



**DEFENCE FORCE RETIREMENT
AND DEATH BENEFITS ACT 1973**

**A BLATANT DECEPTION
OF THE AUSTRALIAN PARLIAMENT**

and

**A GROSS DENIAL
OF THE SUPERANNUATION ENTITLEMENTS
OF EX-SERVICEMEN AND WOMEN**

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INTRODUCTION

1. Executive Summary

On 2 September 1970, the Government appointed a Joint Select Committee on Defence Forces Retirement Benefits Legislation (the Jess Committee), to inquire into and report on the then-current Defence Forces Retirement Benefits (DFRB) legislation. On 18 May 1972, the Jess Committee's final report was tabled in the Parliament.

On 26 May 1973, the responsible Minister, the Hon Lance Barnard, introduced *Defence Force Retirement and Death Benefits (DFRDB) Bill 1973*, to make provision for a new superannuation scheme for more than 70,000 members of the Defence Force. When he moved that the Bill be read a second time, concurrently with three other Bills, he said:

“The Bills give effect to the Government's decision announced last year to implement the recommendations of the Joint Select Committee on Defence Forces Retirement Benefits Legislation.”

But Treasury, which had long controlled Defence Force superannuation benefits, and Defence, the sponsoring Department, considered the Commonwealth Public Service (CPS) superannuation scheme to be the benchmark for Defence Force superannuation schemes. They had opposed the Jess Committee recommendations because they included entitlements which did not exist in the CPS scheme foremost among which was the right to early retirement and commutation, a recognition of the disadvantage resulting from long term military service.

When they drafted Defence Force Retirement and Death Benefits Act 1973 and its subsequent amendments, Defence, Treasury, the Commonwealth Actuary and the Parliamentary Counsel systematically transformed the Jess Committee recommendations, under the guise of maintaining consistency with the updating arrangements in the CPS superannuation scheme.

By incorporating outdated Life Expectancy tables and amendments which modified the Sections that granted the entitlements recommended by the Jess Committee, they transformed the right of DFRDB members to receive an unindexed part pre-payment of their retirement pay entitlement, to assist with their re-establishment in civilian life after 20 years of service, into an indexed lifetime penalty. Not just for the members who availed themselves of that entitlement, but for all recipient members and their surviving dependents.

2. Purpose

This submission shows;

- a. how the architects of the DFRDB Act and its amendments, transformed the Commutation entitlement into a lifetime penalty for all recipient members and their surviving dependents; and
- b. how the Parliament was deceived into enacting that legislation.

DFRDB SCHEME ENTITLEMENTS

3. Entitlements recommended by the Jess Committee

[Annex A](#) details the Jess Committee's recommendations¹ and relevant discussion.

The basic entitlements recommended by the Jess Committee were:

- a. In Recommendations 5 and 6:
That an eligible member should be entitled to retired pay and invalid pay, expressed as a percentage of final salary, adjusted annually so that relativity with average weekly earnings is maintained.
- b. In Recommendations 14(a) and 14(b):
That a recipient member should be entitled to commute (receive as a pre-payment) up to four times the annual retired pay entitlement payable in the first year of retirement and that ongoing retired pay should be reduced proportionately.
- c. In Recommendations 14(c) and 15:
That the widow or widower of a deceased recipient member should be entitled to an annuity of five-eighths of his retired pay entitlement at the date of the member's death, and that in determining a widow's or widower's entitlement, Commutation should be disregarded.
- d. In Recommendations 16(a):
That each eligible child of a deceased recipient member should be entitled to a pension equal to one-sixth of the widow's or widower's annuity.
- e. In Recommendations 16(c):
That each eligible orphan should be entitled to a pension equal to one-eighth of the widow's or widower's annuity.

¹ [Joint Select Committee on Defence Forces Retirement Benefits Legislation Report – May 1972](#)

4. Entitlements granted by the DFRDB Act

The Original DFRDB Act² implements the Jess Committee recommendations:

- a. In Section 23:
Eligible members are entitled to retired pay at a percentage of final salary, based on total years of service as stipulated in Schedule 1 of the Act.
- b. In Section 24:
Recipient members are entitled to commute up to four times their initial retirement pay entitlement with a proportionate reduction of retirement pay determined by dividing the amount commuted by an expectation of life factor stipulated in Schedule 3.
- c. In Section 32:
Eligible members are entitled to Class C invalid pay and commutation on the same basis as retired pay in Sections 23 and 24.
- d. In Section 39:
Widows (and widowers) of deceased recipient members are entitled to a pension equal to five-eighths of retired pay or invalid pay, had the member not commuted.
- e. In Section 42:
Eligible children of deceased recipient members are entitled to a pension at the rate of one-sixth of the widow's or widower's pension.
- f. In Section 43:
Eligible orphans of deceased recipient members are entitled to a pension at the rate of one-eighth of the widow's or widower's pension.

THE TRANSFORMATION OF DFRDB ENTITLEMENTS

5. The Modifying Provisions

The entitlements granted in Sections 23, 24, 32, 39, 42 and 43 are modified by; Sections 24(3)(b), 98A, 98B and Sections 24(5), 24(6) and 24(7) which were in effect from 2 September 1991 until 30 June 2016.

6. Section 24(3)(b)

The wording of Section 24(3)(b) transforms the proportionate reduction of retirement pay or invalidity pay after Commutation, that is, the acquittal of the part pre-payment of retirement pay or invalidity pay entitlements, into a disproportionate lifetime liability.

² [Defence Force Retirement and Death Benefits Act 1973](#)

Section 24(3)(b) determines the quantum the proportionate reduction of retirement pay or invalidity pay after Commutation from Schedule 3, which embodies the outdated Expectation of Life Factors from the 1960-1962 Australian Bureau of Statistics Life Tables³. The outdated Expectation of Life Factors maximises the reduction of retirement pay and invalidity pay, and because those Factors have not been updated, that reduction becomes increasingly disproportionate over time.

The result of Section 24(3)(b) is illustrated in [The Effect of Section 24\(3\)\(b\)](#).

7. Section 98A

Section 98A linked all DFRDB benefit adjustments directly to the Consumer Price Index (CPI), effective from 1 July 1976 until 30 June 2014. However, the CPI failed to maintain the relativity of entitlements. In effect, it reduced the benefits of every member who retired before 2014 by up to 24%, and those reductions flow on to the pensions of the eligible dependents of deceased members.

From 1 July 2014, *Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Act 2014* altered the basis for adjustments for recipients aged 55 or older to the more favourable of positive movements in; the CPI, Pensioner and Beneficiary Living Cost Index and a hypothetical pension at 27.7% of male total average weekly earnings.

This amendment arrested the detrimental effect of the CPI on DFRDB entitlements but locked in the loss of relativity sustained to that point, for the remainder of recipients' lives.

The result of Section 98A is illustrated in [The Effect of Section 98A](#).

8. Section 98B

The updating method used in Section 98B was first introduced in *Defence Force Retirement and Death Benefits (Pension Increases) Act 1974* (the 1974 Pension Increases Act) and then in a modified form in *Defence Force Retirement and Death Benefits (Pension Increases) Act 1976* (the 1976 Pension Increases Act).

The 1974 Pension Increases Act applied an interim 16.2% indexation increase to five-sevenths (71.4%) of DFRDB benefits. For the members who elected to commute, it adjusted their residual retirement pay which, in effect, also applied the indexation increase the retirement pay reduction, thereby significantly altering the commutation arrangement.

The 1976 Pension Increases Act applied an interim 17.6% indexation increase to 100% of DFRDB benefits. Again, for the members who elected to commute, the indexation increase was applied to their residual retirement pay, further altering the commutation arrangement.

³ Australian Bureau of Statistics 3105.0.65.001 Australian Historical Population Statistics

The result of the 1974 and 1976 Pension Increases Acts is illustrated in [The Effect of the 1974 and 1976 Interim Adjustments](#).

Section 98B retained the adjustment method incorporated by the 1976 Pension Increases Act for members who elected to commute. For members who did not to commute, it applied only the indexation increases, which would result had those members commuted their full entitlement, to their retirement pay or invalidity pay entitlements. The effect of which flows on to the pensions of the eligible dependents of deceased recipient members.

The result of Section 98B is illustrated in [The Effect of Section 98B](#).

The effects of Sections 98A and 98B are cumulative.

9. Sections 24(5), 24(6) and 24(7)

Defence Force Superannuation Legislation Amendment Act 1991 (the 1991 Amendment) closed the DFRDB scheme to new members and incorporated Sections 24(5), 24(6) and 24(7) in the DFRDB Act. These amendments applied to re-entrant members who had commuted at the time of their initial retirement and subsequently became entitled to retirement pay again.

Under these amendments, eligible members had deducted from their subsequent Commutation entitlement an amount equal to the difference between the previous Commutation entitlement and the amount of that entitlement indexed, per Section 98B, until the date of re-enlistment. Members could not decline Commutation.

However, the amendments take no account of the retirement pay reduction resulting from the previous Commutation, thereby imposing a significant penalty determined by the interval from the date of the prior Commutation to the data of re-enlistment.

The impact of Sections 24(5), 24(6) and 24(7) is illustrated in [The Effect of Sections 24\(5\), \(6\) and \(7\)](#).

Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015 repealed Sections 24(5), 24(6) and 24(7) because it requires all retired Defence Force members of earlier superannuation schemes, who re-enlisted and retired after 1 July 2016, to become members of the *ADF Super* scheme.

BACKGROUND

10. The 1972 Ministerial Statement

On 26 October 1972, the last sitting day of the House of Representatives of the 27th Parliament, then Prime Minister, the Right Hon William McMahon delivered a Ministerial Statement⁴ on Defence Forces Retirement Benefits.

From the ensuing debate, it is apparent that Treasury was opposed to the Jess Committee's recommendations and that view, represented by the Treasurer (Mr Snedden) and supported by the Minister for Defence (Mr Fairbairn), held sway in Cabinet which decided, after an 11th-hour meeting, not to proceed with a new scheme.

However, after representations to the Prime Minister by the Government members of the Jess Committee, a compromise was reached which included a commitment to hold two new independent inquiries to examine; pension updating methods and the effects of transferring the pre-1959 and the post-1959 DFRB members into the proposed scheme. Which was seen by the Deputy Leader of the Opposition and Shadow Minister for Defence (Mr Barnard)⁵ as a delaying tactic in an attempt *"to do a hatchet job on the Jess recommendations and produce a watered-down version"*.

The Chairman of the Jess Committee (Mr Jess)⁶ was critical of Treasury's inability to produce a report five years after having been tasked in 1967 to see how the pre-1959 members could be brought into the post-1959 scheme. Mr Jess felt that *"the hand of the Treasury has been over the DFRB legislation for too long"* and disagreed that the legislation should remain in Treasury hands.

Mr Jess was *"not impressed one iota with the support that this scheme has been given by the Department of Defence whose job it is to stand and speak on behalf of the defence forces"* and the little stand made by the Department on representing the views of the Services.

Regarding the Treasury, Mr Jess said that the Jess Committee had endeavoured to obtain costings and financial information from the Treasury but had been unable to get satisfactory material.

Mr Whitlam⁷, then the Leader of the Opposition, considered an inhibiting factor regarding the DFRB scheme to be that the Public Service, particularly the Treasury, persisted in equating the peacetime Army to the Commonwealth Public Service.

⁴ [House of Representatives Hansard – 26 October 1972 – Page 3279](#)

⁵ [House of Representatives Hansard – 26 October 1972 – Page 3285](#)

⁶ [House of Representatives Hansard – 26 October 1972 – Page 3287](#)

⁷ [House of Representatives Hansard – 26 October 1972 – Page 3290](#)

The debate following the Prime Minister's statement establishes that there was strong opposition to the Jess Committee's recommendations from Treasury and the Department of Defence because those recommendations included provisions, which did not exist in the Commonwealth Superannuation scheme for public servants.

DECEPTION OF THE PARLIAMENT

11. The Original DFRDB Bill

On 25 May 1973, when he moved that *Defence Force Retirement and Death Benefits Bill 1973* be read a second time⁸, the Minister (the Hon Lance Barnard), reaffirmed his Government's decision to implement the recommendations of the Jess Committee.

The only reference the Minister made to Commutation of retirement pay was that it would be a right, and did not indicate that there were any changes to the Jess Committee's recommendations for that provision.

The Original Bill had already been grouped with three other Bills but the Leader of the House, Mr Daly⁹, asked for the debate to cover a further two Bills. There being no objections, the Speaker allowed the discussion to cover all 6 Bills.

Mr Robert Bonnett¹⁰, a former member of the Jess Committee, considered the translation of the Jess Committee's recommendations into legislation to border on "*incomprehensible*" and regarded the exclusion of Service representation from the drafting committee as inappropriate. But Mr Bonnett appeared to be unaware of the significant departure in the draft legislation from the Jess Committee's recommendations on Commutation.

Mr David Hamer¹¹, also a former member of the Jess Committee, protested that the time allowed for proper consideration of a Bill of such complexity was grossly inadequate¹². He noted that many anomalies would be found, but like Mr Bonnett, appeared to be unaware of the alteration of the Commutation arrangement.

Mr Rendle Holten¹³ considered that the time to read, let alone study the Bill was inadequate.

The Hon David Fairbairn¹⁴, who had been the Minister for Defence in the previous Government, said "*there appeared to be a resistance amongst many people to realise that conditions of service in the Services are completely different from conditions of service in the*

⁸ [House of Representatives Hansard – 25 May 1973 – Page 2707](#)

⁹ [House of Representatives Hansard – 30 May 1973 – Page 2879](#)

¹⁰ [House of Representatives Hansard – 30 May 1973 – Page 2879](#)

¹¹ [House of Representatives Hansard – 30 May 1973 – Page 2882](#)

¹² [House of Representatives Hansard – 30 May 1973 – Page 2882](#)

¹³ [House of Representatives Hansard – 30 May 1973 – Page 2886](#)

¹⁴ [House of Representatives Hansard – 30 May 1973 – Page 2888](#)

Public Service” and that “ it was extremely hard to get some of those who were looking at this problem to see the difference that existed between the DFRB and the Commonwealth Public Service arrangements for retirement”, and he noted that the Jess Committee had considerable problems getting reports they wanted from the Commonwealth Actuary.

Mr Fairbairn disagreed with the appropriation of the DFRB Fund, saying that it did not belong to the Commonwealth but rather to the servicemen, and raised the possibility that the transfer represented an acquisition of property by the Commonwealth under section 51 (xxxii) of the Constitution. He also disagreed with the removal of administrative responsibility of the scheme from Treasury to Defence.

Mr Tom McVeigh¹⁵ observed that the predecessor Defence Forces Retirement Benefits Act was usually amended right at the end of a Parliamentary session when members cannot read let alone ascertain the effect of the amendments and submitted that this had occurred again with the current Bill.

In his reply, the Hon Lance Barnard¹⁶ said the Government had not in any way dishonoured the Jess Committee's recommendations even though the Jess Committee recommendations for Commutation were significantly altered when translated into the draft Bill.

12. The 1974 Pension Increases Bill

In Submission No. 1021 to Cabinet¹⁷, the Minister for Defence said:

"The interim increases were designed to produce an overall effect consistent with the Public Service superannuation scheme adjustment proposed in a Bill before the Parliament at this time, the basis of which was the Government's decision to adopt the adjustment formula recommended by Professor A. H. Pollard."

And the proposed method for adjusting pensions for DFRDB members was:

"by calculating a notional two-sevenths (or 28.57 per cent) "Fund" share of the pension at retirement and applying the Pollard formula to the remainder."

The Pollard formula relates to the indexation of pensions payable under the Commonwealth Superannuation Fund for public servants and indexes on the Consolidated Revenue Fund (CRF) share of the pensions payable. It excludes indexation of the “Fund” which meets two-sevenths of the pensions payable because its assets are invested, yielding a return that exceeds the growth in the Consumer Price Index and Average Weekly Earnings.

¹⁵ [House of Representatives Hansard – 30 May 1973 – Page 2891](#)

¹⁶ [House of Representatives Hansard – 30 May 1973 – Page 2893](#)

¹⁷ [Cabinet Minute – Canberra, 17 September 1974 – Decision No. 2675](#)

None the less, Submission No. 1021 proposed that for consistency with the Commonwealth Superannuation scheme for public servants, two-sevenths of DFRDB pensions should be excluded from indexation.

In Decision No. 2675, Cabinet agreed that DFRDB benefits should be adjusted as set down in Submission No. 1021, seemingly oblivious to the inconsistency in the proposal for indexing DFRDB pensions, as there was no “Fund” in the DFRDB scheme and 100% of benefits were paid from the CRF.

On 13 November, when he moved that *Defence Force Retirement and Death Benefits (Pension Increases) Bill 1974* be read a second time¹⁸, the Minister (the Hon Lance Barnard) said:

“The Government's aim is to ensure that in the matter of post-retirement pension adjustments, all its retired employees receive comparable treatment.”

“The 1973 interim adjustments of DFRB pensions were based on proposals to increase superannuation pensions payable to retired public servants, which are now incorporated in the Superannuation Act, and complied with that aim. There were, however, some difficulties in the way of applying the same adjustment method to pensioners under the new Defence Force Retirement and Death Benefits scheme.”

“For pensioners retired under the conditions of the new DFRDB scheme a notional Consolidated Revenue share of five-sevenths of the total pension payable is to be adjusted.”

Both Dr Alexander Forbes¹⁹ and Mr Robert Bonnett²⁰ questioned why, two years after the Jess Committee had recommended automatic adjustments based on Average Weekly Earnings, the Government had not concluded its examination of the pension updating arrangements.

Mr John Sullivan²¹ said:

“I rise to speak in support of the Bill. I think it provides only due and proper recognition of the service given to this country by the men and women concerned.”

“I ask (the Minister) to see whether he can get some word back from the Actuary about the surplus of money in the (DFRB) scheme. I think it was in March of this year that a surplus was revealed. Questions were asked in July. We are now in November. There is still no word as to the amount involved or exactly what will be done with that surplus. I find it just a little difficult to believe that there is no urgency about this matter. I

¹⁸ [House of Representative Hansard – 13 November 1974 – Page 3443](#)

¹⁹ [House of Representatives Hansard – 20 November 1974 – Page 3780](#)

²⁰ [House of Representatives Hansard – 20 November 1974 – Page 3782](#)

²¹ [House of Representatives Hansard – 20 November 1974 – Page 3783](#)

“speak on behalf of the people who believe that there is urgency; these are the people who need that money.”

“The Bill is one which certainly will be received with tremendous thanksgiving and pleasure by all those ex-servicemen and ex-service women and by present serving men and women who can look forward in time to something of a better deal.”

From the Second Reading speeches of the three speakers, it seems that they were oblivious to the fact that only five-sevenths of the total benefits payable would be adjusted, when 100% of all DFRDB benefits are paid from Consolidated Revenue. Nor did it seem apparent to them, that because the adjustment was applied to the residual retirement pay, of the members who elected to commute a part of their retirement pay entitlement, the increase would also be applied to the retirement pay reduction, thereby substantially altering the commutation arrangement.

13. The 1976 Pension Increases Bill

In Submission No. 189 to Cabinet²², the Minister for Defence said:

“The Commonwealth Public Service (CPS) superannuation scheme has been the traditional reference area for Defence Force pensions. But there were problems in settling permanent adjustment methods for servicemen’s pensions that observed the principle of comparability.”

“I am recommending that DFR & DB pensions be adjusted with effect from 3 July 1975 as an interim measure by applying the percentage increase in the Consumer Price Index to the total pension payable.”

“(The Minister Assisting the Treasurer) has however suggested an alternative approach ... that a notional 5/7 Government share should again be applied to DFRDB pensions as it was in the 1974/75 adjustment.”

“It may be thought that the interim method of 1975/76 for DFRDB adjustment, which I am proposing, is not the same as the earlier method, some confusion might arise amongst beneficiaries; or that beneficiaries might think that the interim method I am proposing will be the permanent method. As to this, it would be surprising if pensioners understood sufficiently well the details of adjustment formulae to enable distinctions to be drawn.”

In Decision No. 414, Cabinet agreed with the proposals set down in Submission No. 189, and seemingly also did understand the adjustment formulae sufficiently well to draw distinctions.

²² [Cabinet Minute – Canberra, 6 April 1976 – Decision No. 414](#)

On 27 April 1976, when he moved that *Defence Force Retirement and Death Benefits (Pension Increases) Bill 1976* be read a second time²³, the Minister (the Hon James Killen) advised that the increase in the Consumer Price Index would be applied to 1.4 times the Government's share of DFRB benefits and the whole of DFRDB benefits.

The Minister said that it would not be appropriate for him to dilate on the differences between the two schemes but that in general terms there would be an approximate 20% increase in the entitlement of DFRB beneficiaries, but failed to say that for DFRDB beneficiaries it would be just 17.6%.

The Hon Bill Hayden²⁴ said:

"one could with some studied restraint describe as uncomplicated adjustments to the system of retirement benefits for ex-service personnel. Unfortunately, with equal restraint in describing the legislation, I must say that it is rather confusing if not overwhelming, for the average layman. Having had a look at the ways in which the adjustment formulas are to apply I am wondering whether there is not some simpler way of expressing in legislation what takes place.

Mr Robert Bonnett²⁵, the last former member of the Jess Committee, merely regarded the Bill as a "*machinery Bill*".

Mr Stephen Calder²⁶ thought that all pensions would be increased in round terms by 20 per cent.

The Hon Frank Crean²⁷ said that in his view "*it was simply a fiction to acknowledge that the Government paid roughly five-sevenths of the pension and the contributor two-sevenths*".

Mr Gordon Bryant²⁸ said that in consideration of any matter associated with servicemen "*we have to face the reality that service in the armed services is of a different order from that in any other area of the Public Service*".

As was the case with the 1974 Pension Increases Bill, from the Second Reading speeches it did not seem to be apparent to any of the speakers that the increase would also be applied to 100% of that retirement pay reduction, further altering the commutation entitlement.

In his Second Reading Reply Speech²⁹, the Hon James Killen said;

²³ [House of Representatives Hansard – 27 April 1976 – Page 1625](#)

²⁴ [House of Representatives Hansard – 27 April 1976 – Page 1858](#)

²⁵ [House of Representatives Hansard – 27 April 1976 – Page 1858](#)

²⁶ [House of Representatives Hansard – 27 April 1976 – Page 1860](#)

²⁷ [House of Representatives Hansard – 27 April 1976 – Page 1859](#)

²⁸ [House of Representatives Hansard – 27 April 1976 – Page 1861](#)

²⁹ [House of Representatives Hansard – 27 April 1976 – Page 1861](#)

"The complexity of the Bill is quite daunting." And; "I venture the view that one would need to go to a lawyer with a considerable degree of brashness, to those who are involved in the discipline of administering the legislation constantly or indeed to actuaries to gain a perceptive understanding of the full implications of the Bill" and "Even though I would be quite confident of sustaining an argument on any aspect of the Bill, I would have some doubts that I should be confident as to the quality of the argument that I might mount."

It seems from this statement that the Minister had no hand in the construction of the legislation.

14. The 1977 Amendments Bill

In Submission No. 862 to Cabinet³⁰, the Minister for Defence, the Hon James Killen, referred to Submission No. 305 to Cabinet dealing with the *Official's Committee Report on Prospective Budget Outlays 1976-77 (Section 25) – Defence Force Retirement and Death Benefits (DFRDB); Other Modification to Defence Force Pension Arrangements*.

The Official's Committee, comprising officials from the Departments of the Prime Minister and Cabinet and Treasury, included in its recommendations *"the incorporation of an appropriate discounting factor in the commutation provisions"*.

The Minister's response in Submission No. 862 was *"the incorporation of a discounting factor as suggested by the Official's Committee would involve a significant change in the current formula for calculating residual pension after commutation."* and the Defence Conditions of Service Committee had agreed that *"a further review was necessary"*, adding: *"There has been a degree of contention on this matter since the introduction of the DFRDB scheme and I think it should be resolved once and for all"*.

However, in paragraphs 16 to 18, Submission 862 incorporates a discounting factor, in the pension updating formula, related directly to members' commutation entitlements.

On 17 February 1977, when he moved that *Defence Force (Retirement and Death Benefits Amendments) Bill 1977* be read a second time³¹, the Minister representing the Minister for Defence (the Hon John McLeay) said that:

- a. The DFRB and DFRDB benefits for the year 1976-77 and in the future would be related to the percentage increase in the Consumer Price Index.
- b. *"The adjustment provisions incorporated in the Bill are detailed and complex. I propose, therefore to explain in broad terms only how they are to operate."*

³⁰ [Cabinet Minute – Canberra, 8 December 1976 – AMENDED Decision No. 1991](#)

³¹ [House of Representatives Hansard – 17 February 1977 – Page 196](#)

- c. For DFRB pensioners, the relevant pension adjustment factor would be applied to the total pension payable. For DFRDB pensioners, the adjustment factor would be applied to the retirement pay remaining as if the member had commuted to the fullest possible extent.

Mr McLeay concluded with; *"In essence, therefore, the pension updating arrangements encompassed by this Bill achieve the earlier stated aim of consistency with those currently applying to comparable classes of pensioners under the Commonwealth Public Service superannuation schemes."*

The Hon Bill Hayden³², then the Leader of the Opposition, considered that the Bill's purpose was to index benefits per the Consumer Price Index and a simple formula and saw little point in taking up the time of the House of Representatives and its officers.

Mr Bonnett³³, the last former member of the Jess Committee remaining in the House of Representatives:

- a. Considered the statement that *"the adjustment provisions incorporated in the Bill are detailed and complex"* was *"the understatement of the year."*
- b. Had forgotten that the Jess Committee considered that the Consumer Price Index *"does not fairly represent changes in general community standards"*.
- c. Was not sure if the provisions in the Bill corrected the injustice that ex-service pensioners had suffered for so long.
- d. Was not aware that the provisions in this Bill would not bring the ex-service pensioner up to the automatic adjustment level of Commonwealth Public Service pension beneficiaries.
- e. Was not aware that this Bill would alter the commutation arrangement and substantially reduce the retirement pay entitlements of members who elected to commute.
- f. Was also not aware that the Bill would equally reduce the retirement pay entitlement of members who elected not to commute, and that the effect of that would flow on to the widows, widowers and eligible children and orphans of deceased recipient members.

Mr King³⁴ did not know what the most significant aspect of the Bill was and alluded to ongoing controversy relating to this legislation.

From their speeches in this Second reading Debate, none of the Speakers, including the Minister who presented the Bill, seemed to have any understanding of the effect of this Bill.

³² [House of Representatives Hansard – 23 February 1977 – Page 371](#)

³³ [House of Representatives Hansard – 23 February 1977 – Page 371](#)

³⁴ [House of Representatives Hansard – 23 February 1977 – Page 272](#)

15. The 1991 Amendment Bill

On 13 March 1991, when he moved that *Defence Force Superannuation Legislation Amendment Bill 1991* be read a second time³⁵, the Hon Gordon Bilney said that this Bill effectively closed the DFRDB scheme.

The House wished to debate the *Military Superannuation and Benefits Bill 1991* concurrently with the *Defence Force Superannuation Legislation Amendment Bill 1991*. There being no objection, this was allowed.

The Minister said that the matters to be dealt with by the Bill included "*changes in the nature of the benefits payable to members who retire a second time.*" He did not elaborate but did present an Explanatory Memorandum to the Bill³⁶ which provided no further explanation.

The "*changes in the nature of the benefits payable to members who retire a second time.*", in fact, imposed a substantial penalty on members who re-enlisted and then retired a second time. However, none of the Speakers in this Second Reading debate indicated any understanding of the purpose or the effect of this amendment.

16. The 2014 Fair Indexation Bill

On 20 March 2014, when he moved that *Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Act 2014* be read a second time³⁷, Assistant Minister for Defence, the Hon Stuart Robert said; "*The government's fair indexation commitment, as reflected in the bill, addresses a long-standing grievance of the veteran and ex-service community about differing—and inequitable—indexation arrangements that apply to DFRB and DFRDB pensions compared to age and service pensions.*"

After the Hon Stuart Robert introduced this Bill, 24 different speakers contributed to the Second Reading debate. However, it was not apparent from their speeches that none were aware or concerned that the Bill did not restore the relativity of the benefits which had been severely eroded, between 1976 and 2015, by the unfair indexation based on the Consumer Price Index.

³⁵ [House of Representatives Hansard - 13 March 1991 – Page 1907](#)

³⁶ [Defence Force Superannuation Legislation Amendment Bill 1991 Explanatory Memorandum](#)

³⁷ [House of Representatives Hansard – 20 March 2014 – Page 2579](#)

CONCLUSION

17. A Systematic Transformation of the Entitlements

Treasury considered the Commonwealth Superannuation scheme for public servants to be the benchmark for all Defence Force superannuation and had long controlled military superannuation entitlements through a succession of Coalition Governments.

Members of the Australian Public Service were opposed to the Commutation provision in the Jess Committee recommendations which the Labor Government adopted after its election in 1972.

However, the Department of Defence, Treasury, the Commonwealth Actuary and the Parliamentary Counsel drafted the legislation, and under the guise of maintaining consistency with the Commonwealth Superannuation Scheme, systematically transformed the entitlement to Commutation into a lifetime penalty via:

- a. Section 24(3)(b) and Schedule 3 in the original Act which transforms the proportionate acquittal of the part pre-payment of retirement pay and invalidity pay entitlements (amount commuted) into an increasingly disproportionate lifetime liability.
- b. The 1974 Pension Increases Act which applied a 16.2% increase to five-sevenths (71.4%) of the retirement pay reduction of the members who elected to commute, making the acquittal of the amount commuted even more disproportionate.
- c. The 1976 Pension Increases Act which applied a 17.6% increase to 100% of the retirement pay reduction of the members who elected to commute, making the acquittal of the amount commuted grossly disproportionate.
- d. Section 98A in the 1977 Amendments Act, which linked all DFRDB benefit adjustments directly to the Consumer Price Index (CPI) from 1 July 1976 until 30 June 2014. Because the CPI failed to remain relevant, it effectively reduced by up to 24% the benefits of every member who retired before 2014 and the eligible dependents of those who were deceased.
- e. Section 98B in the 1977 Amendments Act, which retained the indexation formula introduced by the 1974 and 1976 Pension Increases Acts, but also added the same adjustment formula for the retirement pay and invalidity pay entitlement of members who elected not to commute, the effect of which also flowed on to the eligible dependents of deceased members.
- f. The inclusion of Sections 24(5), 24(6) and 24(7) via the 1991 Amendments Act, which altered the commutation entitlement, imposing a substantial penalty on re-entrants, from 2 September 1991 until 30 June 2016.

- g. The 2014 Fair Indexation Act, which altered the indexation method but permanently locked in for life the benefit reductions of up to 24% which resulted from the unfair indexation until 2014.

In the absence of any definition to the contrary, the object underlying the DFRDB Act is the Jess Committee's report and there is no evidence of any intent to alter that object, or that the outcomes of the ordinary meaning conveyed by the text of these provisions were the intent of the Governments or the Parliaments of the day.

These outcomes are unreasonable and as was suggested by Mr Fairbairn in 1973 when member contributions to the DFRB Fund were appropriated into Consolidated Revenue³⁸, are tantamount to an acquisition of property by the Commonwealth under Section 51 (xxxi) of the Constitution.

18. The Methods of Deception

The Department of Defence expressed the view in Submission No. 189 to Cabinet³⁹ that *"it would be surprising if pensioners understood sufficiently well the details of adjustment formulae to enable distinctions to be drawn"*, but ensured that the alteration of the Commutation arrangement would continue to go unnoticed by disseminating misleading information to serving and retired DFRDB members, as was found by the Commonwealth Ombudsman⁴⁰ after he investigated the DFRDB scheme in 2019.

As the review of the relevant Parliamentary debates shows, the transformation of DFRDB entitlements also went unnoticed by the Parliament, which included former members of the Jess Committee. The methods used to ensure this included:

- a. The exclusion of Service representation from the legislation drafting panels,
- b. The introduction of the inaugural Bill concurrently with three other Bills,
- c. The introduction of Bills toward the end of Parliamentary sessions,
- d. Complicated wording of the legislation to obscure its effect,
- e. Misleading information in Ministers' Second Reading speeches, and
- f. Limiting the time for proper scrutiny of Bills.

³⁸ [House of Representatives Hansard – 30 May 1973 – Page 2891](#)

³⁹ [Cabinet Minute – Canberra, 6 April 1976 – Decision No. 414](#)

⁴⁰ [Commonwealth Ombudsman's Report 06 | 2019](#)

19. Contempt for Ex-servicemen and Women

The alteration of the Jess Committee recommendations by the architects of the DFRDB Act attests to their arrogance and contempt for service personnel and the parliamentary process and the enactment of such far-reaching legislation, without adequate consideration, is a measure of the indifference of the Parliament to the entitlements for the long-serving ex-servicemen and women subject to its provisions.

More than 30,000 of DFRDB members are now already deceased, but it is not too late to remedy this failure for the 50,000 plus who are still alive and will be subject to the provisions of the DFRDB Act for up to forty or more years.

The Parliament can do this by:

- a. Amending the DFRDB Act and removing the insidious wording which transforms recipients' entitlements into lifetime penalties,
- b. Refunding the disproportionate reductions of retirement pay and invalidity pay of the members who elected to receive a pre-payment of their entitlements, and
- c. Restoring the relativity of DFRDB recipients' benefits to the levels which were set down by the Jess Committee.

In the *Australian Veterans' Recognition (Putting Veterans and their Families First) Act 2019*, the Australian Parliament declared that:

“The Commonwealth acknowledges the unique nature of military service and the sacrifice demanded of those who commit to defend our nation.”

This acknowledgement rings hollow to the ex-servicemen and women who, under the DFRDB Act, are being denied the full entitlements they earned through their military service.



(H. F. Ellerbock)

Secretary, Australian Defence Force Retirees Association

Introduction

On 2 September 1970, the Government appointed the Joint Select Committee on Defence Forces Retirement Benefits Legislation, commonly referred to as the Jess Committee, to inquire into and report on the then-current Defence Forces Retirement Benefits (DFRB) legislation.

On 18 May 1972, the Jess Committee's final report⁴¹, which set out the provisions for the introduction of a new scheme, was tabled in the Parliament.

The Jess Report Recommendations

The Jess Committee Recommendations are set out below. The recommendations relevant to this submission are highlighted.

- (1) That the present Defence Forces Retirement Benefits legislation (referred to hereafter as the D.F.R.B. legislation) be repealed and a new scheme introduced without delay. The Committee has examined the Post-1959 Scheme closely to see whether this scheme, as it stands or with modifications, would be suitable as the sole future scheme, and is unanimous that it has many defects, of which the most critical are its lack of simplicity and comprehensibility to servicemen and, therefore, should be replaced by the scheme proposed in this Report.
- (2) That the proposed scheme be a contributory retirement benefit scheme designated the Defence Forces Retirement Benefits Scheme (hereinafter called the *Proposed D.F.R.B. Scheme*) and administered by the Department of Defence. The Minister for Defence should be the responsible Minister.
- (3) That all members of the Defence Force on continuous full time duty for twelve months or more (referred to hereafter as *contributing members*) be eligible and required to join the *Proposed D.F.R.B. Scheme*.
- (4) That all *contributing members* be required to contribute at a flat rate of 5.5 per cent of *pay*.
- (5) That the terms *Pension* and *Pensioner* be discontinued; that the entitlement of a member who becomes a recipient under the *Proposed D.F.R.B. Scheme* be referred to as *retired pay* or *invalid pay*; that a person contributing to the scheme be referred to as *contributing member* and that the recipient be referred to as a *recipient member*.
- (6) That *retired pay* and *invalid pay* be expressed as a percentage of final pay and be adjusted annually so that relativity with average weekly earnings is maintained. A possible method of achieving this would be to maintain the relativity of benefits to current *pay* for the rank held on retirement.

⁴¹ [Joint Select Committee on Defence Forces Retirement Benefits Legislation Report – May 1972](#)

- (7) That the *Proposed D.F.R.B. Scheme* not be 'funded'; that members' contributions not represent a fixed proportion of the cost of the benefits provided; that the contributions of members be payable to the Commonwealth; that the Commonwealth guarantee the benefits provided and meet all costs not covered by members' contributions.
- (8) That all contributors to the *D.F.R.B. Fund* be transferred to the *Proposed D.F.R.D.B. Scheme*. The conditions of the scheme should then apply to them.
- (a) *Contributors* whose total past contributions have exceeded 5.5 per cent of *aggregate pay* should receive a refund of the excess.
- (b) A *Pre-1959 Contributor* whose total past contributions have amounted to less than 5.5 per cent of *aggregate pay* should have an option to either repay the 'shortfall' over a reasonable period or have his entitlement proportionately reduced in relation to the 'shortfall' in his contributions.
- (c) A *Post-1959 Contributor* whose total past contributions have amounted to less than 5.5 per cent of *aggregate pay* should be transferred to the *Proposed D.F.R.B. Scheme* without being required to re-pay any 'shortfall'.
- (9) That pensions and benefits payable under the D.F.R.B. legislation at the time the *Proposed D.F.R.B. Scheme* is introduced remain in force and, thereafter, be adjusted in the same manner as benefits payable to *recipient members* of the *Proposed D.F.R.B. Scheme*.
- (10) That the existing *D.F.R.B. Fund* be transferred to the Commonwealth. The question of whether the present investments are maintained or future contributions invested as a basis for a separate welfare account is a matter for the Government to determine.
- (11) RETIRED PAY
- (i) That a *contributing member* be eligible to receive *retired pay* upon retirement at the completion of twenty years *effective service* from the date of joining the Defence Force. A *Late Entrant Officer* to receive *retired pay* if he can complete at least fifteen years *effective service*.
- (ii) That an officer retired from the Defence Force at his own request before he has served to the retirement age designated for his rank be entitled to receive *retired pay* at the rate provided in Recommendation 11 (iii) reduced by a proportion obtained by multiplying his uncompleted years of service to retiring age by 5 per cent. The *retired pay* entitlement of another rank member retired at his own request before the completion of his current engagement should be reduced by a proportion obtained by multiplying the uncompleted years of his engagement by 5 per cent. (Examples given in Figure VI page 28.)
- (iii) That *retired pay* entitlement accrue at the rate set out in Figure 1 below—

FIGURE I—RETIRED PAY

<i>Years of Effective Service for Retired Pay</i>	<i>Retired Pay as a Percentage of Final Pay</i>	<i>Increments as a Percentage of Final Pay</i>
15	30.00	
16	31.00	1.00
17	32.00	1.00
18	33.00	1.00
19	34.00	1.00
20	35.00	1.00
21	36.50	1.50
22	38.00	1.50
23	39.50	1.50
24	41.00	1.50
25	42.50	1.50
26	44.00	1.50
27	45.75	1.75
28	47.50	1.75
29	49.25	1.75
30	51.25	2.00
31	53.25	2.00
32	55.50	2.25
33	57.75	2.25
34	60.25	2.50
35	62.75	2.50
36	65.25	2.50
37	67.75	2.50
38	70.50	2.75
39	73.50	3.00
40	76.50	3.00
Bold figures indicate entitlement of <i>Late Entrant Officers</i> only.		

- (iv) (a) That a former *contributing member* be entitled to purchase back all periods of past service upon re-joining the Defence Force.
- (b) That provided that no payment of *retired pay* is made during a period of *effective service* with the Defence Force a *recipient member* re-joining the Defence Force be entitled upon his eventual retirement to *retired pay* at the rate applicable to his total *effective service* with the Defence Force.

- (c) That a serving member of the Defence Force who is not a *contributor* to the *D.F.R.B. Fund* because he elected to remain on deferred pay, should not be required to contribute to the *Proposed D.F.R.B. Scheme*, but should be given the option to purchase back sufficient of his past service to qualify for entitlement under the *Proposed D.F.R.D.B. Scheme*, at the rate of 5.5 per cent of *aggregate pay* received during the years for which the member is buying back service.
- (d) That former members of *R.A.S.R.** or any similar corps still serving in the Defence Force when the *Proposed D.F.R.B. Scheme* is introduced be permitted to purchase sufficient past service to qualify for benefits in the proposed scheme.

(12) REFUND OF CONTRIBUTIONS

That a refund of contributions without interest be payable to a *contributing member* who ceases to be a member of the Defence Force before qualifying for an entitlement under the *Proposed D.F.R.B. Scheme*.

(13) GRATUITIES

That the provision in the D.F.R.B. legislation for gratuities should not be re-enacted in the *Proposed D.F.R.B. Scheme*. The Committee considers that any such provision should be made as a normal condition of service. This aspect has been drawn to the attention of the *Committee of Inquiry into Financial Terms and Conditions of Service for Male and Female Members of the Regular Armed Forces*.

(14) COMMUTATION

- (a) That provided that the option is exercised within twelve months from date of retirement a *recipient member* should be entitled to commute an amount not exceeding four times the amount of the annual *retired pay* entitlement payable to him in the first year of his retirement.
- (b) That *retired pay* proportionately reduced in relation to commutation remain payable after commutation.
- (c) That for the purpose of determining a widow's entitlement commutation should be disregarded.
- (d) That *invalid pay* and a widow's annuity should not be capable of commutation.
- (e) That the implementation of this proposal should not affect existing rights of pensioners under the existing D.F.R.B. legislation.

(15) WIDOW'S ANNUITY

- (a) That the widow of a *recipient member* receive an annuity of five-eighths of his *retired pay* entitlement at the date of his death.
- (b) That the widow of a *contributing member* receive an annuity of five-eighths of his notional *invalid pay* entitlement on the assumption that he had been classified as an invalid Class 'A' at the date of his death.
- (c) That provided no widow survives the member the widow's annuity should be payable to a woman, who throughout the period of three years immediately before the member's death, although not married to him, lived with him as his wife on a permanent and bona fide domestic basis.
- (d) That provided he was dependent for support on a female *contributing member* or *recipient member* immediately before the date of her death the annuity referred to in Recommendation 15 (a) and (b) should be payable to a widower. The annuity should only remain payable as long as the widower's financial circumstances remain substantially the same as they were immediately before the death of the *contributing member* or *recipient member*.
- (e) That upon re-marriage of a widow or widower the annuity should terminate.
- (f) That in the case of the marriage of a *recipient member* the annuity should only be payable to the widow, de facto wife, or widower, where that marriage was contracted before the *recipient member* attained age 60.

(16) CHILDREN

- (a) That a benefit be payable in respect of each child under the age of sixteen years of a deceased *recipient member* or *contributing member*. The entitlement should be \$312 per annum (reviewable at regular intervals and adjusted with rises in the cost of living) for each child plus one sixth of the widow's or widower's annuity.
- (b) That the amount in Recommendation 16 (a), (c) and (d) be payable in respect of each child of the deceased member whether legitimate or illegitimate.
- (c) That where a child under the age of sixteen years is orphaned, a benefit in respect of each such child, of \$702 (reviewable at regular intervals and adjusted with rises in the cost of living) plus one eighth of the widow's or widower's annuity be payable.
- (d) That provided a child remains *dependent* and under the age of twenty-five years the benefit payable under (a), (b) or (c) be paid as an education allowance for the period that person is a student undergoing full time education at an approved institution of learning or instruction.

(17) That there be payable to the estate of a *contributing member* or *recipient member* who dies without leaving dependents eligible for benefits provided by the *Proposed D.F.R.B. Scheme* an amount equal to one and a half times his contributions. But the value of any *retired pay* or other benefit received by a *recipient member* should be deducted from the amount payable to his estate.

(18) INVALID PAY

(a) *Initial classification*

That the file and other documents relating to a member discharged from the Defence Force medically unfit be sent to an Assessment Tribunal consisting of a panel with qualified medical members and members with industrial experience. This Tribunal to determine:

- (i) his degree of disability;
- (ii) his degree of incapacity in relation to civilian employment and classify him 'A', 'B' or 'C' with an entitlement as prescribed in Figure II.

FIGURE II

<i>Degree of disability and/or incapacity in relation to civilian employment</i>	<i>Classification</i>	<i>Entitlement</i>
100-60	A	<i>Invalid pay at the rate of 70 per cent of final pay</i>
59-30	B	<i>Invalid pay at the rate of 35 per cent of final pay</i>
29-0	C	A lump sum comprising one and a half times his contributions

(b) *Re-classification*

That the Assessment Tribunal re-examine each invalid retiree from time to time and adjust his classification upon improvement or deterioration in his degree of disability or degree of incapacity in relation to civilian employment. An invalid retiree's earnings in civilian employment should not be taken into account in assessing his entitlement. An invalid retiree should have the right to initiate review of his classification.

(c) *Appeal*

That a member aggrieved by the determination of an Assessment Tribunal should have the right to apply to an Appeal Tribunal, separately constituted

but of similar composition to the Assessment Tribunal, and that this body should have the power to affirm, vary, or substitute for that of the Assessment Tribunal, its own assessment of the member's degree of disability or incapacity in relation to civilian employment. Subject to the requirements of the *Constitution of the Commonwealth of Australia* decisions of this body should be final in respect of those matters it is empowered to examine. Such further appellate procedure as may be regarded as necessary to meet the requirements of the *Constitution of the Commonwealth of Australia* should be included in the legislation.

(19) DISPUTES

That a person whose rights under the *Proposed D.F.R.B. Scheme* are affected by a decision of an authority appointed to administer the proposed scheme should have the right to appeal to a *Prescribed Court* against that decision. Further right of appeal in keeping with requirements of the *Constitution of the Commonwealth of Australia* from the decision of the *Prescribed Court* should be provided.

(20) SERVICE DISCIPLINE

- (a) That where a member has been absent without leave for a period of twenty-eight days or been officially recorded as a deserter he should cease to be a member of the scheme. His dependants should lose all right to benefits in respect of his death on the twenty-ninth day of his absence, or the day he has been officially recorded as a deserter, whichever occurs first. But should he die absent without leave before he has ceased to be a member of the scheme, his dependants should retain their entitlement.
- (b) That *retired pay* or other entitlement of any member should not be reduced by reason only that the member has refused to sign on to a Reserve maintained by the Service of which he was a member.
- (c) That subject to (a), a *contributing member* who has length of service sufficient to qualify him for *retired pay* should not forfeit that entitlement in the event of his discharge from the Defence Force on disciplinary grounds.

Relevant Jess Committee Discussion

Under the heading **Purchase of Past Service**

Paragraph 103 states:

Provided that no payment of *retired pay* is made during a period of effective service with the Defence Force a *recipient member* re-joining the Defence Force be entitled upon his eventual retirement to *retired pay* at the rate applicable to his total *effective service* with the Defence Force. In short the benefit entitlement should correspond to the total service actually performed as a member of the Defence Force. **Of course**

adjustment would be necessary where the member had exercised the right of commutation.

Under the heading **COMMUTATION**

Paragraph 106 states:

The general policy of the Commonwealth has been that benefits should take the form, of retirement annuities wherever possible. This policy pervades the other schemes in the group operated by the Commonwealth. The justification for the inclusion of the commutation provision in the original D.F.R.B. legislation was that a serviceman often had a requirement for a capital sum on his retirement, to assist in his re-settlement and re-establishment in civilian life.

Paragraph 109 states:

The provision made for commutation in the existing legislation is designed to ensure that if the option is exercised the actuarial assumptions on which the scheme is based will not be affected. A retiree may not, therefore, commute more than he could be expected to draw as pension. The assessment of his individual life expectancy is designed to ensure this. The amount payable to the retiree is reduced to allow for expected loss to the fund of anticipated interest earnings. The commutation factors applied by the Actuary contain an element which makes this adjustment. If commutation were to be a right within the existing structure of the scheme, the factors now applied by the Actuary to establish the amount payable would have to be revised to take account of the fact that the option is likely to be exercised by persons at present precluded by the medical examination. The result would be that retirees with a first class life expectancy would be entitled to less than they can now obtain. Where the D.F.R.B. Board exercises its discretion to reject an application because it does not approve the purpose of commutation the actuarial assumptions are not affected.

Under the heading **AUTOMATIC ADJUSTMENT**

Paragraph 115 states:

The Committee considers that it is essential that *retired pay* should be adjusted automatically with increases in average weekly earnings. Unless the payment made to retired members is kept abreast of rising community standards its real value is quickly eroded.

Paragraph 124 states:

The committee has concluded that the adjustment should be related to average weekly earnings and the relativity of *retired pay* with that index maintained. This will ensure that the man in retirement will be able to maintain his position in relation to rising community standards and that he will obtain those increases when they are needed. To some extent this is a compromise between the proportion of salary method of adjustment discussed in paragraphs 118-119 and the proposal that adjustment be related to the Consumer Price Index. The Committee rejects the latter suggestion because it considers that the index does not fairly represent changes in general community standards. The following table, Figure X, extracted from the Commonwealth Actuary's last report on the Commonwealth Public Service Superannuation Fund illustrates this point—

FIGURE X

<i>Year</i>	<i>Consumer Price Index</i>	<i>Average Weekly Earnings Index</i>
(A) The Indexes—		
1969-70	109.4	229.5
1964-65	94.0	167.3
1959-60	85.7	134.3
1954-55	74.0	105.1
(B) Equivalent Annual Increases to 1969-70—	Per cent	Per cent
1964-65	3.12	6.53
1959-60	2.47	5.50
1954-55	2.64	5.34