Australian Government

Repatriation Medical Authority

PRODUCTIVITY COMMISSION

Compensation and Rehabilitation for Veterans

Inquiry into Veterans' Affairs Legislative Framework and Supporting Architecture for Veterans (Serving and Ex-serving Australian Defence Force Members)

Submission of the
Repatriation Medical Authority

July 2018

Introduction

This submission has been prepared by the Repatriation Medical Authority (RMA):

a) To provide advice for the Productivity Commission on the background and rationale for the current methods for developing the Statements of Principles (SOPs); and

b) To address the issues particularly raised in the Productivity Commission Issues Paper with regard to the SOPs, specifically:

> Page 9. The dynamic nature of veterans' needs implies that the system should have sufficient flexibility to be able to respond to external changes - such as medical advances.
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> Page 12. " the use of the SOPs was inflexible, and DVA should have greater discretion to eschew reliance on the SOPs 'where other medical evidence supports a decision favourable to the member or former member' ".
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> Page 13. Have the Statements of Principles helped to create a more equitable, efficient and consistent system of support for veterans? Are there ways to improve their use?
>
> Page 13. What is the rationale for having two different standards of proof for veterans with different types of service?

We have also provided a copy of publicly available documentation about the practices and procedures of the RMA which ensure consistency, transparency and accountability (see **Attachment 1 – RMA Practices and Procedures**, available at http://www.rma.gov.au/assets/FOI/41b02f7a51/The-RMA-practices-and-procedures-document.pdf).

Key points from this submission are:

The SOP system has helped to create a more equitable, efficient and consistent system of support for veterans, as intended by Parliament when the system was created in 1994.

The RMA has developed a standard, consistent and transparent approach to assessing the available sound medical-scientific evidence (SMSE), which accords with modern epidemiological principles and practices.

The *Veterans' Entitlements Act 1986* (the VEA) and the *Military Rehabilitation and Compensation Act 2004* (the MRCA) provide that the SMSE should be assessed at two standards of proof, so that there is a more beneficial reasonable hypothesis standard which recognises the sacrifices and dangers of operational (warlike or equivalent) service.

The balance of probabilities standard for veterans and serving members with non-operational service is closer to the standard that would normally be needed to establish causality, but is still a generous interpretation of the SMSE.

The SOPs are up-to-date due to a systematic review process, and exhaustively list every factor which could be related to each condition, having regard to the available SMSE.

The SOPs are reviewable on request from eligible persons and organisations.

The RMA is responsive to feedback on the development and use of SOPs.

The background and rationale for the current Statement of Principles system

In 1994 the Australian Government directed the Repatriation Commission, in consultation with veterans' organisations, to draft legislation to reform the processes that formed the basis for determining claims for disability pensions and other benefits by veterans and their dependants, related to the impact of service on their health. The aim was to make use of scientific knowledge about disease causation in order to create a more equitable and consistent system of dealing with claims.

Before the introduction of this legislation, veterans' claims were dealt with on a case-by-case basis within an adversarial legal system. The likelihood of a claim's success could depend on the so-called "expert opinion" of an individual medical practitioner as to the cause of a veteran's disease or injury, and the ability of a veteran to appeal a negative decision. These issues had been formally recognised in a 1992 efficiency audit of the compensation system by the Auditor-General[1], who found that fundamental review was required because of inefficiencies and inequities in the system, inconsistencies in decision making, and the need to better respond to the needs of younger veterans.

To address the issues, a subsequent report was commissioned by the Minister for Veterans' Affairs. The report recommended that legally binding "Statements of Principles" (SOPs) be developed to provide objective, evidence-based guidance to decision makers responsible for determining veterans' claims about the contribution of service to a disease or injury they had sustained.[2] The SOPs were to be developed with the assistance of an independent, expert medical committee to ensure that "medical opinions supported by little or no medical-scientific evidence" do not prevail over "the carefully developed mass of medical-scientific opinion."[3]

Thus, in 1994, the *Veterans' Entitlements Act 1986* (the VEA) was amended to establish the Repatriation Medical Authority (RMA) and define its functions and powers. The Specialist Medical Review (SMRC) was established by the same legislation empowered to review the contents of a SOP or a decision by the RMA not to determine a SOP. The SMRC can direct the RMA to include a factor or to carry out an investigation in respect of a factor.

The recommendations of the Tanzer Review led to the Australian Government establishing a new military compensation scheme in 2004, the *Military Rehabilitation and Compensation Act 2004* (the MRCA), which adopted the SOPs to determine liability.[4]

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[1] Worthy D, Greenslade A, Roberts P (1992). Audit Report No. 8. 1992–3. Efficiency audit. Department of Veterans' Affairs: compensation pensions to veterans and war widows. Canberra: Australian National Audit Office, pp. x, xvii.

[2] Baume P, Bomball R, Layton R (1994). A Fair Go: Report on compensation for veterans and war widows. Canberra: Australian Government Publishing Service, pp. 26-28.

[3] The Hon Con Sciacca MP, Minister for Veterans' Affairs, Second Reading Speech in relation to the Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill 1994, Hansard 9 June 1994, p. 1810.

[4] Review of Military Compensation Arrangements (2011) Chapter 2 Historical Overview, p. 71. Available at https://www.dva.gov.au/sites/default/files/files/consultation%20and%20grants/reviews/mrca/mrcareport/vol1-full18032011.pdf.

Responses to the specific issues raised in the Productivity Commission's issues paper

Response to: Page 9. The dynamic nature of veterans' needs implies that the system should have sufficient flexibility to be able to respond to external changes - such as medical advances.

The dynamic nature of medical science and the changing nature of service and potentially related diseases and injuries means that an ongoing process of review is vital. As required by legislation, there are multiple ways in which SOPs are reviewed:

- Under the VEA and the MRCA, eligible individuals or organisations concerned that a SOP is not comprehensive can request reviews of some or all of the contents of an existing SOP, or they can request the development of new SOPs. Without any cost, they can also ask the SMRC to review a decision of the RMA in relation to some or all of the contents of a SOP, or to review a decision of the RMA not to make or amend a SOP.

- When a condition is under review or SOPs are being made for a new condition, the investigation is advertised on the RMA website and the government gazette, so that eligible persons and organisations can make submissions. The RMA publishes the SOPs on its website, together with information on how SOPs are created (http://www.rma.gov.au/what-we-do/), which SOPs are currently being reviewed and how eligible persons and organisations can request review of SOPs (http://www.rma.gov.au/investigations/).

- SOPs are reviewed regularly in a systematic way to ensure that they are up to date, in accordance with scientific principles and the requirements of the *Legislation Act 2003*. These requirements mandate review and reissue within ten years of registration of a legislative instrument. During the period 1 July 2007 to 30 June 2017, the Authority notified full reviews of 588 SOPs, covering 294 medical conditions. Of these reviews, 85.7% were conducted to comply with the sunsetting provisions of the *Legislation Act 2003*.

The RMA has put in place a number of processes to ensure that it can respond flexibly to feedback on the development and use of SOPs:

- Advice on the way in which factors are worded or set out is obtained at the informal meetings held immediately prior to RMA formal meetings so that factors are relevant to service personnel and easy to comprehend and use. These meetings are attended by advisers from the Department of Veterans' Affairs, an adviser from the Australian Defence Force and an ex-service organisation adviser. This advice draws on those advisers' knowledge and experience, especially knowledge of service conditions and experience of difficulties when making or assessing claims.

- Where a factor has been removed, draft SOPs are sent out for stakeholder consultation for a minimum period of three months. Any comments are taken into consideration before the SOPs are finalised.

- The Chairperson and Registrar regularly attend meetings of ex-service organisations across the country and throughout each year. Stakeholders can contact the RMA by phone, email or letter.

Response to: Page 12. “ the use of the SOPs was inflexible, and DVA should have greater discretion to eschew reliance on the SOPs ‘where other medical evidence supports a decision favourable to the member or former member’ ”.

The whole point of the SOP system is that the factors are identified based on the totality of sound medical-scientific evidence (SMSE), not on individual studies. For a particular factor, there may have been a range of studies, with a variety of methodological strengths and weaknesses. The RMA’s processes first locate all studies in the scientific literature, and then come up with a synthesis of their findings, taking into account the strengths and weaknesses of each study. The evidence from one well-conducted study may outweigh the evidence from multiple studies of poorer quality, but that does not mean that individual studies can be simply picked out as supporting evidence. An approach on this basis, or on the basis of medical opinion alone, would return the claims process to the situation that existed before the SOP system was established, with medical opinions supported by little or no medical-scientific evidence prevailing over the SMSE.

Response to: Page 13. Have the Statements of Principles helped to create a more equitable, efficient and consistent system of support for veterans? Are there ways to improve their use?

The SOP system has achieved its intended goals of being more equitable, more efficient and less adversarial than the prior compensation arrangements. This was the conclusion of an independent review carried out in 1997 by an eminent lawyer (Professor Dennis Pearce) and an eminent epidemiologist (Professor D’Arcy Holman).[5] The reviewers found that claims were processed faster and at less cost, and a greater proportion succeeded at the primary level. They concluded that the ability to make a successful claim no longer depended on an ability to find a supportive medical practitioner.

A subsequent survey of decision makers at the Veterans’ Review Board concluded that the SOP system promoted fairness and consistency of decision making because it provides objective and reviewable standards.[6] Claim statistics demonstrate that the SOPs cover the great majority of claimed conditions. Acceptance rates for conditions covered by SOPs are high, and are higher than those for conditions not covered by SOPs (see **Attachment 2 – Statistics on coverage and claim success rate** for 2017 figures).

In relation to ways to improve the use of SOPs, decisions on the facts of individual cases are not a matter for the RMA, but remain with the Repatriation Commission, the Military Rehabilitation and Compensation Commission and their delegates.

[5] Pearce D, Holman D (1997). Review of the Repatriation Medical Authority and the Specialist Medical Review Council. Canberra: Australian Department of Veterans’ Affairs, pp. 21-28.

[6] Topperwien B. Relaxed evidentiary rules in veterans’ legislation: a comparative and empirical analysis. Southern Cross Univ Law Rev 2003;7, pp. 259-307.

Response to: Page 13. What is the rationale for having two different standards of proof for veterans with different types of service?

The VEA and the MRCA provide that claims for pension (and the SOPs used to determine claims) should be assessed at two different standards of proof. The more generous (beneficial) standard, known as the reasonable hypothesis (RH) standard, applies to veterans and serving members who have operational (or equivalent) service, in recognition of the sacrifices and dangers of this type of service. This includes peacekeeping, hazardous and British nuclear test defence service under the VEA, and warlike and non-warlike service under the MRCA. The balance of probabilities (BOP) standard is for veterans and serving members with non-operational service. The BOP standard is closer to the standard that would normally be needed to establish causality.

The RMA determines SOPs at these two standards of proof in line with the intentions of Parliament. The legal tests set out in ss 196B(2) and 196B(3) of the VEA reflected previous legislative provisions contained in the VEA as made in 1986. The SOPs are determined in a manner consistent with scientific evidence and legal understanding. SOPs ensure transparency and consistency, in line with the RMA's evaluation of the SMSE. The SOPs are exhaustive in that they list every factor which could be causally related to that condition, based on the two standards of proof.

In considering what is meant by the term "reasonable hypothesis", the RMA is guided by relevant judicial decisions prior to its establishment, particularly the deliberations of the High Court of Australia in the cases of Bushell (1992)[7] and Byrnes (1993)[8]. The definition of reasonable hypothesis given in Bushell is as follows:

> *"To be reasonable, a hypothesis must possess some degree of acceptability or credibility - it must not be obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous. For a reasonable hypothesis to be 'raised' by material …, we think it must find some support in that material - that is, the material must point to, and not merely leave open, a hypothesis as a reasonable hypothesis."*

On the other hand, the balance of probabilities SOP test of "more probable than not" was the subject of consideration by the High Court in Bradshaw v McEwans Pty Limited (1951)[9] as follows:

> *"By more probable than not is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."*

These legal tests are very broadly framed. To give effect to these tests, the RMA has developed and published grading criteria which set out a standard and consistent approach to assessing the available SMSE. There are five grades, indicating

[7] Bushell vs Repatriation Commission (1992) 175 CLR 408

[8] Byrnes vs Repatriation Commission (1993) 177 CLR 564

[9] Unreported, 27 April 1951: cited with approval in Holloway v McFeeters (1956) 94 CLR 470 at 480-1.

decreasing levels of certainty about the likelihood that a factor is a cause of the condition under investigation (see **Attachment 3 – Levels of Evidence**).

These criteria and grades allow the RMA to use two different lenses to view the same body of scientific evidence on the relationship between a possible factor and a disease or injury that is the subject of the SOP. For some factors, the evidence is so strong that it easily meets both the RH and BOP standards. For others, the evidence is somewhat weaker, and it may only meet the RH standard. Some factors meet both standards, but the evidence requires somewhat tighter criteria (e.g., higher levels of exposure) to be met for the BOP standard to apply.

It is important to note that within both standards of proof, the interpretation of the evidence is as generous as possible within the meaning of the legal tests. Nevertheless, it is inevitable that there will be more factors that meet the criteria for RH SOPs, and that the specified exposure contained in a factor may be easier to satisfy (see **Attachment 4 – Statistics on numbers of RH factors vs BOP factors**). The result is that a particular exposure history related to service is generally more likely to result in a successful claim for veterans and members with operational service.

Attachments

Attachment 1 – RMA Practices and Procedures

Attachment 2 – Statistics on coverage and claim success rates

Attachment 3 – Levels of Evidence

Attachment 4 – Statistics on numbers of RH factors vs BOP factors