

EXPLANATORY STATEMENT

Defence (Individual Benefits) Determination 2021 (No. 4)

This Determination is made under section 58B of the *Defence Act 1903* (the Defence Act) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (AIA Act). Determinations made under section 58B of the Defence Act are disallowable legislative instruments subject to the *Legislation Act 2003*. These instruments are also subject to the interpretation principles in the AI Act, as modified by section 58B of the Defence Act.

The purpose of this Determination is to provide a payment to certain family members of a former member of the Australian Defence Force (ADF). The legal advice is limited to the reasonable expenses of receiving legal advice incurred as the executor of the former member's will and the spouse of the former member to enable them to fully understand options and prospects arising out of matters subsequent to the member's death. Defence has generally well developed processes for supporting the families of members who become injured or deceased while serving. The circumstances relating to the death of the deceased member have identified the need for additional benefits to be paid in this special circumstance.

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

Section 2 is the commencement provision for the Determination and provides that the whole of this Determination commences on the day after registration.

Section 3 provides that this instrument has authority under section 58B of the *Defence Act 1903*.

Section 4 provides definitions that apply in this Determination, including the following:

- Decision maker – identifies the person who is able to make decisions under this Determination.
- Deceased member – identifies the member to which this Determination relates.
- Eligible person – identifies the classes of persons who are eligible for a benefit under this Determination.

Section 5 provides a payment to eligible persons for the cost of legal advice for the purpose of assisting the person to understand the options and prospects of success in respect of the circumstances of the deceased member. The decision is a discretionary decision and may be paid if the decision maker is satisfied that the payment is consistent with its purpose. This power may be exercised more than once, but the combined sum of payments is limited by section 6. Subsection 2 provides context as to matters that may be considered as matters arising out the circumstances of the member's death. Subsection 3 expressly limits the ability of the decision maker to make a payment for legal representation, or in relation to any other matter.

Section 6 provides the power for the decision maker to set the amount of a payment made under section 5. In determining the amount of the payment, the decision maker must consider guidance provided by the Office of Legal Services Coordination and Commonwealth Legal Financial Assistance Schemes Assessment of Costs dated July 2012, published by the Attorney General's Department. The combined sum amount of payments made under this Determination must not exceed \$10,000.

The Commonwealth Legal Financial Assistance Schemes Assessment of Costs is incorporated into this Determination, as in force on the commencement of this Determination.

Section 7 requires a payment made under this Determination to be made to the service provider.

Section 8 repeals this determination on 1 July 2022.

Decisions made and actions taken under this Determination are not subject to any inquiry under the ADF redress of grievance system, however, the CDF may review a decision made under the Determination. If a

more favourable decision is preferred, the CDF may either make recommendations to the decision maker to reconsider the decision, or make a new determination to provide that more favourable outcome.

A person may also make a complaint about the administration of the Determination to the Defence Force Ombudsman. This includes an independent merits review of decision made under the Determination.

Consultation

Before this Determination was made, the Department of Veterans' Affairs, Royal Australian Air Force Headquarters, Chief Finance Officer Group and Defence General Counsel within the Department of Defence were consulted.

The decision maker is satisfied that further consultation is not necessary.

Authority: Section 58B of the
Defence Act 1903

Statement of Compatibility with Human Rights

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

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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 provide a payment to certain family members of a former member of the Australian Defence Force (ADF). The legal advice is limited to the reasonable expenses of receiving legal advice incurred as the executor of the former member's will and the spouse of the former member to enable them to fully understand options and prospects arising out of matters subsequent to the member's death. Defence has generally well developed processes for supporting the families of members who become injured or deceased while serving. The circumstances relating to the death of the deceased member have identified the need for additional benefits to be paid in this special circumstance.

Human rights implications

This Determination does not engage any applicable rights or freedoms.

Conclusion

This Determination is compatible with human rights it does not engage any applicable human rights or freedoms.

Fiona Louise McSpeerin, Assistant Secretary People Policy and Employment Conditions,
Defence People Group