consistent with that of the opposition which flagged its intention to refer the bill for inquiry in order to afford the ex-service community 'the opportunity to have a say and provide input into the proposed changes'.[3]

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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 *Selection of Bills Committee, Report No. 7 of 2011*, 15 June 2011, Appendix 3.

3 See second reading speeches: Mr Stuart Robert, *House of Representatives Hansard*, 16 June 2011, p. 6342; Mrs Karen Andrews, *House of Representatives Hansard*, 16 June 2011, p. 6352; Mrs Natasha Griggs, *House of Representatives Hansard*, 20 June 2011, p. 6469; Mr Michael McCormack, *House of Representatives Hansard*, 20 June 2011, p. 6474.

Conduct of the inquiry

1.4 The committee advertised the inquiry on its website and in the *Australian* on 22 June 2011 and 6 July 2011. It wrote to relevant ministers and departments calling for written submissions and also contacted numerous ex-service organisations. The committee received five submissions which are listed at Appendix 1.

1.5 The committee considered the submissions and decided to hold a public hearing on 11 August 2011 in order to further examine the concerns raised by the Returned and Services League (RSL) in regards to Schedule 2. The witnesses who appeared are listed in Appendix 2. Prior to the public hearing, the committee lodged a series of written questions with the Department of Veterans' Affairs on 27 July 2011, intended to clarify some aspects of the bill. Answers were provided to the committee on 5 August 2011 and are included in Appendix 3.

1.6 The report is divided into two sections. The first is a brief section on Schedules 1 and 3. Neither measure attracted substantial criticism. Indeed, Schedule 1 had overwhelming support from both sides in the House of Representatives and by the ex-service community. With regard to Schedule 3, most of those who commented on the proposal to remove the temporary incapacity allowance understood and supported the logic behind this measure. Compensation offsetting, however, has for some years been a contentious issue for veterans. In light of this history and the main reason for establishing the inquiry, the committee considers carefully the evidence before it on this matter.

Previous reviews

1.7 A number of significant studies of veterans' entitlements have been undertaken over recent years. In this report the committee draws on the findings of two such comprehensive reviews:

- *Report of the Review of Veterans' Entitlements* (Clarke Review), January 2003; and
- *Review of Military Compensation Arrangements Report*, released 18 March 2011.

1.8 In 2003, the Senate Foreign Affairs, Defence and Trade Legislation Committee also inquired into aspects of the VEA and the Military Compensation Scheme. This inquiry focused on the dual eligibility arrangements and the offsetting calculations applied to veterans and ex-service personnel who receive a pension and a benefit by way of lump sum under the VEA and SRCA.

Acknowledgements

1.9 The committee thanks all those who assisted with the inquiry.

Chapter 2

Prisoner of war supplement

2.1 In its Budget statement, the government announced that it would provide $27.8 million over five years to recognise the severe hardship and suffering experienced by former prisoners of war (POWs) of Japan and Europe from the Second World War, and former POWs from the Korean War.

2.2 Due to commence on 20 September 2011, this measure, if passed, will introduce a Prisoner of War Recognition Supplement of $500 per fortnight for eligible former POWs. This new, non-taxable payment will complement an existing range of special benefits available to former POWs and be made to former military personnel and civilians alike who were interned as prisoners. All known ex-prisoners will receive the payment automatically the first being paid from 6 October 2011.[1] It is not to be counted as assessable income for the purposes of means testing of other government payments administered by the Department of Veterans' Affairs and Centrelink.[2] The payment will also be indexed annually in line with the consumer price index.[3]

2.3 According to the Budget statement, the capital cost of $0.5 million for this measure will be met from within the existing resources of the Department of Veterans' Affairs.

Background

2.4 This is not the first time that the government has provided assistance to Australia's ex-prisoners of war in recent times. Since World War II, the community and successive Australian governments have recognised that veterans who were POWs deserve special benefits to assist the repatriated POW and his/her carer in the provision of care.

2.5 In 2001, all former Japanese POWs received a $25,000 tax-free ex gratia payment from the Australian Government. The government made this payment in recognition of the unique suffering and hardships that POWS endured as a group

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1 See second reading speeches: Mr Michael McCormack, *House of Representatives Hansard*, 20 June 2011, p. 6474; 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. 6478.

2 Mrs Natasha Griggs, *House of Representatives Hansard*, 20 June 2011, p. 6469.

3 Mr Rob Mitchell, *House of Representatives Hansard*, 16 June 2011, p. 6345.

under the Japanese over and above those experienced by other POWs. The payment was not intended as an additional benefit to all POWs.[4]

2.6 During its inquiry, the Review of Veterans' Entitlements (the Clarke review) received submissions from former prisoners of war held captive in Europe (POWs(E)) and in Korea (POWs(K)) and their war widows/war widowers. The submissions argued that these POWs should also receive compensation payments on the basis that they experienced similar levels of deprivation and hardship.[5] In their view, the failure to recognise the suffering of POWs(E) and POWs(K) was inequitable and they did not receive the same level of public attention and sympathy.[6]

2.7 In January 2003, after a comprehensive examination of veterans' entitlements, the report of the Clarke review found significant evidence that POWs(K) as a group did experience treatment and circumstances similar to POWs(J). It formed the view that an extension of the $25,000 one-off payment would be consistent with the government's original intention to make a one-off payment to POWs(J). As a consequence, it recommended that an ex-gratia payment be extended to all surviving Australian POWs held captive by the North Korean Forces during the Korean War and to the surviving widows of those who have died.

2.8 Soon after, former Korean POWs received a similar payment to that granted to former Japanese POWs.

2.9 With regard to POWs held captive in Europe, the Clarke review found that their experiences could not equate with those of POWs(J) and considered that a one-off payment of $25,000 would not fulfil the government's intention behind the payment to POWs(J). Consistent with this view, the review recommended that:

> …an ex-gratia payment should not be made to all surviving Australian POWs(E), civilian detainees and internees who were held by the German-Italian forces during World War II, or to their surviving widow/ers.[7]

2.10 Nonetheless, in 2007 the ex-gratia payment was extended to former POWs interned in Europe during World War II.[8]

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4 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 14.

5 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 13.

6 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 2, p. 417.

7 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 14.

2.11 POWs and their families are also entitled to other benefits including residential aged care packages, which provide care similar to low-care residential facilities in the veteran's home, fees for extended aged care at home, which provide care similar to high-care residential facilities in the veteran's home, automatic gold card and funeral benefits, and granting of war widow/war widowers pension to the partner on the death of the former POW.[9]

Eligibility for, and payment of, POW supplement

2.12 All former POWs who are still alive on 20 September will be entitled to receive the payment. According to DVA the payment is 'not dependent on the person having suffered a war-caused injury or disease and is not considered compensation. The department estimates that up to 900 former civilian and veteran POWs who are either residing in Australia or overseas and are alive on 20 September 2011 will receive the initial payment.[10] To be eligible for the supplement, a civilian must have been domiciled in Australia immediately before their internment. This provision is consistent with those governing the ex-gratia payments. The department noted that domiciled in Australia has not the same meaning as 'resident in Australia' and generally a person's domicile 'is the place that they considered to be "home"'.

2.13 The majority of those who are eligible are already known to the department as a result of the $25,000 ex-gratia payment and will be paid the supplement automatically. The department recognises, however, that it may not be aware of all former POWs entitled to the supplement. Those unknown to the department can apply and be assessed on the eligibility criteria. The department informed the committee that a number of new claims have been received following the budget announcement of the supplement. It explained that those POWs previously unknown to the department and who are eligible will also receive the lump sum of $25,000 in addition to the supplement.

2.14 Although war widow or widowers of former POWs were entitled to the lump sum payment of $25,000, they will not be eligible for the POW Supplement. Also, those imprisoned or detained during a conflict, period of hostilities or peacekeeping missions other than World War II or the Korean War are not eligible for the supplement. The payment of the supplement is intended to recognise the severe hardships and deprivations endured by the POWs in World War II and the Korean War.

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8 The Hon Pat Farmer, Parliamentary Secretary to the Minister for Education, Science and Training, *House of Representatives Hansard*, 9 May 2007, p. 1. See also Second reading speeches: Mr Stuart Robert, *House of Representatives Hansard*, 16 June 2011, p. 6341; Mrs Natasha Griggs, *House of Representatives Hansard*, 20 June 2011, p. 6469; Mr Michael McCormack, *House of Representatives Hansard*, 20 June 2011, p. 6474.

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

10 The Hon Justine Elliott, Parliamentary Secretary for Trade, *House of Representatives Hansard*, 20 June 2011, p. 6466.

2.15 As noted earlier, the supplement of $500 per fortnight would be made in addition to the payments and benefits currently received by former POWs from the Commonwealth. The payment will not be an income support payment and not subject to the income test. The payment will not be subject to the offsetting provisions of the VEA.

Support for the measure

2.16 This measure had strong bipartisan support in the House of Representatives with members from both sides commending the supplement.[11] Submissions to the inquiry raised no concerns with this Schedule.

2.17 The committee joins with the ex-service community in welcoming this measure.

11 See second reading speeches: Mr Stuart Robert, *House of Representatives Hansard*, 16 June 2011, p. 6341; the Hon Bruce Scott, *House of Representatives Hansard*, 16 June 2011, p. 6355.

Chapter 3

Incapacity Allowance and Loss of Earnings Allowance

3.1 The changes introduced in Schedule 3 are intended to rationalise the Temporary Incapacity (TI) Allowance and Loss of Earnings (LOE) Allowance. In effect the amendments will abolish the TI Allowance from 20 September 2011. This measure is designed to continue 'the government's commitment to streamlining and enhancing services and support to our veterans and members and their families'.[1]

3.2 Currently, both allowances are paid under the VEA for a temporary inability to work due to a war or defence caused condition. They provide similar compensation, though 'the loss of earnings allowance provides compensation to a broader group but is restricted to veterans who experience an actual loss'.[2]

The temporary incapacity allowance

3.3 The TI Allowance is payable to an eligible veteran who has undergone hospital or other institutional treatment and has been off work for more than 28 days. The 28 days commences from the date of hospitalisation and may include post-discharge out-patient treatment or post-discharge medically recommended rest and recuperation.[3]

3.4 Under this provision, there is no requirement that income is actually lost, but the veteran must have been prevented from undertaking his or her usual remunerative work for the whole period.

3.5 Temporary incapacity allowance is paid at a rate that is the difference between disability pension already received and the special (totally and permanently incapacitated—T&PI) rate. Payment of loss of earnings allowance for this period will affect the amount of temporary incapacity allowance. If any lump sum permanent impairment compensation has been received under the *Safety, Rehabilitation and Compensation Act 1988* the payment of temporary incapacity allowance will be

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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. 6478.

2 Mrs Karen Andrews, *House of Representatives Hansard*, 16 June 2011, pp. 6352–6353.

3 DVA Factsheet, DP77, *Veterans' Entitlements Act 1986* (VEA), Temporary Incapacity Allowance http://factsheets.dva.gov.au/factsheets/documents/DP77%20Temporary%20Incapacity%20Allowance.htm (accessed 29 July 2011)

reduced. This applies to lump sum compensation for any incapacity, irrespective of whether the incapacity is included in the assessment of the allowance.[4]

3.6 Payment of the allowance will also be affected by any entitlement to weekly incapacity payments under the *Military Rehabilitation and Compensation Act 2004*.

The loss of earnings allowance

3.7 Loss of earnings allowance compensates an eligible veteran for salary, wages or earnings lost due to absence from work for treatment of war or defence caused disabilities or to attend certain appointments. It may also compensate the veteran's authorised representative or attendant who accompanies the veteran at the time of receiving treatment or attending the appointments.[5]

3.8 Loss of earnings allowance can be paid where a veteran:

- receives treatment for a war or defence-caused disability (including waiting for the supply or repair of an artificial limb or other surgical aid);
- has used part or all of employer provided sick leave for a war or defence-caused disability, and now has no benefit to cover an absence for another illness;
- attends an appointment arranged by the department for the investigation of a claim for disability pension; or
- has an authorised attendant to provide assistance when obtaining treatment or another person acting on behalf of the veteran in relation to the veteran's claim for disability pension, who loses salary, wages or earnings.[6]

The above situations must result in a loss of earnings.[7]

3.9 The amount of loss of earnings allowance payable is: the difference between the special rate (T&PI) and the veteran's present disability pension, or the amount of

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4 DVA Factsheet, DP77, *Veterans' Entitlements Act 1986* (VEA), Temporary Incapacity Allowance http://factsheets.dva.gov.au/factsheets/documents/DP77%20Temporary%20Incapacity%20Allowance.htm (accessed 27 July 2011)

5 DVA Factsheet, DP75, *Veterans' Entitlements Act 1986* (VEA), Loss of Earnings Allowance, http://factsheets.dva.gov.au/factsheets/documents/DP75%20Loss%20of%20Earnings%20Allowance.htm (accessed 27 July 2011)

6 DVA Factsheet, DP75, *Veterans' Entitlements Act 1986* (VEA), Loss of Earnings Allowance, http://factsheets.dva.gov.au/factsheets/documents/DP75%20Loss%20of%20Earnings%20Allowance.htm (accessed 27 July 2011)

7 DVA Factsheet, DP75, *Veterans' Entitlements Act 1986* (VEA), Loss of Earnings Allowance, http://factsheets.dva.gov.au/factsheets/documents/DP75%20Loss%20of%20Earnings%20Allowance.htm (accessed 27 July 2011)

salary, wages or earnings actually lost (including loadings or other allowances that would have been payable); whichever is the lesser amount.

3.10 Applications that result in the payment of loss of earnings allowance will be reduced if any lump sum permanent impairment compensation has been received under the *Safety, Rehabilitation and Compensation Act 1988*. The same rule applies to lump sum compensation for any incapacity, irrespective of whether the incapacity is included in the assessment of the allowance.

3.11 The maximum amount of compensation that an eligible veteran can receive under either one or both of these allowances is equivalent to the special rate (T&PI) of disability pension.

3.12 From 20 September 2011 eligible veterans will have access to the LOE Allowance only. Thus, payments of temporary incapacity allowance will cease from this date with future payments made through the LOE Allowance. According to the Minister:

> This measure has no impact on a veteran's or member's existing disability pension payment. From 20 September 2011, all eligible veterans and members in this situation will be assessed consistently against the criteria for loss-of-earnings allowance.[8]

3.13 The change in arrangements will simplify the assessment of eligibility for payments and better target compensation expenditure. According to the government, this 'provides greater simplicity for clients in understanding their entitlements'.[9] The department explained:

> In order to receive the LOE Allowance, the veteran or member must have experienced some loss of earnings, which is not a requirement for TIA. Veterans or members who do not suffer a loss of earnings are not eligible to receive the loss of earnings allowance.[10]

3.14 Approximately 200 veterans or members received TI Allowance in the last 12 months. Those receiving TI Allowance that are not eligible for the LOE Allowance from 20 September 2011 will not receive any allowance as they have not suffered a loss of earnings during their temporary incapacity. Any veteran on TI Allowance at that time will need to apply for LOE allowance.

3.15 There are transitional provisions whereby veterans and members will be able to claim TI Allowance within 12 months of the commencement of the treatment, if the

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8 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. 6478.

9 Australian Government, *Budget Paper no. 2, Budget Measures 2010–11*, 'Part 2: Expense Measures, Veterans' Affairs', p. 330.

10 *Submission* 2, p. 7.

treatment period commenced prior to 20 September 2011. The department explained further that:

> Transitional provisions will also mean that veterans and members may be eligible for TIA for any period of treatment that commences in the four weeks prior to 20 September 2011, where the treatment period would extend beyond four weeks, they would still receive TIA for the period up to and including 19 September 2011.[11]

3.16 Although not opposed to 'this rationalisation, the opposition called on the government to ensure the changes are appropriately and effectively communicated to the veterans and ex-service community'.[12] More broadly, the committee considers the importance of keeping veterans informed about entitlements and changes to policy or procedures later in this report.

3.17 The bill 'will remove the current overlap in the allowances paid to veterans and members who are unable to work due to episodes of medical treatment and recuperation for war or defence caused injuries or diseases'.[13]

3.18 No concerns were raised about this measure during the committee's inquiry.

11 *Submission* 2, p. 8.

12 See Second reading speeches: Mrs Natasha Griggs, *House of Representatives Hansard*, 20 June 2011, p. 6469; and Mr Michael McCormack, *House of Representatives Hansard*, 20 June 2011, p. 6474.

13 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. 6478.

Chapter 4

The principle underpinning compensation offsetting

4.1 The main reason for this inquiry is to better understand the offsetting of compensation arrangements under the legislation and to explore fully whether there are any unintended consequences or any issues arising from the proposed changes that need further consideration.[1]

4.2 The main stated purpose of Schedule 2 is to clarify offsetting rules for veteran compensation under the *Veterans' Entitlement Act 1986* (VEA). The measure will cost $2.7 million over four years, to be met from within the existing resources of DVA.[2] 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 is intended to ensure that offsetting continues to be applied on the basis of a person's level of incapacity. Mrs Andrews explained:

> Currently, under Australia's repatriation system, compensation is paid for incapacity, not for a specific injury. These amendments have come about in response to the ruling of the full Federal Court in the case of the Commonwealth of Australia v Smith in 2009. In essence, the court found that the facts of Mr Smith's case meant that the Repatriation Commission's determination to offset his compensation under each scheme, in line with the principle of compensation offsetting, was inappropriate. Therefore, the full Federal Court determined that Mr Smith's separate incapacities should be separately compensated because they were different injuries with different incapacities.[3]

4.3 The Explanatory Memorandum noted that the majority of compensation offsetting cases arise from an entitlement under the VEA and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) and their predecessors, for the same incapacity. Compensation from other sources, including third party insurance and common law cases may also be subject to compensation offsetting under the VEA.[4]

Relevant legislation—VEA and SRCA

4.4 Schedule 2 amends the *Veterans' Entitlement Act 1986* (VEA). The roots of this legislation reach back to the *Australian Soldiers' Repatriation Act 1917* which among other things, provided for benefits and assistance to discharged servicemen;

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1 Mr Stuart Robert, *House of Representatives Hansard*, 16 June 2011, p. 6342.

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

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

4 Explanatory Memorandum, p. 8.

children under 18 of the deceased or incapacitated; and to widows in special circumstances. This legislation was repealed by the *Australian Soldiers' Repatriation Act 1920* which expanded the entitlement for pensions providing cover in respect of death or incapacity resulting from any incident occurring during the period of service. It also introduced the concept of a 'special rate' pension for those totally and permanently incapacitated. Over the decades, it was amended approximately 80 times before being replaced by the VEA in 1986.[5] The VEA has also undergone many changes since then.

4.5 In this chapter, the committee also refers to the *Safety, Rehabilitation and Compensation Act 1988* (SRCA). Under its predecessors, the *Commonwealth Employees' Compensation Act 1930* and later *the Compensation (Commonwealth Employees Act) 1971*, ADF members were entitled to compensation in respect of periods of service not covered by deployments to conflicts such as Korea or Vietnam. The SRCA provides the legislative basis for the Commonwealth Government's workers' compensation arrangements and provides for the compensation and rehabilitation of employees who are injured in the course of their employment. The legislation covers Commonwealth and ACT Public Service employees and includes members of the ADF.[6]

Background to offsetting

4.6 Before the early 1970s, there were effectively two separate compensation systems running in parallel under the repatriation and compensation arrangements for ADF members. One applied to veterans of overseas conflicts and the other to members on peacetime service. Thus, warlike and non-warlike service ('operational service') were covered under the repatriation system and peacetime service in Australia came under the Commonwealth employees compensation system.[7]

4.7 This system changed in 1973 when serving members with certain peacetime service became eligible for benefits under the *Australian Soldiers' Repatriation Act 1920* (replaced by the VEA).[8] At that time, they also retained eligibility under the *Compensation (Government Employees) Act 1971–1973* (replaced by the SRCA). This development created a situation of dual entitlement for incapacities relating to defence service. As a consequence, provisions were included in the Repatriation Act to avoid the payment of double compensation by the Commonwealth. These provisions were designed to offset payments made under the Compensation (Government Employees)

5 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, pp. 81–91.

6 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 3, p. 576.

7 *Submission* 2, p. 3.

8 DVA explained that this change was intended 'to encourage additional personnel to join the ADF following the cessation of national service'. *Submission* 2, p. 4.

Act against entitlements under the Repatriation Act to ensure that an individual could only be compensated once for service-related incapacity.

4.8 According to the RSL these offsetting provisions applied only 'to disability pensions paid in respect of incapacity from disabilities arising out of "defence service"'.[9] They did not apply to pensions in respect of incapacities from disabilities arising out of 'war service', 'special service' or 'Malayan service' (collectively known under the VEA, as 'operational service').[10] Offsetting provisions were included in the VEA when it replaced the Repatriation Act in 1986.

4.9 In 1994, the enactment of the *Military Compensation Act 1994* removed dual eligibility, under the VEA and SCRA, for ADF members rendering peacetime service. There were some exceptions.[11] The Act, however, extended compensation coverage under the SRCA from peacetime defence service only to include operational service. This extension resulted again in dual eligibility under the VEA and SRCA. DVA explained that, in response, 'identical offsetting provisions were introduced for cases where otherwise duplicate compensation would have been paid'.[12]

4.10 The RSL also noted that the changes to legislation in 1994 allowed veterans who rendered operational service after April 1994 to make compensation claims under the Military Compensation Scheme in the SRCA, as well as under the VEA. It explained:

> Taking advantage of consequential requirements of that amendment, the Act was amended in a way that further extended offsetting of disability pensions for any compensation received in respect of a war-caused injury or disease after that date, even if it related to operational service for which claims could not be made under SCRA.[13]

4.11 Dual eligibility under the two Acts continued until the commencement of the *Military Rehabilitation and Compensation Act 2004* in July 2004 which provides compensation for all service-related injuries, diseases and deaths, related to either peacetime or operational service occurring after 20 June 2004.

4.12 The Explanatory Memorandum stated that since compensation offsetting was first introduced in 1973, it has applied 'on the basis of the same incapacity, irrespective of whether or not a common injury or disease exists'. The VEA defines 'incapacity' as the 'effects of that injury or disease and not a reference to the injury or disease itself'.[14]

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

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

11 *Submission* 2, p. 4.

12 *Submission* 2, p. 4.

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

14 Explanatory Memorandum, p. 9.

The purpose of compensation offsetting

4.13 Compensation offsetting is a longstanding practice under Australia's repatriation system and rests on the fundamental principle that payments of compensation are for incapacity not for a specific injury. The Department of Veterans' Affairs (DVA) submitted that:

> The policy intention of the offsetting provisions has always been to offset where a person is compensated twice for the same incapacity and the policy has consistently been implemented on this basis.[15]

Recent reviews

4.14 The 1999 Tanzer review of the Military Compensation Scheme considered the eligibility arrangements to claim disability compensation under both the VEA and SRCA. It defined this dual eligibility as having 'an entitlement to claim benefits under both the VEA and SCRA for an injury or illness that arises out of or in the course of ADF service'.[16] It noted, however, that this arrangement:

> …does not mean being compensated for the same injury/illness twice. Claimants are required to make two separate claims and where the benefits are for the same injury/illness under different Acts, offsetting arrangements apply.[17]

4.15 The Clarke review in 2003 also looked at dual eligibility. It noted that in effect, veterans are able to access, simultaneously, different benefit components of each Act. The Clarke review explained:

> The result is that these veterans are able, with some restraints, to construct a package of benefits to suit their individual circumstances. In many cases, this results in a veteran receiving a higher level of benefit than would be possible under the provisions of one Act alone.[18]

4.16 It found that this arrangement can result in 'inequitable outcomes amongst veterans with identical disabilities'. The review supported the principle that a person should not be compensated twice for the same disability. Payments received for similar purposes, including invalidity superannuation, would be offset dollar for dollar against a veteran's economic loss compensation.[19] It stated that 'where a veteran is

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15 *Submission* 2, p. 4.

16 Review of the Military Compensation Scheme (N Tanzer, chair), *Report of the Review of the Military Compensation Scheme*, Department of Defence, March 1999, p. 20.

17 Review of the Military Compensation Scheme (N Tanzer, chair), *Report of the Review of the Military Compensation Scheme*, Department of Defence, March 1999, p. 20.

18 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 637.

19 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 28; vol. 3, p. 624.

provided with workers' compensation, invalidity superannuation or other disability insurance benefits, any compensation provided under the VEA for the same disability would be reduced first on a dollar-for-dollar basis. This would be consistent with offsetting arrangements in workers' compensation schemes.[20] It recommended that:

> A veteran who has dual entitlement to claim disability compensation under both the VEA and the SRCA, but has not yet made a claim, be required to make a one-time election that restricts him to receiving benefits under one Act at that time and in the future.[21]

4.17 Released in June 2011, the report on the Review of the Military Compensation Arrangements also considered offsetting arrangements between the VEA and SRCA. In its opinion, the arrangements had 'been the subject of widespread criticism and concern in the veterans' community for some years'.[22] It explained that offsetting occurs because certain claimants have dual eligibility and are able to claim compensation under different legislation. It explained:

> Offsetting typically occurs when a claimant receives a pension under the VEA and subsequently elects to receive a SRCA lump sum payment for the same incapacity or death. The legislation that governs the offsetting arrangements requires that the lump sum be converted to give a fortnightly payment equivalent.[23]

4.18 The report noted that while submissions were critical of the methodology to determine the offsetting amounts, they did not take issue with the principle underlying offsetting. It stated:

> The driving principle behind compensation offsetting is equity, in that it ensures that an ADF member with eligibility under two or more pieces of legislation does not receive more compensation for impairment compared to what another member might receive under one piece of legislation for the same impairment. More generally, compensation offsetting is also intended to ensure an individual is only compensated once for incapacity resulting from accepted conditions.[24]

4.19 Thus, in its view:

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20 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 3, p. 624.

21 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol 1, p. 37.

22 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 259.

23 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 259.

24 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 298.

> Total compensation under all three Acts should not exceed the maximum compensation intended to be paid by the Commonwealth for a person's defence service under the MRCA. Compensation should therefore remain capped at the maximum permanent impairment compensation under the MRCA.[25]

4.20 While recognising that the offsetting principle was widely accepted, the Review of the Military Compensation Arrangements found, however, that:

> Dual eligibility continues to be a key source of complexity, confusion and misunderstanding among administrators, claimants and their representatives. It was a central reason for the development and enactment of MRCA as a single piece of compensation legislation covering all forms of service.[26]

4.21 In the following chapter, the committee considers how the principle of offsetting will apply under the proposed changes and, as a result of the changes, whether there are any unintended consequences.

25 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 293.

26 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 262.

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]

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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:

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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:

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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 <u>of the incapacity of the veteran from that injury or disease or the death of the veteran;</u> 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 <u>for the incapacity or death</u>; 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]

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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).

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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.

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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

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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.

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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]

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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.

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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]

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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

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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.

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.*
>
> *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.*
>
> (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

Appendix 1

Public submissions

1 Legacy Australia Council Inc.

2 Department of Veterans' Affairs

3 The Returned and Services League of Australia Limited

4 Department of Defence

5 Vietnam Veterans' Federation

Appendix 2

Public hearing and witnesses

Thursday, 11 August 2011—Canberra

Returned and Services League Ltd.
DOOLAN, RADM Ken (Rtd), National President
HODGES, Mr John, National Veterans' Affairs Advisor

Department of Veterans' Affairs
BROWN, Mr Luke, Director, Costing and Implementation Section
FARRELLY, Mr Sean, General Manager, Support Division
LUCKHURST, Mr Adam, National Manager, Rehabilitation and Entitlements Policy Group
SPIERS, Ms Carolyn, Principal Legal Adviser, Business Integrity and Legal Services Group

Appendix 3

Department of Veterans' Affairs—answers to written questions

Schedule 2 of the Veterans' Entitlements Amendment Bill 2011 clarifies and affirms the policy intention of the offsetting provisions in the *Veterans' Entitlements Act 1986* (VEA). The policy intention of the offsetting provisions has always been to prevent duplicate compensation being paid for the same incapacity and the policy has consistently been implemented on this basis for almost 40 years.

The amendments will not and are not intended to change the operation of the offsetting provisions in any way. The provisions will operate prospectively, and following the passage of the legislation, a person whose disability pension is currently being offset by another payment for the same incapacity will continue to have his or her pension paid at exactly the same rate, unless there is another reason to change that rate.

1. Unintended consequences

1.1 The RSL has raised concerns about Schedule 2. Could you clarify the following matters?

Can you envisage any circumstances under the proposed legislation whereby a veteran could find him or herself at any time in the future receiving compensation payments that are not commensurate with his assessed level of incapacity?

Compensation *under the VEA* will continue to be commensurate with the assessed level of incapacity as a minimum. The situation under the current legislation will not change under the proposed legislation.

It should be noted that it is currently possible for compensation *from another source* to be more than an assessed level of incapacity under the VEA. For example, if a person receives a compensation payment from another source that exceeds the amount of the Special Rate of disability pension (the maximum amount of compensation payable under the VEA). In these circumstances the person's compensation payment from the other source will exceed his or her level of incapacity as assessed under the VEA. This is because the offsetting provisions of the VEA are only able to take into account compensation payments made under that Act. This will not change under the proposed legislation.

1.2 Is the RSL correct in stating that the proposed amendments go 'well beyond' the original intention in 1973 or even 1994?

No, the amendments do not go beyond the original intention or content of the 1973 or 1994 legislation. The original intention referred in the Explanatory Memorandum (EM) is not a reference to offsetting for pensions paid in respect of different types of service. It is a reference to the principle that offsetting should ensure that a person is not compensated twice for the same incapacity, which has been the policy intention since 1973.

In stating that the "amendments in the Bill go well beyond the original intention", the RSL's submission misinterprets the explanation of the reason for the amendments provided in the EM.

The RSL submission correctly recognises that in 1973 compensation coverage under the *Repatriation Act 1920* (the predecessor legislation to the VEA) was extended to include peacetime service. This creates a system of dual entitlement with the *Compensation (Government Employees Act 1971 -1973* (the predecessor to the SRCA), because that Act also provided compensation coverage for peacetime service. Offsetting ensured that a person could not be compensated twice for the same incapacity related to peacetime service under both Acts.

In 1994, compensation coverage for peacetime service generally ceased under the VEA. However, compensation coverage under the SRCA was extended to what is now known as warlike and non-warlike service (still sometimes called operational service). The VEA was subsequently amended to allow for offsetting to ensure a person could not be compensated twice for the same incapacity related to operational service under both Acts.

As stated above, the original intention of the legislation in the EM was to offset for the same incapacity.

1.3 Are you able to explain the concerns raised by the RSL, particularly in the example it provides to indicate that veterans may be disadvantaged by the proposed legislation?

Veterans will not be disadvantaged by the proposed legislation. The Department's understanding of the RSL's concern is it believes the proposed amendments will extend the offsetting provisions under the VEA and will result in a "double dip discount" in some cases. This is not the intention of the current or proposed legislation.

The RSL's submission to the Senate Inquiry states that the proposed legislation will require the Commonwealth to offset an entire compensation payment from another source for a condition not accepted under the VEA against any disability pension received under the VEA for a condition accepted under that Act in circumstances

where the non-accepted condition only results in a small overlap in incapacity with the accepted condition.

This is not the case – the proposed legislation will ensure that offsetting only same incapacity continues. This is explained in further detail below at 1.4.

The RSL's submission also states that this perceived extended offsetting requirement under the proposed legislation, in combination with an existing apportionment methodology under Chapter 19 of *Guide to the Assessment of Rates of Veterans' Pensions* Fifth Edition (GARP V), will result in a "double dip discount" in some cases.

This is not the case. If impairment from a non-accepted VEA condition is removed from the assessment under Chapter 19, then there will be no overlap in incapacity, and therefore no offsetting. Therefore, DVA does not agree that the proposed legislation as drafted will result in a "double dip discount".

1.4 Can you see any way to satisfy its concerns?

As stated above, DVA understands the RSL's concerns but does believe they are based in fact. The proposed legislation will simply clarify and affirm the policy intention of the legislation and does not require a change to the way the offsetting provisions are applied.

The offsetting provisions are administered with the view not to manufacture an overlap in incapacity. Generally, the Department would consider that for discrete conditions to have an overlapping incapacity, those injuries or diseases must at least affect the same system function and be assessable within the same system-specific chapter of GARP V.

Consider the example of a person receiving disability pension in respect of incapacity from emphysema under the VEA and has received lump sum compensation under the SRCA in respect of osteoarthritis of the knees. Both these conditions might have similar and overlapping effects, such as reducing the person's walking pace; however, the incapacity from either condition would not be considered to be the same. This is because the incapacity from the emphysema would affect the person's cardiorespiratory system and be assessable under Chapter 1 of GARP V, whereas the incapacity from the osteoarthritis would affect motor function low limbs and be assessable under Chapter 3 of GARP V.

Another example would be a person who suffers from tinnitus and post-traumatic stress disorder (PTSD). Though both conditions may have similar effects (disturbed sleeping patterns, etc.) they are not assessable under the same system specific chapters of GARP V. Tinnitus is assessable under Chapter 7 of GARP M (Ear, Nose and Throat Impairment), whereas PTSD is assessable under Chapter 4 of GARP V (Emotional and Behavioural Impairment) and therefore would not be considered to result in the same incapacity and would not be offset.

Alternatively, consider the example of a veteran who is receiving disability pension in respect of incapacity from chondromalacia patella (CMP) under the VEA and has received lump sum compensation under the SRCA in respect of osteoarthritis of the knees. The incapacity from both conditions would be considered to be the same if both the incapacity from the CMP and the incapacity from the osteoarthritis affected the veteran's motor function of the low limbs and were assessed under Chapter 3 of GARP V.

1.5 The RSL proposed a different amendment to the VEA. Could you comment on this proposal?

The Department considers that the proposed amendments in Schedule 2 of the Bill are the most appropriate way to clarify and affirm the policy intention of the offsetting provisions. It is arguable that the suggestions for amendment by the RSL go beyond the scope of the amendments contained within the proposed legislation.

The Department has concerns about the RSL proposal's reliance on the use of the apportionment methodology in Chapter 19 of GARP V and the 'but for' test. This process is not a valid substitute for offsetting.

Chapter 19 of GARP V applies "whenever an impairment is not due solely to the effects of accepted conditions" (for example, where impairment is also due to the effect of non-accepted conditions under the VEA, such as age related conditions).

Where the two different conditions contribute to the same incapacity, apportionment under Chapter 19 is not always feasible. Chapter 19 of GARP M requires relative contributions to be determined based on proper medical advice. It is frequently impossible for medical practitioners to assess the relative contributions of different conditions, particularly where the symptoms of the conditions substantially overlap. Indeed, the more closely incapacity from an accepted condition resembles incapacity from a non-accepted condition, the less feasible it is to make an assessment of the relative impairments for the purposes of Chapter 19.

For example, if a person had an accepted condition of PTSD and a non-accepted condition of generalised anxiety disorder, and both would cause a similar symptomatology in the absence of the other, no apportionment could feasibly be made. The 'but for' test proposed in the RSL's submission on apportionment does not resolve this problem. Current practice, which will not change under the Bill, is that the issue is not managed by making an apportionment under Chapter 19.

2. Costs of obtaining compensation

2.1 In its submission, the Vietnam Veterans' Federation state that the legal costs and disbursements should not be taken into account in the offsetting arrangements—they are not the compensation for injuries but the cost of obtaining that compensation.

Could you explain how the costs of, and other expenses incurred in, obtaining compensation which are then included in the compensation payment, are treated under the legislation?

'Party-party' legal costs are subtracted from a lump sum compensation payment before any offsetting occurs. 'Party-party' costs include all amounts specifically included in any Court judgement, settlement or other compensation payment as 'costs'. 'Party-party' costs are not regarded as being in the scope of the definition of compensation.

'Solicitor-client' costs are separate from 'party-party' costs and include all other costs that are not specifically included in a settlement or judgement. These costs are a private arrangement between the solicitor and the client and are not excluded from the compensation payment and are therefore offset.

This policy is aligned with the policy on legal costs in respect of compensation recovery applying to income support payments.

3. Need for change

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

Is this statement correct? If so, why is there a need to make the proposed amendments?

The statement is not correct because the decision of the Full Federal Court in Smith has created some uncertainty about the policy intention of the offsetting legislation. The proposed legislation will confirm and affirm this policy intention.

As stated above, use of the apportionment methodology in Chapter 19 of GARP V is not a valid substitute for offsetting.

3.2 In its submission, DVA stated 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'.[1]

Could you inform the committee about previous examples of, and details on, cases where someone has circumvented the compensation offsetting provisions?

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1 *Submission* 2, p. 6.

The Department has not been able to identify any other offset cases that reflect Mr Smith's particular circumstances. The decision of the Full Federal Court is limited in application to the particular circumstances of Mr Smith's case and is contrary to 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.

Furthermore, the proposed legislation will remove any doubt or uncertainty created by the Full Federal Court decision. The Department has received at least one inquiry from a legal firm seeking to rely on the decision of the Full Federal Court in Smith.

While this inquiry has been resolved, the proposed legislation will remove confusion about the application of the Smith decision and ensure that the offsetting provisions continue to be administered as intended, even where the same or similar particular circumstances arise again.

4. Consultation and communication with the ex-service community

4.1 Could you inform the committee about the level of consultation that took place with the ex-service community in respect of the changes contained in schedule 2?

The 14 national ex-service organisations (ESOs) were briefed about the purpose of the proposed legislation a number of times on Budget day and post-Budget. These 14 ESOs are:

- Australian Federation of Totally & Permanently Incapacitated Ex-Servicemen & Women (TPI Federation)
- Australian Peacekeepers & Peacemakers Veterans' Association (APPVA)
- Australian Veterans & Defence Services Council (AVADSC)
- Defence Force Welfare Association (DFWA)
- Legacy Co-ordinating Council
- Partners of Veterans Association (PVA)
- Returned & Services League of Australia (RSL)
- Vietnam Veterans Association of Australia (VVAA)
- Vietnam Veterans' Federation of Australia (VVFA)
- Naval Association of Australia
- Royal Australian Air Force Association (RAAF)
- Royal Australian Regiment Association (RAR)
- Australian Special Air Service Association (ASASA)
- War Widows' Guild of Australia

The Prime Ministerial Advisory Council on Ex-Service Matters (PMAC) was also briefed at the time of the Budget announcement. PMAC is an advisory body appointed

by the Minister to represent a broad experience and understanding of the issues affecting the ex-service and defence communities.

DVA Deputy Commissioners in each state and territory also briefed local ESOs about the proposed changes following the Budget announcement.

No concerns with the proposed legislation were raised at these briefings. Furthermore, no correspondence has been received expressing concerns with the proposed legislation.

4.2 The committee notes the statement in the Explanatory Memorandum that the High Court *[sic]* decision highlighted 'the need for greater clarity in the compensation offsetting provisions'. The committee also notes the observation of the Review of the Military Compensation Arrangements which found that:

> **Dual eligibility continues to be a key source of complexity, confusion and misunderstanding among administrators, claimants and their representatives. It was a central reason for the development and enactment of MRCA as a single piece of compensation legislation covering all forms of service.[2]**

In your view, is the intention of Schedule 2 to bring clarity to help the courts interpret the meaning of the legislation or to help veterans and/or their dependants better understand the offsetting arrangements?

Yes, these amendments are concerned with affirming the longstanding policy intention of the offsetting provisions and restoring clarity following the decision of the Full Federal Court in Smith. However, the amendments are separate to the Review of Military Compensation Arrangements (the Review).

The Review commented in its report that one of the reasons for the introduction of the *Military Rehabilitation and Compensation Act 2004* (MRCA) was to create a single system for injuries, diseases and deaths related to service rendered on or after 1 July 2004. The MRCA is prospective legislation and does replace the VEA and the SRCA for service rendered before 1 July 2004.

For example, an incident that was a major impetus for the development of the MRCA was the Black Hawk Helicopter accident of 12 June 1996. That accident drew attention to the differences in the form of compensation arrangements that applied to members of the Australian Defence Force (ADF) who were injured or killed. Depending on dates of enlistment and period of service, some of the members killed or injured in the accident had compensation coverage under both the SRCA and the

2 Review of Military Compensation Arrangements Report, p. 262.

VEA, whereas other members had compensation coverage under the SRCA only. This situation was not addressed retrospectively by the introduction of the MRCA. It was only addressed prospectively for service rendered after 1 July 2004.

The proposed legislation is intended to clarify and affirm the principle of offsetting for same incapacity following the Smith case, which has limited or no application to the arrangements for service rendered before 1 July 2004 and the offsetting provisions within the VEA. The Smith decision has no application to the MRCA in situations were service has been rendered after 1 July 2004.

The proposed legislation is unrelated to the examination of offsetting issues in the Review. This legislation addresses the issue of when offsetting is applied under the VEA, whereas the MRCA Review considered the amount of compensation that should be offset under the VEA, as well as some other issues related to offsetting under the MRCA.

Recommendations made as part of the Review are currently being considered by Government. The Government has not yet responded to any of the recommendations from the Review.

5. Request member to institute proceedings

5.1 The committee notes that there are a number of provisions that enable the Commission to request a veteran or dependant to institute proceedings against a person who appears legally liable to pay damages in respect of the same incapacity.

Could you explain the extent to which the Commission may compel a member or dependant to take such action? Should these provisions be understood to mean that if an incapacity has arisen from either a service related cause or a cause from another event (such as a motor vehicle accident), or both, that the Commission can compel a member to take action against another party rather than request compensation from DVA?

The Commission can only request a person to institute action against another party, it cannot compel a person.

Section 30E of the VEA applies where a pension is payable under Part II of the VEA in respect of an incapacity from a war-caused condition and a person other than the Commonwealth appears legally liable to pay damage in respect of that same incapacity. Section 30E provides that the Commission can only request the veteran or dependant to institute proceedings against another party.

Subsection 75(1) of the VEA provides the Commission with similar powers in relation to pensions payable under Part IV of the VEA.

5.2 What options are open to the Commission should a member or dependant decline such a request?

These circumstances are unlikely to arise in a veteran's compensation matter. For most compensation claims lodged under the VEA, the condition claimed will be related to activities undertaken while a person was on duty as member of the ADF. Therefore, it would be rare for another party to be liable to pay damages in respect of the same incapacity.

Examples of where a third party might be liable to pay damages may include a motor vehicle accident that occurs while the member is travelling to a place for the purpose of performing duty, or other similar travel scenarios such as journeying for the purposes of defence service on a commercial airline or ship.

In these circumstances, under s 30F of the VEA, where a person does not agree to a request under s 30E within a reasonable time, the Commission may, on behalf of the person, institute proceedings against the potentially liable person or take over the conduct of proceedings.

Subsections 75(2) and 75(3) make similar provision for pensions payable under Part IV of the VEA.

5.3 Could you provide the committee with some statistics on how often the Commission under the current legislation has made such a request and how often the request has been declined?

The Commission has not used these provisions in the last 10 years and no record has been found of them being used before then.

Australian Government
Department of Veterans' Affairs

ACT OFFICE

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committees on Foreign Affairs, Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Dermody

At the Foreign Affairs, Defence and Trade Legislation Committee hearing of 11 August 2011 into the compensation offsetting amendments contained in the *Veterans' Entitlements Amendment Bill 2011* (tabled in Parliament on 1 June 2011), the Department of Veterans' Affairs (DVA) undertook to provide further information on discussions with the ex-service community related to the measures contained in the Bill.

DVA was unable to engage with stakeholders before the Budget, as the amendments to the *Veterans' Entitlements Act 1986* (VEA) offsetting provisions were part of the 2011-12 Budget and are Cabinet-In-Confidence prior to formal release as part of the Budget. Similarly, legislation is not usually made public until it is tabled in Parliament, particularly where the change is designed to continue the operation of the existing legislation.

DVA considers that it has engaged with the key stakeholders (including the relevant Ex-Service Organisations (ESOs)) adequately and appropriately on this measure. It should be noted that the measure, as outlined in the Senate hearing, will have no impact on the application of Departmental policy regarding offsetting rules that have been applied since 1973.

In relation to the Budget briefing held on 10 May 2011, all major ESOs were represented (full attendance list is at Attachment A) and all aspects of the Budget measures for the Veterans' Affairs portfolio were discussed, including offsetting. Some measures were discussed in greater detail, but offsetting was discussed with the 14 attending ESO representatives. Also, copies of the departmental Portfolio Budget Statement were disseminated to all attendees, which outlined the Budget measures and impacts. No concerns were raised at this meeting about the measure or the engagement with stakeholders up until this point, and only 3 of the 14 ESOs tendered submissions to the Inquiry.

There was a supplementary briefing provided to representing members of the ESO Round Table at a meeting on 31 May 2011, where the attendees (attendance list attached) were able to engage DVA on a more detailed level about the legislative measures arising from the Budget, including offsetting. The only concern raised at this meeting involved whether the measure would affect offsetting of Commonwealth superannuation related to other Commonwealth compensation payments. Members were advised that this is not the effect of the measure. No further concerns were raised about the measure or engagement and communication with stakeholders.

Similarly, DVA Deputy Commissioners in their Budget briefings to the state representatives of the ex-service community outlined this measure. As with the Budget briefing, some measures were discussed in more detail at these briefings, but offsetting was discussed with the attending ESOs.

Prior to the Budget measure and the proposed amendments being announced, the engagement with stakeholders on offsetting had been about the departmental response to the decision in *Commonwealth of Australia v Smith* [2009] FCAFC 175. This issue was discussed at meetings of the Operational Working Party and the Prime Ministerial Advisory Council on Ex-Service Matters (PMAC). These committees involve key ESOs such as the RSL, or individuals involved in the ex-service community.

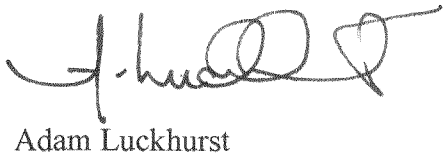
Discussions at PMAC meetings involved either offsetting in general and the role of the Australian Government Actuary, the rules behind offsetting and its analysis in the Review of Military Compensation Arrangements, or the proposed amendments to the legislation. The meetings were held on 19 March 2009 (offsetting and the Actuary), 4-5 March 2010 (offsetting rules and the Review) and 4-5 July 2011 (legislative amendments).

The Operational Working Party at its 1 July 2010 meeting discussed the impacts of the *Smith* decision and DVA action on holding offsetting cases pending clarification of the effect of the *Smith* decision.

The RSL has representatives at all of these forums.

I trust this further information provides the relevant background.

Yours sincerely



Adam Luckhurst
National Manager
Rehabilitation & Entitlements Policy

12 August 2011

ATTACHMENT A

Attendees at ESO Round Table Budget Briefing of 10 May 2010

Commissions	
Mr Ian Campbell	Chair
Mr Shane Carmody	Deputy President
MAJGEN Mark Kelly AO DSC	Commissioner
MAJGEN Craig Orme AM CSC	Military Rehabilitation and Compensation Commission

Members	**Organisation**
Mrs Audrey Blood OAM	War Widows' Guild of Australia
Mr Ron Coxon OAM	Vietnam Veterans Association of Australia
RADM Ken Doolan AO RAN (Retd)	Returned and Services League of Australia
Mr Les Dwyer	Naval Association of Australia
MAJGEN Brian Howard (Retd)	Royal Australian Regiment Association
COL David Jamison AM (Retd)	Defence Force Welfare Association
Mr Tim McCombe OAM	Vietnam Veterans Federation of Australia
AVM Roxley McLennan AO	Royal Australian Air Force Association
Mr John Pepperdine	Legacy Co-ordinating Council

Proxies	**Organisation**
Dr Rod Bain	Australian Veterans and Defence Services Council
Ms Lesley Minner	Partners of Veterans Association
Mr John Burrows	Australian Special Air Services Association
Mr Allan Thomas	Australian Peacekeeper and Peacemaker Veterans' Association
Mr Chris Hudson	Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women

Other DVA Attendees	
Ms Liz Cosson	General Manager, Executive Division
Mr Ken Douglas	General Manager, Services Division
Mr Barry Telford	General Manager, Support Division
Ms Narelle Dotta	General Manager, Corporate Division
Dr Graeme Killer AO	Principal Medical Adviser
Ms Judy Daniel	National Manager, Primary Care Policy
Mr Sean Farrely	National Manager, Organisational Change
Mr Neil Bayles	National Manager, F-111 Implementation/MRCA Review
Ms Glenda Mann	Director, MRCA Review

Secretariat	
Ms Peta Stevenson	National Manager, Research, Grants and Consultation Co-ordination
Mr Robert Hamon	National Consultation Secretariat
Ms Brooke Hill	National Consultation Secretariat

Attendees at Post-Budget Briefing of 31 May 2011

Attendees:

Audrey Blood, War Widows' Guild of Australia
Narelle Bromhead, Partners of Veterans Association
Ron Coxon, Vietnam Veterans Association of Australia
Ken Doolan, Returned and Services League of Australia
Les Dwyer, Naval Association of Australia
Les Bienkiewicz obo Mr David Jamison, Defence Force Welfare Association
Tim McCombe, Vietnam Veterans Federation of Australia
Roxley McLennan, RAAF Association
David Penson, Australian Peacekeepers and Peacemakers Veterans' Association
Ian Wills obo Mr John Pepperdine, Legacy Australia Council
Blue Ryan, Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women

Ian Kelly - DC SA
Mike O'Meara - DC VIC
Jan Hyde - DC TAS
Sean Farrelly – A/g General Manager, Support Division
Judy Daniel – A/g General Manager, Services Division
Carolyn Spiers – Principal Legal Adviser
Kym Connelly – A/g National Manager Primary Care Policy
Luke Brown – Director Costings & Implementation

Apologies:

Ian Crawford, Australian Veterans and Defence Services Council (overseas)
Hori Howard, Royal Australian Regiment Association (not available that day)
David Lewis, Australian Special Air Service Association (not available)