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

## **Inquiry into the provisions of the Veterans' Entitlements Amendment Bill 2011**

*Dear Dr. Dermody,*

Thank you for your invitation of 20 June 2011, providing the Returned & Services League of Australia with an opportunity to make a submission to the Committee's inquiry into Schedule 2 to this Bill.

The RSL opposes the proposed amendments set out in Schedule 2 to the Veterans' Entitlements Amendment Bill 2011 on the basis that:

- the proposed amendments are too far-reaching and unnecessary;
- sufficient provision already exists in Chapter 19 of the Guide to the Assessment of Rates of Veterans' Pensions (commonly referred to as GARP) to discount the assessment of disability pension for the effects of non-service-related disabilities;
- 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;

### **The Court case**

In the case of *Commonwealth v Smith* [2009] FCAFC 175, the Full Federal Court held that the receipt of other compensation does not entitle the Commonwealth to reduce the amount of disability pension unless the injury for which the other compensation was received is identical to the injury that has been accepted as war-caused or defence-caused and for which disability pension is being paid. This is unsurprising. Similar decisions were made by the Full Federal Court nearly 30 years ago in *Australian Telecommunications Commission and the Commonwealth v Leech* (1982) 44 ALR 441 and in 1983 in *Commonwealth v Keogh* (1983) 50 ALR 693.

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## The law currently requires discounting for non-accepted injuries and diseases

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. If the Repatriation Commission had decided to review Mr Smith's pension assessment following the Full Federal Court decision, it might have applied those provisions rather than encourage the Government to promote an amendment of the legislation that will 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.

Currently, under Chapter 19 of GARP, if both an accepted and a non-accepted injury give rise to the same impairment, medical opinion is obtained to determine the relative contribution to that impairment from both injuries, and the impairment rating is reduced to reflect the proportion of contribution (if any) from the accepted disability.

For example, if a veteran's only accepted disability is a war-caused right shoulder injury and the veteran then suffers a new right shoulder injury in a civilian workplace accident, the disability pension for the war-caused injury is assessed by the following (somewhat complicated) process:

- assess the loss of range of movement of the veteran's right shoulder (say, 50%),
- determine the impairment points applicable for that loss (20 points under Table 3.1.1)
- determine whether there is any other impairment such as resting joint pain (say, 2 points under Table 3.4.1);
- determine the contribution to that loss of range of movement and resting joint pain from the war-caused injury (say 50% for each effect);
- reduce the impairment points by applying a Table in Chapter 19 of GARP according to the proportional contribution made to that loss by the war-caused injury (20 points from Table 3.1.1 reduces to 11 points and 2 points from Table 3.4 reduces to 1 point);
- adjust this reduced impairment rating from Table 3.1.1 using an age-adjustment table (e.g. at age 56, 11 points reduces to 10 points under Table 3.6.1);
- combine the ratings from Tables 3.1.1 and 3.4 as affected by age adjustment and partially contributing impairment using Scale 18.1 (10 points and 1 point combine to give 11 points, which are then rounded down to the nearest 5 points, i.e. 10 points)
- determine the different lifestyle effects of the war-caused injury and assign an average lifestyle rating to those effects (say, a rating of 1 mainly due to adverse effects on recreational activities and personal relationships);
- combine the average lifestyle rating with the impairment rating to obtain a 'percentage degree of incapacity', which then becomes the percentage of the general rate of pension (a lifestyle rating of 1 combined with 10 impairment points gives rise to a degree of incapacity of 20%, and a pension of 20% of the general rate).

If the veteran had received workers compensation payments in respect of the civilian workplace injury there would not be any offsetting under the current law because there were two separate and distinct injuries (the effect of *Smith's* case). In any event, the impairment effects of the workplace injury have already been taken into account in assessing the disability pension. The overall impairment from the shoulder has been reduced from 20 to 11 impairment points, effectively halving the pension that might otherwise have been payable.



## The proposed amendments would permit the Commonwealth to 'double dip' in discounting pensions

If the proposed amendments are passed into law, the veteran's pension in the above example would be further reduced (and perhaps eliminated entirely) by requiring the Commonwealth to deduct from the 20% pension payable in the example above, on a dollar-for-dollar basis, any compensation received for the already discounted civilian shoulder injury.

Subsections 30C(1), (4) and (5) of the *Veterans' Entitlements Act 1986* (the VEA) would read as follows, should the amendments proceed (the text proposed by the Bill to be omitted is struck through, and the text proposed by the Bill to be inserted in its place is highlighted):

### 30C Lump sum compensation payment

(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 same incapacity of the veteran from that or any other injury or disease or in respect of that 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 day.

Note 1: Pensions under this Part are payable in respect of the incapacity of a veteran from a war-caused injury or disease or in respect of the death of the veteran (see section 13).

Note 2: A payment of arrears of periodic compensation is not a lump sum compensation payment (see subsection 30B(2)).

...

#### *Pension payable to one person*

(4)Subject to subsection (6), if:

(a)a person is taken to be in receipt of payments of compensation at a particular rate per fortnight under subsection (1), (2) or (3); and

(b)but for this subsection, pension referred to in paragraph (1)(c), (2)(c) or (3)(c) would be payable to the person at a particular rate per fortnight;

after the lump sum payment is made, the rate per fortnight of the pension is to be reduced by the rate per fortnight of compensation.

(5)If, under subsection (4), the rate per fortnight of compensation is equal to or exceeds the rate per fortnight of pension, pension is not payable to the person.

If the proposed amendments were to become law, the Commonwealth would be required to determine whether compensation has been paid 'in respect of' the same incapacity as the war-caused injury. Section 5D of the VEA defines 'incapacity from a war-caused injury' as 'the



effects of that injury'. This is a very broad concept and includes not only medical impairment produced by the injury but also the lifestyle effects of the injury on matters such as personal relationships, mobility, recreational and community activities, employment activities and domestic activities (see Chapter 22 of GARP).

As the civilian shoulder injury (in the above example) is likely to have contributed to one or more of the same lifestyle effects as the war-caused injury, the proposed new offsetting provisions would require the Commonwealth to reduce the payment of disability pension on a dollar for dollar basis by reference to the total amount of compensation paid in respect of incapacity from the injury. Nothing in the Bill permits the Commonwealth to reduce the pension on a basis proportionate to the contribution to the overall incapacity made by the civilian injury. Instead, once it is found that the compensation was paid in respect of the same incapacity, for example, joint pain or the veteran's inability to pursue previous activities such as playing tennis, the entire amount of compensation must be used to offset the disability pension being received for incapacity from the war-caused injury.

The above example concerned two shoulder injuries, but an even more obvious inequity results if there are two quite unrelated injuries involved. If there is some small overlap in the incapacity resulting from a war-caused injury and a compensated non-war-caused injury, the Commonwealth would be required to apply whatever compensation was received for the non-war-caused injury as an offset against any disability pension that would otherwise be received for the war-caused injury.

Many different injuries and diseases are likely to have the same effects on various aspects of a person's personal relationships, mobility, recreational and community activities, employment activities and domestic activities. All that the proposed legislation requires is that compensation is paid 'in respect of' the same incapacity (that is, the same effect of the injury or disease). The phrase 'in respect of' has been described by the courts as connoting the broadest of relationships. 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. Once compensation is paid 'in respect of' the same incapacity, then all of that compensation must be taken into account in offsetting that compensation against the pension on a dollar-for-dollar basis.

### **The proposed amendments go well beyond the original intention in 1973 (or even 1994)**

The Explanatory Memorandum states (at page ii) that the purpose of the amendments is to 'clarify and affirm the original intention of the compensation offsetting policy in relation to disability pensions'. Page 8 of the Explanatory Memorandum further states:

'When, in 1973, serving members with certain peacetime service became eligible for benefits under the *Repatriation Act 1920* (the predecessor of the *Veterans' Entitlements Act*), they also retained eligibility under the *Compensation (Government Employees) Act 1971 – 1973* (the predecessor of the *Safety, Rehabilitation and Compensation Act*), creating a situation of dual entitlement. Provisions were included in the *Repatriation Act 1920* at that time to offset payments under the *Compensation (Government Employees) Act 1971 – 1973* against entitlements under the *Repatriation Act 1920* to avoid the payment of double compensation by the Commonwealth.'

The amendments proposed in the Bill go well beyond that original intention.

In 1973, when the offsetting provisions were introduced into the *Repatriation Act*, they applied only to disability pensions paid in respect of incapacity from disabilities arising out of 'defence service'. They did not apply to pensions paid in respect of incapacity from disabilities arising out of what was then called 'war service', 'special service' or 'Malayan service' (now collectively known, under the VEA, as 'operational service').



In 1994, the VEA was amended to permit veterans who rendered operational service after 6 April 1994 to make compensation claims under the Military Compensation Scheme in the *Safety Rehabilitation and Compensation Act 1988* (SRCA) as well as under the VEA. 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 the *Safety Rehabilitation and Compensation Act 1988* (SRCA) – see section 17 of the *Military Compensation Act 1994* and section 3 of the *Veterans' Affairs Legislation Amendment Act 1994*.

The proposed amendments build upon the extensions to offsetting made in 1994 rather than going back to the 1973 intention of applying only to injuries for which compensation could be claimed under the Commonwealth Employees' Compensation legislation. The 1994 amendments applied to any injuries arising out of operational service, whether or not such injuries could be claimed under the SRCA – the only restriction was that the compensation had to have been paid after 6 April 1994. The proposed amendments will now apply not only 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, even if they are not war-caused or defence-caused, 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.

### **A proposal for greater equity and fairness**

If the Government's intention is 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 compensated incapacity from the assessment of incapacity).

The first part is likely to be difficult to determine in many cases where there may be no obvious or detailed system of assessment involved in the awarding of compensation and so it could be difficult to identify the particular portion of compensation applicable to any particular aspect of incapacity. However, a reasonable estimate could be made.

The second part is more easily determined because of the detailed assessment system required to be employed by the Repatriation Commission in assessing the rates of disability pension. Nearly all aspects of incapacity are considered in that process, and the impact on the overall rate of pension can be assessed by application of a 'but for' test in a notional assessment of pension. That is, the decision-maker would determine what the rate of pension would be if the particular aspect of incapacity that has been found to arise both from the pensioned injury and the compensated injury had not been included in the assessment? In other words, 'but for' the existence of the compensated incapacity, what would the pension rate have been (the notional rate)? The difference, if any, between the actual rate as previously assessed by the Commission and the notional rate would be a rate of pension that could be the subject of offsetting by reference to the portion of compensation paid for that aspect of incapacity.

Currently, notwithstanding the statement in the Explanatory Memorandum at page 9 that offsetting 'has been applied on the basis of the same incapacity', actual Departmental practice has been based on applying a 'but for' test in relation to the 'injury' or 'disease'. In

other words, the Department has always made a notional assessment based on what the assessment would be had the war-caused injury or disease that is said to be the same as that which has been compensated through other sources, not been accepted. That notional rate is then deducted from the actual rate to determine the rate of pension that can be offset against any compensation that has been received for that injury or disease. The Department has not, in the past, sought to identify a particular aspect of incapacity and then offset compensation against the impact that particular aspect of incapacity has had on the overall pension rate. It has always made the notional assessment by taking the entire injury or disease out of the equation, and comparing that notional assessment with the actual assessment that had included the particular injury or disease.

If this option were to be applied to the example given above, then the only aspect of the incapacity that had not already been discounted for the effect of the civilian injury would be a lifestyle effect. This might result in a lowering of the average lifestyle rating to 0 (and thus giving a notional assessment of 10% of the general rate rather than 20%) or, given that the lifestyle rating is a rounded average, it might not change at all. But in each instance, it would clearly be seen that only that portion of pension that could be demonstrated to be attributable to the same aspect of incapacity that was compensated would be offset by the compensation.

Should the Senate Committee decide to hold hearings into this matter and to invite witnesses, the League is willing to attempt to provide any further detail that may be sought by members of the Committee.

Yours sincerely

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National President