

EXPLANATORY STATEMENT

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2019

This Determination repeals and replaces a previous determination made under paragraph 6(1)(b) of the *Military Rehabilitation and Compensation Act 2004* (the Act). Paragraph 6(1)(b) of the Act defines non-warlike service as meaning service with the Australian Defence Force (the ADF) that is of a kind determined in writing by the Defence Minister to be non-warlike service for the purposes of the Act.

A determination of non-warlike service allows the Military Rehabilitation and Compensation Commission to apply a more beneficial standard of proof when assessing a claim for liability of a veteran's injury, disease or death in relation to a period of non-warlike service. This beneficial standard of proof reflects an understanding of the unique nature of military service and the risks associated with service on warlike and non-warlike operations. Similarly, an assessment of permanent impairment and the calculation of compensation payable to a member involves determining a compensation factor for an impairment and lifestyle rating whereby a service differential applies. The outcomes in terms of compensation will be more beneficial for ADF members who are injured or contract a disease that relates to non-warlike or warlike service and will mean greater compensation amounts will be payable compared to those members who were injured on peacetime service. A veteran with non-warlike service will also be eligible for treatment of malignant neoplasia and pulmonary tuberculosis on a non-liability basis.

This Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and is exempt from disallowance pursuant to item 21 in Section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulations) and is also exempt from sunseting pursuant to item 39 in Section 12 of the Regulations.

The purpose of this Determination is to repeal and replace a previous determination made under the *Military Rehabilitation and Compensation Act 2004* (the Act) and insert end dates for 11 operations and add one new operation which is considered to be non-warlike under the auspices of the Act.

The historical dates in this Determination does not affect the rights of a person (other than the Commonwealth) in a manner prejudicial to that person, nor does it impose any liability on such person. The retrospective application of this Determination is required to ensure that no ADF member (or their legal personal representative) is disadvantaged if claiming for death, injury or disease that may have occurred between the period when they commenced service on the operation and the commencement of this Determination.

Section 1 of this Determination sets out the manner in which this Determination may be cited.

Section 2 provides that this Determination commences on the day after the Determination is registered on the Federal Register of Legislation.

Section 3 identifies that this Determination has authority under paragraph 6(1)(b) of the *Military Rehabilitation and Compensation Act 2004*.

Section 4 provides that each Determination that is specified in a Schedule to this Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Determination has effect according to its terms.

Section 5 provides definitions used in this Determination.

Section 6 provides that service in an operation described in Schedule 1 to this Determination is non-warlike service for the purposes of paragraph 6(1)(b) of the Act.

Schedule 1 – Non-warlike Service

Section 1 specifies the areas of operation and the period in which Service in that area is non-warlike Service for the purposes of paragraph 6(1)(b) of the Act. The difference between the table provided in this Determination and the table provided in Schedule 1 to the *Military Rehabilitation and Compensation (Non-warlike Service—2017 Measures No. 1) Determination 2017*, which is repealed by Schedule 2 to this Determination, is as follows:

- Operation Osier has been amended to provide an end date to service period of 12 December 2011.
- Operation Joint Guardian has been amended to provide an end date to service period of 12 December 2011.
- Operation Pomelo has been amended to provide an end date to service period of 31 May 2005.
- Operation Anode has been amended to provide an end date to service period of 30 September 2013.
- Operation Citadel has been amended to provide an end date to service period of 26 June 2008.
- Operation Spire has been amended to provide an end date to service period of 26 June 2008.
- Operation Azure has been amended to provide an end date to service period of 31 December 2011.
- Operation Astute has been amended to provide an end date to service period of 19 April 2013.
- Operation Ramp has been amended to provide an end date to service period of 27 November 2008.
- Operation Hedgerow has been amended to provide an end date to service period of 23 June 2011.
- Operation Hawick has been amended to provide an end date to service period of 18 May 2015.
- Item 22 has been inserted and provides a new operation within the service period 16 May 2016 to 2 August 2016. The nature of this operation is to recognise the ADF contribution to efforts against global terrorism.

Schedule 2 – Repeals

Section 1 repeals the *Military Rehabilitation and Compensation (Non-warlike Service—2017 Measures No. 1) Determination 2017*.

Consultation

The Department of the Prime Minister and Cabinet and the Department of Veterans' Affairs were consulted during the classification process. It is noted that decisions about the nature of service are subject to bipartisan consultation through Government and do not impact business or competition.

Authority: Paragraph 6(1)(b) of the
*Military Rehabilitation and
Compensation Act 2004*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2019

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The purpose of this Determination is to repeal and replace a previous determination made under the *Military Rehabilitation and Compensation Act 2004* (the Act) and insert end dates for 11 operations and add one new operation which is considered to be non-warlike under the auspices of the *Military Rehabilitation and Compensation Act 2004*.

Human rights implications

This Determination engages the following human rights:

- *The right to health is the right to the enjoyment of the highest attainable standard of physical and mental health* (article 12(1) International Covenant on Economic, Social and Cultural Rights),
- *The right to social security requires a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme* (article 9 International Covenant on Economic, Social and Cultural Rights),
- *Live, take part and be included in the community* (article 19 Convention on the Rights of Persons with Disabilities).

This Determination establishes an end date of service provided by ADF members on Operation Osier, Joint Guardian, Pomelo, Anode, Citadel, Spire, Azure, Astute, Ramp, Hedgerow, and Hawick. A new operation which recognises the ADF contribution to efforts against global terrorism has been added.

Legitimate objective: Defence members who become ill or injured in the course of duty may require special assistance and support on return from that duty. Whether an injury or illness is seen as arising out of duty may depend on the nature of the service that the member has been required to perform. The actual decision about whether the nature of service will be warlike or non-warlike is made by the Executive, this Determination ensures that the nature of service that a member provides is reflected in the level and type of benefits that they may be eligible for if they are ill or injured due to their Service.

The historical dates in this Determination do not affect the rights of any persons (other than the Commonwealth) so as to disadvantage those persons nor does it impose liabilities (other than on the Commonwealth) in respect of anything done before the date this Determination is registered. It is a beneficial legislative instrument.

Reasonable, necessary and proportionate: Determining the nature of service that a member has provided allows the relevant level of additional support to be provided to assist the member with the health care and other needs that they may have as a member. Benefits may also be provided to a member's dependants, who are directly affected by the additional needs that a member may have as a result of their illness or injury.

Although the application for benefits may require some provision of personal information and some limitation on the suppliers of health treatment and benefits that are provided, these restrictions are considered proportional:

- the personal information is treated in accordance with legislated privacy protections, and
- the benefits are additional to those provided to the general public and address a special need arising out of a member's injury or illness.

Conclusion

This Determination is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Darren Chester, Minister for Defence Personnel