



Defence Legislation Amendment Bill (No.1) 2009

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Defence Legislation Amendment Bill (No.1) 2009

Date introduced: 18 March 2009

House: House of Representatives

Portfolio: Defence Science and Personnel

Commencement: Sections 1–3 on the day of Royal Assent; Schedule 2 on the 28th day after Royal Assent and; Schedule 1 on the 28th day after Royal Assent or 1 July 2009, whichever is the earlier.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is twofold:

- to amend the *Defence Act 1903* (the Defence Act) to introduce a Tactical Payment Scheme (TPS) which would enable expeditious no-liability payments to be made to eligible persons adversely affected by Australian Defence Force Operations outside of Australia, and
- to amend the *Defence Home Ownership Assistance Scheme Act 2008* (DHOAS Act) to remove a number of unintended operational outcomes which are inconsistent with the original policy intent.

Background—Tactical Payment Scheme

The laws of armed conflict

According to Ronen:¹

In order to protect civilians from harm, the laws of armed conflict distinguish between combatants and civilians. The principle of distinction is expressed foremost in the

1. Yael Ronen, 'Avoid or Compensate? Liability for incidental injury to civilians inflicted during armed conflict', *Vanderbilt Journal of Transnational Law*, Vol 42, January 2009, pp. 181–224.

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absolute prohibition on intentional targeting of civilians expressed in the first Protocol Additional to the Geneva Conventions (Additional Protocol I).²

And further:

[Nevertheless], civilians are not entirely immune to attack, and not every injury to a civilian constitutes a violation of international law. Instead, beyond the absolute prohibition on intentional targeting of civilians ... the parties' conduct is governed by the obligation to minimise harm to civilians, without setting undue limitations on the pursuit of military goals.³

Article 57 of Additional Protocol I, provides that, amongst other things, a party must not carry out an attack which may be expected to cause incidental civilian loss that would be excessive in relation to the direct military advantage anticipated.

Article 58 of Additional Protocol I requires the targeted party to endeavour, to the maximum extent feasible, to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.⁴

Together, Articles 57 and 58 lay down a due diligence standard by which international legal responsibility for civilian loss and damage only arises from a failure to comply with the obligations to take reasonable precaution to minimise harm to civilians.

When the attacking party complies with the precautionary requirements ... the causation of injury to civilians is regarded as 'unavoidable'. The attack is not a breach of international law and the attacking party does not bear international responsibility for the resulting injury.⁵

Whilst Additional Protocol I doesn't quite have the essentially universal membership that the 1949 Geneva Conventions do, some 168 countries have ratified Additional Protocol I, including Australia.

The United States is not a signatory to Additional Protocol 1. Nevertheless, it has in place a number of mechanisms for paying civilian compensation. The details of the US payments scheme are outlined below. They provide some of the basis for the proposed TPS.

2. See Article 51(2) Protocol Additional to the Geneva conventions of 12 august 1949, and Relating to the Protection of Victims of International Armed Conflicts which was adopted on 8 June 1977 viewed at: <http://www.unhchr.ch/html/menu3/b/93.htm>, accessed on 7 May 2009.

3. Yael Ronen, p. 184.

4. For example, by not locating military objectives within or near densely populated areas.

5. Yael Ronen, p. 185.

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The position of the United States

According to the United States Government Accountability Office:

There are a number of ways that the U.S. government provides assistance to Iraqi or Afghan civilians who are killed, injured, or suffer property damage as a result of U.S. and coalition forces' actions.

... the Department of Defense (DOD) administers a program that provides compensation under the Foreign Claims Act to inhabitants of foreign countries for death, injury, or property damage caused by non-combat activities of U.S. military personnel overseas. Further, DOD provides monetary assistance in the form of solatia and condolence payments to Iraqi and Afghan nationals who are killed, injured, or incur property damage as a result of U.S. or coalition forces' actions during combat [under the Commander's Emergency Response Program (CERP)].⁶

A '*condolence*' payment is an expression of sympathy for death, injury, or property damage caused by coalition or US forces generally during combat. In addition, at commander discretion, payments may be made to Iraqi civilians who are harmed by enemy action when working with US forces. Payment is not an admission of legal liability or fault.⁷

A '*solatia*' payment is a token or nominal payment for death, injury, or property damage caused by coalition or US forces during combat. Payment is made in accordance with local custom as an expression of remorse or sympathy toward a victim or his/her family. Payment is not an admission of legal liability or fault.⁸

The amount of the US payments

The amount of condolence payments⁹ is limited to up to US\$2500 for each instance of death, injury, or property damage. Importantly, it has been reported that whilst a

6. United States Government Accountability Office, 'The Department of Defence's Use of Solatia and Condolence Payments in Iraq and Afghanistan', *Report to Congressional Requesters*, May 2007 viewed at: <http://www.gao.gov/new.items/d07699.pdf>, accessed on 21 April 2009.

7. United States Government Accountability Office, p. 13.

8. United States Government Accountability Office.

9. More information about condolence payments can be found at: http://www.boston.com/news/nation/washington/articles/2006/06/08/condolence_payments_to_iraqis_soar/, accessed 22 April 2009.

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maximum of US\$2500 (A\$3347) is paid to relatives of someone killed by coalition forces, less is paid if the dead person is a man of military age.¹⁰

The amount of solatia payments¹¹ is limited as follows:

- in Iraq—up to US\$2500 for death, up to US\$1500 for serious injury and US\$200 or more for minor injury.
- in Afghanistan—up to 100 000 Afghani (US\$2336+/-) for death, 20 000 Afghani (US\$467+/-) for serious injury and 10 000 Afghani (US\$236+/-) for non-serious injury or property damage.¹²

From fiscal years 2003 to 2006, DOD reported about US\$1.9 million in solatia payments and more than US\$29 million in condolence payments to Iraqi and Afghan civilians who were killed, injured, or incur property damage as a result of US or coalition forces' actions during combat.¹³

Criticism of the US position

Tracy explains the problems which have arisen for US Forces in regard to these payments as follows:

The new U.S. Army Field Manual on Counterinsurgency greatly stresses the importance of winning civilians' hearts and minds. To win hearts and minds, militaries must take a holistic approach to rebuilding a nation after war by providing infrastructure, governance, safety and well-being. Failure in these components may prevent lasting victory.

... positive treatment of civilians becomes imperative to strategic military interests. While building a school or hospital may help the military "win over" a community, providing individual monetary assistance to a family who lost a breadwinner during a firefight can "win over" a family and a neighborhood.

[However] instead of creating an equitable law, in every major conflict since Vietnam, the United States has implemented ad hoc nominal payment programs. Iraq is no different...

For several reasons the program is inequitable and inadequately meets the moral and practical goals of a combat claims program.

10. '[US forces in Fallujah try to win grieving hearts and minds with cash](#)', *The Age*, 4 November 2004, p. 11.

11. More information about the number of claims for payment can be found at: <http://www.aclu.org/natsec/foia/29316prs20070412.html>, accessed on 22 April 2009.

12. United States Government Accountability Office, p. 13.

13. United States Government Accountability Office. p. 1.

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First, payments for every death, injury, or property damage incident are limited to \$2,500. Brigadier generals or higher can now authorize payments of up to \$10,000; however, there is little to no evidence of any individual payments exceeding \$2,500 per death. Placing a price on personal tragedy is always difficult, but it is possible to provide payments respectfully and in line with regional customs... officers may pay full market value when a tank runs over an Iraqi's truck in the course of a non-combat related accident, but may only pay \$2,500 for the death of a civilian killed in a firefight... This artificial limit leaves survivors bitter and frustrated.

Second, reconstruction projects overshadow condolence payments. Commanders prioritize CERP funds for reconstruction projects at hospitals, schools, or power stations, at the expense of condolence payments. In fiscal year 2005 condolence payments accounted for eight percent of all CERP disbursements.

Third, the rules governing condolence payments are ad hoc. Each unit takes different approaches to if, when, and how to make condolence payments. Some units choose to pay only high profile cases. Others will not pay claims when a different unit caused the harm no matter how difficult or impossible it will be for an Iraqi to file with the "appropriate" unit.

A final problem resulting from the program's ad hoc nature is that no adequate claims officers' guidelines exist. Different victims receive disparate treatment because officers lack substantive guidance regarding standard of proof, rules of evidence, how to determine valuation, or sensitivity training... The nature of this system leads to drastically different results for civilians who suffer the same harm. These conflicting outcomes intensify negativity and nullify any potential goodwill won by offering condolence payments.¹⁴

The position of Australia

At present, Australia does not have a formal scheme of payments which is similar to the condolence or solatia payments made by the US. Instead, some ad hoc payments have been made in respect of civilian loss and damage by way of an act of grace payment.

In August 2005 it was reported that the Australian Defence Force (ADF) had worked with US and British armed forces to establish compensation rates to be paid to civilian victims in the war zone, believed to include those caught in crossfire or mistakenly shot at checkpoints.¹⁵

Air Chief Marshal Angus Houston, the Chief of Defence Force, was specifically questioned about payments of compensation made to two Iraqi families by the Senate Estimates Committee on Foreign Affairs, Defence and Trade Legislation on 2 November 2005. He made the following comments:

14. United States Government Accountability Office. pp. 17–18.

15. Mark Dunn, '[Aussies pay Iraqis secret compo](#)', *Herald Sun*, 26 August 2005, p. 3.

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First of all, I would say that it is not actually compensation...

If we have a driving accident in Iraq and we injure somebody we pay compensation. But if an Iraqi citizen is injured during the course of military operations, in those circumstances we will look at the circumstances and do a full investigation. If we determine that the Iraqi has been injured or indeed has suffered property damage as a consequence of the military action or military circumstances that occurred, our people in Baghdad will put forward a submission suggesting that an **act of grace** payment be made to the individual for the injuries they sustained or the damage to property that occurred. The process runs from Baghdad through the operational chain of command. It comes through to the Vice Chief of the Defence Force, who then puts that submission up to the minister and, if the minister believes that the circumstances warrant an act of grace payment, we then move across to Finance who have the delegation for these payments...¹⁶

What is an 'act of grace' payment?

Section 33 of the *Financial Management and Accountability Act 1997* (FMA Act) provides the legislative basis for an act of grace payment where the Finance Minister considers it appropriate to do so because of special circumstances.

The Department of Financial and Deregulation has issued a circular¹⁷ about the making of act of grace payments which includes, but is not limited to, the following information about the payments:

- they may be appropriate in relation to losses that have occurred as a direct result of the involvement of an agency of the Australian Government (such as the ADF), where that involvement had an unintended outcome
- conditions may be attached
- they are made where the paramount obligation to the claimant is moral, rather than legal
- they can cover economic and non-economic losses sustained.

In addition, the circular sets out those circumstances in which the making of an act of grace payment is not appropriate.¹⁸

16. Foreign Affairs Defence and Trade Legislation Committee, [Answers to Questions, Supplementary Budget Estimates](#), Canberra, 2 November 2005, pp. 16—17.

17. Department of Finance and Deregulation, ['Finance Circular No. 2006/05'](#), Australian Government, Canberra, 17 April 2008, pp. 4–5.

18. Department of Finance and Deregulation, paragraph 18, p. 31.

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The amount of the payments made

Although act of grace payments must be authorised by the Finance Minister or a delegate, payments are funded and reported under an appropriation and outcome of the agency to which the act of grace case relates. The number and quantum of payments must be included in the notes to the agency's financial statements each year.¹⁹

However the quantum of payments to date is not clear. For example, Senator the Hon. John Faulkner, in hearings by the Senate Estimates Committee on Foreign Affairs, Defence and Trade Legislation on 2 November 2005 stated:

I believe the corrected figure of the act of grace payments is \$A10,540... I know, firstly, that the total amount of \$A10,540 is the corrected evidence and, secondly, that there are two such act of grace payments.²⁰

The notes to and forming part of the financial statements for the Department of Defence for the financial year 2007–08 indicate that three act of grace payments were made during that period amounting to a total of \$81 483. The amount for the previous financial year was \$199 559 when 14 such payments were made.²¹ However, this is the total of act of grace payments in the relevant financial year and it is not clear whether each of those payments relate to 'an activity of the Defence Force outside Australia' as is contemplated by proposed subsection 123H(1) of the Bill.

Criticism of the Australian position

The criticism of the current system for making payments relates to the alleged secrecy relating to the circumstances which give rise to the payments and the details of the amounts paid. In April 2007 it was reported that:

In total \$266,681 of taxpayers' money has been paid out to Iraqi civilians in so-called act of grace payments since the Australian Defence Force began operations in Iraq.

The payments are huge sums for Iraqis, with the US Agency for International Development putting the present Iraq average annual income at \$1,830...

While brief details are provided for some of the awards, the single biggest amount of \$89,100 paid out last year has not been explained.²²

19. Department of Finance and Deregulation, p. 36.

20. Foreign Affairs Defence and Trade Legislation Committee, op. cit., pp. 15–16.

21. Department of Defence, '[Defence Annual Report 2007–08](#)', Vol. 1, Australian Government, Canberra, October 2008, p. 332.

22. Kelvin Bissett, '[Blood Money: Iraqis get \\$260,000 in secret payments](#)', *Daily Telegraph*, 9 April 2007, p. 1.

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Effect of the Bill

The Hon. Warren Snowdon, Minister for Defence Science and Personnel stated that:

... in many areas in which the ADF operates, the expectation of financial compensation for collateral damage to property, injury or loss of life is often a common aspect of local cultures.

... experience in East Timor, Iraq and Afghanistan has shown that the administrative requirements involved in making an act of grace claim make that system unsuitable for use in operational environments.²³

In addition:

Even small delays in making payments can have a negative impact on relations with the local community and therefore on the security and protection of ADF personnel deployed overseas.²⁴

The TPS is intended to operate independently from the act of grace payments provisions and be managed and operated by Defence.²⁵

A number of matters should be borne in mind in considering the effectiveness of the proposed TPS. **Firstly**, it will be important to maintain some level of consistency in deciding when payments should be made. Whilst individual decisions are intended to be made in the context of local cultures which will be different in each sphere of operation, it would be helpful if decision makers were able to draw up upon appropriate guidelines in implementing the TPS.

Secondly, whilst there is provision in the Bill to set a maximum payment under the TPS of \$250 000, there is no provision to make regulations which could be used, for instance, to set a sliding scale of payments for specified injuries or damage. Specifically the Bill does not propose to amend the regulation making power in section 124 of the Defence Act to include the TPS.²⁶

Thirdly, the Bill seeks to provide a mechanism for a payment which is an appropriate and immediate response to a civilian who has suffered personal or property damage in an area

23. The Hon. Warren Snowdon MP, Minister for Defence Science and Personnel, 'Second reading speech: Defence Legislation Amendment Bill (No. 1) 2009', [House Hansard](#), 18 March 2009, p. 3031.

24. '[Faster compo for ADF damage overseas](#)' *The Age*, 18 March 2009, accessed 4 May 2009.

25. Explanatory Memorandum, p. 2.

26. Whilst this is not technically necessary, it appears that past practice has generally been to list those matters about which regulations may be made for carrying out or giving effect to the Defence Act in section 124.

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where the ADF is operating. The Bill provides that the making of a payment is not limited by section 33 of the FMA Act and ‘will act independently from the act of grace payments provisions’.²⁷ This brings about two consequences:

- it is likely that TPS payments will not be subject to the same rigid examination and investigation as occurs before an act of grace payment is made, and
- the distinction between the payment schemes is not clear—that is, whilst TPS payments will only be available to persons who have suffered loss, damage or injury **outside Australia** there is nothing in the proposed legislation which indicates that those persons might be eligible for an act of grace payment as an alternative.

Finally, currently the number and total amount of act of grace payments made in a financial year must be reported in the notes of the Department of Defence annual report. The Bill is silent about the reporting and transparency of TPS payments. Given the allegations that the circumstances surrounding the making of act of grace payments have been secretive, accountability for the payments should be specified.

Background—Defence Home Ownership Assistance Scheme

The Defence Home Ownership Assistance Scheme²⁸ commenced on 1 July 2008 in accordance with the *Defence Home Ownership Assistance Act 2008*. The relevant [Bills Digest](#) provides useful background to the Scheme.

According to the second reading speech, the Scheme Administrator, the Department of Veterans’ Affairs ‘has highlighted a number of unintended outcomes inconsistent with the initial policy intent’.²⁹ The Bill addresses those unintended outcomes.

The relevant report by the Department of Veterans’ Affairs has not been published.

Committee consideration

At its meeting of 19 March 2009, the Selection of Bills Committee resolved that the Bill not be referred to Committee.³⁰

27. The Hon. Warren Snowdon MP, Minister for Defence, Science and Personnel, ‘[Second reading speech: Defence Legislation Amendment Bill \(No. 1\) 2009](#)’, *House Hansard*, 18 March 2009, p. 3031.

28. Information about the operation of the Defence Home Ownership Assistance Scheme is available at: <http://www.dhoas.gov.au/www/html/497-overview.asp>, accessed on 23 April 2009.

29. The Hon. Warren Snowdon MP, Minister for Defence, Science and Personnel.

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Financial implications

According to the Explanatory Memorandum, the amendments in the Bill will have no additional impact on Commonwealth expenditure or revenue.³¹

However it is not clear:

- whether the ADF will make a higher number of payments under the TPS
- whether the quantum of those payments will be greater than under the current act of grace arrangements and
- what financial impact, if any, this will have.

Main provisions

The Bill contains two schedules.

Schedule 1—Tactical Payment Scheme

Item 1 of Schedule 1 amends the Defence Act by inserting **proposed sections 123H and 123J**.

Proposed subsection 123H(1) provides that the Minister³² may authorise the making of one or more payments to a person who has suffered loss, damage or injury outside Australia because of an incident that occurs in the course of an activity of the ADF outside Australia in the following circumstances:

- person is not an Australian citizen and
- the payment is not otherwise authorised by law or required to meet any legal liability.

Three matters arise from this proposed subsection. **Firstly**, the nature and extent of the ‘loss’ that has been suffered is not defined in the Bill. It may be that this term is **intended** to encompass the ‘loss’ of a next-of-kin who has been killed in the course of the relevant ADF activity. However, it should be noted that, unlike the US scheme, **proposed subsection 123H(1)** does not make specific provision for a payment to a next-of-kin, in the event of a civilian death.

30. Selection of Bills Committee, *Report No. 4 of 2009*, 19 March 2009.

31. Explanatory Memorandum, p. 3.

32. Under section 19A of the *Acts Interpretation Act 1901* a reference to ‘the Minister’ in the Defence Act is a reference to the Minister for Defence.

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Secondly, the loss, damage or injury does not have to specifically be **caused by** the ADF, merely to have occurred in the course of an activity of the ADF outside Australia. That being the case, the proposed subsection has a broad application. It could potentially include loss, damage or injury:

- caused by non-ADF personnel (including enemy forces) or
- where the exact circumstances of the loss, damage or injury cannot be determined

as long as it is sufficiently connected to the incident.

Thirdly, the proposed subsection refers to an **activity** of the ADF. According to the Explanatory Memorandum ‘an activity may include military action, operation, exercise or training undertaken during an overseas operation’.³³ However the term, ‘activity’ is not defined in the Bill or in the principle act. This makes the proposed TPS much broader than the US scheme because condolence payments and solatia payments are only triggered by death, injury, or property damage caused by coalition or US forces generally **during combat**.

The payment cannot be made to the person more than 12 months after the relevant incident: **proposed subsection 123H(2)**. There is no requirement that investigations be undertaken, and decisions made, within a specific time frame.

The total amount of the payments must not be more than the amount set by regulation—currently \$250 000: **proposed subsection 123H(3)**.³⁴

Proposed subsection 123H(4) makes it clear that the TPS operates independently of the act of grace payment provisions of the FMA Act. It may be that the act of grace payment provisions will apply to a person whose next-of-kin has been killed in the course of the relevant ADF activity. See the comments in respect of **proposed subsection 123H(1)** above.

Proposed section 123J allows the Minister to delegate his or her powers under proposed section 123H to:

- the Secretary of the Department of Defence
- the Chief of the Defence Force
- an officer in command of an activity of the ADF outside Australia and

33. Explanatory Memorandum, paragraph 7, p. 4.

34. **Proposed subsection 123H** refers to regulations in force for the purposes of subparagraph 65(2)(a)(ia) of the FMA Act. That regulation is subregulation 29(1) of the Financial Management and Accountability Regulations 1997.

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- an Australian Public Service employee who holds or performs the duties of an APS 6 or higher position in the Department of Defence.

Schedule 2—Defence Home Ownership Assistance Scheme

There are five parts to Schedule 2 of the Bill. All of the parts amend the DHOAS Act.

Part 1 of Schedule 2 relates to **rejoining members**.

The first of the unintended consequences which the Bill seeks to address is the windfall gain in the eligibility and entitlement of members who rejoined the ADF after a break in service prior to 1 July 2008.³⁵

Defence Home Ownership Assistance (DHOA) is payable as either or both a monthly subsidy or a subsidy lump sum. A person's eligibility for the subsidy is based, in part, on their '*effective service*'. **Item 1** amends the existing definition of '*effective service*' by inserting **proposed paragraph 3(a)**. The effect of the amendment is to exclude any service performed before a break in service of greater than five years for the purpose of calculating a member's eligibility or entitlement.

Existing section 7 of the DHOAS Act lists the persons who are eligible for the subsidy as:

- a serving member
- an incapacitated member
- a rejoining incapacitated member
- a rejoining member
- a separated member
- an old scheme member.

Item 2 inserts **proposed subsection 8(3)** which clarifies that where a member appears to be eligible for DHOA under more than one of those categories, the member is expressly eligible under the section that most closely describes his or her circumstances.

Item 3 amends existing paragraphs 10(1)(b) and 11(c) by omitting the words 'on or after 1 July 2008' and substituting 'before, on or after the commencing day'. The effect of this amendment is that those persons who would be classed as 'rejoining incapacitated member' or 'rejoining member' are assessed under those categories rather than under the category of 'serving member' as currently occurs.

Part 2 of Schedule 2 relates to **subsidy certificates and service credits**.

35. Explanatory Memorandum, paragraph b, p. 2.

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A subsidy certificate is issued to an applicant so that it may be presented to a home loan provider as evidence of the member's entitlement to payment of a subsidy. Under the current arrangements:

... a subsidy certificate could have been issued even if the member had exhausted their service credit and could not receive a subsidy payment. This undermined the reliability of the certificate as evidence for home loan providers that a member was able to receive a subsidy on the loan provided.³⁶

Item 5 addresses this perceived anomaly. **Item 5** amends existing subsection 16(2) which provides that the Secretary must give a subsidy certificate to an applicant if sections 17, 18, 19 or 20 apply. **Proposed paragraph 16(2)(b)** is inserted to include the additional requirement that the applicant must also have either:

- a service credit: **proposed subparagraph 16(2)(b)(i)**, or
- in the case of a surviving partner, the service credit the deceased partner would have had if he or she had not died: **proposed subparagraph 16(2)(b)(ii)**.

In addition, **item 6** amends existing section 22 which provides for the period during which a subsidy certificate is in force by inserting **proposed subparagraph 22(b)(ia)**. The amendment provides that where a person who holds a subsidy certificate is not a member of the ADF, the subsidy certificate stops being in force as soon as the person no longer has a service credit.

Item 7 is an applications provision which operates so that the amendments in Part 2 of Schedule 2 of the Bill do not have retrospective effect.

Part 3 of Schedule 2 relates to **subsidy lump sums**.

Under the current arrangements, a member who owns an investment property whilst serving in the ADF is able to access the subsidy lump sum payment option to purchase a property to occupy as a home. This is inconsistent with the original policy intent of the lump sum payment to assist genuine first home buyers.³⁷

Item 8 repeals existing section 26 and inserts **proposed section 26** which clarifies that a lump sum subsidy is only payable to a member of the ADF and is only payable in relation to the first residential property bought while a member of the ADF.

Items 9 and 10 amend existing section 34 which details when the subsidy lump sum becomes payable. **Item 9** repeals existing paragraph 34(1)(f) and inserts **proposed paragraphs 34(1)(f) and (g)** which require the Secretary to be satisfied before approving

36. See Department of Defence website viewed at:
http://www.defence.gov.au/DPE/pac/dhoas_amend.htm, accessed 1 May 2009.

37. Department of Defence website.

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a lump sum payment that there is a reasonable expectation that monthly subsidy will be payable to the *'subsidised borrower'*:³⁸

- for at least one month if the borrower is a member of the Permanent Forces: **proposed subparagraph 34(1)(f)(i)** and
- for at the number of months remaining in the service year if the borrower is a member of the Reserves: **proposed subparagraph 34(1)(f)(ii)**.

Proposed paragraph 34(1)(g) clarifies that the subsidy lump sum will not become payable if there is previous home ownership.

Proposed subsection 34(2) relates to previous home ownership. The proposed subsection prevents a person from being paid the subsidy lump sum in circumstances where he or she (either with a partner or as an individual) has previously purchased residential property, regardless of whether he or she has resided in that property.

Item 11 provides that the amendments in Part 3 of Schedule 2 of the Bill only apply to a request for payment of subsidy lump sum which is made on or after the amendments commence.

Part 4 of Schedule 2 relates to **shared liability**.

Under existing paragraph 28(4)(c) a person may have their own subsidised loan limit added to their partner's loan limit, allowing them to jointly apply their loan limits on a single loan up to the value of the loan.³⁹

Item 13 replaces the existing paragraph 28(4)(c). The proposed wording removes the reference to 'partners' so that it becomes possible for any two *'subsidised borrowers'* to obtain subsidy on the same loan, regardless of their relationship.

Items 14 and 15 insert the words 'to a subsidised borrower' in existing subsection 51(1) and paragraph 51(1)(a) in order to clarify that subsidy is payable to a *'subsidised borrower'* in those provisions.

Items 16 repeals existing paragraph 51(1)(b) and inserts **proposed paragraph 51(1)(b)** to specify that the loan capital in respect of which subsidy is payable to a subsidised borrower is linked to the provisions in subsection 51(2)—that is, to the borrowers' length of service or eligibility.

38. Section 3 of the DHOAS Act defines a *'subsidised borrower'* as a person to whom subsidy is payable under Part 4 of the Act.

39. Department of Defence website.

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Item 17 inserts a note which links the amount of loan capital in respect of which subsidy is payable to **proposed sections 51A–C**.

Item 20 inserts **proposed sections 51A–C** which set out the rules for the treatment of loans for which both a *‘subsidised borrower’* and another person are liable.

Proposed section 51A is about the monthly subsidy payable where a *‘subsidised borrower’* and his or her partner⁴⁰ are parties to a single subsidised loan. Proposed subsection 51A(2) contains a table which sets out the relevant loan capital rules so that:

- where both of the parties to the loan are *‘subsidised borrowers’*—each partner is taken to be liable for half the loan, and each is taken to have a loan limit equal to the average of both their loan limits as sole borrowers: **proposed item 1**
- where only one of the parties to the loan is a *‘subsidised borrower’*—the subsidised borrower will be taken to be liable for the whole loan and will be able to use the full value of their loan limit as if they were a sole borrower: **proposed item 2**.

Proposed section 51B is about the monthly subsidy payable where the borrower’s partner dies. **Proposed subsection 51B(1)** applies where, at the time of death, the monthly subsidy was paid in accordance with proposed item 1 of section 51A and the entitlement of the deceased borrower to the payment of subsidy is transferred to the surviving borrower under either section 60 or 61 of the DHOA Act. In that case, **proposed subsection 51B(2)** provides that item 1 will continue to apply to the surviving borrower, as if the deceased borrower was still alive.

Proposed section 51C is about the monthly subsidy payable where a *‘subsidised borrower’* is jointly and severally liable with another person who is **not** his or her partner, for the subsidized loan. In that case, the *‘subsidised borrower’* is liable for 50 percent of the total capital amount owing on the subsidised loan: **proposed paragraph 51C(2)(a)**. In addition the *‘subsidised borrower’* has the loan limit that is set under subsection 51(2): **proposed paragraph 51C(2)(b)**.

Note 1 which is inserted after proposed subsection 51C(2) specifies, in order to avoid any doubt, that where a subsidised loan is shared between the *‘subsidised borrower’* and his or her partner, it is proposed sections 51A and 51B which apply.

Item 21 is an applications provision which provides that the amendments made by Part 4 of Schedule 2 of the Bill apply in relation to payment of subsidy during an entitlement period starting after the day on which the amendments commence.

40. According to section 3 of the *Defence Home Ownership Assistance Scheme Act 2008* a person is a *‘partner’* of another person if the two persons have a relationship as a couple (whether the persons are different sexes or the same sex) and ordinarily live with each other on a permanent and bona fide domestic basis.

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Part 5 of Schedule 2 relates to the giving of a written statement of reasons for a decision by the scheme administrator.

Existing subsection 81(2) of the DHOAS Act provides that the Secretary may, by signed instrument, delegate to the scheme administrator⁴¹ any or all of the Secretary's functions or powers under the DHOAS Act, **other than** a power or function under section 73, 74 or 75 which relate to the review of decisions.

Item 22 proposes to omit the reference to section 73. The effect of this amendment is that the scheme administrator will have the delegated power of the Secretary's function to provide written statements of reason for a decision that may be reviewable, including information about the affected person's rights.

41. In this case, the Department of Veterans' Affairs.

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