



Australian Government
Repatriation Medical Authority

EXPLANATORY STATEMENT

**STATEMENT OF PRINCIPLES CONCERNING
HERPES SIMPLEX
(BALANCE OF PROBABILITIES) (NO. 40 OF 2018)**

VETERANS' ENTITLEMENTS ACT 1986
MILITARY REHABILITATION AND COMPENSATION ACT 2004

1. This is the Explanatory Statement to the *Statement of Principles concerning herpes simplex (Balance of Probabilities)* (No. 40 of 2018).

Background

2. The Repatriation Medical Authority (the Authority), under subsection 196B(8) of the *Veterans' Entitlements Act 1986* (the VEA), revokes Instrument No. 4 of 2010, determined under subsection 196B(3) of the VEA concerning **herpes simplex**.
3. The Authority is of the view that on the sound medical-scientific evidence available it is more probable than not that **herpes simplex** and **death from herpes simplex** can be related to particular kinds of service. The Authority has therefore determined pursuant to subsection 196B(3) of the VEA a Statement of Principles concerning **herpes simplex (Balance of Probabilities)** (No. 40 of 2018). This Instrument will in effect replace the revoked Statement of Principles.

Purpose and Operation

4. The Statement of Principles will be applied in determining claims under the VEA and the *Military Rehabilitation and Compensation Act 2004* (the MRCA).
5. The Statement of Principles sets out the factors that must exist, and which of those factors must be related to the following kinds of service rendered by a person:
 - eligible war service (other than operational service) under the VEA;
 - defence service (other than hazardous service and British nuclear test defence service) under the VEA;
 - peacetime service under the MRCA,

before it can be said that, on the balance of probabilities, herpes simplex or death from herpes simplex is connected with the circumstances of that service. The Statement of Principles has been determined for the purposes of both the VEA and the MRCA.

6. This Instrument results from an investigation notified by the Authority in the Government Notices Gazette of 19 October 2016 concerning herpes simplex in accordance with section 196G of the VEA. The investigation involved an examination of the sound medical-scientific evidence now available to the Authority, including the sound medical-scientific evidence it has previously considered.

7. The contents of this Instrument are in similar terms as the revoked Instrument. Comparing this Instrument and the revoked Instrument, the differences include:
- adopting the latest revised Instrument format, which commenced in 2015;
 - specifying a day of commencement for the Instrument in section 2;
 - revising the definition of 'herpes simplex' in subsection 7(2);
 - revising the reference to 'ICD-10-AM code' in subsection 7(4);
 - revising the factor in subsection 9(1) concerning 'being exposed to HSV-1 or HSV-2', for clinical onset only;
 - revising the factors in subsections 9(2) & 9(13) concerning 'a severe thermal burn';
 - new factors in subsections 9(3) & 9(14) concerning 'a thermal or chemical burn';
 - revising the factors in subsections 9(4) & 9(15) concerning 'being in an immunocompromised state';
 - revising the factors in subsections 9(5) & 9(16) concerning 'surgery to nerve root ganglia';
 - revising the factors in subsections 9(7) & 9(18) concerning 'being at least 20 weeks pregnant';
 - revising the factors in subsections 9(8) & 9(19) concerning 'having surgery to the brain', for acute herpes simplex encephalitis and acute herpes simplex retinal necrosis only;
 - revising the factors in subsections 9(9)(a) & 9(20)(a) concerning 'having surgery to the face', for orofacial herpes simplex only;
 - new factors in subsections 9(9)(c) & 9(20)(c) concerning 'having a fever', for orofacial herpes simplex only;
 - new factors in subsections 9(10)(a) & 9(21)(a) concerning 'having cataract surgery', for herpes simplex of the cornea (herpes simplex keratitis) only;
 - new factor in subsection 9(10)(b) concerning 'having a corneal transplant', for herpes simplex of the cornea (herpes simplex keratitis) only, for clinical onset only;
 - new factors in subsections 9(10)(c) & 9(21)(b) concerning 'wearing contact lenses', for herpes simplex of the cornea (herpes simplex keratitis) only;
 - new factors in subsections 9(11)(a) & 9(22)(a) concerning 'having atopic dermatitis', for eczema herpeticum only;
 - new factors in subsections 9(11)(b) & 9(22)(b) concerning 'having a psoriatic lesion', for eczema herpeticum only;
 - new factors in subsections 9(12)(a) & 9(23)(a) concerning 'having chapped lips', for herpes simplex of the lip only;
 - new factors in subsections 9(12)(b) & 9(23)(b) concerning 'playing a woodwind or brass musical instrument', for herpes simplex of the lip only;
 - new definitions of 'chapped lips', 'chronic renal failure', 'close to the site', 'eczema herpeticum', 'immunocompromised state as specified', 'immunosuppressive drug', 'MRCA', 'severe thermal burn' and 'VEA' in Schedule 1 - Dictionary;
 - revising the definitions of 'being exposed to HSV-1 or HSV-2' and 'relevant service' in Schedule 1 - Dictionary; and
 - deleting the definitions of 'a significant thermal burn' and 'being in an immunosuppressed state'.

Consultation

8. Prior to determining this Instrument, the Authority advertised its intention to undertake an investigation in relation to herpes simplex in the Government Notices Gazette of 19 October 2016, and circulated a copy of the notice of intention to investigate to a wide range of organisations representing veterans, service personnel and their dependants. The Authority invited submissions from the Repatriation Commission, organisations and persons referred to in section 196E of the VEA, and any person having expertise in the field. No submissions were received for consideration by the Authority during the investigation.

Human Rights

9. This 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*. A Statement of Compatibility with Human Rights follows.

Finalisation of Investigation

10. The determining of this Instrument finalises the investigation in relation to herpes simplex as advertised in the Government Notices Gazette of 19 October 2016.

References

11. A list of references relating to the above condition is available to any person or organisation referred to in subsection 196E(1)(a) to (c) of the VEA. Any such request must be made in writing to the Repatriation Medical Authority at the following address:

The Registrar
Repatriation Medical Authority
GPO Box 1014
BRISBANE QLD 4001



Australian Government
Repatriation Medical Authority

Statement of Compatibility with Human Rights

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

Instrument No.: **Statement of Principles No. 40 of 2018**

Kind of Injury, Disease or Death: **Herpes simplex**

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

1. This Legislative Instrument is determined pursuant to subsection 196B(8) of the *Veterans' Entitlements Act 1986* (the VEA) for the purposes of the VEA and the *Military Rehabilitation and Compensation Act 2004* (the MRCA). Part XIA of the VEA requires the determination of these instruments outlining the factors linking particular kinds of injury, disease or death with service such being determined solely on the available sound medical-scientific evidence.
2. This Legislative Instrument:-
 - facilitates claimants in making, and the Repatriation Commission in assessing, claims under the VEA and the MRCA respectively, by specifying the circumstances in which medical treatment and compensation can be extended to eligible persons who have herpes simplex;
 - facilitates the review of such decisions by the Veterans' Review Board and the Administrative Appeals Tribunal;
 - outlines the factors which the current sound medical-scientific evidence indicates must exist before it can be said that, on the balance of probabilities, herpes simplex is connected with the circumstances of eligible service rendered by a person, as set out in clause 5 of the Explanatory Statement;
 - replaces Instrument No. 4 of 2010; and
 - reflects developments in the available sound medical-scientific evidence concerning herpes simplex which have occurred since that earlier instrument was determined.
3. The Instrument is assessed as being a technical instrument which improves the medico-scientific quality of outcomes under the VEA and the MRCA.

Human Rights Implications

4. This Legislative Instrument does not derogate from any human rights. It promotes the human rights of veterans, current and former Defence Force members as well as other persons such as their dependents, including:
- the right to social security (Art 9, *International Covenant on Economic, Social and Cultural Rights*; Art 26, *Convention on the Rights of the Child* and Art 28, *Convention on the Rights of Persons with Disabilities*) by helping to ensure that the qualifying conditions for the benefit are 'reasonable, proportionate and transparent'¹;
 - the right to an adequate standard of living (Art 11, ICSECR; Art 27, CRC and Art 28, CRPD) by facilitating the assessment and determination of social security benefits;
 - the right to the enjoyment of the highest attainable standard of physical and mental health (Art 12, ICSECR and Art 25, CRPD), by facilitating the assessment and determination of compensation and benefits in relation to the treatment and rehabilitation of veterans and Defence Force members;
 - the rights of persons with disabilities by facilitating the determination of claims relating to treatment and rehabilitation (Art 26, CRPD); and
 - ensuring that those rights "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Art 2, ICESCR).

Conclusion

This Legislative Instrument is compatible with human rights as it does not derogate from and promotes a number of human rights.

Repatriation Medical Authority

¹ In General Comment No. 19 (The right to social security), the Committee on Economic, Social and Cultural Rights said (at paragraph 24) this to be one of the elements of ensuring accessibility to social security.