

# REPATRIATION MEDICAL AUTHORITY

## MEMORANDUM

### Introduction

1. In this matter I am instructed on behalf of the Repatriation Medical Authority (**RMA**). I have been asked to advise in relation to what is a disease, injury or death within the meaning of s 5D of the *Veterans Entitlements Act, 1986 (Act)*, for the purposes of the exercise of the RMA's functions and powers, including the significance of the phrase "particular kind".

### The Role of the RMA

2. It is, of course, the function of the RMA to determine SOPs under s 196B with respect to particular kinds of injury, disease and death so as to provide a causal template for decision-makers to connect such injuries, diseases or death to a veteran's service. In promulgating SOPs the RMA is only entitled to act upon "sound medical-scientific evidence" (**SMSE**) as defined in s 5AB(2) of the Act. The legislature chose, in enacting s 196B, to provide that a SOP must be determined if there is SMSE that indicates a *particular* kind of injury, disease or death can be related to service. A SOP then must promulgate factors "in respect of that kind of injury, disease or death".
3. The requirement for a particular kind of injury, disease or death to be identified is also reflected in the role of the Specialist Medical Review Council (**SMRC**); s 196W.

4. Importantly, identification of the particular injury, disease or death is also an essential element in the definition of SMSE itself; s 5AB. For information to constitute SMSE it has to be information that is about a particular kind of injury, disease or death and which meets the additional requirements set out in s 5AB(2)(a) and (b).
5. The legislative scheme under which the RMA operates was discussed by the NSW Court of Appeal in *Repatriation Commission v Vietnam Veterans' Association of Australia (NSW Branch) Inc* (2000) 48 NSWLR 548.

### **The RMA's approach**

6. When the RMA is asked to conduct an investigation it considers whether or not to do so. In the process of that decision it forms a view as to whether the relevant request identifies the particular kind of injury, disease or death that the relevant party wants the RMA to investigate. If it does not, in the RMA's view, identify a particular kind of injury, disease or death, then it seeks further input from the requesting party in order to identify a particular kind of injury, disease or death. If, at the end of that process, the RMA is unable to identify that particular kind, it will not undertake an investigation.
7. If the RMA decides not to conduct an investigation because no particular kind of injury, disease or death has been identified or is identifiable by it, its practice is to provide a statement of reasons for that decision to the requesting party.
8. The RMA does not adopt a technical or pedantic approach in considering requests for investigation but takes the view that it must be able to identify a particular kind of injury, disease or death the subject matter of a request.
9. The issue of whether or not a particular kind of disease has been identified also involves consideration of the exclusions from the definition of disease in s 5D of the Act. In particular, the " results from normal physiological stress" or "the temporary effect of extraneous agents" are excluded. Thus, if a request only identifies the temporary departure from " the normal physiological state" arising from such causes,

the RMA will not conduct an investigation into such effects as a particular kind of “disease”.

10. The RMA’s primary role is to gather and evaluate information about particular kinds of injury, disease or death and to evaluate the SMSE about the same to determine if that SMSE indicated that it could be related to service. Any other form of inquiry would fall outside that role. The starting point for the exercise of the RMA’s powers and functions is the identification of a particular kind of injury, disease or death.

### **The statutory definitions**

11. The definition of “disease” in s 5D of the Act is:

“(a) any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or

(b) the recurrence of such an ailment, disorder, defect or morbid condition;

but does not include:

(c) the aggravation of such an ailment, disorder, defect or morbid condition; or

(d) a temporary departure from:

(i) the normal physiological state; or

(ii) the accepted ranges of physiological or biochemical measures.”

12. The definition of “injury” is:

“any physical or mental injury (including the recurrence of a physical or mental injury) but does not include:

(a) a disease; or

(b) the aggravation of a physical or mental injury.”

13. The broad definitions are qualified, when a request for an investigation is made to the RMA, by the words “particular kind”. The use of the word “particular” is important.

The RMA is only tasked with investigating particular kinds of injury, disease or death. It follows that the same must be identified before the RMA's investigative role is activated.

14. Until the proclamation of the *Veterans' Affairs Legislation Amendment Act, 1991* the definition of "disease" in the Act was inclusive rather than exclusive. The former definition was as follows:

"'disease' includes any physical or mental ailment, disorder, defect or morbid condition whether of sudden onset or gradual development and the recurrence of such an ailment, disorder, defect or morbid condition but does not include the aggravation of such an ailment, disorder, defect or morbid condition."

15. The present definition includes the exclusions set out above.
16. The RMA takes the view that there is a need to identify the "particular" kind of injury, disease or death as a first step in the investigative process. In my view this is correct. The starting point, of course, is the wording of s 5D itself, construed in the context of the Act as a whole. The words of the Act are paramount and govern the operations of the RMA. At the same time, the RMA is a specialist medical tribunal entrusted with key decision making in the area of veterans' entitlements. In applying the words of the statute, the RMA takes the view that the meaning of what constitutes a 'disease' or 'injury' for the purposes of determining a Statement of Principles under the Act is to be determined by the Authority.
17. In considering the statutory terms, the RMA also has regard to ordinary dictionary definitions, medical dictionaries and its own expert knowledge. So, for example, in determining whether a condition is a disease as defined by the Act, the RMA is entitled to have regard to the connotations of the word disease as it is understood and used in its ordinary meaning. In taking this approach the RMA mirrors that taken by the Court in *Comcare v Mooi* (1996) 69 FCR 439; (1996) 42 ALD 495, in which the definition of "disease" in the *Safety, Rehabilitation and Compensation Act* was considered by Drummond J. That definition included reference to any physical or mental ailment, disorder, defect or morbid condition.

18. Drummond J rejected the contention that a condition could be a “disease” if it satisfied one or other of the definitions in the statute, but did not otherwise have any of the connotations inherent in the word “disease”. In his Honour’s view particular circumstances would only fall within the definition if they not only fell within the defining phrase but also within “the connotations which the word defined by that phrase has in ordinary speech” (500.2).

19. His Honour recognised the role played by medical science, and the difficulties inherent in the definition of disease:

“There may be difficulties in a particular case in determining whether a bodily condition, i.e. one not involving any effect on a person’s mental faculties, amounts to a disease...medical opinion changes too; regularly encountered signs may eventually come to be acknowledged as comprising a disease or as symptomatic of an underlying disease when previously medical opinion rejected that notion.” (498.6)

20. In my respectful opinion, his Honour’s analysis was correct and is applicable to the definition of “disease” in the Act. The RMA must, of course, look first and foremost to the statute, but it is entitled also to use its specialist knowledge as to what constitutes a particular kind of injury, disease or death. This is consistent with the RMA’s broader and primary function, the promulgation of SOPs providing the causal connection between a veteran’s service and the particular injury, disease or death suffered by the veteran. That function requires the medico-scientific expertise that the RMA possesses and which allows it to assess the relevant SMSE.

21. Thus, it would not be enough, in order to trigger the RMA’s obligations to conduct investigations, for a person to assert the existence of a “defect” if there were otherwise no connotation of disease in its ordinary usage.

22. The Parliament has provided that “disease” for the purposes of the Act excludes matters that can only be decided upon by determining questions of medical science. This is a powerful indication that the RMA is to use its expertise in such matters at the threshold stage of whether a request has identified a particular kind of injury, disease or death.

23. There have been occasions where parties requesting an investigation have disagreed with the RMA's view that the request, even after invitations have been extended to define a particular kind of injury, disease or death, does not so identify the proper subject matter of an investigation.
24. It may be suggested that the function of the RMA is only to evaluate sound medical-scientific evidence (SMSE) as defined, perhaps relying on some observations in *Kattenberg v Repatriation Commission* [2002] FCA 412, at [8] . If this was so a conclusion that no particular kind of injury, disease or death is identified in a request is wrong in law as it would be inconsistent with the proper approach to what is a "disease", that being found in "peer review" publications. While it is undoubtedly correct that the Act is beneficial legislation and should be construed accordingly (*Budworth v Repatriation Commission* [2001] FCA 317; (2001) 63 ALD 422) I do not agree with these contentions. It is true that the RMA evaluates SMSE but that is not its only function.

### **The issues**

25. The issues can therefore be identified as follows:

- 25.1. What is the correct approach to assessing whether a particular kind of injury, disease or death has been identified in a request?
- 25.2. In particular, does the RMA have the statutory power and duty to determine as an initial matter whether a particular kind of injury, disease or death has been identified in a request?
- 25.3. In particular, is the RMA constrained by authority to take a different view of the identification of "disease" to that which it has generally adopted?
- 25.4. Is the RMA's decision not to conduct an investigation reviewable by the SMRC?

### **What is a disease?**

26. Although the key phrase deals also with injuries and death, the question of what is a “disease” has proved to be the contentious element. A kind of injury or death has not, in practice, been productive of debate. In considering the legislative definition of “disease” I have formed the following views:

- 26.1. The exclusions from the definition of “disease” by the amendments effected by the *Veterans Affairs Legislation Amendment Act, 1991* were significant.
- 26.2. Those amendments altered the definition of disease to specifically exclude conditions that only involved a temporary departure from the normal physiological state or the accepted ranges of physiological or biochemical measures resulting from normal physiological stress or the effect of extraneous agents.
- 26.3. The definition thus contains a negative yardstick as to the meaning of “disease”.
- 26.4. It is necessarily implicit in the statutory scheme for veterans’ compensation that the RMA’s task includes, in relation to requests for investigation, the identification of what constitutes a disease for the performance of its investigative role.
- 26.5. The addition of the qualifier “particular” to the phrase is also important. The RMA must be able to identify, from a request, a particular disease that can be investigated.
- 26.6. The words of the statutory definition must be applied, but in doing so there remains room for the application of expert medico-scientific opinion of the kind held by the RMA.
- 26.7. A decision not to conduct an investigation following a decision that a condition is not a “disease” is one requiring the RMA to give reasons, as is its practice.

27. These views are supported by an examination of the provisions of the Act dealing with SOPs. The Act contemplates that SOPs will only be promulgated where SMSE indicates that a *particular* kind of injury, disease or death can be linked to service by veterans. The SOP is confined to “that kind” of disease, injury or death; s 196B. The obligation on the RMA to carry out an investigation is based upon, *inter alia*, a request to carry out an investigation into “a particular kind of injury, disease or death” as a precursor to the possible promulgation of a SOP.
28. As the SOP itself is confined to providing the causal link between a veteran’s condition and a particular kind of disease, the starting point must be the recognition or acceptance that a disease has been identified with sufficient particularity.
29. This is not to say that it is incumbent on a person or organisation requesting an investigation to be completely precise and correct, from a medical or scientific point of view, about the proper description of the “disease” (or injury or death) the subject of the request. Whilst the court was considering a different issue in *Budworth v Repatriation Commission* [2001] FCA 317; (2001) 63 ALD 422 the case does provide some analogous support, in my view, for the fact that a misdescription of a disease in a request would not permit the RMA to ignore such a request if its expertise and the definition in the Act permitted it to identify the substantive “particular” kind of disease that was dealt with or sought to be raised in the request.
30. With that caveat, however, it is my view that the RMA must make a decision anterior to the conduct of an investigation, that there is a particular kind of disease that is the subject matter of the request. If no such disease can be discerned after the RMA has applied the definition in the Act and its own expertise, then it has the power and duty to decline to conduct the investigation requested. The requisite subject matter of such an investigation would not be present.
31. The scheme of the Act is to provide compensation to veterans in relation to diseases, injuries or death suffered by them where an SOP provides the causal connection between the same and service. The veteran, however, has to show on the balance of probabilities that he or she has actually suffered the same. The reverse onus provisions of s 120 only apply to certain types of service and apply only to the



question of the connection between disease, injury or death and service. This was reaffirmed by the Full Court in *Repatriation Commission v Budworth* [2001] FCA 1421; (2001) 66 ALD 285.

32. So viewed, it is not correct, in my opinion, to conflate the question of the existence of a particular type of disease, injury or death with the regime that governs the investigation to be undertaken by the RMA and the regime in the Act for proceeding only upon SMSE.
33. It is not enough for there to be a claim that a particular disease exists in order to attract the RMA's obligation to conduct an investigation. The RMA must form the view that there is such a particular kind of disease as a first step in the discharge of its investigative functions. I do not think that the fact that the Act is undoubtedly beneficial legislation overcomes this requirement. The legislature has made its intentions clear.

#### **A morbid condition**

34. One of the matters that have to be considered by the RMA in relation to a request is whether a "morbid condition", which is found in the definition of "disease" in the Act, is present. The question arises whether a "morbid condition" would include any claimed syndrome or "cluster of symptoms". An example is alcohol dependence, which is recognised as comorbid with accepted PTSD. However, in such a case there is an otherwise known "disease" accepted by scientific-medical opinion.
35. In my opinion this too is a question involving the expert opinion of the RMA. It is tasked with identifying the particular "morbid condition" (and thus "disease") the subject of the request. If a proper assessment of a "cluster of variable symptoms" said to be suffered by veterans is not sufficient to allow the RMA to identify the relevant "morbid condition", as against an inchoate and inherently variable group of complaints, then it can properly conclude that no morbid condition has been identified as the particular morbid condition, and thus disease, that the RMA is being asked to investigate.

36. In short in my opinion the Act contemplates investigations into disease states that accord with clinical practice and research. If, therefore, a request for investigation of a “morbid condition” lacks the criteria for acceptance as a particular kind of disease the RMA could not investigate the same.

37. Further, as is often the case in this area, the definition itself is somewhat circular. “Disease” includes a “morbid condition”. But the *Oxford English Dictionary* defines a “morbid condition” as “a departure, subjective or objective, from a state of physical or mental well-being, as a result of either disease or injury”. So read, the reference to a disease including a “morbid condition” in the definition of disease means that a departure from well being caused by a disease is a disease.

### **An injury**

38. The definition of “injury” involves far less complexity than that of “disease”. First, the definition excludes a disease, obviating the question of whether a disease is or could be an injury. Secondly, the Federal Court has given guidance as to what is meant by the term. In *Repatriation Commission v Brown* (1990) 12 AAR 252, at 257-259 Hill J made the following points:

38.1. The word is an ordinary English word, to be treated as such.

38.2. Injury includes any physical damage to the human body sustained as the identifiable result of a traumatic occurrence such as the external application of force or the internal application of pressure generated by personal exertion.

38.3. What is inherent in the concept of injury is that there be suffered some harm by the person claiming to have been injured.

39. In my opinion, this is the formulation of “injury” that should be applied by the RMA.

**Does the definition of SMSE compel the RMA to find that there is a ‘disease’?**

40. The conflation of SMSE and the question of whether there is a disease can arise where there are peer-reviewed articles suggesting a connection between an exposure and some symptoms. Does this mean that the RMA is compelled to accept that there is a “disease” related to the symptoms said to derive from the exposure? In my opinion the SMSE regime and the RMA’s role in the promulgation of SOPs do not compel this conclusion.
41. This is not to say, of course, that if there was a definition or recognition in a peer reviewed article of a “particular disease” the RMA would not give that view weight in deciding the preliminary question. No doubt it should and would be obliged to.
42. This is different to the suggestion that since there are some articles that posit or hypothesise a connection between an exposure and certain symptoms that a disease must therefore be shown to exist.
43. I do not think that such a contention is supported by the wording of the Act referred to above nor by the decision of the Full Federal Court in *Vietnam Veterans’ Association (NSW Branch) v Specialist Medical Review Council* [2002] FCAFC 439; (2002) 125 FCR 127; (2002) 72 ALD 378. In that case Branson and Stone JJ made some observations, clearly *obiter dicta*, about the use of SMSE in the second stage of the RMA’s consideration of SMSE.
44. Stone J agreed with Branson J’s analysis, although her Honour added some further comments; [105]. In those comments Stone J discussed “the test for inclusion in an SOP”; [110] & *ff*.
45. Branson and Stone JJ spoke in orthodox terms of the task of the SMRC, for present purposes identical to that of the RMA, in undertaking its task. That task was two-fold, first to identify the pool of SMSE and second to decide whether the SMSE identified by it indicated that the disease in question could be linked to operational service.

46. Branson J referred several times to the *particular* kind of disease, injury or death being investigated; [46], [48]. If there is found to be SMSE capable of suggesting that the particular condition can be related to operational service the RMA has to form a view whether such evidence “indicates that a particular kind of injury, disease or death can be related” to service; [49]. The RMA has to evaluate the relevant SMSE and form a view whether it “points to, as opposed to merely leaves open, the possibility of the particular condition being related to service by veterans.
47. The obvious point is that the inquiry is not at large, nor is there any suggestion that the mere possibility of the existence of the particular disease etc is sufficient to enliven the process.
48. The error of the SMRC found by Branson and Stone JJ was having regard to the total pool of SMSE and concluding that it was not satisfied that there was “sufficient evidence” of a causal relationship between smoking and prostate cancer. But there is nothing in their Honour’s views to support the contention that a claimed or asserted disease has to be accepted as a proper condition to be investigated by the RMA.
49. Further, the Court emphasised that even on the proper approach, the causal material had to point to or support the requisite connection, not merely leave open the possibility of a connection existing. The requirement for the material to “indicate” such a connection was expressly recognised by Stone J; [111].
50. Accordingly, I do not think that a contention that, in effect, the assertion of a disease is sufficient to trigger the RMA’s duty to investigate. Whether there is a particular disease remains a question for the RMA.

## **Conclusion**

51. In my opinion, for the reasons given above, the RMA’s approach to the question of whether a particular kind of injury disease or death is identified in a request for investigation is consistent with the Act and its purpose. The RMA must apply the

statutory definitions but informed by its medico-scientific expertise on matters such as the identification of a particular kind of disease (or injury or death).

D E J Ryan SC

Chambers

11 March 2013