ATTACHMENT E

Hansard 15 March, 2017.

Senator FAWCETT: At the moment, item 2 of part 2 of schedule 1 is in legislation that will be law that says whatever applied in the past there will be no detriment to the veteran from what they were entitled to in the past. That is about as absolute as you can get. The previous witnesses were talking about whether we could make that better by providing the best of whatever schemes they may have been eligible for, but that is a separate discussion.
But in terms of drawing a line under disadvantage to veterans, putting it in law is about as tight as you can get under our system of government.

Col. Jamison : I accept your point, but you have to understand that the veteran community is extremely nervous about unfettered use of power by the government and its administration. We are nervous about this. I guess that is the way to put it.

Mr McLaughlin : Perhaps I could assist here. First, I have a disclosure: I am the nominated representative for ADSO to what is known as the ESO Ginger Group. It is a group of five ESOs who meet with senior departmental officers on an as-required basis. We met for the first time on 9 November to discuss this bill, which had been introduced to parliament that day. We had to have prime ministerial approval to discuss it. We met again on 24 November to discuss the digital measures bill.

When the principal legal adviser for the department mentioned the Henry VIII clause I stated to her that, in other words, it is best described as reverse disadvantage on the Commonwealth, and she agreed completely. We have no brief with the Henry VIII provision. I think anything that is a handmaiden of the act—that can be actually turned around and used to tell the act to do what it is told and when it is told—is a brilliant thing.

But, as my colleague said here, when we looked into it further and looked at the learned submission from Slater and Gordon it created what we would call a reasonable doubt, and we had to look at that reasonable doubt for the simple reason that perception is the diesel fuel of the public service and the government and the diesel fuel of the veteran community, particularly where rights and entitlements are at stake.

I refer you to a document—a Henry VIII fact sheet—prepared by Mr Stephen Argument, Legal Adviser (Subordinate Legislation) to the ACT Legislative Assembly Standing Committee on Justice and Community Safety in 2011, in which he cited from a paper by two New Zealand parliamentarians, Tim Macindoe MP and the Hon. Lianne Dalziel MP, entitled *New Zealand's response to the Canterbury earthquakes.* In this paper Mr Argument stated, inter alia:

The Legislative Assembly has no control over the form of subordinate legislation or when it takes effect. ... In short, "Henry VIII" clauses detract from the legislative power of the Legislative Assembly.

The two New Zealand parliamentarians stated:

Henry VIII powers provide the executive with a power to override primary legislation by way of delegated legislation. The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. In other words, matters of policy can be determined by the executive without the effective scrutiny of Parliament.

The leading High Court case, as I understand it, is a 1931 case—Dignan's case, if I cite it correctly—but I note that other high courts recognise the validity of the Henry VIII clause but also its repugnance. And the Lord Chief Justice of England and Wales is very condemnatory of the Henry VIII clauses in the same legislative assembly document.
That is an itch that we need to scratch. We definitely need to scratch that itch.
We are comfortable with the fact that it will reverse a detriment to one veteran that may have an overall effect on numerous other veterans through case law. But this particular concern is worrying the community out there. There has been a bit of a backlash about it. Unless we have this honourable committee refer the bill back for further scrutiny and further consultation, it will be difficult for us to cross the road and change our support for the bill from conditional to absolute.

Senator FAWCETT: In some other areas of law—the intelligence and securities area that I am involved with, where we have powers granted to an agency or a minister that appear to be out of the ordinary—they are required to report back to the committee or to the parliament via the committee, as well it is often to an independent oversight body, whether it is an ombudsman, that that power has been used and the circumstances under which it has been used.

That then gives the legislature an opportunity to ask, 'Was that as we intended that power to be used? Do we need to change anything?' If there was a provision like that, would that give any comfort that it would not be an unfettered power but every time it was used there would be transparency and the opportunity for the legislature to respond?

Mr McLaughlin : Absolutely, without a doubt, because one of the primary pieces of ammunition in our ready round bin, as a general member of the community, is the Administrative Decisions (Judicial Review) Act 1977, sections 5 and 6. That is the ammo that any class of veteran or veterans would probably rely on to have an adverse Henry VIII decision hopefully reversed by a court of competent jurisdiction. But I agree with what you say: it would be very good indeed.