

The Official History's Agent Orange Account: The veterans'  
perspective

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**(Presented on 24 September 2009 at the *War Wounds-Medicine and the Trauma of Conflict* Conference held at the Australian War Memorial)**

The United States Air Force (USAF) was being frustrated. It had mastery of the skies over South Vietnam and wanted to unleash its air power on the local units of National Liberation Front (NLF) and on the troops of the People's Army of Vietnam (PAVN). But those enemies skillfully used the thick canopy of the Vietnamese jungle to avoid attack from the air. For the USAF the solution was clear: remove the canopy by defoliating the jungles with Agent Orange. This herbicide was also used for the destruction of enemy crops and for clearing lines of sight around bases and along the sides of roads.

The term 'Agent Orange' popularly refers to a number of chemical mixtures used in Vietnam as defoliants. Strictly speaking, it was the name of the most widely used of those defoliants, a mixture of the chemical 2,4,D and the chemical 2,4,5-T with its impurity, dioxin. Other herbicides to which servicemen and women were potentially exposed were picloram, cacodylic acid, diquat, paraquat, bromocil, borate chlorate and creosote.

Between 1965 and 1971, the USAF used low-flying aircraft to spray some 20 million US gallons (75.7 million litres) of these chemical agents over the Vietnamese countryside.<sup>1</sup>

The chemical deluge did not end there. In the tropical heat and humidity of South Vietnam, mosquitoes, spiders and scorpions thrived. To kill these and other pests in military bases, chemical insecticides such as DDT, malathion, lindane, chlordane and dieldrin were regularly sprayed from the air and ground, while soldiers engaged in night ambushes saturated themselves with

insecticides from pressure packs. These insecticides are sometimes included under the banner of Agent Orange.

During the war, scientists in the United States began linking exposure to Agent Orange with cancer and birth defects. As a result, the herbicide spraying program was discontinued in 1971.

After the war, worried Australian veterans began to come together to ask about the chemicals to which they had been exposed and the possible consequences of that exposure. No satisfactory answers came from the federal government and bureaucracy.

Disappointed by the official response, the veterans, headed by Phil Thompson and supported by Tim McCombe, Terry Loftus and others, began to make their own enquiries. Guided by scientific advice, they gathered evidence indicating that exposure might cause cancer, birth defects and toxic brain dysfunction. But they were aware that other credible studies had failed to confirm a causal link. This conflicting evidence produced doubt. But the veterans were confident that the Repatriation Commission would agree to provide treatment and compensation to sick veterans who had been exposed to Agent Orange, because repatriation law demanded that war veterans be given the benefit of such doubt.<sup>2</sup>

Such special consideration for war veterans was not new. With increasing numbers of servicemen returning from the First World War, the Australian Soldiers' Repatriation Bill was introduced into parliament by the Minister for Repatriation, Senator E.D. Millen, in 1917. Repatriation, the Minister said, was 'an earnest attempt to meet the nation's obligations to those who on its behalf have gone down into the Valley of the Shadow of Death'.<sup>3</sup> The bill included compensation arrangements and medical care specifically tailored for war-damaged veterans.

The Prime Minister at that time, Billy Hughes, had no doubts that this obligation was the result of an unwritten but binding contract between the Australian parliament and Australia's servicemen and women: '[W]e say to them "You go and fight, and when you come back we will look after your welfare" ... [W]e have entered into a bargain with the soldier, and we must keep it.'<sup>4</sup> Hughes made it clear that the servicemen and women had every right to expect that the government would honour its promises: 'The soldier will say to the Commonwealth Government. "You made us a promise. We look to you to carry it out."<sup>5</sup>

By 1929 it had become clear that too great a burden was being placed on returned servicemen in seeking compensation for war-related disabilities. The remedy was the *Australian Soldiers' Repatriation Act 1929*, which relaxed evidentiary rules and put the onus on the Repatriation Commission to disprove a veteran's prima facie case.

In 1941 the Federal parliament again considered its responsibilities to the members of the armed forces returning from the front. A Joint Parliamentary Committee examined the adequacy of existing repatriation arrangements 'in the light of the conditions caused by the 1939 war'<sup>6</sup> and under the pressure of some 'well publicised grievances'<sup>7</sup> generated by the existing legislation. The result was Australia's new repatriation contract with its fighting forces, as embodied in the *Australian Soldiers' Entitlement Act 1943*.

In framing the new Act, much thought was given again to how difficult it should be for sick and disabled veterans to have their illnesses and disabilities accepted as war-caused. The thought of sick war veterans having to continue to fight their way through court hearing after court hearing, with too heavy a burden of proof on them, was abhorrent both to the parliament and to the Australian people. So the new legislation included a more lenient test for whether a veteran's sickness could be linked with war service. In short, the new legislation gave veterans a

generous 'benefit of the doubt'. In introducing the legislation, the Attorney-General explained:

*The whole purpose of this provision is to reverse completely the method of proof and put the burden of proof upon the authorities to negative any connection between war service and the disability. In other words, if any question which is material to the case made by any of these tribunals cannot be placed beyond reasonable doubt, the question must be determined in favour of the member of the armed forces.*<sup>8</sup>

During the long parliamentary debate on the 1943 bill, the Federal Opposition's only objection to this provision was that it might not be generous enough.<sup>9</sup>

While successive Federal parliaments supported these provisions, ambiguities in the wording of the Act led to disputes between the Repatriation Commission and the veteran community over interpretation of the 'benefit of the doubt' rule.

In 1977, however, parliament settled this issue in an amendment to the Act. In unambiguous wording that closely reflected the Attorney-General's 1943 explanation, the parliament reiterated its intention that the 'benefit of the doubt' rule should be interpreted generously.<sup>10</sup> Senator Peter Durack, the Minister for Veterans' Affairs responsible for the amendment, later told parliament: 'In redrafting the legislation, we gave the right of [reverse onus of] proof beyond reasonable doubt, which is now enshrined in the Act, to veterans.'<sup>11</sup>

It was in this longstanding tradition of what Billy Hughes had described as the 'bargain', the 'promise', that Vietnam veterans began applying for compensation for cancer on the grounds that it may have been caused by their exposure to Agent Orange. The veterans were acting as Hughes had predicted they would: 'The soldier will say to the Commonwealth Government: "You made us a promise. We look to you to carry it out."'<sup>12</sup>

The Repatriation Commission rejected the veterans' claims. The veterans believed this was because the Repatriation Commission had failed to concede the

'benefit of the doubt', as prescribed by law. This belief was reinforced by the large (and increasing) numbers of veterans whose compensation claims were initially rejected but who were subsequently successful at appeals tribunal hearings. In 1982–83, for example, 87 per cent of appeals to the Repatriation Review Tribunal were successful<sup>13</sup>. One of these successful appeals, which the campaigning veterans sponsored, was the Colin Simpson case. In 1982 the Repatriation Review Tribunal found that Simpson's fatal lymphoma was caused by his exposure to Agent Orange.

Frustrated at the Repatriation Commission's behaviour, and wanting all available evidence to be gathered, the veterans demanded an enquiry by a Royal Commission. After a change of government in 1983, the Evatt Royal Commission began its enquiry.<sup>14</sup>

An article in the April 1983 edition of the Vietnam Veterans Association's journal *Debrief* canvassed the Evatt enquiry's possible outcomes. It said in part:

*It is possible that the Royal Commission could recognise that substantial conflicting evidence exists, therefore leaving the question in doubt. In this case the Department's policy of not accepting chemical exposure as the cause of certain disabilities would be shown to be wrong because it is the Department's obligation to give veterans the benefit of any doubt.*<sup>15</sup>

The Evatt enquiry's report was presented in 1985. It confirmed the suspicions of the campaigning veterans:

*It is a matter of public record that there has been a clear divergence of opinion and of result between the Repatriation Review Tribunal and the Repatriation Commission as to the proper interpretation and application of the standards of proof prescribed under the legislation.*<sup>16</sup>

The enquiry was clear on who was guilty of error. It noted that the Repatriation Commission had 'for a number of years, refused to concede that benevolent

judicial interpretations of the application of ... [the law] were consistent with parliamentary intention'.<sup>17</sup>

And, the report said, the Department was guilty of 'finding a method whereby the Repatriation Commission may restrict benefits which have flowed from a generous - though proper - interpretation of the legislation'.<sup>18</sup>

The Evatt enquiry went so far as to accuse the Repatriation Commission of training Determining Officers 'to find ways around Court statements of what the law was'<sup>19</sup> and of emphasising 'ways in which a claim could be "knocked-out"'.<sup>20</sup>

In May 1985, while the Evatt enquiry was still sitting, an amendment was made to repatriation law that made it more difficult for veterans to succeed in claiming compensation.<sup>21</sup> The amendment introduced a more onerous standard of proof, requiring veterans' evidence to pass a 'reasonable hypothesis' test before the 'benefit of the doubt' could be given. Within a year the success rate of veterans' claims had declined.<sup>22</sup>

It was in the light of this less generous legislation that the Evatt enquiry made its medical findings. It found no link at all between exposure to Agent Orange and birth defects or toxic brain dysfunction. However, in the body of the report, the Evatt enquiry, despite the new evidentiary hurdle in repatriation law, did find a link between exposure to Agent Orange and some cancers. Specifically, it found that a repatriation determining authority might well attribute a Vietnam veteran's soft tissue sarcoma or non-Hodgkins lymphoma to his exposure to Agent Orange while on war service in Vietnam.<sup>23</sup> Had the 1985 amendment not been enacted, the list of cancers would most likely have been longer.

Confusingly for some, the 'Conclusions and Recommendations' section of the enquiry's report failed to mention the link with soft tissue sarcoma and lymphoma. Indeed in its summing-up, the report proclaimed: 'There is no reliable evidence that the chemicals in Agent Orange cause cancer in humans.'<sup>24</sup>

In general, it declared 'Agent Orange Not Guilty'.<sup>25</sup>

Clearly the 'Not Guilty' findings were made at a higher standard of proof than that demanded in repatriation legislation<sup>26</sup>. Those conclusions were, therefore, irrelevant to the veterans' case. Nevertheless, the Repatriation Commission focused only on the 'Not Guilty' conclusions and continued to reject veterans' cancer claims.

The greater propensity of the two appeals tribunals to obey the law had been noted both by the campaigning veterans and the Evatt enquiry. And so, disappointed with the Repatriation Commission's continuing intransigence, the veterans turned again to sponsoring appeals. Of course, the 1985 amendment made success more difficult to achieve, but assisted by the mountain of information compiled by the Evatt enquiry and supported by eminent medical scientists, the campaigning veterans sponsored successful case after successful case.

The first of these successful cases heard by the Administrative Appeals Tribunal was the Adrian Crisp case<sup>27</sup>. He was an infantry soldier in Vietnam who later died from malignant schwannoma (cancer of the nerve sheath). In 1990 the Tribunal found that Crisp's cancer had been caused by his exposure to toxic chemicals during his Vietnam tour of duty. In 1991 the Tribunal accepted veteran John Humffray's<sup>28</sup> death from astrocytoma (a cancerous tumour of the brain) as chemically-caused. Later in 1991 the Tribunal found that veteran Michael Shar's<sup>29</sup> pituitary adenoma (a cancerous tumour of the pituitary gland) had been caused by his exposure to herbicides. There were also the cases of Peter Edwards and Ken Kain, heard jointly.<sup>30</sup> In December 1992 the Tribunal found that both veterans' Hodgkin's lymphoma had been caused by their exposure to toxic chemicals while in Vietnam.

There were also a number of cases conceded by the Repatriation Commission before hearings at the Administrative Appeals Tribunal. Additionally, more than

ten cases were won at the first level of appeal, the Veterans Review Board.<sup>31</sup>

The Repatriation Commission, seemingly at war with the law, the appeals tribunals and the intentions of parliament, was continuing to resist stubbornly.

Meanwhile, an historian, Professor F.B. Smith, was chronicling the Agent Orange controversy for the official history of the Vietnam War. In early 1994 his account was published in the official history's third volume, *Medicine at War*.<sup>32</sup> Smith unreservedly supported the Evatt enquiry's 'Not Guilty' conclusions and vigorously castigated those who questioned them. His account, however, was silent on the events directly relevant to the veterans' case. There was no mention of the Evatt enquiry's finding that, given the 'benefit of the doubt' required by law, some cancers could be linked with veterans' exposure to Agent Orange. Missing too was any reference to the Evatt enquiry's rebuke to the Repatriation Commission for its systematic attempts to circumvent the 'benefit of the doubt' provision..

And what did Smith make of the appeals tribunal hearings that time and time again found veterans' cancers could be attributed to their exposure to Agent Orange, hearings that for some eight years had tested the evidence and found it convincing?<sup>33</sup> In this, Smith seems to have joined the Repatriation Commission in its war on the law, the appeals tribunals and the intentions of parliament because he mentions only two of these appeals tribunal hearings and then only to dismiss their importance, complaining that the veterans' success depended on them being given the benefit of the doubt.<sup>34</sup>

These omissions were startling. They showed that Smith had failed to identify the core of the controversy. The story that Smith missed can be summed up as follows. The Repatriation Commission repeatedly rejected veterans' claims that they may have been harmed by their exposure to Agent Orange. The veterans believed those claims were being rejected mainly because the Repatriation Commission failed to give the 'benefit of the doubt' as required by law. Their

suspensions were confirmed by the Evatt enquiry, which reprimanded the Repatriation Commission for willfully circumventing this law. While the Evatt enquiry was sitting, a legislative amendment was passed that made it more difficult for veterans' compensation claims to succeed. Despite this added difficulty, the Evatt enquiry found that, under repatriation law, soft tissue sarcoma (with its very many varieties) and lymphoma could be linked with exposure to Agent Orange in Vietnam. Subsequently, the campaigning veterans, time and time again, sponsored cases at the appeals tribunals in which veterans' cancers were attributed to Agent Orange exposure.

Surely this meant that the veterans were vindicated in their 'David and Goliath' contest with the Repatriation Commission. But rather than acknowledge the veterans' success in that contest, Smith launched an attack on the veterans' leadership.

Professor Smith had a belief about the 1980s. It was a time, he proclaimed, 'when ... private greed became, for some, a public good'.<sup>35</sup> Without interviewing any of the campaign's national leaders, he lumped them into that category. In intemperate outbursts, he declared: 'A small minority of disgruntled Vietnam veterans seized on the issue both as an explanation of their discontent and a likely source of [undeserved] additional repatriation benefits.'<sup>36</sup> For Smith, '[t]he clash epitomizes many of the worst aspects of Australian behaviour in the 1980s.'<sup>37</sup>

But was this really true of the national leadership? Had they not already given the most selfless service possible: going to war on behalf of the Australian community?

Phil Thompson was the campaign's national leader. He was later appointed to the Order of Australia (OAM). He completed two tours of Vietnam with the 1st Battalion, the Royal Australian Regiment (1RAR), during which he fought at the battle of Fire Support Base Coral and was later wounded by rocket-propelled

grenade shrapnel. He was devastated when, after 14 years' service, he was discharged from the army at the rank of warrant officer with a hereditary cancer. He saw his leadership of the Vietnam veteran movement as a continuation of his service.

Tim McCombe was one of the national leadership team. He also was later appointed to the Order of Australia. He served with 2RAR in Vietnam, where he lost a leg after standing on a mine. McCombe has for many years served the veteran community as the National President of the Vietnam Veterans' Federation of Australia.

Terry Loftus was another member of the national leadership team. He served two tours in Vietnam with 1RAR, during which he was wounded in action and Mentioned in Despatches. He left the army as a warrant officer after 22 years' service. Since the early 1980s, Loftus has given continuous service to the veteran community.

There were others among the national campaign leadership of the same ilk. So at the time of publication, Smith's story of the veterans' Agent Orange campaign was not only fatally flawed, it was also insulting.

Since then, the credibility of Smith's account has continued to crumble. In July 1993, the US National Academy of Science released a report (commissioned by the US Congress) on the association between Agent Orange exposure during Vietnam service and ill health.<sup>38</sup> The National Academy of Science had reviewed all existing publicly available evidence. It concluded, at a demanding high standard of proof, that exposure to Agent Orange was associated with several kinds of cancer.<sup>39</sup> It effectively overturned the Evatt enquiry's conclusion that '[t]here is no reliable evidence that the chemicals in Agent Orange cause cancer in humans',<sup>40</sup> and thus cast doubt on the 'Not Guilty' conclusion.

Although the US National Academy of Science report was published some seven

months before the publication of *Medicine at War*, there was no mention of it in Professor Smith's account. Perhaps seven months before publication had been too late in the publishing process to make changes to his manuscript. But even after the release of the US National Academy of Science report, Smith still did not publicly modify his position. And when interviewed for the March 1994 edition of the *Bulletin*, he failed to acknowledge the US report's findings.<sup>41</sup> This was another of his strange silences.

Following up on the 1993 publication of the US National Academy of Science report, the Australian government commissioned a review of it.<sup>42</sup> Published in 1994, the review concluded that, at a high standard of proof,<sup>43</sup> the following cancers were linked with exposure to Agent Orange: soft tissue sarcoma (with its very many varieties); non-Hodgkin's lymphoma; Hodgkin's disease; multiple myeloma; leukemia; and respiratory cancers (lung, larynx, trachea). It also concluded there was strong evidence for a link with chloracne and porphyria cutanea tarda.

Subsequently, the Australian repatriation system accepted these cancers and diseases as 'war-caused' in Vietnam veterans who stayed a minimum period in-country, thus entitling them to medical treatment and compensation. As a result of further US and Australian reports, prostate cancer, type 2 diabetes (subject to a blood test) as well as acute and sub-acute transient peripheral neuropathy were added to the list.

And what of birth defects? Professor Smith strongly supported the Evatt enquiry finding, which had stated: 'The hypothesis that exposure of fathers to chemicals in Vietnam caused birth defects in children conceived in Australia is fanciful'<sup>44</sup>. However, the 1996 update of the US National Academy of Science report challenged this finding.<sup>45</sup> The report identified a link between exposure of veteran fathers to Agent Orange and their children suffering the birth defect spina bifida. While the report did not

put the strength of evidence in the highest category, the evidence was sufficiently compelling for the US government to accept responsibility and generously compensate the affected children.<sup>46</sup> In other words, the hypothesis of a link between the fathers' exposure to Agent Orange and birth defects in their children is far from 'fanciful'.

Indeed, the US report's 2008 update strengthened the possibility of a link with birth defects. It stated that the developing understanding of the transgenerational effects of Agent Orange was making the link between fathers' exposure and their children's ill-health more plausible, and recommended increasing the level of epidemiological research.<sup>47</sup>

In his account, Smith quoted the Australian Commonwealth Institute of Health birth defects study of 1983.<sup>48</sup> That study found that there was 'no evidence that army service in Vietnam increases the risk of fathering children with abnormalities diagnosed at birth'.<sup>49</sup> In 1997, however, an Australian government study found an increase in the incidence of spina bifida manifesta, cleft lip, cleft palate, adrenal gland cancer and acute myeloid leukemia in the children of Vietnam veterans.<sup>50</sup> The study was not specifically designed to find a link between the children's ill health and Agent Orange but it did establish a firm relationship with 'service in Vietnam'. The Australian government instituted a program of help for the victims.

The Agent Orange controversy was a chaotic episode. Given the horror of a situation in which veterans saw possible connections between their war service and a range of postwar cancers and birth defects, it was understandable that emotion sometimes overwhelmed rationality. In fact, as war-caused psychological stress sometimes amplified the concerns of veterans, their claims

could become exaggerated and even hysterical. The pronouncements of some over-enthusiastic lawyers and fringe medicos did not help either. Additionally, the media fed an intense public interest with sensational and sometimes inaccurate reports. There were also problems with the evidence presented to the Evatt Royal Commission. In some cases, the scientific opinions on which the veterans had relied were cut to pieces. In one case, a witness was even found to have exaggerated his qualifications. The evidence given by some Vietnam veterans was also found to be flawed and unconvincing.

Smith spends a large proportion of his account indignantly detailing these inaccuracies, exaggerations, ratbaggery and disappointments. Perhaps he was attracted to this detail because he felt it demonstrated his view that the 1980s was a time in Australian society when, as he put it, 'private greed became, for some, a public good'. But Smith's focus on these details seems to have blinded him to what was important. After all, the Evatt enquiry, the decision-makers and appeals tribunals of the repatriation system, and the courts were well equipped to sort out the wheat from the chaff. What was important were the findings of these enquiries and tribunals as they affected the veterans' case. Yet the most important of these findings, Smith entirely omits from his account. He gives us a comprehensive description of the static but misses completely the message.

It was not only these irrelevant details which distracted Professor Smith. He spends another large proportion of his account attempting to discredit those who disagreed with the Evatt enquiry's 'Not Guilty' verdict. In doing so, however, he failed to acknowledge that the 'Not Guilty' verdict was reached using a standard of proof irrelevant to the veterans' case. Smith's zeal in this pursuit may have been the reason he missed entirely the central finding of the Evatt enquiry that, under repatriation law, there was indeed a link between exposure to Agent Orange and certain cancers suffered by veterans.

Perhaps Smith also became blind to the core story because of his personal

antipathy to the ‘benefit of the doubt’ law. He makes his disapproval of it clear. The chapter titled ‘The Cancer Allegations’ culminates in his criticism of the law’s generosity to veterans in Administrative Appeals Tribunals decisions. Indeed, the chapter seems to have that criticism as its purpose. It is a puzzling attitude. The Evatt enquiry, which Smith believed was ‘the pre-eminently thorough, authoritative survey of the Agent Orange episode’,<sup>51</sup> found that the application of the law by the appeals tribunals was both consistent with ‘parliamentary intention’ and whilst generous was properly so. Moreover, a whole system of appeals tribunals and courts existed to expertly interpret and apply the law. Smith seems to have missed the point that it was within a long established institutional, legal and philosophical context that the veterans were prosecuting their case, and not in some open scientific forum. His personal disapproval of veterans being treated generously is disappointing but irrelevant. These themes, pursued by Smith, were red herrings that led him further and further away from the core issues. They may provide interesting polemics for some other forum, but they do not belong in a historical account of the veterans’ encounter with Agent Orange. What should have guided Smith in this official history was the sentiment expressed in 1917 by Senator Millen and Prime Minister Hughes, and endorsed by every subsequent Australian parliament: ‘[W]e have entered into a bargain with the soldier, and we must keep it.’<sup>52</sup>

The official history’s account of Agent Orange controversy betrays this sentiment. It was fatally flawed when it was written, and has since been further discredited and superseded. Sadly, it remains the official version of these events. It must be rewritten.

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<sup>1</sup> Mr Justice Phillip Evatt, *Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam, Final Report*, Australian Government Publishing Service, 1985, vol. 1, ch. IV, p. 21.

<sup>2</sup> *Repatriation Act 1920 (Amendment Bill 1977)*.

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<sup>3</sup> *Commonwealth Parliamentary Debates*, 18-11-1917, Senate, p. 195.

<sup>4</sup> Report of the Resolutions, Proceedings and Debates of the Premiers' Conference Held at Melbourne, December 1916, in *Commonwealth Parliamentary Papers, Reports of Proceedings of Premiers' Conference, 1916-17*, p. 13.

<sup>5</sup> Report of the Resolutions, Proceedings and Debates of the Premiers' Conference (with Ministers of Lands), Held at Melbourne, January 1917, (adjourned from December 1916), in *Commonwealth Parliamentary Papers, Reports of Proceedings of Premiers' Conference 1916-17*, p. 9.

<sup>6</sup> Minister for Repatriation, Mr Francis, Minister's second reading speech, *Parliamentary Debates*, Australian Soldiers' Repatriation Bill 1943.

<sup>7</sup> Lloyd and Rees, *The Last Shilling*, Melbourne University Press, 1994 p. 266.

<sup>8</sup> *Hansard*, House of Representatives, 18 March 1943, p. 2009. Emphasis added.

<sup>9</sup> See, for instance, Mr Marwick's exchange with the Attorney-General in *Hansard*, House of Representatives, 18 March 1943, p. 1016.

<sup>10</sup> The *Repatriation Bill 1920 (Amendment Bill 1977)* said of the standard of proof:

(2) The Commission, Board, Appeal Tribunal or Assessment Appeal Tribunal shall grant a claim or application or allow the appeal, as the case may be, unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim or application or allowing the appeal.

This is generally referred to as 'reverse onus of proof beyond reasonable doubt'.

<sup>11</sup> *Hansard*, Senate, Wednesday 16 December 1992, p. 5243.

<sup>12</sup> Report of the Resolutions, Proceedings and Debates of the Premiers' Conference (with Ministers of Lands), Held at Melbourne, January 1917, (adjourned from December 1916), in *Commonwealth Parliamentary Papers, Reports of Proceedings of Premiers' Conference, 1916-17*, p. 9.

<sup>13</sup> "The Annual Report of the Veterans Review Tribunal for the year 1983-84 stated that its 'set aside' rate was 13.5% in 1979-80; 34.4% in 1980-81; 66.6% in 1981-82; 87% in 1982-83; and 84.8% in 1983-84." Bruce Topperwien, 'Relaxed Evidentiary Rules in Veterans' Legislation: An empirical analysis', a paper presented at Veterans Law Conference, Banora Point NSW, 16-17 July 2004 (sponsored by the Veterans Review Board), p. 11.

<sup>14</sup> Mr Justice Phillip Evatt, *Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam, Final Report*, Australian Government Publishing Service, 1985.

<sup>15</sup> *Debrief*, Journal of the Vietnam Veterans Association of Australia, vol. 3, no. 19, April 1983, p. 17.

<sup>16</sup> Royal Commission, Evatt, vol. 7, ch. XIV, Benefits and Treatment, p. 359. See also Topperwien 'Relaxed Evidentiary Rules in Veterans' Legislation: An empirical analysis', p. 11

<sup>17</sup> Royal Commission, Evatt, vol. 7, ch. XIV, Benefits and Treatment, pp. 364-65.

<sup>18</sup> Royal Commission, Evatt, p. 366.

<sup>19</sup> Royal Commission, Evatt, p. 360.

<sup>20</sup> Royal Commission, Evatt, p. 364.

<sup>21</sup> This was the *Repatriation Act 1920 (Amendment Bill 1985)*.

<sup>22</sup> 'Within a year the amended legislation had led to a rejection of 55 per cent of claims and to a fall in the number of claims lodged or pursued.' Brendan O'Keefe and F.B. Smith, *Medicine at*

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*War: Medical aspects of Australia's Involvement in Southeast Asian Conflicts 1950–1972*, vol. 3: *The Official History of Australia's Involvement in Southeast Asian Conflicts 1948–75*, Allen and Unwin, 1994, p. 353.

<sup>23</sup> Royal Commission, Evatt, vol. 4, ch. VIII, Cancer, p. 399.

<sup>24</sup> Royal Commission, Evatt, vol. 8, ch. XV, Conclusions, Recommendations, p. 22.

<sup>25</sup> Royal Commission, Evatt, pp. viii, 1.

<sup>26</sup> The Royal Commission report, identifies two separate standards of proof it is tasked to consider. Of the first it says, 'The Commission adopted the normal civil onus of proof...'. Of the second it says, 'It kept in mind those sections of the Repatriation Act dealing with the standard ... of proof required in determinations'. Royal Commission, Evatt, vol. 8, ch. XV, Conclusions and Recommendations, p. 10.

<sup>27</sup> Administrative Appeals Tribunal, Reasons for Decision: Repatriation Commission v Maree Smith (4/5/1990).

<sup>28</sup> Administrative Appeals Tribunal, Reasons for Decision: Humffray v Repatriation Commission (1991).

<sup>29</sup> Administrative Appeals Tribunal, Reasons for Decision: Repatriation Commission v Schar (1991).

<sup>30</sup> Administrative Appeals Tribunal, Reasons for Decision: Edwards v Repatriation Commission (December 1992); Kain v Repatriation Commission (December 1992).

<sup>31</sup> Interviews with Tim McCombe OAM, during March 2009 at the Granville, Sydney, headquarters of the Vietnam Veterans Federation of Australia. McCombe was the veterans' advocate at many of the Veterans Review Board cases. He also sponsored many of the Administrative Appeals Tribunal cases on behalf of the campaigning veterans.

<sup>32</sup> Brendan O'Keefe and F.B. Smith, *Medicine at War: Medical aspects of Australia's Involvement in Southeast Asian Conflicts 1950–1972*, vol. 3: *The Official History of Australia's Involvement in Southeast Asian Conflicts 1948–75*, Allen and Unwin, 1994

<sup>33</sup> Administrative Appeals Tribunal, Reasons for Decision: Repatriation Commission v Maree Smith (4/5/1990); Humffray v Repatriation Commission (1991); Repatriation Commission v Schar (1991); Edwards v Repatriation Commission (December 1992); Kain v Repatriation Commission (December 1992). There were a number of cases which the Repatriation Commission conceded before hearing. There were at least ten such decisions made at the Veterans Review Board in this period.

<sup>34</sup> O'Keefe and Smith, *Medicine at War*, pp. 334–35

<sup>35</sup> O'Keefe and Smith, *Medicine at War*, p. 362.

<sup>36</sup> O'Keefe and Smith, *Medicine at War*, p. 293.

<sup>37</sup> O'Keefe and Smith, *Medicine at War*, p. 362.

<sup>38</sup> *Veterans and Agent Orange*., Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Science, National Academy Press, 1993, (prepublication copy).

<sup>39</sup> 'The committee was ... conservative in its evaluation of evidence.' Robert MacLennan and Peter Smith, *Veterans and Agent Orange: Health effects of herbicides used in Vietnam*, Department of Veterans' Affairs, September 1994, p. 3.

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- <sup>40</sup> Royal Commission, Evatt, vol. 8, ch. XV, Conclusions, Recommendations, p. 22.
- <sup>41</sup> Robin Hill, *Old Wounds Re-opened*, in *Bulletin*, March 15, 1994, p. 41. In the article it is also reported that 'Edwards [the official historian] says he is happy with Smith's contribution'.
- <sup>42</sup> MacLennan and Smith, *Veterans and Agent Orange*. Professor MacLennan was from the Epidemiology Unit, Queensland Institute of Medical Research. Professor Smith was from the Department of Haematology-Oncology, Royal Children's Hospital, Parkville, Victoria.
- <sup>43</sup> 'At least as likely as not', equivalent to the Australian civil court standard of 'balance of probabilities'.
- <sup>44</sup> Royal Commission, Evatt, vol. 8, ch. XV, Conclusions and Recommendations, p. 19.
- <sup>45</sup> *Veterans and Agent Orange: Update 1996*, Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, Division of Health Promotion and Disease Prevention, Institute of Medicine, National Academy of Science, National Academies Press, 1996, ch. 9, p. 17.
- <sup>46</sup> 104th US Congress, 2nd Session, US House of Representatives, Report 104-812. President Clinton, *Announcement by President Clinton, Topic: Agent Orange*, also present: Vice President Al Gore, Admiral Elmo Zumwalt Jr and Secretary of Veterans Affairs, Jesse Brown, Washington DC, Tuesday, 28 March 1996. It became Public Law 104-204 on 26 September 1996.
- <sup>47</sup> *Veterans and Agent Orange: Update 2008*, Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update), Division of Health Promotion and Disease Prevention, Institute of Medicine, US Academy of Science, National Academies Press, 2008, Summary, p. 10.
- <sup>48</sup> Australian Veterans Health Studies, *Pilot Studies Report*, (4 vols.), Australian Government Printing Service, 1983.
- <sup>49</sup> O'Keefe and Smith, *op. cit.*, p. 317.
- <sup>50</sup> *Morbidity of Vietnam Veterans: A study of the health of Australia's Vietnam veteran community*, vol. 3, Validation Study, Commonwealth Department of Veterans Affairs, November 1999.
- <sup>51</sup> O'Keefe and Smith, *Medicine at War*, p. 361.
- <sup>52</sup> Report of the Resolutions, Proceedings and Debates of the Premiers' Conference Held at Melbourne, December 1916, in *Commonwealth Parliamentary Papers, Reports of Proceedings of Premiers' Conference, 1916-17*, p. 13.