



**Australian Government**  
**Specialist Medical Review Council**

# Members' Manual

January 2018

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## INTRODUCTION

The SMRC is an independent statutory body that can be established to review a SoP that has been written by the RMA. The SMRC is independent of the Repatriation Commission, the Military Rehabilitation and Compensation Commission (MRCC) and the RMA.

Members of the SMRC are medical practitioners and scientists, appointed by the Minister for Veterans' Affairs on a part-time basis. SMRC members are selected for the purposes of each specific review of a SoP that is before the SMRC. Each review council must consist of at least three and not more than five members appointed by the Minister.

This manual contains a number of chapters, covering an introduction to the Statements of Principles system, sound medical-scientific evidence, and standards of proof. It includes a number of detailed appendices, including a history of the Australian Repatriation system, those Parts of the *Veterans' Entitlements Act 1986* (VEA) which directly relate to the SMRC and the Repatriation Medical Authority (RMA, whose decisions the SMRC reviews), a number of policy documents providing a detailed description of the SMRC's operations, and the operations of the RMA.

Members wishing to obtain additional information about any aspect of the SMRC, SOPs, disability compensation or the Repatriation system should discuss their specific needs or interests with the SMRC Registrar.

## THE STATEMENTS OF PRINCIPLES SYSTEM

### Background

Compensation for the incapacity or death of members of the Australian Defence Force, as part of a wider 'repatriation' system, has its genesis in World War One. The establishment of the Repatriation Commission and the Repatriation Department (now known as the Department of Veterans' Affairs) and passage of the *Repatriation Act* in 1920 created a national system designed to deliver on behalf of Australia obligations owed to volunteers who had "heroically fought and suffered in its defence."<sup>1</sup> The system has been organised around five principal areas – war pensions and other compensatory assistance; general assistance to war veterans; medical and hospital benefits; housing; and war graves<sup>2</sup>.

Other programs have ceased or been developed over time as circumstances and expectations have changed. Pensions and assistance provided to veterans with tuberculosis, for example, disappeared in the 1970s. A national network of prostheses factories (the Repatriation Artificial Limb and Appliance Centres) were closed in the early 1990s, and general and psychiatric hospitals were similarly closed, transferred to State Governments or sold between 1988 and 1994. Compensation pensions for 'peacetime' service commenced in 1972, and expanded greatly in 1999. Commemoration activities grew rapidly from the late 1990s.

Compensation, in the form of a pension (payable at a variety of levels commensurate with the level of severity of the associated impairment) and medical treatment, for injuries or diseases causally related to war service was introduced as an integral part of the original repatriation system. The provisions and basis for determining whether a claimed condition is in fact due to war service – or other types of 'eligible' service after World War Two – have varied over time, as a result of changes to the legislation, decisions by the courts or the understanding of medical causation. The area of veterans' entitlements law is one of the most extensively contested areas of administrative law, with more cases each year than any other area other than taxation law.

A formal review of the compensation program was prompted by the 1992 Auditor-

General's report on the compensation provided by the Department of Veterans' Affairs (DVA) to veterans and their dependants for injuries, diseases and death attributable to service. That review, together with a number of High Court decisions which allowed successful claims by veterans and the outcome of an inquiry by the Senate Committee on Legal and Constitutional Affairs, led to the establishment in 1993 of the Veterans' Compensation Review Committee, chaired by Professor Peter Baume. That Committee took evidence from the veteran community and issued a report entitled 'A Fair Go' in March 1994.

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<sup>1</sup> Lloyd, C & Rees J (1994) *The Last Shilling: A History of Repatriation in Australia*, MUP, Melbourne, p 1

<sup>2</sup> Ibid p 3

The RMA arose from the recommendation of the Baume Committee that an expert medical committee should be formed. It was considered that such a committee would assist in providing a more equitable and consistent system of determining claims for disability pensions for veterans and their dependants.

The Government announced the establishment of the RMA in the 1994/95 Federal Budget. The role of the RMA was to issue binding Statements of Principles (SOPs) based on sound medical-scientific evidence stating what factors must exist to establish a causal connection between service and a medical condition. The *Veterans' Entitlements Act 1986* (the VEA) was amended to reflect this announcement on 30 June 1994. The passage of the *Military Rehabilitation and Compensation Act 2004* (the MRCA) extended the application of SOPs to the consideration of claims to have injury, disease or death accepted as service-related under that Act for all service on or after 1 July 2004.

A more detailed overview of the Repatriation system can be found **APPENDIX 1**. The overview, 'History of Repatriation System', is chapter 3 of the 2003 Report of the Review of Veterans' Entitlements (the Clarke Report)<sup>3</sup>. An overview with a focus on military compensation arrangements, chapter 2 of the 2011 Review of Military Compensation Arrangements, can be found at **APPENDIX 2**<sup>4</sup>. Further reading could include Lloyd and Rees' *The Last Shilling* or Creyke and Sutherland's *Veterans' Entitlements Law*<sup>5</sup>.

## The Legislation

The VEA was amended in 1994 to establish the RMA (s196A). A new Part XIA was inserted in the Act which set out the constitution, functions and powers of the organisation and, broadly, how it should operate. Its functions are specified as undertaking investigations and determining SOPs (s196B). The VEA specifies how investigation are commenced (s196B), who may request an investigation or review (s196E), make a submission (s196F), and how investigations must be notified (s196G).

The number (s196L), qualifications (s196M) and tenure of office(s196N) of RMA Members are also specified in Part XIA, as well as reference to the meetings of the RMA (s196R), payments to Members (s196S) and staff to support the RMA (s196T).

Part XIB of the VEA covers similar matters in relation to the SMRC.

## Statements of Principles

SOPs are disallowable instruments used to determine liability for claims made under the VEA and the MRCA.

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<sup>3</sup> <http://www.dva.gov.au/consultation-and-grants/reviews/clarke-review#report>

<sup>4</sup> <http://www.dva.gov.au/consultation-and-grants/reviews/review-military-compensation-arrangements/implementation-activities>

<sup>5</sup> Creyke, RC & Sutherland, P (2008) *Veterans' Entitlements Law*, 2<sup>nd</sup> Edition, Federation Press, Sydney

The SOPs are 'templates' which set out all factors which can cause or permanently worsen a disease or injury (and potentially death). All claims for pensions are assessed against the relevant SOP. If an individual claimant's circumstances meet at least one of the causal factors listed in a SOP, the claim may be accepted provided that the provisions of the factor relied upon are related to service. If an individual claimant's circumstances do not meet one of the causal factors listed in a SOP, the claim must be refused.

Disallowable instruments are a form of delegated legislation (also known as legislative instruments), which have the status of law. Parliament has delegated its authority to make legislation to the RMA. The SOPs do not have to be passed (or even considered) by the Parliament, although they are required to be registered and then 'tabled' in both Houses of Parliament for 15 sitting days. During that time, any MP (or Senator) can move a motion of disallowance in relation to a SOP, which if passed (or if not defeated, withdrawn or otherwise disposed of within a further 15 sitting days) causes the SOP to cease to be operative. SOPs apply from the date of their registration on the Federal Register of Legislative Instruments or the date specified in them, whichever is the later.

For information about the structure of the SOPs see the **APPENDIX 4**

## Statutory Bodies

There are a number of statutory bodies with a role in the SOPs system.

### The Repatriation Medical Authority

The RMA is an independent statutory authority responsible to the Minister for Veterans' Affairs (s196A of the VEA). It consists of a [panel of five practitioners](#) eminent in their fields of medical science, who are appointed on a part-time basis for up to 5 years (with members being eligible for reappointment).

The VEA requires that at least one RMA Member must be a person having at least 5 years experience in the field of epidemiology. In practice, all Members have had extensive experience in epidemiology. Since its initial establishment in 1994, Ministers have ensured that all RMA members have expertise in epidemiology and evidence-based medicine, and collectively have a mix of research and clinical skills covering areas of particular relevance to veterans, including oncology, psychiatry, cardiovascular and respiratory diseases, and musculoskeletal conditions.

The RMA's primary function, as set out in s196B of the VEA, is to undertake investigations of particular injuries and diseases, and determine the contents of SOPs for each injury or disease based on sound medical-scientific evidence.

For further information on the operations of the RMA, see [RMA Practices and Procedures](#)

### Specialist Medical Review Council

The SMRC is an independent statutory authority established under s196V of the VEA. Its functions are to review the determinations of the RMA. The SMRC does not determine individual claims for pension.

The SMRC consists of [members](#) appointed by the Minister according to the expertise necessary to deal with matters referred for review. The membership of the SMRC reflects the legislative intention to have determinations of the RMA reviewed by those medical specialists or scientists who are expert in the injury or disease under review.

The SMRC Convener establishes a new Review Council for each new review. The SMRC may comprise a number of separate Review Councils working concurrently on different reviews.

### The Commissions

The Repatriation Commission and the Military Rehabilitation and Compensation Commission (together, the Commissions) are responsible for the general administration of the VEA and the MRCA. The Commissions have no staff of their own but delegate their powers to Department of Veterans' Affairs (DVA) staff. The Commissions are responsible for considering and determining individual claims for pension, utilising the SoPs determined by the RMA.

The Commissions may request a review of a determination (or of a SoP) and make submissions to both the RMA and to the SMRC.

The Commissions may choose to make joint submissions to the SMRC on its reviews.

The Commissions, like the RMA and the SMRC, are independent statutory bodies responsible to the Minister and Parliament.

## SOUND MEDICAL-SCIENTIFIC EVIDENCE (SMSE)

Central to the SOPs Regime is the concept of SMSE. Both the RMA and the SMRC must base their decisions on SMSE as defined in the s5AB of the VEA which states:

2. Information about a particular kind of injury, disease or death is taken to be **sound medical-scientific evidence** if:
  - (a) the information:
    - i) is consistent with material relating to medical science that has been published in a medical or scientific publication and has been, in the opinion of the Repatriation Medical Authority, subjected to a peer review process; or
    - ii) in accordance with generally accepted medical practice, would serve as the basis for the diagnosis and management of a medical condition; and
  - (b) in the case of information about how that kind of injury, disease or death may be caused—meets the applicable criteria for assessing causation currently applied in the field of epidemiology.

### Evaluation of sound medical-scientific evidence

The RMA can only make a SOP about a particular kind of injury, disease or death where there is sufficient SMSE to justify the making of the SOP. The SMRC when reviewing a

decision made by the RMA must base its decision on the SMSE available to and obtained by the RMA<sup>6</sup>.

The RMA and the SMRC are required to assess material against certain epidemiological criteria. The criteria set out below are not exhaustive and may not be relevant in all cases. They are a guide to the material that is acceptable to the RMA and the SMRC.

### Quality of evidence

In assessing studies, both the RMA and the SMRC look for SMSE that:

- is well-designed;
- provides enough information;
- is not merely hypothesis generating exercises from large databases;
- has adequate outcome measurements; and
- has no other faults in the methodology

### Assessing Combined Epidemiological Evidence

The RMA and the SMRC examine the body of evidence against these criteria:

- strength of association;
- consistency;
- specificity;
- temporality;
- biological gradient;
- plausibility;
- experimental evidence; and
- analogy.

### Websites

Website articles are not SMSE if they are opinion based, not subject to peer review, or do not meet the applicable criteria for assessing causation currently applied in the field of epidemiology.

### Animal Studies

Animal studies may sometimes support the biological plausibility of an association. However, results from animal studies may not be generalisable to humans and are at best used as initial research that may indicate a need for further studies on human subjects or to demonstrate possible biological mechanisms.

### Laboratory Studies

Laboratory-based studies of human cells are used in medical research for exploring potential pathological mechanisms, such as examining inflammatory responses to toxins. Processes occurring at the cellular level can be misleading as many other processes contribute to human health effects. While such studies may demonstrate biological mechanisms or generate further research, only some would lead to further discoveries, and they can often produce a range of conflicting results.

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<sup>6</sup> The SMRC does not conduct new literature searches and cannot rely on 'new' information that has not been considered by the RMA.

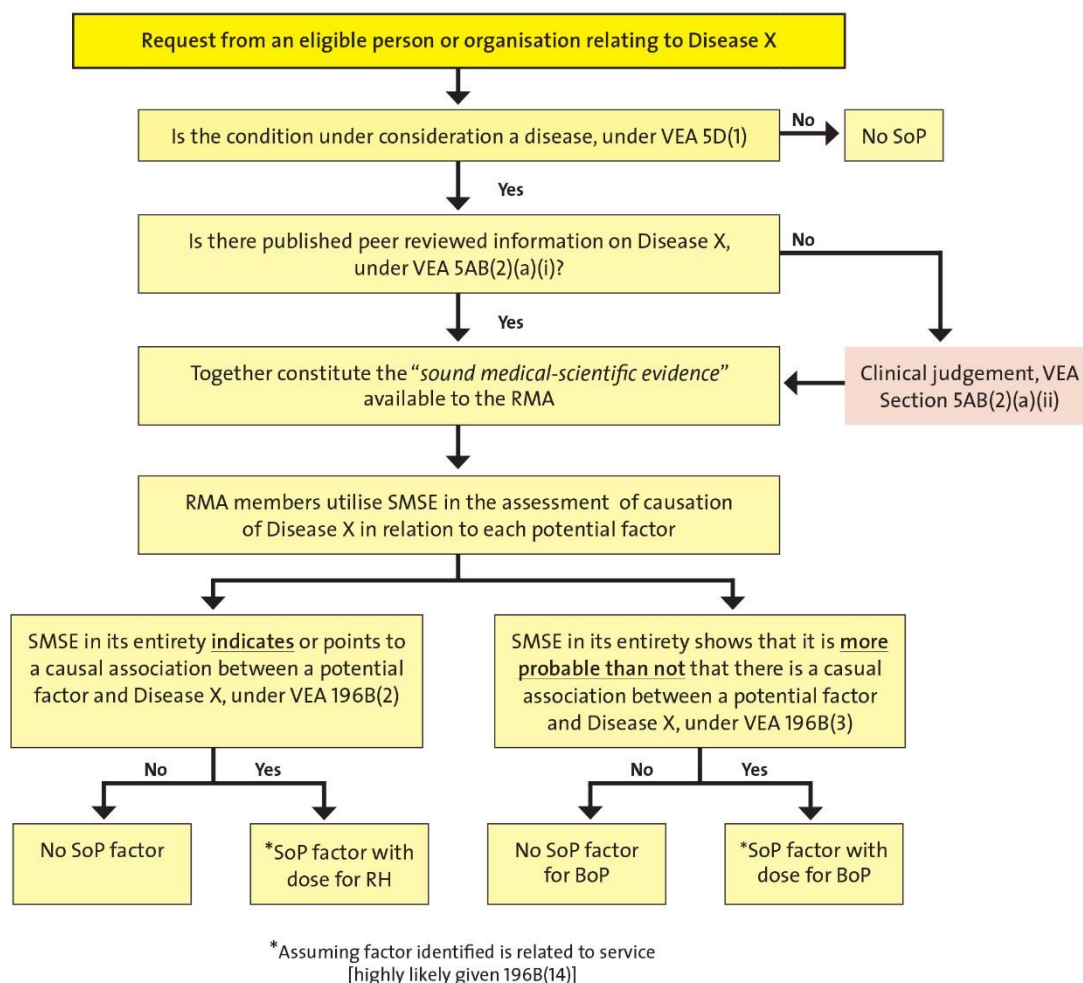


Such studies can be material that epidemiologists would consider appropriate to take into account, but the weight attached to their results when considering causes of diseases varies, and is generally relatively low compared to human studies.

The RMA’s process for sourcing evidence for its briefing papers follows standard practices for systematic reviews. See Error! Reference source not found..

The following diagram summarises the process of SOP determination.

**Figure 1 Determination of Statements of Principles**



The RMA writes the SOPs, but does not consider individual claims for pension, nor specify the ways in which factors in a SOP may be related to service.

Investigations and reviews are undertaken on request from eligible parties<sup>7</sup>, at direction by the SMRC, or on the RMA’s own initiative. The *Legislative Instruments Act 2003* (LIA) requires the RMA to review and reissue each SOP at least every 10 years, failing which a SOP ceases to have legal effect.

<sup>7</sup> S196E(1) of the VEA specifies the persons and organisations eligible to request an investigation or review.

## STANDARDS OF PROOF

Under the VEA and the MRCA, two legislated standards of proof are applied to SoPs.<sup>8</sup> Based on these, the RMA creates two SoPs for each kind of injury, disease or death.

The two SoPs are known generically as the reasonable hypothesis (RH) and balance of probability (BoP) SoPs.

### Applying Standards of Proof

Both the RMA and the SMRC are required to apply the two standards of proof in arriving at their decisions.

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<sup>8</sup> The Statutory Tests as described in the Veterans' Entitlements Act (VEA)

Reasonable Hypothesis 196B provides:

(2) If the Authority is of the view that there is sound medical-scientific evidence that indicates that a particular kind of injury, disease or death can be related to:

- (a) operational service rendered by veterans; or
- (b) peacekeeping service rendered by members of Peacekeeping Forces; or
- (c) hazardous service rendered by members of the Forces; or
- (caa) British nuclear test defence service rendered by members of the Forces; or
- (ca) warlike or non-warlike service rendered by members;

the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:

- (d) the factors that must as a minimum exist; and
- (e) which of those factors must be related to service rendered by a person;

before it can be said that a reasonable hypothesis has been raised connecting an injury, disease or death of that kind with the circumstances of that service.

Balance of Probabilities - 196B(3) provides:

(3) If the Authority is of the view that on the sound medical-scientific evidence available it is more probable than not that a particular kind of injury, disease or death can be related to:

- (a) eligible war service (other than operational service) rendered by veterans; or
- (b) defence service (other than hazardous service and British nuclear test defence service) rendered by members of the Forces; or
- (ba) peacetime service rendered by members;

the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:

- (c) the factors that must exist; and
- (d) which of those factors must be related to service rendered by a person;

before it can be said that, on the balance of probabilities, an injury, disease or death of that kind is connected with the circumstances of that service.

Whether a reasonable hypothesis is 'indicated' is explicitly a matter for consideration and assessment by the RMA (or the SMRC) as part of the overall evaluative exercise it is carrying out. The evaluation addresses all the relevant SMSE, recognising that there may be contradictory evidence.

The overall evaluation function of the RMA and the SMRC is to determine whether the relevant SMSE, considered as a whole, indicates a reasonable hypothesis.

In short, the mere fact that one study (or even more than one study) is supportive of the existence of a reasonable hypothesis does not ordain the outcome on its own, but such a study (or studies) may be regarded as sufficient.

For the BoP, the consideration of 'more likely than not', a similar process applies, where all the relevant SMSE is considered.

The RMA has prepared a policy guide for its members on applying the standards of proof. See the [RMA Practices and Procedures](#) . See also the RMA's [Guidelines fro Reseachers](#).

## SPECIALIST MEDICAL REVIEW COUNCIL

### Applications for Review

A valid application made by an eligible person or organisation (as defined in s196Y of the VEA) is the trigger for an SMRC review.

Under s196Y of the VEA, the SMRC can review on request:

- some or all of the contents of a SOP in force under Part XIA; or
- a decision of the (RM) not to make, or not to amend, a SOP in respect of a particular kind of injury, disease or not to make a SOP in respect of a particular kind of injury, disease or death under subsection s196B(2) or (3).

Under s196Z of the VEA, the SMRC can review a decision by the RMA not to carry out an investigation.

### Review Councils

The VEA sets out some procedural requirements, including that:

- each Review Council is made up of three to five Councillors;
- the Convener or Presiding Councillor may convene meetings of the Review Council as is considered necessary;
- questions are decided by a majority of the votes of Councillors; and
- the Review Council must keep minutes of each meeting.

Apart from these specified matters, each Review Council determines its procedures for convening meetings and conducting its business within general guidelines.

### The Information subject to review

This 'available' information is that information that was in fact used by the RMA. It does not include information that may have been available for the use of the RMA at the time but was not accessed by the RMA.

Eligible persons and organisations are entitled to reasonable access to the information that was available to the RMA in its determination of a SoP.<sup>9</sup> Lists of information obtained by the RMA in the course of an investigation or review are routinely provided to eligible persons and organisations on request.

The available information is provided to Councillors and parties to a review through an on-line repository called FILEForce.

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<sup>9</sup> s196I of the VEA

## New Information

'New information' is information the RMA advises was not available to it when it made the decision under review. This may include relevant information published before or after the date that the RMA determined the SoPs under review, including during the time the SMRC undertakes the review.

Generally people seeking a SMRC review because of such new information are referred to the RMA in the first instance.

In appropriate circumstances, the SMRC can consider new information for the different purpose of deciding whether there seems to be SMSE not previously considered by the RMA, which might justify a recommendation to the RMA that it conduct a fresh investigation into the injury, disease or death, considering the new information.

## Submissions

The Council must publish in the Australian Government Gazette a notice of its intention to carry out a review. That notice specifies the date by which all submissions must be received.

Eligible persons and organisations may make a written submission to the SMRC. A person having expertise in a field relevant to the review may also make a written submission.

The SMRC asks that written submissions refer to the information that was available to the RMA, and which is relevant to the review, rather than an individual case.

An eligible individual or organisation making written submissions may appear before the SMRC to make an oral submission complementing their written submission.

Guidelines for making written submissions are available on the SMRC website.

## SMRC tasks

Having considered 'the information' subject to review, the Applicant's contentions and any submissions, the Review Council:

- forms a view on the scope of the review, ie whether any factors, in addition to that contended by the applicant, should be considered in the review. These can be factors already in the SoPs (which the Council may want to consider amending or excising), or the inclusion of new factors;
- evaluates the 'information' to decide those factors, which as a minimum exist connecting the injury / disease / death (condition) to service.

## Applying Standards of Proof

Both the RMA and the SMRC are required to apply the two standards of proof in arriving at their decisions as set out above.

See [RMA Practices and Procedures](#).

### Decisions available to the Review Council

The decision for the Review Council is whether the available information (the SMSE available to the RMA at the time of its decision) justifies the making of SoPs or an amendment to the SoPs under review, by applying the relevant legal tests of reasonable hypothesis and balance of probabilities.

Whatever the outcome of the review, the SMRC cannot, itself make or amend SoPs.

If the Review Council is of the view that there is sound medical-scientific evidence on which the RMA could have relied to amend one or both of the SoPs, by amending, adding or deleting a factor or factors, it may:

- direct the RMA to amend the SoPs to insert such a factor(s) or otherwise amend the SoPs in accordance with directions given by the SMRC; or
- remit the matter to the RMA for reconsideration in accordance with any directions or recommendations the SMRC may make.

If the Review Council is of the view that there is:

- no sound medical-scientific evidence justifying an amendment; or
  - that the sound medical-scientific evidence is insufficient to justify an amendment
- it makes a declaration to that effect. It may also make any recommendation that it considers appropriate. For example, it may recommend that the RMA conduct a new investigation.

If the Review Council is reviewing a decision of the RMA not to determine a SoP, it can determine whether the available SMSE justifies making a SoP concerning the particular kind of disease, injury or death.

If the Review Council is reviewing a decision of the RMA not to carry out an investigation under s196C(4), it can, under s196Z, determine whether there appears to be a new body of SMSE, not previously considered by the RMA, could justify making or amending a SoPs. In so doing, it assesses the new information along with the SMSE that was available to the RMA.

*See the diagrams setting out the process of review at the end of this section.*

### Reasons for Decision

The final decision is the responsibility of all members of the Review Council.

SMRC Review Councils are required to give reasons for their decisions. Each Review Council makes a Declaration and Statement of Reasons setting out its evaluation and decisions. The declarations are published in the Australian Government Gazette.<sup>10</sup>

Unlike the SMRC, the RMA is not required to give reasons for its determination of a SoP and does not do so. A brief summary is included in correspondence to those applicants who have requested an investigation or review.

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<sup>10</sup> s196W(4) of VEA.

### **Role of Convener and Presiding Councillors on Reviews**

The Minister for Veterans' Affairs appoints the Convener. The Convener oversees the operations of the SMRC as a whole. He or she presides at all meetings of Review Councils constituted for the purposes of a review.

When the Convener is not available to preside over a new review, he or she can appoint a presiding councillor to manage the functions for the term of that specific review.

During a review, the Convener or the Presiding Councillor will be required to:

- participate in the selection of councillors for the review over which they will preside;
- work with the secretariat on preparations for the review, including liaison with the legal adviser as required;
- preside at all meetings of a Review Council constituted for the purposes of a review;
- provide guidance and counsel to members; and
- provide continuity and guidance that is necessary for the SMRC to ensure consistency of decision-making.

If the Convener is not presiding, he or she remains available for support and advice and values feedback from Presiding Councillors. The Convener reviews drafts of decisions before sign off by each Review Council.

### **Role of Review Council members**

Councillors are responsible for evaluating the SMSE available for each review. They consider the application, any submissions, and the 'available information' along with the contents of the SoPs under review to determine the scope of the review. They then evaluate the relevant SMSE to form a collective view and decisions.

### **Role of the Secretariat**

Secretariat staff are employees of the Department of Veteran's Affairs, made available to the SMRC. They:

- provide support and guidance on all administrative matters, including decision documents and records of meetings;
- manage all correspondence and liaison with applicants, the Commissions and anyone making submissions;
- liaise with the RMA about the available information and other review related matters; and
- manage the contracts with relevant providers.

Early in the review process, there will be an opportunity for the Presiding Councillor and staff to discuss working arrangements.

### **Role of Medical Science Writer**

A medical science writer assists each Review Council to present its findings on the medical science for incorporation into its Reasons document.

### **Meetings of Review Councils**

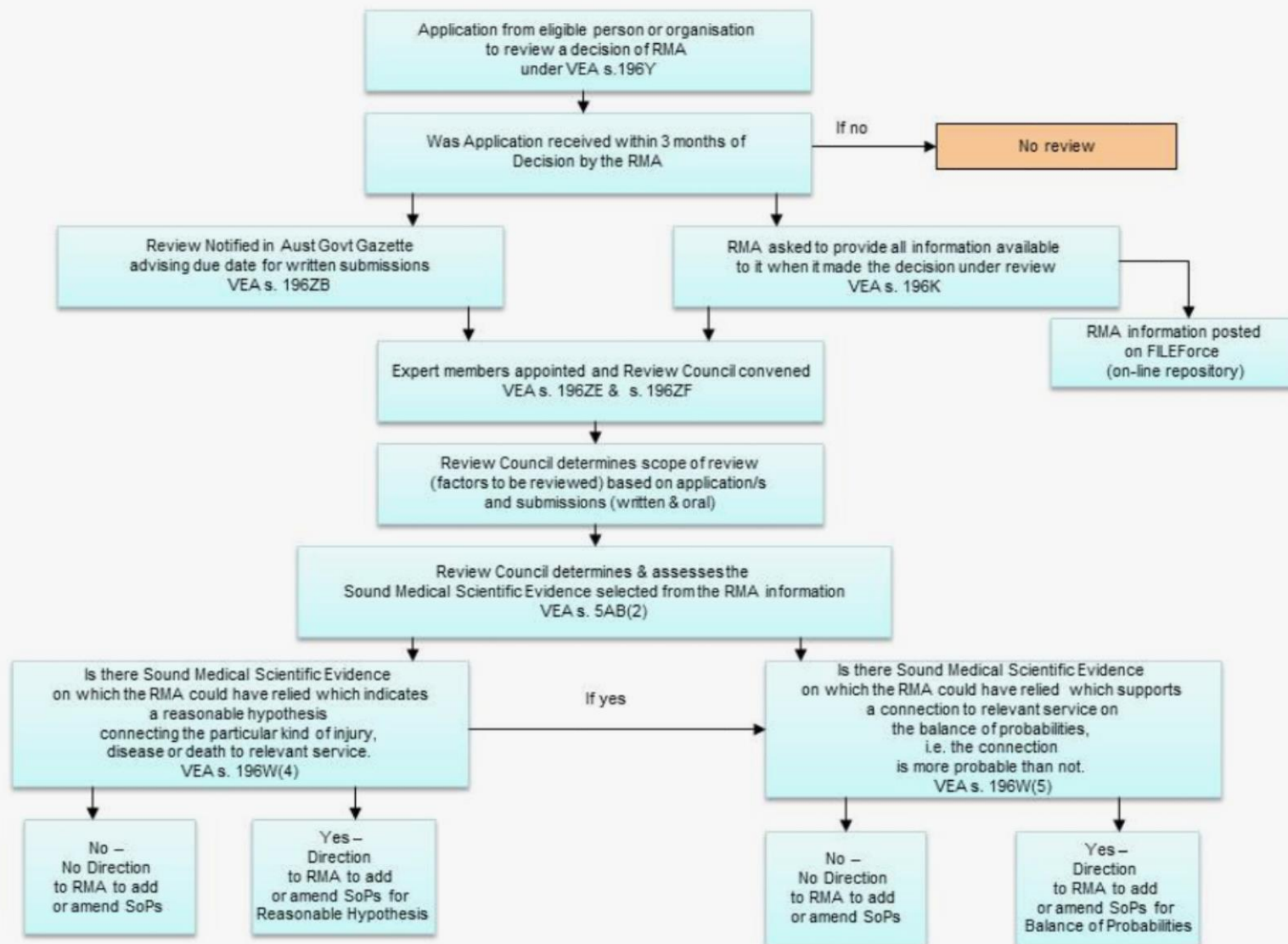
There are usually three to four meetings over the course of a review. All meetings are held by teleconference (no longer than two hours) apart from one meeting which includes the hearing of oral submissions. The hearing of oral submissions meeting is held face-to-face, and Councillors may be required to travel.

### **Legal Advice**

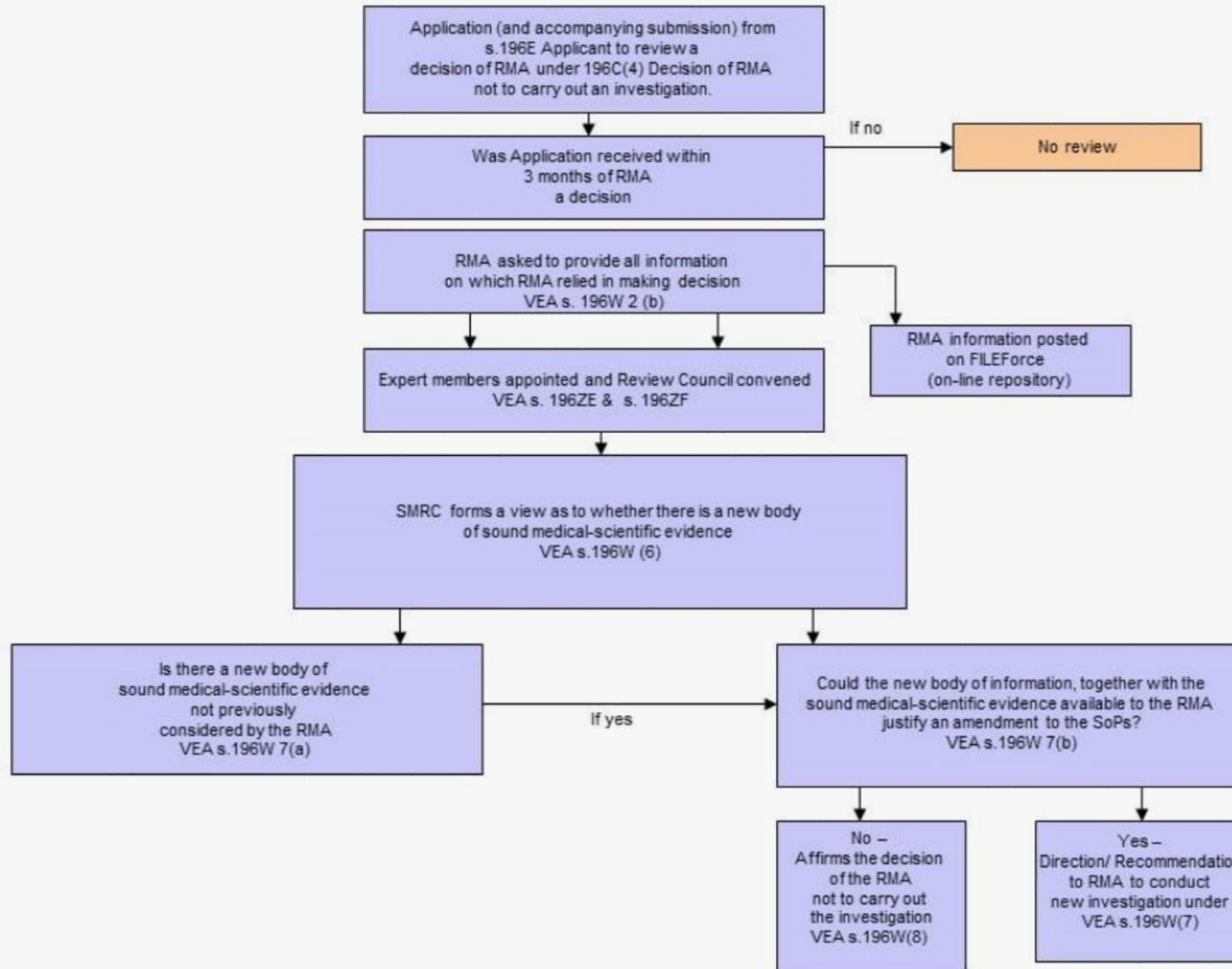
The SMRC may engage legal advisers and Council's refer specific legal questions to them via the Registrar and Convener.



## SMRC Process of Review under s.196Y of the VEA



## SMRC Process of Review under s.196Z of the VEA



## GLOSSARY

BoP	balance of probabilities
DVA	Department of Veterans' Affairs
ESO	Ex-Service Organisation
LIA	<i>Legislative Instruments Act 2003</i>
MRCA	<i>Military Rehabilitation and Compensation Act 2004</i>
RH	reasonable hypothesis
RMA	Repatriation Medical Authority
SMRC	Specialist Medical Review Council
SMSE	sound medical-scientific evidence
SOP	Statement of Principles
VEA	<i>Veterans' Entitlements Act 1986</i>

## **APPENDIX 1**

### **History of the SOP system**

This overview entitled 'History of Repatriation System', is chapter 3 of the report of the Review of Veterans' Entitlements (also known as the Clarke Report). The review was commissioned by the Minister for Veterans' Affairs in early 2002, and the three-person committee chaired by retired Supreme Court Judge the Honourable John Clarke QC submitted its detailed report in January 2003.

## CHAPTER THREE

# HISTORY OF REPATRIATION SYSTEM

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# 3

### ANTECEDENTS

3.1 The obligation of the state to recompense the soldiery for service in its defence is an ancient one, dating at least from the Assyrian empire *circa* 1200 BC (Lloyd and Rees 1994, p. 7). Resettling veterans on land taken from vanquished barbarians or rival senatorial families was popular in ancient Rome and a linkage between land and resettlement appears frequently in the ensuing centuries, across a number of cultures. In Britain, pensions granted by statute began during the reign of Elizabeth I, with an Act of 1603 conferring the right of pension to a veteran 'maimed in the Queen's service' (Toose 1975, p. 19).

3.2 In 1681 under Charles II, the Chelsea Hospital system was established to provide treatment and convalescence for 'war damaged' or 'time-expired' soldiers. These men were known as 'in-pensioners'. Four years later an 'out-pensioner' scheme was established, with a gratuity for disablement payable at a flat rate for all ranks. In 1806, the amount of pension was made proportionate to the extent of the injury incurred (Toose 1975, p. 19). The debilitating effects of tropical disease were also recognised, in acknowledgment of the role of the military in forging and preserving the empire.

3.3 Widows and children of veterans were first provided for in Britain during the Crimean War (1854-56) through the Royal Patriotic Fund Corporation, a body reliant on public subscription with some support from the War Office. Similar funds were established in the Australian colonies in response to the sending of contingents to the Sudan Campaign, the Boxer Rebellion and the Boer War. While those organisations were assiduous in raising funds from the public, they were far less so in the actual distribution of money to veterans, and tended to be derelict in attending to the needs of those for whom they had been established.

### EARLY DEVELOPMENT

3.4 The *Defence Act 1903* made provision for members of the Defence Force or their widows in the event of incapacity or death resulting from wounds or disease acquired while on active service. However, members of the Defence Force

employed on active service were specifically excluded from the Commonwealth *Workmen's Compensation Act 1912*, apparently out of concern about the extent of the probable liabilities that would be incurred in time of war (Toose 1975, p. 20).

3.5 Nevertheless, Australia's commitment to the imperial war effort in 1914 necessitated the Commonwealth providing more fully for returned servicemen. Accordingly, in November 1914, the War Pensions Bill was introduced into the Parliament and received bipartisan support. The resulting Act granted pensions to Defence Force members killed or incapacitated as a result of service in warlike operations. Beneficiaries included those who enlisted or were appointed to active service outside Australia, or who served on a ship of war. Home service did not qualify. Disease was also included, with the proviso that it was contracted on active service. In 1915, the Act was amended to include members of the Army Medical Corps Nursing Service accepted or appointed for service outside Australia, and the following year it was extended to members on home service (Toose 1975, pp. 20-21).

3.6 Another significant early piece of legislation was the Australian *Soldiers' Repatriation Fund Act 1916*, although not for the reasons originally envisaged by its authors. The fund was in principle virtually identical to the failed patriotic funds of the 19th century, reliant on public subscriptions, with some augmentation from the Government, but established by statute rather than by the citizenry. It failed most singularly to achieve anything by way of fundraising, largely because of the prevailing political climate. Nevertheless, it did help shape the early model of the Australian repatriation system.

3.7 In early 1917, an executive committee of the trustees of the fund made a series of recommendations to the Prime Minister. They were:

- that the entire question of the re-establishment of discharged soldiers and the care of the dependants of soldiers generally should be made the concern of a Commonwealth authority; and
- that the Commonwealth authority should devise a substantially uniform system of dealing with returned soldiers and the dependants of soldiers on service or soldiers who died as a result of service in respect of:
  1. immediate amelioration;
  2. care of the totally incapacitated;
  3. vocational training of the partially incapacitated;
  4. employment generally;
  5. assistance towards permanent re-establishment;
  6. care of dependants;
  7. coordination of governmental and private efforts for the expansion of existing industries and promotion of new industries to meet the demand for employment; and
  8. assembling and administration of funds (Toose 1975, pp. 24-5).

3.8 The recommendations were debated at an interstate conference shortly thereafter, at which it was decided that the Commonwealth should have definite control over all matters relating to repatriation, and that states should administer land settlement in conjunction with the Commonwealth through the Soldiers' Settlement Board of Australia (Toose 1975, p. 24).

3.9 It is worthwhile to note the burgeoning activities of ex-service organisations (ESOs) in this period as more and more Australians returned from Europe. Pre-eminent among those ESOs was the Returned Sailors' and Soldiers' Imperial League

of Australia (RSSILA), now known as the Returned & Services League of Australia (RSL). Through exceptionally skilful organisation, building on public sentiment in favour of the returned diggers, the League was able to exert considerable pressure on the Commonwealth Government. In particular, it achieved recognition of compensation as a right, rather than as an act of gratuity, which in turn signalled the end of the voluntary system exemplified by the patriotic funds.

## **THE AUSTRALIAN SOLDIERS' REPATRIATION ACT 1917**

3.10 In response to the recommendations of the Trustees, the Vice-President of the Executive Council and soon to be first Minister for Repatriation, Senator Edward Millen, introduced the Australian Soldiers' Repatriation Bill into the Parliament on 18 July 1917. Among other things, the legislation provided for benefits and assistance to discharged servicemen, children under 18 of the deceased or incapacitated, and to widows in special circumstances.<sup>3</sup>

3.11 The Act was proclaimed on 8 April 1918 and the new Department of Repatriation began operations on the same date. The Minister was given overall responsibility for the administration of the Act, and a part-time honorary Repatriation Commission of seven was appointed with power to make recommendations to the Government for regulations granting benefits and assistance.

3.12 Millen introduced amendments to the Act shortly afterwards, saying that the Repatriation Department accepts 'as the minimum obligation the responsibility of providing the returned soldier with an opportunity of earning at least a living wage, and that until such opportunity is forthcoming subsistence be granted' (Toose 1975, p. 26).

3.13 The Repatriation Commission considered that the achievement of the objectives would entail expenditure on:

1. sustenance while awaiting employment;
2. sustenance while undergoing training;
3. sustenance while undergoing treatment or care in hospitals or special institutions;
4. sustenance while awaiting the allotment of land, and during the initial period of land occupancy;
5. medical treatment after discharge, including the provision of artificial limbs and other surgical aids;
6. emergency grants to cover exceptional necessities;
7. fees to educational institutions;
8. tools of trade, professional instruments and personal equipment;
9. small business plant and livestock;
10. homes;
11. passages to and from the Commonwealth;
12. transportation within the Commonwealth;
13. allowances to dependants; and
14. funeral expenses (Toose 1975).

3.14 The practical working of the repatriation system was governed by regulation, rather than by the provisions of the Act, principally because there was

no precedent for the scheme and policy was therefore unfolding and changing at a rate too rapid to be accommodated within a formal legislative framework.

## **THE AUSTRALIAN SOLDIERS' REPATRIATION ACT 1920**

3.15 New legislation in the form of the *Australian Soldiers' Repatriation Act 1920* repealed the *War Pensions Act 1914* and the *Australian Soldiers' Repatriation Act 1917*. Administrative changes under the new legislation included the reform of the Repatriation Commission into an incorporated body of three members, with Repatriation Boards (also of three) constituted for each state. The boards were responsible for determining and assessing claims, with an appeal from their decisions available to the Commission. Commissioners were paid for their work for the first time. At the same time, the Repatriation Department assumed responsibility for the payment of pensions from the Treasury (Toose 1975, p. 27)

3.16 The new Act also expanded entitlement for pensions through the introduction of the so-called 'occurrence clause'. This gave cover in respect of death or incapacity resulting from any occurrence happening during the period of service. As a result, the death or injury need not have had any causal connection with the individual's service; it must merely have occurred during the period of service (Toose 1975, p. 27).

3.17 Perhaps most significantly, the *Repatriation Act 1920* introduced the concept of a 'special rate' pension for those totally and permanently incapacitated (TPI) or blinded as a result of war service. Often referred to as 'the TPI pension', its initial rate of payment was £4 per week.<sup>4</sup>

3.18 Amendments to the Act in 1921 and 1922 saw the Department accept liability for medical and hospital treatment of servicemen upon their discharge and for the administration of artificial limb factories. In addition, a Fifth Schedule to the Act was inserted after representations were made to Minister Millen by the Limbless Soldiers Association. This provided for an extra allowance to this class of veteran that brought their overall benefit to substantially the same level as that of special rate recipients (Toose 1975, p. 29).

## **THE BLACKBURN ROYAL COMMISSION**

3.19 On 27 August 1924, a Royal Commission chaired by Dr C B Blackburn was established to inquire if :

... the present method of determining whether an ex-soldier's disability is due to or aggravated by war service [is] adequate to decide the degree to which it is aggravated and what portion of his present incapacity can be regarded as having resulted from war service. (Toose 1975, p. 29)

3.20 After consideration, the Royal Commission found that:

In the majority of cases the present machinery for determining disability and assessing pensions is sufficient. There are, however, certain types of disabilities that are, for various reasons, inadequately determined. The inadequacy, to some extent, has been due to defects in the *Australian Soldiers' Repatriation Act* ... (Toose 1975, p. 29)



3.21 The Royal Commission's deliberations and findings on the matter of the appeals system provide an excellent illustration of the evolutionary gulf that exists between accepted policy strictures then and now. For instance, it was accepted that there would be no final body of appeal, but rather that the Repatriation Commission could reconsider a case virtually *ad infinitum*, provided that the claimant could adduce new evidence on each occasion. Other

recommendations included that the Repatriation Commission should not have medical practitioners as members, but only as technical advisers or referees, and that it was proper for a veteran to discuss his file, but most improper for him to actually see it (Lloyd and Rees 1994, pp. 232-5).

## THE TWENTIES AND THIRTIES

3.22 Throughout the span of the Bruce-Page Government (1923-29) there was no minister appointed with sole responsibility for repatriation. Rather, the job was passed among a number of ministers and attended to only on a part-time basis. The absence of any consistent political control of repatriation, in combination with the lack of an appeal mechanism from decisions of the Repatriation Commission, resulted in considerable disquiet among the veteran community. It was felt that there were insufficient checks on the freedom of action of both the Department and the Commission.

3.23 The Government eventually moved to assuage these concerns in 1929. The Health Minister, Sir Neville Howse, who had general responsibility for repatriation, introduced legislation to establish War Pensions Entitlement and War Pensions Assessment Tribunals. An important principle laid down in the legislation related to the onus of proof. Once the appellant had made out a prima facie case, the onus was on the Repatriation Commission to disprove it (Toose 1975, p. 31).

3.24 By the 1930s, a condition known as 'burnt-out digger syndrome' began to attract official attention. A report from the Commonwealth Statistician in 1934 found a 13 per cent excess mortality rate among veterans compared with similarly aged civilians. In response, the Government introduced a service pension payable to returned soldiers at age 60 rather than at 65 (Lloyd and Rees 1994, pp. 251-6). This was the first repatriation income support measure, all previous benefits having been compensatory in nature.

## WORLD WAR II

3.25 The *Australian Soldiers' Repatriation Bill 1940* introduced separate pension bases for troops who served overseas and those who served entirely in Australia. In the former case the 'occurrence clause' had application, but not in the latter. The *Seamen's War Pensions and Allowances Act 1940* also came into force that year, providing for compensation and other benefits to Australian mariners (Toose 1975, pp. 35-8).

3.26 Three events of significance occurred in 1943. The first was new legislation to pension those who had served in New Guinea on the same basis as those who served overseas. The second was a liberalisation of the standard of proof provisions in the Repatriation Act. This effectively enshrined the reverse criminal standard of

proof in legislation. The third was the extension of the area in which the Citizens' Military Force could be used. Previously, the militia was confined to service within Australia. Now it could be used in the South-Western Pacific Zone within an area fixed by proclamation for a period up to six months after the end of the war (Toose 1975, pp. 37, 38).

## THE FIFTIES AND SIXTIES

3.27 The *Repatriation Act* was extended through the 1950s to provide benefits, including the service pension, to those who served from 27 June 1950 to 19 April 1956 and were allotted for duty in the operational area in Korea, or from 29 June 1950 to 1 September 1957 in Malaya. The Act was later amended in the 1960s to cover Australian armed services personnel serving in the Indonesian Confrontation. In 1957, the Repatriation (Far East Strategic Reserve) Act 1956 brought members of the Far East Strategic Reserve within the purview of the repatriation system, although the nature of their service was considered not to be the same as that of personnel in World War II or Korea. As a consequence they did not, at that time, receive eligibility for the service pension.

3.28 Increasing Australian military involvement in South-East Asia led to the passage of the *Repatriation (Special Overseas Service) Act* 1962. This legislation

... extended repatriation benefits for [s]pecial service in prescribed areas overseas, where Australian forces were engaged in 'warlike operations'. This provision was instrumental in providing pensions and benefits for Vietnam War veterans. (Lloyd and Rees 1994, p. 319)

3.29 A major reform to the war (now disability) pension structure took place in 1965 with the introduction of the intermediate rate, midway between the 100 per cent general rate and the special rate. The intention was to provide a greater level of compensation to veterans who were quite severely disabled, but nonetheless capable of engaging in employment on a part-time or intermittent basis.

3.30 The last major reform of the 1960s was the extension of the service pension to those with 'special service' under the *Special Operations Act* in 1968.

## THE SEVENTIES

3.31 During the 1970s, peacetime coverage under the *Repatriation Act 1920* (to be preserved in the *Veterans' Entitlements Act 1986* (VEA)), was extended to serving military personnel (including national servicemen). This created a dual entitlement, as those individuals were already covered by the normal Commonwealth employees' compensation legislation. The situation was intended to be a short-term bridging measure pending the implementation of a new, separate Military Compensation Scheme. Unfortunately, that legislation did not eventuate for another 22 years. The *Military Compensation Act 1994* ended peacetime coverage under the VEA.

3.32 Between 1971 and 1975, Justice Paul Toose of the New South Wales Supreme Court undertook a wide-ranging inquiry into all aspects of the repatriation system. A principal recommendation was that the various pieces of legislation be consolidated into one Act. This eventually occurred in 1986 with the passage of the VEA. But Toose's most enduring legacy is the underlying principles of repatriation that he expounded in his report (see Chapter 4).

3.33 In 1973, the Commonwealth began to partially exempt the disability pension from the service pension means test. The initial amount was 25 per cent, followed by an increase to 50 per cent in 1975, 60 per cent in January 1982 and finally 100 per cent in November of the same year.

3.34 From 1974, virtually all the Commonwealth's training schemes were transferred to the Department of Labour and Immigration. The following year, British, Commonwealth and allied (BCAL) veterans became eligible for the service pension. Between 1976 and 1979, Consumer Price Index (CPI) indexation of the major pensions was introduced, linking them to changes in the CPI. In accordance with a recommendation of the Toose Report, the Department of Repatriation became the Department of Veterans' Affairs (DVA) on 5 October 1976.

3.35 The appeals and review structure changed in 1979 with the establishment of the Repatriation Review Tribunal, which replaced the Entitlements Appeals Tribunal and the Assessment Appeals Tribunal. There were also increased avenues of appeal to the Federal Court and High Court on matters of law.

## **VETERANS' HEALTH CARE**

3.36 After World War I, the Repatriation Department assumed responsibility for providing medical treatment for discharged soldiers suffering service-related disabilities. The Department's facilities were limited, and medical treatment was usually provided by arrangement with institutions established during the war by the Defence Department.

3.37 With the cessation of hostilities and the return to civilian life of the majority of servicemen, control of the military hospitals, sanatoria and artificial limb factories that had been built in each capital city was transferred progressively to the Repatriation Department. This was completed by 1922. To supplement the centralised outpatient facilities, arrangements were made by the Department for general practitioner and pharmaceutical services in country areas.

3.38 Similarly, after World War II, the Repatriation Department took over the much larger and more modern Army hospitals built during the war to meet immediate and post-war needs. These institutions became repatriation general hospitals and certain of the older institutions were retained and used as auxiliary hospitals to provide for special inpatient and outpatient needs.

3.39 By the time of the Toose Enquiry in the early 1970s, the continuing relevance of the repatriation general hospitals had come into question, with some submissions arguing that they should be amalgamated with hospitals in the state health systems. They were ultimately transferred to state government or private enterprise control by 1995, and DVA now purchases almost all its medical services from these and other agents.

## **THE EIGHTIES**

3.40 Allied veterans were made eligible for the service pension in 1980. It was necessary that they had served in a theatre of war, had at no time been a member of enemy forces and had been resident in Australia for 10 years.

3.41 In the early 1980s there were two particularly significant court cases, *Law* and *Bowman*, both of which had far-reaching ramifications for the repatriation system. The *Law* case of 1981 'effectively conceded cigarette smoking in war-time as a causative element in entitlement' (Lloyd and Rees 1994, p. 358). This decision led to a very significant increase in claims for compensation resulting from smoking-related illnesses.

3.42 In *Bowman*, also in 1981, the Federal Court held with respect to the TPI pension that 'the effect of incapacity on ability to earn could only be gauged by reference to the market in which the applicant might expect to earn'. Also, it was

... sufficient in testing whether an applicant's ability to earn is due to his war-related disability to consider whether he would be equally unable to earn if he were free of this disability. The only hypothesis involved in this would be the consideration of the applicant free of his disability. (Lloyd and Rees 1994, p. 391)

3.43 This case significantly broadened potential eligibility for the TPI payment.

3.44 In 1981, peacekeeping operations were given coverage under the VEA and in 1982 this was made retrospective to World War II. Also in 1982, Australian, Commonwealth and allied mariners became eligible for the service pension. In the following year, the Commonwealth Government established a royal commission into the effects of the herbicide 'Agent Orange' on Vietnam veterans. Headed by Mr Justice Evatt, the commission ultimately found there was no connection between the spraying of the herbicide and health problems in Vietnam veterans. Similarly, no link was found to account for birth defects in the children of Vietnam veterans. The Commission's findings engendered considerable controversy and the issue is still without final resolution nearly two decades later.

3.45 In 1984, an income and assets test was introduced for the service pension and social security income support payments, replacing the sole income test. In May 1985, the Treasurer brought down an economic statement that had a noticeable impact on veterans' benefits. Among other things, the war widow's income support supplement was frozen, grants of dependants' pensions were terminated, and changes to the standard of proof were announced in response to the *O'Brien* case, in which

... a majority of the High Court held that it was not necessary for the material in a particular case to 'provide some positive reference in favour of the requisite connection between death and incapacity and war service'. (Creyke and Sutherland 2000, p. 402)

3.46 Unsurprisingly, this decision led to a subsequent large increase in the number of claims for disability pension. Changes to the standard of proof provided that

... where the Repatriation Commission is reasonably satisfied that the material before it does not raise a *reasonable hypothesis* of a connection between the death and incapacity of a veteran and the veteran's war service ... a pension shall not be granted. (Lloyd and Rees 1994, p. 400)

3.47 In addition, the reasonable hypothesis standard was restricted to those who had 'engaged in combat, the civil standard [applying] in other cases' (Lloyd and Rees

1994, p. 400).

3.48 In 1986, Toose's recommendation for a single Act consolidating all repatriation legislation was finally implemented. The VEA left most of the law unaffected, but did attempt to make crucial changes in certain areas relating to the disability and war widow's pensions. In particular, the Minister emphatically restated in the second reading speech that the special or TPI rate of disability pension should not be granted to veterans over the age of 65, except in very rare cases.

3.49 To oversee the early years of the VEA, a committee of eminent persons chaired by Justice Toose and known as the Veterans' Entitlements Act Monitoring Committee (VEAMC) was established. While generally finding the operations of the new legislation to be satisfactory, the VEAMC nevertheless recommended increased compensation for frail, aged veterans with high levels of impairment and restricted lifestyles. The result of this was the introduction of the extreme disablement adjustment (EDA), payable to extremely disabled veterans over 65 at effectively 150 per cent of the general rate disability pension.

## RECENT DEVELOPMENTS

3.50 Australian personnel were involved in several, mainly United Nations-sponsored, activities throughout the 1990s. These tended to be of a peacekeeping or peace-enforcement type, and included deployments to Namibia, the Gulf, Rwanda, Cambodia, Somalia, Bougainville and Timor. The level of access of veterans of these engagements to VEA benefits has primarily depended on whether the service was declared 'warlike' or 'non-warlike'.

3.51 In terms of the operation of the VEA, two events took place that directly challenged the way the repatriation scheme had been operating. These were the Auditor-General's Report 1992-93 (Auditor-General 1993), and the *Bushell* case, which was considered by the High Court in 1992 (Creyke and Sutherland 2000, p. 177). The first made a series of critical findings relating to what were seen as tenuous causal linkages between service and disability. The concerns of the Auditor-General were confirmed by the *Bushell* decision of 1992.

3.52 Essentially, the High Court held that the establishment of a reasonable hypothesis – which the Commission must thereafter rebut beyond reasonable doubt to defeat certain claims – could be established if a specialist in a medical field found a causal link, notwithstanding that every other specialist in that field did not. This decision had the potential to substantially widen the scope of successful compensation claims. In response, the Government appointed a committee of review headed by the Hon Professor Peter Baume, Head of Community Medicine at the University of New South Wales, to examine and make recommendations.

3.53 The Baume Report made a number of contentious recommendations on both points. The 'reasonable hypothesis' was considered too generous and the report recommended its replacement with the normal civil 'balance of probabilities' test. Regarding the *Bushell* decision, Baume recommended that an independent medical body be established to decide what factors caused particular disabilities. As a result, the Repatriation Medical Authority (RMA) and a Specialist Medical Review Council (SMRC) were established in 1994, the first body to formulate Statements of Principles (SOPs) on which medical conditions could be accepted as service related, and the second to hear appeals from decisions of the RMA. The recommendations on

onus of proof were not taken up, but the RMA and SMRC were established despite opposition from some sections of the veteran community (Baume 1994).

3.54 Between 1995 and 2001, a number of studies were commissioned or undertaken by DVA into the health and mortality rates of Vietnam veterans. In part, these were in response to long-standing claims by Vietnam veterans of health problems and higher death rates peculiar to them. Many new programs targeting benefits and assistance to Vietnam veterans and their families were initiated as a result of these studies. A number of other studies for other veterans or service personnel have since commenced, including cancer and mortality studies for Korean veterans and British atomic test participants, and a health study for Gulf War veterans.

3.55 Rehabilitation of disabled veterans was given increased emphasis in 1997 with the introduction of the Veterans' Vocational Rehabilitation Scheme (VVRS), which allowed veterans to undertake training and subsequent employment without jeopardising their pension entitlements. The scheme has been generally well received, with a gradual increase in participation occurring in recent years.

3.56 The Military Compensation and Rehabilitation Service (MCRS) was transferred from Defence to DVA in 1999 under a service agreement between the two departments.

3.57 That year also saw the extension of the Repatriation Health Card – For All Conditions (Gold Card) to all World War II Australian veterans with qualifying service who were aged over 70. A subsequent extension effective from 1 July 2002 granted the Gold Card to all post-World War II Australian veterans aged over 70 with qualifying service. In addition, a Repatriation Pharmaceutical Benefits Card (Orange Card), giving World War II BCAL veterans aged 70 years or more with qualifying service access to the Repatriation Pharmaceutical Benefits Scheme, came into effect on 1 January 2002.

3.58 The last major review of repatriation legislation before the present one occurred in 2000. The report of Major General R F Mohr into service entitlement anomalies in respect of South-East Asian service between 1955 and 1975 recommended the extension of benefits to veterans of several conflicts not previously covered by the VEA.

## CONCLUSION

3.59 Australia's repatriation system has often been described by successive governments as either the most, or one of the most, generous in the world. The Committee cannot comment on whether or not that statement is true without exhaustive analysis of other countries' systems and the context in which they operate. However, the Australian repatriation system emerged in its own unique social, political and economic context. Furthermore, it has evolved considerably over the past eight decades or more. The *Repatriation Act 1920* was amended approximately 80 times before its replacement by the VEA, and there have been many changes to the latter. Nevertheless, the system's essential elements have remained in place and there can be no doubt that it has been a major institution of social justice in 20th century Australia, touching the lives of many Australians.

3.60 Repatriation is a fundamentally benevolent concept. The nation as a whole

has always held that 'the right thing' should be done by our veterans. In keeping with this, the scheme has developed in a cautious and incremental fashion.

3.61 The Review has sought to maintain this tradition of generosity balanced by fairness.

## APPENDIX 2

### Historical overview

This 'Historical Overview', sets out the background to the current military compensation arrangements as part of a review of the 2004 *Military Rehabilitation and Compensation Act* undertaken in 2009, which followed concerns expressed by the veteran and ex-service community. A 6 member Steering Committee composed of high level senior officials handed down its findings in a 2011 report entitled *Review of Military Compensation Arrangements*. This extract is chapter 2 of that report<sup>11</sup>.

#### Chapter summary

The Committee examined the evolution of military compensation arrangements in Australia. Since the First World War, successive governments have made it a high priority to provide compensation and related support to veterans and their dependants. Military compensation arrangements have evolved since that time in response to changing situations and a number of reviews. During the 1980s and early 1990s, significant changes were made in the standard of proof, pension eligibility, and compensation arrangements for peacetime service.

Legislation has included the *Australian Soldiers' Repatriation Act 1920* (later renamed the *Repatriation Act 1920*), *Veterans' Entitlements Act 1986* (VEA), *Safety, Rehabilitation and Compensation Act 1988* (SRCA), *Military Compensation Act 1994*, and the current *Military Rehabilitation and Compensation Act 2004* (MRCA). The MRCA covers defence service on or after 1 July 2004; the SRCA and VEA cover service before 1 July 2004. The MRCA is the first compensation legislation designed to cover the whole spectrum of military service, and it came into operation following an extensive examination of military compensation arrangements.

The current Review of Military Compensation Arrangements is the latest in a long line of reviews, inquiries and analyses of the compensation arrangements applying to military personnel and their dependants. Such attention demonstrates the sensitive and complex nature of this legislation and the importance given to it by governments.

### Introduction

2.1 This chapter sets out some of the historical background to current military compensation arrangements. In what follows, the term 'military compensation arrangements' is used in a generic sense, covering the *Australian Soldiers' Repatriation Act 1920* (later renamed the *Repatriation Act 1920*) and subsidiary legislation; its successor, the *Veterans' Entitlements Act 1986* (VEA); the *Military Rehabilitation and Compensation Act 2004* (MRCA); and Commonwealth workers'

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<sup>11</sup> <http://www.dva.gov.au/consultation-and-grants/reviews/review-military-compensation-arrangements/implementation-activities>



compensation legislation as and when applied to military personnel (e.g. the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) and its antecedent legislation).

## Background to the repatriation system

2.2 Since 1914, Australian governments of all political persuasions have made it a high priority to provide compensation and related support to veterans and their dependants. The casualties and widespread social effects of the First World War made this an imperative for Australian governments. The repatriation system, as it was known, became both an important Australian institution and a key public policy issue.

2.3 Large-scale mobilisation in the Second World War led to significant growth of the repatriation system. The system remained in place throughout Australia's military involvement in Korea, Borneo, Malaya, and Vietnam. In a modified form, it played a role in operations in the First Gulf War, East Timor and the early stages of the Iraq and Afghanistan conflicts.

2.4 Veterans have a special status in Australian society. The compensatory benefits provided to veterans (or their dependants) can be seen as an expression of gratitude by the government of the day, and through it the nation, for their war service.

## Legacy of the repatriation system

2.5 The more beneficial aspects of military compensation arrangements have evolved gradually over a long period of time. They have been influenced by a generally sympathetic approach taken by governments and courts to the repatriation system.

2.6 The *Repatriation Act 1920* was repealed in 1986, and its successor, the VEA, ceased for the purposes of compensation from 1 July 2004. A number of the policies and processes from the original repatriation system can still be identified in military compensation arrangements today. For example, warlike and non-warlike service ('operational service') have the more beneficial standard of proof applied in the assessment of Commonwealth liability; and elements of the Special Rate of pension under the VEA continue in the form of a safety net payment, and are complemented by an increased focus on rehabilitation.

## Beyond reasonable doubt standard of proof

2.7 The beyond reasonable doubt standard of proof that applies to operational service is unique to military compensation. It has evolved in the specific context of veterans' law. As far back as 1929, the *Australian Soldiers' Repatriation Act 1920* was amended to ensure that when veterans made a prima facie case of causation or aggravation due to war service, the onus of proof (that it was not caused by war service) lay with the determining authority, the Repatriation Commission.

2.8 In 1943, the legislation was further amended to lessen the burden on veterans to establish a prima facie case of causation. Veterans were given the benefit of any doubt in relation to the existence of any fact that would be favourable to them, or any question that arose for decision, and it was not necessary for them to furnish proof.

2.9 In 1977, the concept of the standard of proof 'beyond reasonable doubt', derived from the standard of proof used in criminal law, was introduced for the first time. This required the

determining authority to allow the claim ‘unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim or application or allowing the appeal’. This was intended to ensure that the benefit of any doubt be given to veterans.

2.10 However, in 1981, the High Court found that the beyond reasonable doubt standard meant the same in repatriation law as it did in criminal law.<sup>12</sup> The reverse of the criminal standard of proof was to be applied.

2.11 In 1985, the High Court went further, finding that a mere possibility was enough for a claim to succeed unless the Repatriation Commission could be satisfied beyond reasonable doubt that the condition was not related to service.<sup>13</sup> Even if there was no evidence, or the evidence was neutral, the claim must succeed.

### Reasonable hypothesis

2.12 In response to these High Court decisions, the Australian Government amended the legislation. This provided that a claim should not be accepted unless the material raised a reasonable hypothesis connecting the injury, disease or death to the veteran’s service.

2.13 In 1992 and 1993, the High Court ruled on the meaning of the term ‘reasonable hypothesis’.<sup>14</sup> The consequence of these decisions was that the view of a single responsible medical practitioner acting within his or her area of expertise (or a single expert eminent in the field) who supported a claim automatically satisfied the reasonable hypothesis standard of proof.

2.14 Before the High Court decisions of the early to mid 1980s, claims for smoking-related conditions were generally not accepted. But those decisions, along with developments in medical research, led to smoking being linked to a wide range of medical conditions. It became less a matter of establishing the link between smoking and the condition claimed, and more a question of whether or not the commencement of, or increase in, smoking could be connected to service. Given that many of these conditions were directly or closely associated with the cause of death of many veterans, the number of successful claims for the war widow(er)’s pension also increased.

### Statements of Principles

2.15 Following the High Court decisions of the early 1990s, the Australian Government established a review led by Professor Peter Baume to examine the repatriation compensation system. The Baume Review reported in March 1994, recommending that:

- there should be a single standard of proof — the civil standard of balance of probabilities — for both operational and peacetime service;
- there should be provision for veterans with operational service whereby they are given the benefit of any doubt;
- an expert medical committee should decide on generalised medical contentions; and

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<sup>12</sup> *Repatriation Commission v. Law* (1981) 147 CLR 635.

<sup>13</sup> *Repatriation Commission v. O’Brien* (1985) 155 CLR 422.

<sup>14</sup> *Bushell v. Repatriation Commission* (1992) 175 CLR 408 and *Byrnes v. Repatriation Commission* (1993) HCA 51.

- where the predominant cause of a death, injury or disease is not related to war service, the pension should be assessed at a lower rate.

2.16 The Australian Government did not accept Baume’s recommendations relating to the single standard of proof and reducing the rates of certain pensions.

2.17 The Australian Government did, however, establish the Repatriation Medical Authority (RMA) and the Specialist Medical Review Council (SMRC). The RMA was given the power to determine legislative instruments, known as Statements of Principles (SoPs), which set out the factors that cause certain medical conditions under the applicable standard of proof. SoPs are determined by the RMA in accordance with sound medical–scientific evidence. SoPs alone determine what factors could cause a medical condition that is the subject of a claim. The SMRC was set up to review the contents of a SoP (within three months of issue) or a decision by the RMA not to determine a SoP, on application from specified parties. The SoPs continue to be used to determine liability under both the VEA and the MRCA.

2.18 The result of the beneficial standard of proof and the SoPs is that there are substantial numbers of older veterans whose death or condition may be attributed to their service. In other words, many of the health conditions that are part of the normal ageing process are capable of being linked to military service.

2.19 The standards of proof and SoPs will be discussed in further detail in Chapter 5 of this report.

### Special Rate of pension

2.20 The Special Rate of pension was introduced in the *Australian Soldiers' Repatriation Act 1920* and was granted to veterans who were blinded or totally and permanently incapacitated to such an extent that they could not earn a living wage. The payment was intended to benefit the most seriously disabled veterans, including those who were crippled or paralysed with no hope of restoration to health.

2.21 In the early 1980s, several Federal Court decisions<sup>15</sup> were seen as undermining the original intention of the Special Rate. Some veterans were granted the Special Rate of pension even though they had enjoyed a full working life. Some commentators remarked that the Special Rate of pension was seen as a type of retirement benefit.<sup>16</sup>

2.22 In 1985, the old provisions were replaced with provisions similar to those currently in the VEA to tighten up the criteria. It was restated that the Special Rate of pension was designed for severely disabled veterans of a relatively young age who could never go back to work and could never hope to support themselves or their families, or put away money for their old age.

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<sup>15</sup> *Bowman v. Repatriation Commission* (1981) ALR 556; *Smith, K.K. v. Repatriation Commission* (1982) 1 RPD 238; *Delkou v. Repatriation Commission* (1984) 2 RPD 327.

<sup>16</sup> Bruce Topperwein with Nicky Langhorne, ‘Special Rate of Disability Pension: Analysis of the legislation and case-law concerning the special rate of pension’, *VerBosity*, Special Edition, 2003, p.6.

2.23 Before 1994, there were no special rules for veterans who were older than 65 years. In 1994, restrictive rules for veterans aged over 65 years were introduced.

2.24 In 1997, the introduction of the Veterans' Vocational Rehabilitation Scheme (VVRS) resulted in further changes. The VVRS is a totally voluntary scheme to assist veterans to find or continue in suitable employment.

2.25 The Special Rate Disability Pension (SRDP) under the MRCA is linked to the amount of the Special Rate of pension under the VEA. However, the eligibility criteria have a number of important differences. The SRDP paid under the MRCA is also subject to a number of offsets, including offsets against Commonwealth superannuation payments.

2.26 The SRDP is discussed in further detail in Chapter 11 of this report. Superannuation offsetting is discussed in further detail in Chapter 12 of this report.

### Peacetime service compensation arrangements

2.27 At the same time as the repatriation system was being established, workers' compensation legislation in Australia was developing. The original Commonwealth scheme — forerunner to the SRCA — and the first state schemes were all in place by 1914, albeit in much more restricted forms than today. When the repatriation system was introduced, the Commonwealth Parliament had already accepted the principle of statutory workers' compensation and had passed legislation to that effect.

2.28 For many years, peacetime compensation coverage for military personnel was provided under the *Defence Act 1903* and the *Naval Defence Act 1910*. From 1949, Australian Defence Force (ADF) members were given formal access to Commonwealth workers' compensation legislation.

2.29 Compensation pensions under the VEA were generally more beneficial for ADF members engaged on 'active service' or who 'served in a theatre of war and incurred danger from the enemy', than the entitlements provided for those on peacetime service.

2.30 Governments arguably saw it as appropriate and necessary to provide a higher level of compensation and support to veterans, as a means of recognising their service in engaging with enemy forces in defence of Australia.

### Dual eligibility post-Vietnam War

2.31 Until the early 1970s, the repatriation system and the compensation arrangements for ADF members on peacetime service were effectively two separate systems. What is now known as operational service was covered under the repatriation stream, and peacetime service in Australia was covered under the Commonwealth employees' compensation stream.

2.32 This changed in 1973 when the Australian Government extended the *Repatriation Act 1920* to peacetime service, subject to a qualifying period of three years. This change was significant because governments had, for many years, thought of the repatriation system as exclusive to war service, and the change was not consistent with the history of Australia's military compensation arrangements.

2.33 Compensation for peacetime service was also still available under the *Compensation (Commonwealth Government Employees) Act 1971*, which created a system of ‘dual eligibility’.

2.34 This meant that those injured on peacetime service could choose between different benefits provided by two separate Acts, whereas those on operational service were restricted to one Act. The decision to combine these two systems began the complexity and confusion that was to characterise military compensation arrangements for years.

2.35 The introduction of the SRCA in 1988 was especially significant because of the pre-eminent role it gave to rehabilitation and helping injured employees return to the workforce. Enactment of the SRCA resulted in the two preceding Acts — the *Commonwealth Employees’ Compensation Act 1930* and the *Compensation (Commonwealth Government Employees) Act 1971* — being repealed.

2.36 However, Part X of the SRCA gives employees and former employees of the Commonwealth, who are covered by the earlier Acts, the right to claim compensation under the SRCA as if the 1930 and 1971 Act continued to operate. This provision includes ADF members and former members. Thus, the SRCA is effectively three pieces of legislation.

2.37 In April 1994, the *Military Compensation Act 1994* was enacted. It introduced dual eligibility between the VEA and the SRCA for members on operational, peacekeeping or hazardous service. This added another significant layer of complexity to military compensation.

2.38 At the same time, it removed dual eligibility under the VEA and SRCA for members on peacetime service. With the exception of those who enlisted before May 1986 and served on continuous full-time service (CFTS) for three 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. The table below demonstrates the complexity in compensation coverage for the ADF following the 1994 changes.

**Table 2.1 Military compensation coverage before 1 July 2004**

Type of service	Key date		
	7 December 1972	22 May 1986	7 April 1994
CFTS before 22 May 1986	SRCA and VEA		
CFTS on or after 22 May 1986 and less than 3 years before 7 April 1994	Not applicable	SRCA	
CFTS on or after 22 May 1986 and greater than or equal to 3 years CFTS before 7 April 1994	Not applicable	SRCA and VEA	SRCA
CFTS on or after 7 April 1994	Not applicable		SRCA
Warlike service (including service in operational areas)	VEA		SRCA and VEA
Non-warlike (including peacekeeping and hazardous) service	SRCA and VEA		
Part-time Reservist service	SRCA		

CFTS = Continuous full-time service, SRCA = *Safety, Rehabilitation and Compensation Act 1988*, VEA = *Veterans’ Entitlements Act 1986*

## Black Hawk helicopter accident and the Tanzer Review

2.39 On 12 June 1996, two Black Hawk helicopters collided and crashed at the High Range Training Area near Townsville, resulting in the deaths of 18 Australian Regular Army members and injuries to a further 12 members.

2.40 This accident focused public and political attention on the differences in military compensation benefits that applied to ADF members killed or injured in the same incident or circumstances. The dates of enlistment of those killed or injured determined whether they or their dependants were eligible for compensation under the VEA and the SRCA, or only under the SRCA.

2.41 Following the Black Hawk helicopter accident, an interdepartmental inquiry into compensation for ADF members was established. The principal outcome was an increase in the benefits pertaining to death and severe injury for ADF members covered by the SRCA under a *Defence Act 1903* determination, together with a number of criticisms about the adequacy of existing arrangements.

2.42 This inquiry was followed by the Tanzer Review, an independent review established to develop options for a single, self-contained compensation scheme encompassing all service short of declared war.

2.43 The recommendations of the Tanzer Review led to the Australian Government establishing a new military compensation scheme, the MRCA. This scheme is premised on modern compensation principles, including an increased focus on rehabilitation, and also maintains some important VEA features.

## Development of the Military Rehabilitation and Compensation Act

2.44 Following the Australian Government's consideration of the Tanzer report, a 'Briefing Paper on the New Military Compensation Scheme' was prepared in March 2000 by the Department of Defence, in consultation with the Department of Veterans' Affairs (DVA). DVA undertook a program of briefings with ex-service organisations (ESOs) and departmental officials.

2.45 After the 2001 election, the momentum was renewed to develop the new single scheme. The briefing paper was revised and reissued in February 2002 with the following key features for the new single scheme:

- application to all military service, both in Australia and overseas;
- a better focus on military-specific requirements;
- a more integrated approach to management of safety, rehabilitation, resettlement and compensation;
- a basis in best-practice principles;
- prospective operation, with existing entitlements (under the VEA or SRCA) preserved for conditions arising before the commencement date of the new scheme;
- a benefits structure based on the current SRCA, plus the Defence Determinations, and additional benefits under the VEA;

- use of the VEA SoPs to determine initial liability, and the Guide to Assessment of Rates of Veterans' Pensions (GARP) to assess the lump sum for permanent impairments;
- removal of dual entitlements then existing between SRCA/VEA; and
- a dedicated regulatory body for the new scheme.

2.46 An ESO Working Group (ESOWG) representing the nine major organisations was formed to review the proposals for the new scheme, and six meetings were held between April and September 2002. Meetings were chaired by the President of the Repatriation Commission, and also attended by the other members of the Commission and senior Defence officers. ESOs also provided papers on particular issues of concern and, at the end of the process, a full set of the Departmental and ESO papers was issued to participants. Two organisations representing the Special Air Service and peacekeepers were later added to the ESOWG. ESO presidents and ESOWG members were briefed on developments with the new scheme at a meeting with the Repatriation Commission in March 2003.

2.47 An Exposure Draft of the Military Rehabilitation and Compensation Bill 2003 (MRCB) was prepared by the Office of Parliamentary Counsel and released in June 2003 for consideration by the wider community. ESOWG members were briefed on the day of release. An extensive round of presentations followed for ADF, Defence and DVA staff, and the ex-service community, at each major base and office in Australia, as well as for ADF members serving in East Timor.

2.48 A number of important changes were made as a result of the consultation process on the Exposure Draft in June–September 2003:

- withdrawal of the proposal to offset future payments of the Special Rate of pension under the VEA by the value of any Commonwealth superannuation received (this had been strongly opposed by ESOs);
- removal of an exclusion from the Commonwealth's liability to pay compensation where a person is injured or contracts a disease as a result of reasonable disciplinary action;
- relaxation of requirements for eligibility for the SRDP safety net payment to cover those who are unable to work more than 10 hours per week (no hours were stated in the Exposure Draft) — this removed the disincentive for a person receiving the safety net payment to return to some part-time work;
- extension of the time allowed to choose between a lump sum and weekly payments from three months to six months;
- removal of the bar on receiving more than one weekly death benefit payment where the partner is widowed a second time; and
- inclusion of a further choice of receiving part lump sum and part periodic payments for permanent impairment.

2.49 Following consideration of the comments on the Exposure Draft, the MRCB and the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003 were tabled in the House of Representatives on 4 December 2003. The ESOWG met on several occasions during 2004 to discuss the new arrangements and the preparation of rehabilitation principles and protocols.

2.50 The MRCA was listed for review by the Senate Committee on Foreign Affairs, Defence and Trade. Submissions were sought by the Senate for response by 30 January 2004, and hearings were held in Perth, Canberra and Melbourne on 23–25 February 2004. The Bill was passed with amendments, resulting from the Senate Inquiry, to ensure that all death benefits were the same, regardless of the nature of service; and changes that made the VRB available to all ADF members, regardless of the type of service that gave rise to the claim.

2.51 The MRCA commenced operation on 1 July 2004.

## Conclusions

2.52 The MRCA, which had bipartisan support, is the first compensation legislation specifically designed to cover the whole spectrum of military service. The MRCA came into operation on 1 July 2004, after approximately seven years of examining military compensation arrangements.

2.53 The MRCA's introduction was a pragmatic response to the complexity of military compensation arrangements in the mid 1990s. It was a significant change to Australia's military compensation arrangements; perhaps the most significant change since the inception of the repatriation system. However, changing from a complex system with a number of different pieces of legislation to a single Act would be difficult, particularly in relation to transitional arrangements and offsetting.

2.54 This Review of Military Compensation Arrangements is the latest in a long line of reviews, inquiries and analyses of the compensation arrangements that apply to military personnel and their dependants, undertaken on behalf of the Australian Government. Such attention underlines the sensitive and complex nature of this legislation, and the importance given to it by governments since the inception of the repatriation system in the aftermath of the First World War.



## **APPENDIX 3**

### **Part XIA and XIB of the Veterans' Entitlements Act 1986**

## Part XIA—The Repatriation Medical Authority

### Division 1—Establishment, functions and powers

#### 196A Establishment of Authority

- (1) A Repatriation Medical Authority is established.
- (2) The Repatriation Medical Authority:
  - (a) is a body corporate with perpetual succession; and
  - (b) has a common seal; and
  - (c) may sue and be sued.
- (3) All courts, judges and persons acting judicially must:
  - (a) take judicial notice of the imprint of the seal of the Authority appearing on a document; and
  - (b) presume that the document was duly sealed.
- (4) Debts incurred by the Authority in the performance of its functions are, for all purposes, taken to be debts incurred by the Commonwealth.

#### 196AA Application of the *Public Governance, Performance and Accountability Act 2013* to the Authority

Despite paragraph 10(1)(d) of the *Public Governance, Performance and Accountability Act 2013* and the definition of *Department of State* in section 8 of that Act, the Repatriation Medical Authority is not a Commonwealth entity for the purposes of that Act and is taken to be part of the Department for those purposes.

Note: This means that the members of the Authority are officials of the Department for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

#### 196B Functions of Authority

- (1) This section sets out the functions of the Repatriation Medical Authority. The main function of the Authority is to determine Statements of Principles for the purposes of this Act and the MRCA.

##### *Determination of Statement of Principles*

- (2) If the Authority is of the view that there is sound medical-scientific evidence that indicates that a particular kind of injury, disease or death can be related to:
  - (a) operational service rendered by veterans; or
  - (b) peacekeeping service rendered by members of Peacekeeping Forces; or
  - (c) hazardous service rendered by members of the Forces; or(caa) British nuclear test defence service rendered by members of the Forces; or
  - (ca) warlike or non-warlike service rendered by members;the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:
  - (d) the factors that must as a minimum exist; and
  - (e) which of those factors must be related to service rendered by a person;before it can be said that a reasonable hypothesis has been raised connecting an injury, disease or death of that kind with the circumstances of that service.

Note 1: For *sound medical-scientific evidence* see subsection 5AB(2).

Note 2: For *peacekeeping service, member of a Peacekeeping Force, hazardous service, member of the Forces* and *British nuclear test defence service* referred to in paragraphs (2)(b), (c) and (caa), see subsection 5Q(1A).

Note 2A: For *warlike service, non-warlike service* and *members* referred to in paragraph (2)(ca), see section 196KA. (These definitions are for the purposes of the MRCA.)

Note 3: For *factor related to service* see subsection (14).

(3) If the Authority is of the view that on the sound medical-scientific evidence available it is more probable than not that a particular kind of injury, disease or death can be related to:

- (a) eligible war service (other than operational service) rendered by veterans; or
- (b) defence service (other than hazardous service and British nuclear test defence service) rendered by members of the Forces; or
- (ba) peacetime service rendered by members;

the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:

- (c) the factors that must exist; and
- (d) which of those factors must be related to service rendered by a person;

before it can be said that, on the balance of probabilities, an injury, disease or death of that kind is connected with the circumstances of that service.

Note 1: For *sound medical-scientific evidence* see subsection 5AB(2).

Note 2: For *defence service, hazardous service, British nuclear test defence service* and *member of the Forces* referred to in paragraph (3)(b), see subsection 5Q(1A).

Note 2A: For *peacetime service* and *members* referred to in paragraph (3)(ba), see section 196KA. (These definitions are for the purposes of the MRCA.)

Note 3: For *factor related to service* see subsection (14).

(3A) The Authority may determine a Statement of Principles under subsection (2) or (3) for the purposes of this Act, the MRCA, or both Acts.

### *Investigation*

(4) If the Authority:

- (a) receives a request under section 196E to carry out an investigation in respect of a particular kind of injury, disease or death; or
- (b) of its own initiative, decides that a particular kind of injury, disease or death ought to be investigated for the purposes of this Act, or the MRCA, to find out whether a Statement of Principles may be determined in respect of it;

the Authority must carry out an investigation to obtain information that would enable the Authority to establish:

- (c) how the injury may be suffered or sustained, the disease may be contracted or the death may occur; and
- (d) the extent (if any) to which:
  - (i) the injury, disease or death may be war-caused or defence-caused; or
  - (ii) the injury, disease or death may be a service injury, a service disease or a service death.

Note 1: For *war-caused* see sections 8 and 9.

Note 2: For *defence-caused* see section 69.

Note 3: For *service injury, service disease* and *service death* see section 196KA. (These definitions are for the purposes of the MRCA.)

(5) If, after carrying out the investigation, the Authority is of the view that there is sound medical-scientific evidence on which it can rely to determine a Statement of Principles

under subsection (2) or (3), in respect of that kind of injury, disease or death, the Authority must do so as soon as practicable.

Note: This subsection does not mean that the Authority must carry out an investigation before it can determine a Statement of Principles under subsection (2) or (3).

- (6) If, after carrying out the investigation, the Authority is of the view:
- (a) that there is no sound medical-scientific evidence on which it can rely to determine a Statement of Principles under subsection (2) or (3) in respect of that kind of injury, disease or death; or
  - (b) that the sound medical-scientific evidence on which it can rely is insufficient to allow it to do so;

the Authority must make a declaration in writing:

- (c) stating that it does not propose to make a Statement of Principles; and
- (d) giving the reasons for its decision.

*Subsequent investigation and review of determinations concerning Statement of Principles*

- (7) If the Authority:
- (a) is asked under section 196E to review:
    - (i) some or all of the contents of a Statement of Principles; or
    - (ii) a decision of the Authority not to make a Statement of Principles in respect of a particular kind of injury, disease or death; or
  - (b) thinks that there are grounds for such a review; or
  - (c) is directed by the Review Council under subsection 196W(7) to carry out an investigation in respect of a particular kind of injury, disease or death;
- the Authority must, subject to subsection 196C(4) and section 196CA in a case where paragraph (a) applies, carry out an investigation to find out if there is new information available about:
- (d) how the injury may be suffered or sustained, the disease may be contracted or the death may occur; or
  - (e) the extent (if any) to which:
    - (i) the injury, disease or death may be war-caused or defence-caused; or
    - (ii) the injury, disease or death may be a service injury, a service disease or a service death.

Note 1: For *war-caused* see sections 8 and 9.

Note 2: For *defence-caused* see section 69.

Note 3: For *service injury*, *service disease* and *service death* see section 196KA. (These definitions are for the purposes of the MRCA.)

- (7A) If the investigation:
- (a) relates to a request under section 196E to review some of the contents of a Statement of Principles; or
  - (b) is one to which paragraph (7)(b) applies and that relates to some of the contents of a Statement of Principles; or
  - (c) is carried out because of a direction under subsection 196W(7) by the Review Council following a request to the Council under section 196Z to review the Authority's refusal to carry out an investigation relating to a request under section 196E to review some of the contents of a Statement of Principles;
- the Authority may limit its investigation to matters relating to those contents.

Note: For *Review Council* see subsection 5AB(1).

- (8) If, after carrying out the investigation, the Authority is of the view that there is a new body of sound medical-scientific evidence available that, together with the sound medical-scientific evidence previously considered by the Authority, justifies the making of a Statement of Principles, or an amendment of the Statement of Principles already determined, in respect of that kind of injury, disease or death, the Authority must:
- (a) determine a Statement of Principles in respect of that kind of injury, disease or death under subsection (2) or (3); or
  - (b) make a determination amending the Statement of Principles determined under subsection (2) or (3) in respect of that kind of injury, disease or death; or
  - (c) make a determination revoking the Statement of Principles determined under subsection (2) or (3), and determine a new Statement of Principles under subsection (2) or (3) in respect of that kind of injury, disease or death;
- as the case requires.

Note: For *sound medical-scientific evidence* see subsection 5AB(2).

- (9) If, after carrying out the investigation, the Authority is of the view:
- (a) that there is no new sound medical-scientific evidence about that kind of injury, disease or death; or
  - (b) that the new sound medical-scientific evidence available is not sufficient to justify the making of a Statement of Principles, or an amendment of the Statement of Principles already determined in respect of that kind of injury, disease or death;
- the Authority must make a declaration in writing:
- (c) stating that it does not propose to make a Statement of Principles, or amend the Statement of Principles already determined (as the case may be); and
  - (d) giving the reasons for its decision.
- (10) If the Review Council has, by a decision notified in the *Gazette*, directed the Authority to amend a Statement of Principles in respect of a particular kind of injury, disease or death, the Authority must make a determination amending the Statement of Principles determined in respect of that kind of injury, disease or death in accordance with the directions of the Council.
- (11) If, after reviewing a decision of the Authority not to determine a Statement of Principles under subsection 196B(2) in respect of a particular kind of injury, disease or death, the Review Council has, by a decision notified in the *Gazette*, directed the Authority to make such a Statement of Principles, the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out, in accordance with the directions of the Council:
- (a) the factors that must as a minimum exist; and
  - (b) which of those factors must be related to service rendered by a person;
- before it can be said that a reasonable hypothesis has been raised connecting an injury, disease or death of that kind with the circumstances of that service.

Note 1: For *factor related to service* see subsection (14).

Note 2: The Statement of Principles may be determined for the purposes of this Act, the MRCA, or both Acts, in accordance with the directions of the Council (see subsection 196W(4A)).

- (12) If, after reviewing a decision of the Authority not to determine a Statement of Principles under subsection 196B(3) in respect of a particular kind of injury, disease or death, the Review Council has, by a decision notified in the *Gazette*, directed the Authority to make such a Statement of Principles, the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out, in accordance with the directions of the Council:
- (a) the factors that must exist; and

(b) which of those factors must be related to service rendered by a person; before it can be said that, on the balance of probabilities, an injury, disease or death of that kind is connected with the circumstances of that service.

Note 1: For *factor related to service* see subsection (14).

Note 2: The Statement of Principles may be determined for the purposes of this Act, the MRCA, or both Acts, in accordance with the directions of the Council (see subsection 196W(4A)).

- (13) Despite section 12 of the *Legislative Instruments Act 2003*, a determination under subsection (10) of this section amending a Statement of Principles, or a Statement of Principles under subsection (11) or (12) is to be taken to have had effect from the day on which the decision of the Review Council was notified in the *Gazette*. The determination or Statement of Principles must specify that day.
- (13A) A determination under this section:
- (a) must be in writing; and
  - (b) is a legislative instrument.
- (14) A factor causing, or contributing to, an injury, disease or death is *related to service* rendered by a person if:
- (a) it resulted from an occurrence that happened while the person was rendering that service; or
  - (b) it arose out of, or was attributable to, that service; or
  - (c) it resulted from an accident that occurred while the person was travelling, while rendering that service but otherwise than in the course of duty, on a journey:
    - (i) to a place for the purpose of performing duty; or
    - (ii) away from a place of duty upon having ceased to perform duty; or
  - (d) it was contributed to in a material degree by, or was aggravated by, that service; or
  - (e) in the case of a factor causing, or contributing to, an injury—it resulted from an accident that would not have occurred:
    - (i) but for the rendering of that service by the person; or
    - (ii) but for changes in the person’s environment consequent upon his or her having rendered that service; or
  - (f) in the case of a factor causing, or contributing to, a disease—it would not have occurred:
    - (i) but for the rendering of that service by the person; or
    - (ii) but for changes in the person’s environment consequent upon his or her having rendered that service; or
  - (g) in the case of a factor causing, or contributing to, the death of a person—it was due to an accident that would not have occurred, or to a disease that would not have been contracted:
    - (i) but for the rendering of that service by the person; or
    - (ii) but for changes in the person’s environment consequent upon his or her having rendered that service.

## **196C Powers of Authority with respect to investigations**

- (1) The Repatriation Medical Authority may not, for the purposes of an investigation, carry out any new research work (including any test or experiment).
- (2) The Authority may, for the purposes of an investigation, ask the Secretary:
  - (a) to forward to the Authority any information:
    - (i) in the possession of the Secretary; or

- (ii) that the Secretary may obtain; relating to the kind of injury, disease or death under investigation; or
  - (b) to carry out research (including any test or experiment) to obtain, confirm, or disprove, specific information about that kind of injury, disease or death and forward a report to the Authority.
- (3) In forming any view during the investigation, the Authority:
  - (a) may rely only on sound medical-scientific evidence:
    - (i) that has been submitted to it; or
    - (ii) that it has obtained on its own initiative or from the Secretary (under subsection (2)) or from a consultant; and
  - (b) must consider and evaluate all the evidence so made available to it.
- (4) If:
  - (a) the Authority has carried out the investigation in respect of a particular kind of injury, disease or death; and
  - (b) within 12 months after the Authority has, at the end of the investigation:
    - (i) determined or amended a Statement of Principles; or
    - (ii) declared that it does not propose to make or amend a Statement of Principles;
 a person or organisation asks the Authority under section 196E to review:
    - (iii) some or all of the contents of the Statement of Principles; or
    - (iv) its decision not to make a Statement of Principles; and
  - (c) the Authority thinks that there are no grounds for such a review;
 the Authority may decide not to carry out an investigation in respect of that kind of injury, disease or death. The Authority must then inform the person or organisation in writing of its decision, stating the reasons for it.

### **196CA Authority not required to investigate certain requests**

- (1) The Authority may decide not to carry out an investigation in respect of a request for a review made under paragraph 196E(1)(e) or (f) if:
  - (a) the request does not state the grounds on which the review is sought; or
  - (b) the Authority considers that the request does not identify sufficient relevant information:
    - (i) to support the grounds on which the review is sought; or
    - (ii) to otherwise justify the review; or
  - (c) the request is vexatious or frivolous.
- (2) If the Authority decides not to carry out an investigation, it must inform the person or organisation in writing of the decision, stating the reasons for it.

### **196CB Authority may consolidate requests**

- If:
- (a) 2 or more requests for review are made under subsection 196E(1); and
  - (b) the requests are in relation to the same injury, disease or death;
- the Authority may carry out one investigation in relation to those requests.

### **196E Request for an investigation, review etc.**

- (1) Any of the following:
  - (a) the Commission;

- (aa) the Military Rehabilitation and Compensation Commission;
  - (b) a person eligible to make a claim for a pension under Part II or IV of this Act;
  - (ba) a person eligible to make a claim for compensation under section 319 of the MRCA;
  - (c) an organisation representing veterans, Australian mariners, members of the Forces, members of Peacekeeping Forces, or members within the meaning of the MRCA, or their dependants;
- may request the Repatriation Medical Authority:
- (d) to carry out an investigation under subsection 196B(4) in respect of a particular kind of injury, disease or death; or
  - (e) to review a decision of the Authority under subsection 196B(6) not to make a Statement of Principles in respect of a particular kind of injury, disease or death; or
  - (f) to review some or all of the contents of a Statement of Principles in force under this Part.
- (2) A request under subsection (1) must:
- (a) be in a form approved by the Authority; and
  - (b) be lodged at an office of the Authority in Australia in accordance with the directions of the Chairperson of the Authority under subsection (2A).
- (2A) The Chairperson of the Authority may give directions:
- (a) as to the manner of lodging requests, including electronic requests, with the Authority for the purposes of subsection (1); and
  - (b) as to the time at which such requests are to be taken to have been so communicated.
- (3) If the request is a request for a review made under paragraph (1)(e) or (f), the request must also:
- (a) state the grounds on which the review is sought; and
  - (b) identify any information relied on to support those grounds.

## **196F Submissions to the Authority**

- (1) If the Repatriation Medical Authority is carrying out an investigation under subsection 196B(4) or (7), any person or organisation referred to in any of paragraphs 196E(1)(a) to (c) may make a submission in writing to the Authority on any matter (other than a legal matter) relevant to the investigation.
- (2) A person having expertise in a field relevant to the investigation may make a submission in writing to the Authority on any matter (other than a legal matter) within his or her expertise that is relevant to the investigation.
- (3) If an individual, the Commission, the Military Rehabilitation and Compensation Commission or an organisation has made a written submission, the individual or his or her representative, or a representative of the relevant Commission or of the organisation may, subject to subsection (4), appear before the Authority to make an oral submission complementing the written submission. The oral submission may not cover any legal matter.
- (4) A person or organisation may not be represented before the Authority by a legal practitioner.



## **196G Notice of investigation**

- (1) As soon as practicable after the Repatriation Medical Authority:
  - (a) has been asked under section 196E to carry out:
    - (i) an investigation; or
    - (ii) a review of a decision of the Authority not to make a Statement of Principles;  
or
    - (iii) a review of some or all of the contents of a Statement of Principles;  
regarding a particular kind of injury, disease or death; or
  - (b) has decided on its own initiative to carry out such an investigation or such a review;the Authority must publish in the *Gazette* a notice:
  - (c) stating that the Authority intends to carry out an investigation in respect of that kind of injury, disease or death; and
  - (d) inviting persons or organisations authorised under subsection 196F(1) to do so to make written submissions to the Authority.
- (2) A notice is to specify:
  - (a) the date on which the Authority will hold its first meeting for the purposes of the investigation; and
  - (b) the date by which all submissions must have been received by the Authority.
- (3) A notice must be published in the *Gazette* at least 28 days before the date of the first meeting of the Authority.
- (4) A notice is not invalid merely because it fails to comply with subsection (2).

## **196H Copyright in submissions**

- (1) The Repatriation Medical Authority is not the owner of any copyright subsisting in material (*submitted material*) contained in a submission made to the Authority for the purposes of an investigation under section 196B.
- (2) In spite of the *Copyright Act 1968*, the Authority does not infringe any copyright subsisting in submitted material if, in performing its functions or exercising its powers, the Authority does an act comprised in the copyright without the licence of the owner of the copyright.

## **196I Access to information**

- (1) Subject to subsection (2), any person or organisation referred to in any of paragraphs 196E(1)(a) to (c) is entitled, on request made in writing to the Repatriation Medical Authority, to have reasonable access to any document containing information considered by the Authority for the purposes of an investigation.
- (2) The Authority may not disclose any personal information about a particular person if the information is likely to reveal the identity of that person.

## **196J Notice of decision not to make etc. Statement of Principles**

- (1) When the Repatriation Medical Authority decides not to make, or not to review or not to amend, a Statement of Principles, it must, within 14 days, notify the Commission or the Military Rehabilitation and Compensation Commission (as the case requires) in writing of its decision.
- (2) If the decision is made following a request from a person or organisation under section 196E, the Authority must also notify the person or organisation in writing of its decision.

## **196K Repatriation Medical Authority to send information to Review Council**

The Repatriation Medical Authority must, within 28 days after being notified that the Review Council has been asked to review:

- (a) a Statement of Principles; or
  - (b) its decision not to determine a Statement of Principles in respect of a particular kind of injury, disease or death; or
  - (ba) its decision not to amend a Statement of Principles in respect of a particular kind of injury, disease or death; or
  - (c) its decision under subsection 196C(4) not to carry out an investigation in respect of a particular kind of injury, disease or death;
- send to the Council a copy of all the information that was available to it when it:
- (d) determined, amended, or last amended, the Statement of Principles; or
  - (e) decided, or last decided, not to determine, or not to amend, a Statement of Principles in respect of that kind of injury, disease or death; or
  - (f) decided not to carry out the investigation.

## **196KA Definitions for the purposes of the MRCA**

In this Division:

- (a) for the purposes of paragraphs 196B(4)(d) and 196B(7)(e), *service death* has the same meaning as in the MRCA; and
- (b) for the purposes of paragraphs 196B(4)(d) and 196B(7)(e), *service disease* has the same meaning as in the MRCA; and
- (c) for the purposes of paragraphs 196B(4)(d) and 196B(7)(e), *service injury* has the same meaning as in the MRCA; and
- (d) for the purposes of paragraphs 196B(2)(ca) and 196B(3)(ba), *members* has the same meaning as in the MRCA; and
- (e) for the purposes of paragraph 196B(3)(ba), *peacetime service* has the same meaning as in the MRCA; and
- (f) for the purposes of paragraph 196B(2)(ca), *non-warlike service* does not have the meaning given by this Act but instead has the same meaning as in the MRCA; and
- (g) for the purposes of paragraph 196B(2)(ca), *warlike service* does not have the meaning given by this Act but instead has the same meaning as in the MRCA.

## **Division 2—Constitution and meetings**

### **196L Membership**

- (1) The Repatriation Medical Authority consists of a Chairperson and 4 other members.
- (2) All members are to be appointed on a part-time basis by the Minister.
- (3) One of the members must be a person having at least 5 years experience in the field of epidemiology.

### **196M Qualifications**

The Minister is to appoint a person as Chairperson or as a member only if the person is a registered medical practitioner, or a medical scientist, with at least 10 years experience.

### **196N Tenure of office**

- (1) Subject to this Act, a person appointed as Chairperson or as a member holds office for the period specified in the instrument of appointment.
- (2) A person may not hold office for a period of more than 5 years but is eligible for reappointment.

### **196O Resignation**

A member may resign from office by written notice given to the Minister.

### **196P Termination of appointment**

The Minister may terminate the appointment of a person as Chairperson or as a member:

- (a) for misbehaviour or for physical or mental incapacity; or
- (b) if he or she becomes bankrupt, applies to take the benefit of a law for the relief of bankruptcy or insolvent debtors, compounds with his or her creditors or assigns remuneration or property for their benefit.

### **196Q Acting Chairperson**

The Minister may appoint a member to act as Chairperson:

- (a) during a vacancy in the office of Chairperson, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Chairperson is absent from office.

### **196R Meetings**

- (1) The Chairperson may convene meetings of the Repatriation Medical Authority as he or she considers necessary for the performance of its functions. The Chairperson may delegate this power to another member or to a member of the staff of the Authority.
- (2) The Chairperson presides at all meetings of the Authority.
- (3) At a meeting, 3 members constitute a quorum.
- (4) A question arising at a meeting is to be determined by a majority of votes of the members present and voting. The Chairperson has only a deliberative vote.

- (5) The Authority must keep minutes of the proceedings at each meeting.
- (6) Subject to this section, the Authority determines the procedures for convening its meetings and for conducting its business.

### **196S Remuneration and allowances**

- (1) A member shall be paid such remuneration as is determined by the Remuneration Tribunal but, if no determination of that remuneration by the Tribunal is in operation, a member shall be paid such remuneration as the Minister determines in writing.
- (2) A member shall be paid such allowances as the Minister determines in writing.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

## **Division 3—Staff and consultants**

### **196T Staff**

The staff necessary to assist the Repatriation Medical Authority consists of persons engaged under the *Public Service Act 1999* and made available to the Authority by the Secretary.

### **196U Consultants**

- (1) The Repatriation Medical Authority may, under written agreement, engage consultants to provide expert advice to the Authority about any disease, injury or death that the Authority is investigating.
- (2) The Authority may not engage a consultant without the approval of the Minister.

## Part XIB—The Specialist Medical Review Council

### Division 1—Establishment and functions

#### 196V Establishment of Council

- (1) A Specialist Medical Review Council is established.

Note: All references in this Part to the Review Council are references to the Specialist Medical Review Council: see the definition of *Review Council* in subsection 5AB(1).

- (2) The Review Council:
- (a) is a body corporate with perpetual succession; and
  - (b) has a common seal; and
  - (c) may sue and be sued.
- (3) All courts, judges and persons acting judicially must:
- (a) take judicial notice of the imprint of the seal of the Review Council appearing on a document; and
  - (b) presume that the document was duly sealed.
- (4) Debts incurred by the Review Council in the performance of its functions are, for all purposes, taken to be debts incurred by the Commonwealth.

#### 196VA Application of the *Public Governance, Performance and Accountability Act 2013* to the Council

Despite paragraph 10(1)(d) of the *Public Governance, Performance and Accountability Act 2013* and the definition of *Department of State* in section 8 of that Act, the Review Council is not a Commonwealth entity for the purposes of that Act and is taken to be part of the Department for those purposes.

Note: This means that the councillors are officials of the Department for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

#### 196W Functions of Review Council

- (1) This section sets out the functions of the Review Council.
- (2) If the Council is asked under section 196Y to review:
- (a) some or all of the contents of a Statement of Principles in respect of a particular kind of injury, disease or death; or
  - (b) a decision of the Repatriation Medical Authority not to determine a Statement of Principles under subsection 196B(2), or a Statement of Principles under subsection 196B(3), in respect of a particular kind of injury, disease or death; or
  - (ba) a decision of the Repatriation Medical Authority not to amend a Statement of Principles in respect of a particular kind of injury, disease or death;
- subject to subsection (3), the Council must, for that purpose, carry out a review of all the information that was available to the Authority when it:
- (c) determined, amended, or last amended, the Statement of Principles; or
  - (d) decided, or last decided, not to determine, or not to amend, a Statement of Principles;
- in respect of that kind of injury, disease or death.

- (3) If the Council has been asked to review some or all of the contents of a Statement of Principles, the Council may carry out a review under subsection (2) only if:
- (a) the period within which the Statement of Principles may be disallowed under section 42 of the *Legislation Act 2003* has ended; and
  - (b) the Statement of Principles has not been disallowed.
- (3A) If:
- (a) the Council has been asked to review some or all of the contents of a Statement of Principles in respect of a particular kind of injury, disease or death; and
  - (b) there is another Statement of Principles in force in respect of that kind of injury, disease or death, but the Council has not been asked to review some or all of the contents of that other Statement of Principles;
- then the Council must also review that other Statement of Principles by reviewing the information subsection (2) requires it to review in reviewing the Statement of Principles it has been asked to review.
- (4) If after carrying out the review, the Council is of the view that there is sound medical-scientific evidence on which the Authority could have relied:
- (a) to amend either or both of the Statements of Principles in force in respect of that kind of injury, disease or death; or
  - (b) to determine a Statement of Principles under subsection 196B(2), or a Statement of Principles under subsection 196B(3), in respect of that kind of injury, disease or death;
- the Council must make a declaration in writing stating its views, setting out the evidence in support and:
- (c) directing the Authority to amend either or both of the Statements of Principles, or determine a Statement of Principles (as the case may be), in accordance with the directions given by the Council; or
  - (d) remitting the matter for reconsideration in accordance with any directions or recommendations of the Council.
- (4A) The Council may give directions under subsection (4) for the purposes of this Act, the MRCA, or both Acts.
- (5) If, after carrying out the review, the Council is of the view:
- (a) that there is no sound medical-scientific evidence that justifies the making of a Statement of Principles, or an amendment of either or both of the Statements of Principles in force, in respect of that kind of injury, disease or death; or
  - (b) that the sound medical-scientific evidence available to the Authority is insufficient to justify the making of a Statement of Principles, or an amendment of either or both of the Statements of Principles, in respect of that kind of injury, disease or death;
- the Council must make a declaration in writing to that effect giving the reasons for its decision. The Council may include in the declaration any recommendation that it considers fit to make about any future investigation that the Authority may carry out in respect of that kind of injury, disease or death.
- (6) If the Council is asked under section 196Z to review a decision of the Repatriation Medical Authority under subsection 196C(4) not to carry out an investigation in respect of a particular kind of injury, disease or death, the Council must consider:
- (a) the reasons given by the Authority for making the decision; and
  - (b) the information on which it relied in making that decision; and
  - (c) the grounds on which the request for the review was made and any submission made in support of those grounds.

- (7) If, after considering the matters referred to in paragraphs (6)(a), (b) and (c), the Council is of the view that:
- (a) there appears to be a new body of sound medical-scientific evidence in respect of that kind of injury, disease or death that has not been previously considered by the Authority; and
  - (b) that new body of evidence, together with the sound medical-scientific evidence available to the Authority, could justify the making of a Statement of Principles, or an amendment of the Statement of Principles already determined, in respect of that kind of injury, disease or death;

the Council must make a declaration in writing to that effect giving the reasons for its decision and directing the Authority to carry out an investigation under subsection 196B(7) in respect of that kind of injury, disease or death. The Council may include in the declaration any recommendation or direction that the Council considers fit to make about the carrying out of the investigation.

- (8) If, after considering the matters referred to in paragraphs (6)(a), (b) and (c), the Council is not of the view referred to in subsection (7) in respect of that kind of injury, disease or death, the Council must make a declaration in writing:
- (a) affirming the decision of the Authority not to carry out the investigation; and
  - (b) giving the reasons for its decision.

The Council may include in the declaration any recommendation that it considers fit to make about any future investigation that the Authority may carry out in respect of that kind of injury, disease or death.

#### **196X Notification of decision of Review Council to be notified in *Gazette***

- (1) A decision of the Review Council under section 196W must be notified in the *Gazette*.
- (2) The Council must also give a copy of the decision to:
  - (a) the person or organisation that asked for the review; and
  - (b) the Commission, or the Military Rehabilitation and Compensation Commission, (if it is not the person referred to in (a)); and
  - (c) the Repatriation Medical Authority.

#### **196Y Request for review of contents of Statement of Principles etc.**

- (1) Subject to subsection (2), any of the following:
    - (a) the Commission;
    - (aa) the Military Rehabilitation and Compensation Commission;
    - (b) a person eligible to make a claim for a pension under Part II or IV of this Act;
    - (ba) a person eligible to make a claim for compensation under section 319 of the MRCA;
    - (c) an organisation representing veterans, Australian mariners, members of the Forces, members of Peacekeeping Forces, or members within the meaning of the MRCA, or their dependants;
- may ask the Review Council to review:
- (d) some or all of the contents of a Statement of Principles in force under Part XIA; or
  - (e) a decision of the Repatriation Medical Authority not to make, or not to amend, a Statement of Principles in respect of a particular kind of injury, disease or death.



- (2) The request must be made:
  - (a) in the case of a request to review some or all of the contents of a Statement of Principles—within 3 months after the Statement of Principles was made, amended or last amended; or
  - (b) if paragraph (a) does not apply—within 3 months after the decision of the Authority.
- (3) A request must:
  - (b) state the grounds on which the review is sought; and
  - (c) be lodged with the Review Council in accordance with the directions of the Convener under section 196ZR.
- (4) The Review Council must notify the Secretary and the Repatriation Medical Authority of the request within 28 days of the request being lodged.

### **196Z Request for review of decision of Repatriation Medical Authority not to carry out an investigation**

- (1) If:
  - (a) a person or organisation asks the Repatriation Medical Authority under section 196E to review:
    - (i) some or all of the contents of a Statement of Principles in respect of a particular kind of injury, disease or death; or
    - (ii) its decision not to make a Statement of Principles in respect of a particular kind of injury, disease or death; and
  - (b) the Authority refuses under subsection 196C(4) to carry out an investigation in respect of that kind of injury, disease or death;

the person or organisation may, within 3 months, ask the Review Council to review the decision of the Authority not to carry out the investigation.
- (2) The request must:
  - (b) state the grounds on which the review is sought; and
  - (c) be accompanied by any submission that the person or organisation wishes to submit in support of those grounds; and
  - (d) be lodged with the Review Council in accordance with the directions of the Convener under section 196ZR.
- (3) The Review Council must notify the Secretary and the Repatriation Medical Authority of the request within 28 days of the request being lodged.

### **196ZA Submissions to Review Council**

- (1) If the Review Council is carrying out a review under subsection 196W(2), any person or organisation referred to in any of paragraphs 196Y(1)(a) to (c) may make a submission in writing to the Council about any information that was available to the Repatriation Medical Authority and is relevant to the review (*relevant information*).
- (2) A person having expertise in a field relevant to the investigation may make a submission in writing to the Review Council on any relevant information pertaining to that field.
- (3) If an individual, the Commission, the Military Rehabilitation and Compensation Commission or an organisation has made a written submission, the individual or his or her representative, or a representative of the relevant Commission or of the organisation may, subject to subsection (5), appear before the Review Council to make an oral submission complementing the written submission.

- (4) If the Review Council is carrying out a review under subsection 196W(6) at the request of an individual, the Commission, the Military Rehabilitation and Compensation Commission or an organisation, the individual or his or her representative, or a representative of the relevant Commission or of the organisation may, subject to subsection (5), appear before the Review Council to make an oral submission complementing the written submission (if any) lodged under paragraph 196Z(2)(c).
- (5) A person or organisation may not be represented before the Review Council by a legal practitioner.
- (6) In this section, a reference to a submission does not include a submission on a legal matter.

### **196ZB Notice of investigation**

- (1) As soon as practicable after the Review Council has been asked under section 196Y to review:
  - (a) a decision of the Repatriation Medical Authority not to make, or not to amend, a Statement of Principles in respect of a particular kind of injury, disease or death; or
  - (b) some or all of the contents of a Statement of Principles in respect of a particular kind of injury, disease or death;
 the Council must publish in the *Gazette* a notice:
  - (c) stating that the Council intends to carry out a review of the information available to the Authority about that kind of injury, disease or death; and
  - (d) inviting persons or organisations authorised under subsection 196ZA(1) to do so to make written submissions to the Council.
- (2) A notice must specify the date by which all submissions must be received by the Council.
- (3) A notice must be published in the *Gazette* at least 28 days before the date of the first meeting of the Council.
- (4) A notice is not invalid merely because it fails to comply with subsection (2).

### **196ZC Copyright in submissions**

- (1) The Review Council is not the owner of any copyright subsisting in material (*submitted material*) contained in a submission made to the Council for the purposes of an investigation under section 196B.
- (2) In spite of the *Copyright Act 1968*, the Review Council does not infringe any copyright subsisting in submitted material if, in performing its functions or exercising its powers, the Council does an act comprised in the copyright without the licence of the owner of the copyright.

### **196ZD Access to information**

- (1) Subject to subsection (2), any person or organisation referred to in any of paragraphs 196Y(1)(a) to (c) is entitled, on request made in writing to the Review Council, to have reasonable access to any document containing information considered by the Review Council for the purposes of an investigation.
- (2) The Review Council may not disclose any personal information about a particular person if the information is likely to reveal the identity of that person.

## **Division 2—Constitution and meetings**

### **196ZE Membership**

- (1) The Review Council consists of such number of members as the Minister determines from time to time to be necessary for the proper exercise of the functions of the Council.
- (2) The councillors are to be appointed on a part-time basis by the Minister as provided in this section.
- (3) When appointing councillors, the Minister must have regard to the branches of medical science expertise which would be necessary for deciding matters referred to the Review Council for review.
- (4) One of the councillors must be a person having at least 5 years' experience in the field of epidemiology.
- (5) The Minister must appoint one of the councillors to be the Convener.

### **196ZF Qualifications**

The Minister is to appoint a person to be a councillor only if the person is a registered medical practitioner, or a medical scientist, with at least 10 years experience.

### **196ZG Tenure of office**

- (1) Subject to this Act, a person appointed as Convener or as a councillor holds office for the period specified in the instrument of appointment.
- (2) A person may not hold office for a period of more than 5 years but is eligible for reappointment.

### **196ZH Resignation**

A councillor may resign from office by written notice given to the Minister.

### **196ZI Termination of appointment**

The Minister may terminate the appointment of a person as councillor:

- (a) for misbehaviour or for physical or mental incapacity; or
- (b) if he or she becomes bankrupt, applies to take the benefit of a law for the relief of bankruptcy or insolvent debtors, compounds with his or her creditors or assigns remuneration or property for their benefit.

### **196ZJ Acting Convener**

The Minister may appoint a councillor to act as Convener:

- (a) during a vacancy in the office of Convener, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Convener is absent from Australia or from duty.

### **196ZK Conduct of reviews**

- (1) The Review Council is, for the purposes of a review, to be constituted by at least 3, but not more than 5, councillors selected by the Convener.

- (2) If the Review Council as constituted for the purposes of a review includes the Convener, the Convener presides at all meetings of the Council as so constituted.
- (3) If the Review Council as constituted for the purposes of a review does not include the Convener, the Convener must appoint one of the councillors selected for the purposes of the review (*presiding councillor*) to preside at all meetings of the Council as so constituted.
- (4) The Convener or the presiding councillor may convene meetings of the Council as he or she considers necessary to carry out the review. The Convener may delegate this power to another councillor or to a member of the staff of the Council.
- (5) A question before the Council is to be decided by a majority of the votes of the councillors present and voting. The Convener or presiding councillor has only a deliberative vote.
- (6) The Council must keep minutes of the proceedings at each meeting.
- (7) Subject to this section, the Council determines the procedures for convening its meetings and for conducting its business.

### **196ZL Remuneration and allowances**

- (1) A councillor is to be paid such remuneration as is determined by the Remuneration Tribunal but, if no determination of that remuneration by the Tribunal is in operation, a member is to be paid such remuneration as the Minister determines in writing.
- (2) A councillor is to be paid such allowances as the Minister determines in writing.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

## **Division 3—Staff**

### **196ZM Staff**

The staff necessary to assist the Review Council consists of persons engaged under the *Public Service Act 1999* and made available to the Council by the Secretary.

## **Division 4—Payment of medical and travelling expenses**

### **196ZN Medical expenses**

- (1) The Commonwealth may, subject to this section, pay to an applicant who asks the Review Council to conduct a review as provided for by this Part an amount to cover the medical expenses incurred by him or her in respect of medical evidence relevant to, and obtained by the applicant for the purposes of, the review and submitted to the Review Council.
- (2) The applicant is not to be paid more than the amount prescribed by, or worked out in accordance with, the regulations.
- (3) An amount is not payable in respect of medical expenses unless:
  - (a) the person who has incurred the expenses; or
  - (b) any person approved by that person or by the Review Council;applies in writing to the Review Council for payment.
- (4) The application for payment must be:
  - (b) made within 3 months after the medical evidence was submitted to the Review Council; and
  - (c) be accompanied by any document that the applicant considers relevant; and
  - (d) be lodged with the Review Council in accordance with the directions of the Convener under section 196ZR.

### **196ZO Travelling expenses for obtaining medical evidence**

- (1) If an applicant has had to travel to obtain any medical evidence submitted to the Review Council as mentioned in subsection 196ZN(1), the applicant is, subject to this section, entitled to be paid in relation to that travel the travelling expenses that are prescribed.
- (2) If:
  - (a) the applicant is accompanied by an attendant when travelling to obtain the evidence; and
  - (b) the Review Council is of the view that it is reasonable for the applicant to be so accompanied by an attendant;the attendant is, subject to this section, entitled to be paid in relation to that travel the travelling expenses that are prescribed.
- (3) Travelling expenses are not payable in respect of travel outside Australia.
- (4) Travelling expenses are not payable unless:
  - (a) the person who has incurred the expenses; or
  - (b) any person approved by that person or by the Review Council;applies in writing to the Review Council for payment under subsection (5).
- (5) The application for payment must be:
  - (b) made within:
    - (i) 3 months after the completion of the travel; or
    - (ii) if the Review Council thinks that there are exceptional circumstances that justify extending that period—such further period as the Review Council allows; and
  - (c) be accompanied by any document that the applicant considers relevant; and

- (d) be lodged with the Review Council in accordance with the directions of the Convener under section 196ZR.
- (6) The Commonwealth is to pay the travelling expenses to which a person is entitled under this section.

### **196ZP Advance of travelling expenses for obtaining medical evidence**

- (1) If the Review Council is satisfied that:
  - (a) it is reasonable to expect that a person may become entitled to travelling expenses under section 196ZO; and
  - (b) it is appropriate, in all the circumstances, that the person should be paid an advance on account of those expenses;the Review Council may authorise the payment of that advance to the person.
- (2) If:
  - (a) a person has received an advance on account of any travelling expenses that the person is likely to incur; and
  - (b) the person:
    - (i) does not incur those travelling expenses; or
    - (ii) incurs travelling expenses that are less than the amount of the advance;the person is liable to repay to the Commonwealth:
    - (c) the amount of the advance; or
    - (d) the difference between the amount of the advance and the amount of the travelling expenses;as the case requires.

### **196ZQ Travelling expenses for making oral submissions**

- (1) If:
  - (a) either:
    - (i) the Review Council is carrying out a review under subsection 196W(2) and an individual, or an organisation referred to in paragraph 196Y(1)(c), has made a written submission in relation to the review; or
    - (ii) the Review Council is carrying out a review under subsection 196W(6) at the request of an individual or an organisation; and
  - (b) a person who is one of the following appears before the Review Council to make an oral submission in relation to the review:
    - (i) the individual or his or her representative;
    - (ii) a representative of the organisation;the person is, subject to this section, entitled to be paid, for travel that the person undertook to appear, the travelling expenses that are prescribed.
- (2) If:
  - (a) the person is accompanied by an attendant when travelling to appear before the Review Council; and
  - (b) the Review Council is of the view that it is reasonable for the person to be so accompanied by an attendant;the attendant is, subject to this section, entitled to be paid for that travel the travelling expenses that are prescribed.
- (3) Travelling expenses are not payable in respect of travel outside Australia.

- (4) Travelling expenses are not payable unless:
  - (a) the person who has incurred the expenses; or
  - (b) any person approved by that person or by the Review Council;applies in writing to the Review Council for payment and the Review Council approves the application.
- (5) The application for payment must be:
  - (a) made within 3 months after the completion of the travel; and
  - (b) accompanied by any document that the applicant considers relevant; and
  - (c) lodged with the Review Council in accordance with the directions of the Convener under section 196ZR.
- (6) The Commonwealth is to pay the travelling expenses to which a person is entitled under this section.



## **Division 5—Lodgement of requests and applications**

### **196ZR Lodgement of requests and applications**

- (1) The Convener may give written directions:
  - (a) as to the manner of lodging requests or applications, including in electronic form, with the Review Council for the purposes of paragraphs 196Y(3)(c), 196Z(2)(d), 196ZN(4)(d), 196ZO(5)(d) and 196ZQ(5)(c); and
  - (b) as to the time at which such requests or applications are taken to have been lodged.
- (2) A direction under subsection (1) is not a legislative instrument.

## APPENDIX 4

### User Guide to the RMA's Statements of Principles

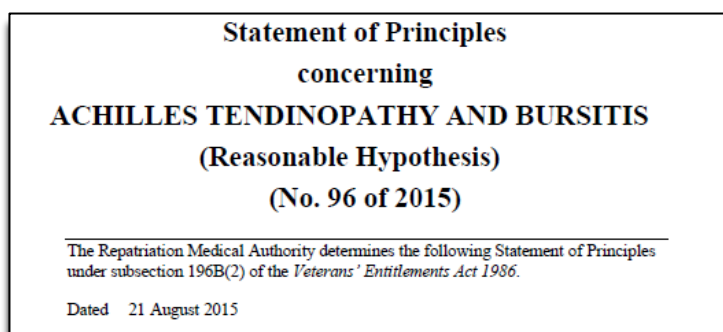
The main role of the Repatriation Medical Authority (RMA) is to determine 'Statements of Principles' (SOPs), in accordance with subsections 196B(2) and 196B(3) of the *Veterans' Entitlements Act 1986* (VEA). SOPs are used to determine claims for pension made under the VEA. They are also used to determine claims made under the *Military Rehabilitation and Compensation Act 2004* (MRCA).

The SOPs are legislative instruments, as defined by the *Legislative Instruments Act 2003* (LIA) and in order to be valid, must be compliant with the LIA.

The first SOPs were determined in 1994, and despite minor stylistic changes since that time followed essentially the same format until 2015. From mid-2015 the RMA introduced a number of changes to the format of the SOPs.

The RMA introduced the changes to ensure that the content of the SOP is fully consistent with the legislative framework that authorises it, and to improve readability for users of the SOP.

The following commentary explains the purpose and use of each section of a SOP, and should be read in conjunction with a SOP drafted using the revised (August 2015) format. Section numbering may vary from SOP to SOP. The commentary is illustrated using as an example one of the first SOP issued by the RMA using the changed format, the Statement of Principles concerning Achilles tendinopathy and bursitis No. 96 of 2015. Each section of this SOP is reproduced below (in full or part), followed by corresponding explanatory comments.



The title page (page 1) starts with the name of the injury or disease that is covered by the SOP. Note that the SOP also covers death from the specified injury or disease. A detailed definition of the injury or disease can be found in Section 7.

The name of the injury or disease is followed by the type of SOP in brackets (Reasonable Hypothesis or Balance of Probabilities) and the number and year of the SOP in brackets. The section of the VEA under which the SOP is made is also specified.

If the SOP is an amendment, this will be stated on the title page. The Amendment SOP is drafted in the format of the instrument it is amending.

The title page also records the date of signing of the instrument and the signature of the RMA Chairperson.

Contents	
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The contents page (page 2) lists sections of the SOP and the page number of each section

<b>1</b>	<b>Name</b>	<p>This is the Statement of Principles concerning <i>Achilles tendinopathy and bursitis (Reasonable Hypothesis)</i> (No. 96 of 2015).</p>
----------	-------------	---

the.

This section states the name of the particular kind of injury or disease covered by the SOP, exactly as on the title page.

<b>2</b>	<b>Commencement</b>	<p>This instrument commences on <b>21 September 2015</b>.</p>
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The RMA specifies the date of commencement of the SOP. This date must be after the registration date of the SOP, and is selected so that factors can be applied as soon as possible in the assessment of claims.

<b>3</b>	<b>Authority</b>	<p>This instrument is made under subsection 196B(2) of the <i>Veterans' Entitlements Act 1986</i>.</p>
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This section informs the reader of the section of the VEA under which the RMA has determined, amended or revoked the SOP. The RMA determines new SOPs under either subsection 196B(2) (reasonable hypothesis) or 196B(3) (balance of probabilities) of the VEA. An amendment to a SOP also relies upon subsection 196B(8) of the VEA.

#### **4 Revocation**

The Statement of Principles concerning Achilles tendinopathy and bursitis No. 37 of 2007 made under subsection 196B(2) of the VEA is revoked.

If a SOP concerning this kind of injury or disease has previously been determined, this section specifies that the older version is being revoked (in order to be replaced by the current one).

#### **5 Application**

This instrument applies to a claim to which section 120A of the VEA or section 338 of the *Military Rehabilitation and Compensation Act 2004* applies.

This section informs the reader of the Act, and section of the Act, that specify the kind of claim that can be assessed utilising the factors in the SOP.

#### **6 Definitions**

The terms defined in the Schedule 1 - Dictionary have the meaning given when used in this instrument.

This statement lets the reader know that some words or phrases in the SOP are used with a specific meaning, and that these words, along with their definitions for the purpose of the SOP, can be found in Schedule 1.

Wherever a defined word or phrase is used in the SOP, a note referring the reader to Schedule 1 is included immediately under the section or subsection containing the word or phrase.

**7 Kind of injury, disease or death to which this Statement of Principles relates**

- (1) This Statement of Principles is about Achilles tendinopathy and bursitis and death from Achilles tendinopathy and bursitis.

*Meaning of Achilles tendinopathy and bursitis*

- (2) For the purposes of this Statement of Principles,
- (a) Achilles tendinopathy means a condition characterised by painful inflammation associated with degeneration in the Achilles tendon, including degenerative tears of the Achilles tendon, or inflammation of the paratendinous tissues; and
  - (b) bursitis means inflammation and thickening of the deep retrocalcaneal bursa about the Achilles tendon; and
  - (c) excludes posterior adventitial heel bursitis.
- (3) While Achilles tendinopathy and bursitis attracts ICD-10-AM code M76.6, in applying this Statement of Principles the meaning of Achilles tendinopathy and bursitis is that given in subsection (2).

This section defines the injury or disease covered by the SOP. Subsection (1) restates the name of the injury or disease, and explicitly mentions that the SOP covers death from the injury or disease.

Subsection (2) provides a detailed definition, in medical terminology, intended to inform people with medical or other relevant training what types of injury or disease the RMA intends to be covered by the SOP. This more detailed definition is necessary because the names of injuries or diseases do not always have universally agreed meanings. The definition of the injury or disease may be broadened or narrowed in various ways in order to assist claimants and decision-makers using the SOP.

A subsection (3) is often (but not always) included in a SOP, which refers the reader to *The International Statistical Classification of Diseases and Related Health Problems* (ICD), which specifies a code (or multiple codes) for injuries or diseases that are most comparable to those covered by the SOP. The ICD codes are included as a general guide for readers. The subsection also emphasises that, regardless of the ICD code specified, the legally binding meaning of the injury or disease covered by the SOP remains that defined in subsection (2).

- (4) For subsection (3), a reference to an ICD-10-AM code is a reference to the code assigned to a particular kind of injury or disease in *The International Statistical Classification of Diseases and Related Health Problems, Tenth Revision, Australian Modification* (ICD-10-AM), Ninth Edition, effective date of 1 July 2015, copyrighted by the Independent Hospital Pricing Authority, ISBN 978-1-76007-020-5.

Subsection (4) provides the full reference for the ICD manual (if relevant).

*Death from Achilles tendinopathy and bursitis*

- (5) For the purposes of this Statement of Principles, Achilles tendinopathy or bursitis, in relation to a person, includes death from a terminal event or condition that was contributed to by the person's Achilles tendinopathy or bursitis.

Note: *terminal event* is defined in the Schedule 1 – Dictionary.

The final subsection informs the reader that the SOP may be relevant to claims regarding a person who has died, provided the injury or disease covered by the SOP contributed to the person's death.

**8 Basis for determining the factors**

The Repatriation Medical Authority is of the view that there is sound medical-scientific evidence that indicates that Achilles tendinopathy or bursitis and death from Achilles tendinopathy or bursitis can be related to relevant service rendered by veterans, members of Peacekeeping Forces, or members of the Forces under the VEA, or members under the MRCA.

Note: *relevant service* is defined in the Schedule 1 – Dictionary.

The wording of this section depends on whether the SOP is being determined under subsection 196B(2) (as above) or 196B(3) of the VEA (i.e. whether it is using the reasonable hypothesis or balance of probabilities standard of proof). The section follows the statutory language of the VEA, in stating a causal link can be made as a result of the factor or factors listed in the subsequent section, between relevant service and the particular kind of injury or disease covered by the SOP. The RMA must be satisfied that this link exists before it can determine a SOP.

There are a range of types of service that are recognised as being “relevant” to each of the two SOP types, as defined in Schedule 1.

## 9 Factors that must exist

At least one of the following factors must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting Achilles tendinopathy or bursitis or death from Achilles tendinopathy or bursitis with the circumstances of a person's relevant service:

- (1) running or jogging an average of at least 30 kilometres per week for the four weeks before the clinical onset of Achilles tendinopathy or bursitis;
- (2) undertaking weight bearing exercise involving repeated activity of the ankle joint of the affected leg, at a minimum intensity of five METs, for at least four hours per week for the four weeks before the clinical onset of Achilles tendinopathy or bursitis;

Note: *MET* is defined in the Schedule 1 - Dictionary.

- (3) increasing the frequency, duration or intensity of weight bearing activity involving the ankle joint of the affected leg by at least 100 percent, to a minimum intensity of five METs for at least two hours per day, within the seven days before the clinical onset of Achilles tendinopathy or bursitis;

Note: *MET* is defined in the Schedule 1 - Dictionary.

This section is made up of a list of the SOP's 'factors'. A SOP may contain "onset" factors, each of which describes a way in which injury or disease covered by the SOP can be caused. It may also contain "worsening" factors, each of which describes a way in which the disease can be made worse.

- (24) inability to obtain appropriate clinical management for Achilles tendinopathy or bursitis.

A SOP may contain an "inability" factor, which states that the injury or disease may be worsened if a person is unable to get appropriate clinical management.

For a factor to be included in a SOP, the RMA will have concluded that the factor could potentially arise in the context of service.

## **10 Relationship to service**

- (1) The existence in a person of any factor referred to in section 9 must be related to the relevant service rendered by the person.
- (2) The factors set out in subsections 9(12) to 9(24) apply only to material contribution to, or aggravation of, Achilles tendinopathy or bursitis where the person's Achilles tendinopathy or bursitis was suffered or contracted before or during (but did not arise out of) the person's relevant service.

Subsection 10(1) states that if a SOP factor is used to support a person's claim, at least one of the factors in Section 9 must apply to the person, and must be related to that person's 'relevant service'. The definition of 'relevant service' can be found in Schedule 1.

Subsection 10(2) is about 'worsening factors' (see Section 9). It notes that a worsening factor can only be applied if the injury or disease already existed before or during 'relevant' service (i.e. prior to discharge or the last day of 'relevant' service, whichever is the earlier).

## **11 Factors referring to an injury or disease covered by another Statement of Principles**

In this Statement of Principles:

- (1) if a factor referred to in section 9 applies in relation to a person; and
- (2) that factor refers to an injury or disease in respect of which a Statement of Principles has been determined under subsection 196B(2) of the VEA;

then the factors in that Statement of Principles apply in accordance with the terms of that Statement of Principles as in force from time to time.

This section relates to the situation where a person wishes to make a claim for an injury or disease covered by a particular SOP, and in that SOP one of the factors is an injury or disease which itself is covered by a second SOP. If so, the claim for the injury or disease covered by the first SOP can succeed if it meets one or more factors in the current version of the second SOP. In order to do so, the factor in the second SOP must be related to relevant service.

It is not sufficient for the injury or disease covered by the second SOP to have previously been accepted as related to service. The only exception occurs in claims to have death accepted as related to service, where the death results directly from an accepted injury or disease (ss 8(1)(f) and 70(5)(e) of the VEA).



# Schedule 1 - Dictionary

Note: See Section 6

## 1 Definitions

In this instrument:

*Achilles tendinopathy and bursitis*—see subsection 7(2).

*being obese* means having a Body Mass Index (BMI) of 30 or greater.

$BMI = W/H^2$  and where:

W is the person's weight in kilograms; and

H is the person's height in metres.

*crystal-induced arthropathy* means arthropathy resulting from the deposition of monosodium urate, calcium pyrophosphate dihydrate, calcium hydroxyapatite or calcium oxalate.

*glucocorticoid drug as specified* means any of the corticosteroid drugs listed in the following table, in the specified combinations of administration, dose level and duration of treatment:

Drug or Class of Drugs	Mode*	Dose	Minimum Duration of Treatment	Duration
prednisolone or pharmacologically equivalent glucocorticoid	IV, IM, O	≥ 0.5 grams over 6 months	6 months	within the 3 years
		≥ 3 grams	NS	within the 5 years
		≥ 10 grams	NS	NS

Abbreviations: IV = intravenous; IM = intramuscular; O = oral; NS = not specified.

*MET* means a unit of measurement of the level of physical exertion. 1 MET = 3.5 ml of oxygen/kg of body weight per minute, or 1.0 kcal/kg of body weight per hour, or resting metabolic rate.

*MRCA* means the *Military Rehabilitation and Compensation Act 2004*.

*relevant service* means:

- (a) operational service under the VEA;
- (b) peacekeeping service under the VEA;
- (c) hazardous service under the VEA;
- (d) British nuclear test defence service under the VEA;
- (e) warlike service under the MRCA; or
- (f) non-warlike service under the MRCA.

The Schedule includes all words and phrases that have specific definitions in the SOP, in alphabetical order.

If a word or phrase is not defined in a SOP, then the ordinary meaning found in a relevant technical (usually medical) dictionary may be used, or a general dictionary. As SOPs are legislative instruments

made under the LIA, the courts and Tribunals may have provided guidance on how to interpret the meaning of a word or expression, which is then binding on decision-makers.

The interpretation of a term used in a SOP is a matter for the decision-maker, where no definition is included and where no judicial guidance is available. The RMA does not determine claims or make a final determination on the meaning of words or phrases in SOPs.

## APPENDIX 5

### Agreed Process for assessing evidence and making Statements of Principles under the Veterans' Entitlements Act 1986

1. Statements of Principles (**SOPs**) are made for the purpose of providing the principles for determining whether a particular kind of injury, disease or death suffered by a veteran is, or might be, related to the veteran's service. If the answer is yes then compensation may be payable under the *Veteran Entitlement Act 1986* (Cth) (**the Act**) or the *Military Rehabilitation and Compensation Act 2004* (Cth)
2. A SOP is made by the Repatriation Medical Authority (**RMA**). The Specialist Medical Review Council (**SMRC**) has the function of reviewing SOPs made by the RMA.
3. A SOP is determined by the RMA after an investigation. In undertaking the investigation the RMA may rely only on the sound medical-scientific evidence (**SMSE**) that has been submitted to it or that it has obtained on its own initiative. SMSE is defined in s 5AB(2) of the Act to mean:
  - (a) the information:
    - i) is consistent with material relating to medical science that has been published in a medical or scientific publication and has been, in the opinion of the Repatriation medical authority, subjected to a peer review process, or
    - ii) in accordance with generally accepted medical practice, would serve as the basis for the diagnosis and management of a medical condition; and
  - (b) in the case of information about how that kind of injury, disease or death may be caused meets the applicable criteria for assessing causation currently applied in the field of epidemiology.
4. The RMA is required to consider and evaluate all of the SMSE made available to it. Likewise, the SMRC must conduct its review of a SOP made by the RMA on the basis of the SMSE that was before the RMA.
5. SOPs are required to be applied by decision-makers in claims for compensation under both of the Acts described above, which apply two different standards of proof. As is explained in paragraph 6 below, each standard of proof depends broadly on whether a claim is based on operational service (the reasonable hypothesis test) or non-operational service (the balance of probability test). Consequently, the two types of SOPs are known as a reasonable hypothesis SOP and a balance of probability SOP.
6. After the overall evaluation of the SMSE carried out by the RMA for a reasonable hypothesis SOP (and, on review, the SMRC) a view must be formed by the RMA as to whether there is SMSE that indicates the existence of a reasonable hypothesis that a particular kind of injury, disease or death can be related to a veteran's operational service. A balance of probability SOP is based on

a view, after the overall evaluation of the SMSE by the RMA (and, on review, the SMRC) that it is more probable than not that a particular kind of injury, disease or death can be related to a veteran's non-operational service.

7. On occasions one or two pieces of particular evidence contained in the pool of SMSE might support the existence of a reasonable hypothesis, and therefore support the making of a reasonable hypothesis SOP or the inclusion of a particular factor in a reasonable hypothesis SOP. But, there may also be a significant body of SMSE of a superior quality that is against the hypothesis and therefore against an indication that a particular kind of injury, disease or death can be related to the veteran's service. In such a case the RMA (or the SMRC) must form a view based on its evaluation of the entirety of the SMSE as to whether it indicates the requisite relationship. A piece of information on its own might tend to indicate such a relationship. But when placed in context with other information which the RMA (or the SMRC) is entitled to consider, it may not bear the required indicative force.
8. In determining what factors as a minimum must exist for a reasonable hypothesis SOP to be made or whether a particular factor is to be included in a reasonable hypothesis SOP, the RMA is not bound to accept the opinion which most favors compensation. Rather, it is open to the RMA to form the view that there is some, albeit insufficient, evidence in the pool of SMSE which is supportive of the existence of a reasonable hypothesis. In that situation there is no relevant distinction in relation to the ultimate outcome between a view formed by the RMA that there is insufficient SMSE to support the existence of a reasonable hypothesis and a view that there is no SMSE to support the existence of such a hypothesis. These conclusions can only be arrived at after the RMA, or on review the SMRC, has conducted an overall evaluation of the entire pool of SMSE before it. In either case the RMA must decline to make a SOP (or include a particular factor).
9. The issues discussed in paragraphs 7 and 8 above in relation to a reasonable hypothesis SOP will not arise in a balance of probabilities SOP as, in the latter case, the RMA (or the SMRC) is required to form a view as to whether on the SMSE before it, it is more probable than not that a particular kind of injury, disease or death can be related to non-operational service.
10. When the RMA has determined to make a SOP it has a discretion as to the factors that as a minimum must exist and which must be related to a veteran's service. In many cases the matters under investigation by the RMA, or on review by the SMRC, may be the subject of considerable controversy. The sources of such controversy may be matters such as:
  - (a) how different studies within the pool of SMSE should be interpreted;
  - (b) the relative strength of results obtained from different studies in the pool of SMSE;
  - (c) whether, and to what extent, particular studies in the pool of SMSE should be regarded as undermining the weight to be attached to other studies in the pool.

Any such controversy is to be resolved by the application of the criteria discussed above.