Australian Government
Department of Veterans' Affairs
OFFICE OF THE SECRETARY

Dr Kathleen Dermody
Committee Secretary
Foreign Affairs, Defence and Trade Legislation Committee
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Dear Dr Dermody

I refer to your letter of 20 June 2011 in relation to the Senate Committee on Foreign Affairs, Defence and Trade Inquiry into the provisions of the Veterans' Entitlements Amendment Bill 2011.

Please find attached a submission from the Department which addresses the amendments contained within the Bill..

If you wish to discuss the submission please contact Luke Brown from the Department on (02) 6289 6095.

Yours sincerely

Shane Carmody
Acting Secretary

ENCL

15 July 2011

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Senate Standing Committee on Foreign Affairs, Defence and Trade – Inquiry into the provisions of the Veterans' Entitlements Amendment Bill 2011

Department of Veterans' Affairs Submission

Introduction

The Veterans' Entitlements Amendment Bill 2011 ('the Bill') gives effect to the following Veterans' Affairs 2011-12 Budget measures:

- Prisoner of War Recognition (POWR) Supplement;
- Compensation offsetting under the *Veterans' Entitlements Act 1986* (VEA); and
- Rationalisation of Temporary Incapacity Allowance and Loss of Earnings Allowance.

2. The Department of Veterans' Affairs (DVA) notes that the principal reason behind the inquiry is Schedule 2 of the Bill which seeks to clarify the compensation offsetting provisions of the VEA. However, this submission also addresses the amendments contained within Schedule 1 and Schedule 3 of the Bill.

Schedule 1 – Prisoner of Wars Recognition Supplement

3. Since 2001 lump sum payments of $25,000 have been made to former prisoners of war (POWs) of the Japanese during World War 2. In 2003 these lump sum payments of $25,000 were extended to former POWs of the North Koreans during the Korean War, and were extended again in 2007 to former POWs interned in Europe during World War 2.

4. Thee payments were made to Australian veteran POWs, civilian internees and to the widow or widowers of deceased former POWs or civilian internees.

5. The lump sum payments were additional to other benefits available under the VEA to veteran POWs, including:

- provision of a Repatriation Health Card – All Conditions ('Gold Card');
- funeral benefits for the former POW;
- automatic granting of war widow/ers pension to the partner upon the death of the former POW;
- payment of residential aged care fees in both low and high-care facilities; and
- payment of fees for Extended Aged Care at Home and Extended Aged Care at Home Dementia packages, which provide care similar to high-care residential facilities in the veteran's home.

6. Subject to the passage of the Bill through Parliament and Royal Assent, the POWR Supplement will commence on 20 September 2011, with the first payment to be made on 6 October.

7. The POWR Supplement will be a payment of $500.00 per fortnight payment and will be made in addition to those payments and benefits currently received by former POWs from the Commonwealth.

8. The only criterion that a person needs to fulfil to be eligible for the payment will be that they are a former POW and still alive on 20 September 2011. The payment is not dependent on the person having suffered a war-caused injury or disease and is not considered compensation. The payment will not be subject to the offsetting provisions of the VEA.

9. The POWR supplement will not be an income support payment and will not be subject to the income test. However, if the payment remains in a recipient's bank account, it will form part of that person's assets for the purposes of the assets test. As such interest will also be deemed on that amount.

10. Other key features of the POWR Supplement are that it:

- will be tax-free;
- will not affect Family Tax Benefits or various tax offsets such as the Seniors Tax Offset;
- will not be included in the assessment of income support payments; and
- will be indexed annually on 20 September in line with the Consumer Price Index (CPI).

11. The initial payment will be made to up to 900 former civilian and veteran former POWs who are either residing in Australia or overseas and are alive on 20 September 2011. Those former POWs of whom DVA is aware will be paid automatically. It is believed that the majority of those who are eligible are already known to the DVA as a result of the $25,000 payment. If a POW who received the $25,000 lump sum does not receive their first payment on 6 October the Bill provides the capacity for their payment to be backdated to 20 September 2011.

12. There may still be some former POWs that DVA is not aware of. Those former POWs who are unknown to DVA can apply and be assessed on the eligibility criteria. A number of new claims have already been received following the budget announcement of the POWR Supplement. Those who were previously unknown to DVA and who are eligible will receive a lump sum of $25,000 in addition to the POWR supplement.

Date of commencement

13. Eligibility for the supplement will commence on 20 September 2011. This date was chosen because of the tasks required to prepare for the new payment. These include the need for the authorising legislation to be passed by the Parliament and receive Royal Assent and for IT system changes to be made to ensure that the payment is made correctly.

The POWR Supplement will be limited to former POWs

14. Although war widow/ers of former POWs were entitled to the lump sum payments of $25,000, they will not be eligible for the POWR Supplement. The intention of the POWR Supplement is to recognise the severe hardships and deprivations of the POWs themselves.
15. Widow/ers of former POWs are entitled to a range of other benefits such as the automatic grant of the war widow/ers pension and the Gold Card which entitles them to life-time treatment for all conditions.

The POWR Supplement will be limited to POWs of World War 2 and the Korean War

16. The POWR Supplement will only be made to surviving veteran and civilian former POWs held captive during World War 2 by military forces of a European enemy State or Japan or veteran POWs held captive by North Korea during the Korean War. The POWR Supplement will not be made to those who were imprisoned or detained during a conflict, period of hostilities or during peacekeeping missions other than World War 2 or the Korean War.

17. While there is wide community acknowledgment of the service of all members of the Australian Defence Force, during both war and peace, the POWR supplement is intended to recognise the extraordinary privations and suffering visited upon individuals who endured extended captivity in World War 2 and the Korean War.

Civilians will only eligible if they were domiciled in Australia immediately before their internment

18. To be eligible a civilian must have been domiciled in Australia immediately before their internment to be eligible. This is consistent with the eligibility for receipt of the previous lump sum payments of $25,000.

19. 'Domiciled in Australia' is not the same as 'resident in Australia'. Generally a person's domicile is the place that they considered to be 'home'. For example, if a person was working on contract in Malaya they probably would not think of Malaya as *home*. Home is usually, but not always, the place where a person was born, raised, educated, worked and where their relatives live.

Schedule 2 – Compensation Offsetting

20. Until the early 1970s the repatriation system that applied to veterans of overseas conflicts and the compensation arrangements that applied to members of the Australian Defence Force (ADF) on peacetime service were effectively two separate compensation systems, running in parallel. That is, what are now known as warlike service and non-warlike service ('operational service') were covered under the repatriation system, whereas peacetime service in Australia was covered under the Commonwealth employees' compensation system.

21. In 1973 this changed when the then Government extended compensation coverage under the *Repatriation Act 1920* ('Repatriation Act'; the predecessor to the VEA) to injuries, diseases and deaths related to peacetime defence service, subject to a qualifying period of three years. The intention was to encourage additional personnel to join the ADF following the cessation of national service. Coverage for peacetime service under the Repatriation Act was backdated to 7 December 1972.

22. However, compensation for injury and death related to peacetime service was also still available under the provisions of the *Compensation (Commonwealth Government Employees) Act 1971* (the predecessor to the *Safety, Rehabilitation and Compensation Act 1988* [SRCA]). As a consequence the two previous separate compensation systems that applied to members of the ADF converged and provided a system of "dual eligibility" for incapacities relating to Defence service.

23. Dual eligibility was also possible where a veteran or war widow/er received common law damages or compensation under another statutory scheme (such as under state workers compensation legislation) as well as compensation under the VEA.

24. At the same time, offsetting provisions were introduced into the Repatriation Act to ensure that an individual could only be compensated once for a service-related incapacity. These offsetting provisions were duplicated in the VEA when it replaced the Repatriation Act in 1986.

25. On 7 April 1994, the enactment of the *Military Compensation Act 1994* removed dual eligibility under the VEA and SRCA for ADF members rendering peacetime service. With the exception of those who enlisted before May 1986 and served on continuous full-time service (CFTS) for 3 or more years, or who enlisted after May 1986 and served until April 1994, members on peacetime service were covered by only the SRCA from 1994 onwards.

26. The *Military Compensation Act 1994* also extended compensation coverage under the SRCA from peacetime defence service only to include operational service, once again resulting in dual eligibility under the VEA and the SRCA. Identical offsetting provisions were also introduced for cases where otherwise duplicate compensation would have been paid.

27. Dual eligibility under the two Acts continued until the commencement of the *Military Rehabilitation and Compensation Act 2004* (MRCA) on 1 July 2004. The MRCA provides compensation for all post 30 June 2004 service-related injuries, diseases and deaths, irrespective of whether the related service is peacetime or operational service.

28. The table in the Attachment to this submission provides dates and details of the overlapping entitlements between the SRCA and the VEA.

Policy intention

29. The policy intention of the offsetting provisions has always been to offset where a person is compensated twice for the same incapacity and the policy has consistently been implemented on this basis.

30. The VEA defines 'incapacity' as the 'effects of that injury or disease and not a reference to the injury or disease itself'.

31. The level of incapacity suffered by an individual determines the amount of disability pension payable under the VEA. The level of incapacity is assessed by reference to the impairment and lifestyle effects of the injury or disease. A similar assessment regime is in the SRCA and the MRCA.

32. The following table provides an example of how compensation offsetting is applied under the VEA.

Table 1.2: Example of compensation offsetting

Step	Action	Example
1	Identify the dollar amount of disability pension paid in respect of the incapacity for which other compensation is paid.	Veteran A receives 70% disability pension per fortnight ($276.99) for incapacity from a lower back condition, the only accepted disability.
2	Identify the fortnightly amount of other compensation paid.	Veteran A is also receiving $1,185.20 (gross) in compensation from another source per fortnight for the same incapacity.
3	Compare the dollar amounts from Step 1 and Step 2; the lesser is the amount by which the disability pension is offset.	Disability pension is fully offset as the incapacity payment exceeds the 70% disability pension rate.

33. Current offsetting arrangements have been supported by successive Commonwealth Governments since they were introduced. In 2003, the Senate Committee Inquiry into Aspects of the Veterans' Entitlements Act and the Military Compensation Scheme considered the offsetting provisions. However, it only considered the actuarial formula to be applied to offsetting cases in calculating the fortnightly equivalent of a compensation lump sum to be offset against VEA disability pension.

34. Since the Senate Inquiry, offsetting arrangements have continued unchanged, with the only development in this area being a Full Federal Court decision in 2009.

What is being addressed by the amendments to the offsetting provisions?

35. In *The Commonwealth v Smith* [2009] FCAFC 175 ('the Smith case'), the Full Federal Court considered whether offsetting should have been applied to Mr Smith's disability pension. Mr Smith had served in Vietnam and as a result of that service suffered post traumatic stress disorder (PTSD). He was granted disability pension under the VEA for the emotional and behavioural consequences of that condition. He was also onboard the HMAS Melbourne when it collided with the HMAS Voyager and was granted common law damages in respect of the severe shock from that incident. His common law damages were paid by the Commonwealth and the terms of settlement specifically excluded PTSD.

36. The Full Federal Court decided that it had not been appropriate to offset in Mr Smith's case because the condition for which he was granted disability pension was a different condition from that compensated at common law.

37. It is considered that the decision of the Full Federal Court that offsetting should not have occurred applies only to the unique circumstances of Mr Smith's case. These included that, with the agreement of the Commonwealth, the common law claim for compensation was expressly changed to remove the two conditions that were being compensated under the VEA.

38. Nevertheless, the Government decided to amend the offsetting provisions of the VEA to ensure that the legislation is clear in its intent.

39. The amendments seek to affirm and give clarity to the original intention of the legislation – that is, that offsetting occurs where a person receiving a disability pension under the VEA for an incapacity receives duplicate compensation for that same incapacity. As such, if passed, they should avoid the likelihood that, on the basis of the Smith case, those seeking future compensation payments could circumvent the offsetting provisions by exclusion of specific injuries or diseases from the terms of the compensation settlements.

40. Broadly, the policy objective of the amendments is to provide some certainty that the offsetting provisions in the VEA can continue to be administered as they have been for nearly 40 years, so as to prevent duplicate compensation being paid to veterans for the same incapacity.

What is <u>not</u> being addressed by the amendments to the offsetting provisions?

41. The following issues which have been topics of discussion with the ex-service community over a number of years are not affected by the proposed amendments to the offsetting provisions of the VEA contained within the Bill:

- the formula used for calculating the amount of offsetting to be applied once a decision has been made to offset;
- the offsetting of Commonwealth superannuation payments against certain payments made under the SRCA or the MRCA; and
- the effect of VEA or SRCA payments on the quantum of permanent impairment payments made under the MRCA.

42. The issues in paragraph 37 above are the subject of recommendations made by the Review of Military Compensation Arrangements which is currently before the Government. The report from the Review was finalised in February 2011 with the report being released publicly on 18 March 2011. At that time the Minister for Veterans' Affairs sought feedback from members of the defence and veteran communities up to 30 June 2011. The Minister will consider all feedback prior to the Government formulating its response.

Impact on current entitlements

43. Some veterans may be concerned that the amount of disability pension that they are currently receiving will be affected by this amendment.

44. The amendments will not and are not intended to change the operation of the offsetting provisions in any way. As a result, following the passage of the legislation, a person whose disability pension is currently being offset by another payment for the same incapacity will continue to have his or her pension offset at exactly the same rate, unless there is another reason to change that rate.

Schedule 3 – Temporary Incapacity Allowance

45. Under the VEA, Temporary Incapacity Allowance (TIA) is currently payable to employed veterans or members who have undergone hospital or other institutional treatment for a war or defence caused disability and have been off work for a continuous period of more than 28 days. There is no requirement that the veteran or member have suffered a loss of income during this period, but the veteran or member must have been prevented from undertaking his or her usual remunerative work for the whole period. TIA is paid at a rate that is the difference between disability pension already received and the Special Rate.

46. The Loss of Earnings (LOE) Allowance is also available under the VEA, and is similar to TIA except that it applies in wider circumstances. The LOE Allowance compensates eligible veterans or members for salary, wages or earnings lost due to absences from work for treatment of war- or defence-caused disabilities, or to attend certain appointments. It may also compensate the veteran's or member's authorised representative or attendant who accompanies them at the time of receiving treatment or attending the appointments. The LOE Allowance has no requirement for the period of incapacity to exceed 4 weeks as is the case with TIA. The LOE allowance is payable at the rate of the earnings loss, limited to a maximum of Special Rate disability pension (taking into account any disability pension already paid).

Why the change is happening

47. This measure will abolish TIA with effect on and from 20 September 2011. From this date, any veteran or member who suffers a temporary period of incapacity due to treatment received for a war- or defence-caused condition will be encouraged to claim the LOE Allowance instead of TIA.

48. In order to receive the LOE Allowance, the veteran or member must have experienced some loss of earnings, which is not a requirement for TIA. Veterans or members who do not suffer a loss of earnings are not eligible to receive the loss of earnings allowance.

49. Therefore, the changes outlined in this measure remove the payment of allowances in circumstances where the veteran or member has not experienced an actual loss of earnings and allows the Government to better target assistance to the ex-service community. It also removes the confusion about two similar payments and removes unnecessary overlap.

When the change will take effect

50. Payment to existing TIA recipients will cease on 19 September 2011. Any veteran or member receiving TIA will be encouraged to apply for the LOE allowance.

51. Under the existing TIA provisions, veterans and members have 12 months from the commencement of the treatment period within which to claim the allowance. Transitional provisions will enable veterans and members to still be able to claim TIA, within 12 months of the commencement of the treatment period, if the treatment period commenced prior to 20 September 2011. Transitional provisions will also mean that veterans and members may be eligible for TIA for any period of treatment that commences in the four weeks prior to 20 September 2011, where the treatment period would extend beyond four weeks, they would still receive TIA for the period up to and including 19 September 2011. For example, if a veteran commenced treatment on 8 September 2011 and ceased treatment on 30 October 2011, TIA may be payable for the period from 9 September 2011 to 19 September 2011.

Impact

52. As a result of this measure, some existing TIA recipients will be affected. Those receiving TIA who are not eligible for the LOE Allowance from 20 September 2011 as they have not suffered a loss of earnings during their temporary incapacity will not receive any allowance.

53. Other existing TIA recipients will be affected from 20 September 2011 if their loss of earnings is less than the difference between the Special Rate of disability pension and their current level of disability pension, as they will only receive an amount equivalent to their loss of earnings, rather than an increase to the Special Rate.

Approximately 200 veterans or members received TIA in the last 12 months.

ATTACHMENT

Comparison Table of VEA and SRCA

If your injury occurred on:	7 Dec 72 - 21 May 86	22 May 86 - 6 Apr 94	7 Apr 94 - 30 Jun 04
Peacetime Continuous Full-Time Service (CFTS)			
Enlisted on or after 7 Apr 94	N/A	N/A	SRCA
Enlisted on or after 22 May 86 (and have completed 3 years continuous service by 6 Apr 94)	N/A	SRCA & VEA	SRCA
Enlisted on or after 22 May 86 (and have not completed 3 years continuous full-time service by 6 Apr 94)	N/A	SRCA	SRCA
Enlisted before 22 May (and have continuous services up to and after 7 Apr 94)	SRCA & VEA	SRCA & VEA	SRCA & VEA
Former Members (prior to 7 Apr 94)	SRCA & VEA	SRCA & VEA	N/A
Part-time Service	SRCA	SRCA	SRCA
Operational Service (warlike service)	VEA	VEA	SRCA & VEA
Peacekeeping Service (non-warlike service)	SRCA & VEA	SRCA & VEA	SRCA & VEA
Hazardous Service (non-warlike service)	No Declared	SRCA & VEA	SRCA & VEA

Notes:

1. For service between 3 January 1949 and 7 December 1972, ADF members are covered under the SRCA only for peacetime service and under the VEA for operational and peacekeeping service. There was no provision for hazardous service at that time

2. Members who enlisted on or after 22 May 1986 and who did not complete 3 years continuous full-time service before 6 April 1994 but were discharged as medically unfit may claim under the VEA

3. 'Hazardous service' is service that has been declared, in writing, by the Minister of Defence, to be hazardous.