

# REPLACEMENT EXPLANATORY STATEMENT

## Veterans' Entitlements (Counselling) Extended Eligibility Determination 2021 (Instrument 2021 No.R11)

### EMPOWERING PROVISION

Subsection 92(2) of the *Veterans' Entitlements Act 1986* (the Act).

### PURPOSE

This instrument, the *Veterans' Entitlements (Counselling) Extended Eligibility Determination 2021* (Instrument 2021 No. R11) revoked the legislative instrument known as the *Veterans' Entitlements (Counselling) Extended Eligibility Determination (No. 2) 2017* (2017 No. R19) and remade it to correct a minor drafting error and to clarify the eligibility of the different classes of persons eligible for the counselling services provided by Open Arms (formerly the "Veterans and Veterans Families Counselling Service" or VVCS).

The instrument is made under subsection 92(2) of the Act which enables the Repatriation Commission, by legislative instrument, to specify a class of persons who will be eligible for counselling services under subparagraph 92(1)(a)(iii) of the Act.

This instrument should also be read in conjunction with subparagraph 92(1)(a)(i) of the Act, which provides that veterans and dependants of veterans are eligible for Open Arms counselling.

Counselling services for all eligible persons are provided by 'Open Arms'. Open Arms is funded by the Department of Veterans' Affairs and provides free and confidential, Australia-wide counselling and mental health support services to current and former ADF members and their family members who are eligible, in accordance with the legislation, the attached and various other instruments.

The authority to revoke the earlier determination is found in subsection 33(3) of the *Acts Interpretation Act 1901* which provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Further details of the attached instrument are set out in [Attachment A](#).

### CONSULTATION

Section 17 of the *Legislation Act 2003* requires the rule-maker to be satisfied that any consultation that is considered appropriate and reasonably practicable to undertake, has been undertaken.

The revised instrument has been made with the assistance of Open Arms and no further consultation was required as there are no changes to the eligibility of the various classes of persons who may under the existing instrument be eligible for counselling services.

The revised instrument is entirely beneficial in nature in terms of its impact on members and the ex-service community.

In these circumstances it is considered that the requirements of section 17 of the *Legislation Act 2003* have been met.

## **COMMENCEMENT**

With the exception of paragraph 6(o) the instrument will commence from the day after it is registered.

For the purposes of rectifying an omission in the revoked instrument (new paragraph 6(o) refers) a retrospective commencement is required for paragraph 6(o) to commence immediately after the commencement of the *Veterans' Entitlements (Counselling) Extended Eligibility Determination (No. 2) 2017* on 1 July 2017.

Subsection 12(2) of the *Legislation Act 2003*, provides that a legislative provision with a retrospective application will not apply to a person retrospectively to the extent that it would affect the person's rights so as to disadvantage them.

While the relevant amendment made by the Determination applies retrospectively from 1 July 2017, the purpose is to correct a drafting error which inadvertently removed the eligibility of partners of ADF members for the services provided by Open Arms (formerly the Veterans and Veterans Families Counselling Service).

As the error was not discovered until recently there had been no restrictions on the provision of services to the partners of ADF members until that time and it was recognised that no such restrictions would apply in the period before the error could be rectified.

## **REPLACEMENT EXPLANATORY STATEMENT**

This Replacement Explanatory Statement is required following consultation with the Secretariat of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Senate Committee).

The Senate Committee assesses legislative instruments against the scrutiny principles set out in Senate standing order 23. The Secretariat had identified potential scrutiny concerns in relation to the Determination, and had sought further information on behalf of the Senate Committee.

The information sought concerned the retrospective commencement of one of the provisions of the Determination and whether the eligibility of members of the ADF who had undertaken 'border protection service' is dependent on insufficiently defined administrative powers in the form of the conferral of discretionary powers to delegates of the Repatriation Commission to determine if service of that type had been undertaken.

## **REGULATORY IMPACT**

The Office of Best Practice Regulation has been consulted. A RIS is not required as there is no regulatory impact (OBPR ID Number 21336).

## **FURTHER EXPLANATION OF PROVISIONS**

See [Attachment A](#).

## **Statement of Compatibility with Human Rights**

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

### ***Veterans' Entitlements (Counselling) Extended Eligibility Determination 2021 (Instrument 2021 No.R11)***

This Legislative Instrument 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 Legislative Instrument**

The attached legislative instrument engages with, and advances, the Right to Health by clarifying the provision of free counselling services to certain sectors of the Australian Defence Force (ADF) community and their family members.

Counselling services from Open Arms, delivered with an awareness of the military experience and culture, are already available for veterans, peacekeepers and their dependants, along with a range of other cohorts in the veteran and ex-service community.

#### **Human rights implications**

The attached legislative instrument engages an applicable right or freedom, namely, the Right to Health contained in article 12(1) of the International Covenant on Economic Social and Cultural Rights.

The Right to Health is the right to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic Social and Cultural Rights has stated that health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health (including mental health) conducive to living a life in dignity.

#### **Conclusion**

The attached legislative instrument is considered to be compatible with the right to health because it enables various sectors of the ex-service community to access free, specialised counselling services and is provided where it is likely to be of greatest benefit.

**Vicki Rundle**  
**Deputy Secretary, Veterans' and Families' Services**  
**Delegate for the Minister for Veterans' Affairs**  
**Rule-Maker**

## **FURTHER EXPLANATION OF PROVISIONS**

### **Part 1 Introduction**

#### Section 1

This section sets out the name of the instrument – the *Veterans’ Entitlements (Counselling) Extended Eligibility Determination 2021*.

#### Section 2

Subsection (1), subject to subsection (2), provides that the instrument will commence on the day after it is registered.

Subsection (2) provides that paragraph (o) of section 6 will be taken to have commenced on 1 July 2017, immediately after the commencement of the *Veterans’ Entitlements (Counselling) Extended Eligibility Determination (No. 2) 2017*.

New paragraph 6(o) provides for the inclusion of a “partner or former partner of a veteran or a person within a class specified in paragraph (a), (b) or (c)”. Paragraphs (a), (b) and (c) respectively refer to the defined terms ‘service member’, ‘NLHC member’ and ‘Registered DART complainant’.

Paragraph 6(o) of the revoked instrument had referred only to the ‘former partner’ and should have also included a reference to the ‘partner’ that had been included in the previous instrument made in 2014 that was being revoked.

The retrospective commencement provides for the correction of an error which inadvertently made the previously eligible partners of ADF members ineligible for counselling services. As that error was only recently identified there had been no reduction in the services available to the partners of ADF members.

#### Section 3

This section sets out the empowering provision in the primary legislation that authorises the making of this instrument – subsection 92(2) of the *Veterans’ Entitlements Act 1986*.

#### Section 4

This section revokes the earlier determination – the *Veterans’ Entitlements (Counselling) Extended Eligibility Determination (No. 2) 2017*.

The classes of persons specified in that instrument are retained in the attached instrument with the effect that all persons currently eligible for counselling services under the revoked instrument will retain that eligibility.

#### Section 5

This is the interpretation provision. It defines the terms used in the instrument.

The definitions give meaning to the various terms used in the provisions of Part 2 of the instrument to specify the classes of persons eligible for counselling services.

The section also includes a list of definitions for which the meaning is the same as that set out in the *Veterans Entitlements Act 1986* (VEA).

Included in the terms which define the various types of service which will provide a 'service member' with eligibility for the services provided by Open Arms is 'border protection service'.

Border protection service is defined as service rendered by an ADF member in an area in or outside Australia that, in the opinion of the Repatriation Commission, had the purpose of securing Australia's borders against a potential or real threat by a State, person or persons.

#### *Conferral of discretionary powers*

The Secretariat raised concerns about the discretionary powers conferred on a delegate of the Repatriation Commission. This concern relates to determinations about 'border protection service', which is defined as service rendered by an ADF member "in an area in or outside Australia that, in the opinion of the Commission, had the purpose of securing Australia's borders against a potential or real threat by a State, person or persons".

Eligibility for the services provided by Open Arms was first extended to ADF members with 'border protection service' from 1 July 2014 as part of the 2013 Budget Measure *Mental Health Services – Expansion (Strengthening Veteran Mental Health)*. The current definition of 'border protection service' is unchanged from that used in the instrument which initially provided eligibility from 1 July 2014, the *Veterans' Entitlements (Counselling) Extended Eligibility Determination 2014*.

The current contribution by the ADF to the whole of government border patrol operation, Operation Sovereign Borders is provided under Operation RESOLUTE which commenced in 2006. ADF members who have participated in border protection operations since 1997 have been eligible for the 'Australian Operational Service Medal – Border Protection' since 22 May 2012.

In order to qualify for the medal, the ADF member must have been deployed or force assigned for duty as a member of a declared operation:

- for a period of not less than an aggregate of 30 days; or
- completed 30 sorties from a unit assigned to a declared operation, provided that those sorties were conducted over a period of not less than an aggregate of 30 days at a rate of one sortie per day.

In almost all cases eligibility for counselling for a member with 'border protection service' will be determined by the applicant being the holder of an 'Australian Operational Service Medal – Border Protection'.

The exercise of the discretion by the delegate provided under section 5 of the instrument will be required for those few cases where the ADF member did undertake

‘border protection service’ but did not have the requisite period of service or the completed number of sorties.

The exercise of the delegation to determine if the member has ‘border protection service’ will only be required where the ADF member does not hold the relevant Service Medal is provided only to appropriately qualified employees of the Department at the EL 1 level and above.

The instances where the delegate may need to exercise the discretion have also effectively been removed by the expansion in eligibility for Open Arms counselling that took place in 2017.

From 1 July 2017 eligibility for counselling services was effectively provided to current and former ADF members defined as a ‘NLHC service member’ by the instrument that is to be replaced, the *Veterans' Entitlements (Counselling) Extended Eligibility Determination 2017*.

An ‘NLHC service member’ was defined as being “a person in respect of whom a claim for treatment of a mental health condition on a non-liability health care basis has been accepted under the *Veterans' Entitlements (Extension of Non-Liability Health Care for Mental Health Treatment) Determination 2016*” (the 2016 Determination).

To be eligible for ‘Non-Liability Health Care’ under the 2016 Determination a person had to be or have been “a member of the ADF rendering continuous full-time service”. A minimum period was not applied on the period of continuous full-time service required of the member which meant that eligibility could be established with a single day of service.

In practice, members seeking counselling services are often eligible under both section 92 of the *Veterans' Entitlements Act 1986* as well as one or more of the instruments that are made under that section.

Given the urgent nature in which counselling services are usually required to be provided a delegate making a determination concerning eligibility will look to the easiest category under which the member can meet the criteria. On that basis, there would be few instances in which a delegate would be required to make a determination concerning eligibility based on ‘border protection service’ where the member does not have the relevant Service Medal.

## **Part 2 Specified Class of Person**

### Section 6

This section determines (for the purposes of subparagraph 92(1)(a)(iii) of the Act), the classes of persons who are eligible for counselling services. The classes are:

#### *Paragraph 6(a) - service member*

The term ‘service member’ is defined in section 5 of the instrument to mean the following groups outlined below:

- a member or former member of the ADF with an ‘accepted mental health disability’;

- a person who, as a member of the ADF, rendered ‘border protection service’, ‘Australian or overseas disaster zone service’ or ‘submariner service’;
- a member or former member of the ADF involved in a training accident;
- a person who has been medically discharged from the ADF;
- a member of the ADF ‘killed in a service-related incident’;
- a veteran under paragraph (b) of the definition of veteran in subsection 5C(1) of the Act who satisfies subsection 37(3) of the Act and who is undertaking a rehabilitation program under the *Veterans’ Vocational Rehabilitation Scheme* (VVRS).

This last group covers ‘Commonwealth veterans’, ‘allied veterans’ and ‘allied mariners’ (as those terms are defined in the Act) who have Australian residency for a continuous period of at least 10 years, and who are undertaking rehabilitation under the VVRS.

The definition excludes ‘veterans’, ‘members of the Forces’ and ‘members of a Peacekeeping Force’ (and their dependants or former dependants) as these groups are covered for counselling services under section 92 of the Act.

*Paragraph 6(b) - NLHC service member*

The term ‘NLHC service member’ is defined in section 5 to mean a person in respect of whom a claim for treatment of a mental health condition on a non-liability health care basis has been accepted under the *Veterans’ Entitlements (Expanded Access to Non-Liability Health Care for Mental Health Treatment) Determination 2017* as in force from time to time or a subsequent legislative instrument, as in force from time to time, that repeals or replaces that determination.

*Paragraph 6(c) - registered DART complainant*

The term ‘registered DART complainant’ is defined in section 5 to mean a person who is registered and accepted to access a reparation payment or other outcome from the Defence Abuse Reparation Taskforce under the Defence Abuse Reparation Scheme.

*Paragraph 6(d) - SHOAMP participant*

The term ‘SHOAMP participant’ is defined in section 5 to mean a person who is a Group 1 or Group 2 participant in the SHOAMP (Study of Health Outcomes in Aircraft Maintenance Personnel) health care scheme.

The note to the definition in section 5 explains that Group 1 participants are the primary participants being the aircraft maintenance (aircraft fuel tank) workers and Group 2 participants are the family members or ex partners of the primary participants.

*Paragraph 6(e) - child of a service member who is dependent on the service member*

The term ‘child’ has a detailed definition in subsection 5F(1) of the Act and the meaning of ‘service member’ is provided in section 5.

*Paragraph 6(f) – family member of a service member killed in a service-related incident*

*Paragraph 6(g) – family member of a veteran killed in a service-related incident*

*Paragraph 6(h) – family member of a current or former member of the ADF where the member has died by suicide or suspected suicide*

*Paragraph 6(i) - family member of a registered DART complainant.*

The term ‘family member of a person’ is defined in section 5 to mean a parent, partner, former partner, child, former child or sibling of the person.

The term ‘child’ has the meaning given in subsection 5F(1) of the Act.

The term ‘former child’ is defined in section 5 of the instrument and refers to an adult child who was once a child within the meaning of subsection 5F(1) of the Act. A note to the definition explains that the term ‘former child’ includes all offspring aged 25 years or over, and those offspring aged between 16 and 25 years who have ceased full-time education or who are in receipt of certain payments under the *Social Security Act 1991*.

The term ‘partner’ has the meaning given in subsection 5E(1) of the Act with a ‘former partner’ being defined in section 5 of the instrument to mean a person who was once a ‘partner’ of the person. A note to the definition explains the meaning of the term by reference to the definitions of ‘partner’ and ‘member of a couple’ as defined in subsection 5E(1) of the Act.

The term ‘sibling’ is defined in section 5 of the instrument to have the same meaning as it has in section 23 of the *Social Security Act 1991*. The note to the definition explains that under section 23 of the *Social Security Act 1991* the sibling of a person is defined to include a half-brother, half-sister, adoptive brother, adoptive sister, stepbrother or stepsister of the person, but does not include a foster-brother or a foster-sister of the person.

The meaning of ‘service member’ is provided in section 5.

*Paragraph 6(j) – former child or former partner of a post-Vietnam War member or a former child or former partner of a deceased post-Vietnam War member*

The term ‘post-Vietnam War member’ is defined in section 5 as meaning a ‘veteran’ or a ‘service member’ who has rendered any amount of continuous full time service after 11 January 1973. The definition covers a certain subset of ADF members with post-Vietnam War service, namely ‘service members’ as defined in this instrument and ‘veterans’ within the meaning of section 92 of the Act, who have served after the Vietnam War.

*Paragraph 6(k) - partner or former partner of a Gold Card holder*

*Paragraph 6(l) - child or former child of a Gold Card holder*

*Paragraph 6(m) - partner or former partner of a White Card holder (mental health condition)*

*Paragraph 6(n) - child or former child of a White Card holder (mental health condition)*

*Paragraph 6(o) - partner or former partner of a veteran or a person within a class specified in paragraphs 6(a), (b) or (c)*

The classes of persons referred to in paragraphs 6(k), (l), (m) and (n) provide access to Open Arms counselling services to the partners and children (including adult children) of Gold Card holders and White Card holders (mental health condition).



The terms ‘Gold Card holder’ and ‘White Card holder (mental health condition)’ are defined in section 5 of the instrument.

The effect of paragraph 6(o) extends Open Arms counselling services to the partners and former partners of veterans or persons within the classes specified in paragraphs 6(a), (b) and (c).

This group includes the partners and former partners of service members, NLHC service members and registered DART complainants as well as the partners and former partners of veterans within the expanded meaning of the term ‘veteran’ given by section 81 of the Act.

### Section 7

Section 7 places a limit on the time that ‘former partners’ will be entitled to access Open Arms counselling services. Counselling services for this class will be available for a period of up to five years after the couple separates or while the ‘former partner’ has co-parenting responsibility for a child who has not attained the age of 18.

The section provides that a ‘former partner’ is eligible for counselling services:

- for a period of 5 years commencing on the ‘break-up date’; or
- if the ‘former partner’ has co-parenting responsibility in respect of a child who has not attained the age of 18 years, for the period of the duration of that co-parenting responsibility.

The ‘Break-up date’ is defined in section 5 of the instrument to mean the date on which a divorce-order takes effect in respect of the marriage between the ‘former partner’ and the person, or as the case may be, the date on which the marriage-like relationship between the former partner and the person ceased to exist.