



Australian Government
Specialist Medical Review Council

Friday, 11 January 2019

Robert Fitzgerald
Presiding Commissioner
Productivity Commission

Via email: veterans@pc.gov.au

Compensation and Rehabilitation for Veterans Draft Report

Dear Commissioner

I have read with interest the Productivity Commission's draft report "A better way to support Veterans" published in December 2018.

I note the Commission's recommendation 8.2 concerning the future of the Specialist Medical Review Council (SMRC), and while I consider that this is a question for the Department of Veterans' Affairs, Ex-service organisations and other relevant stakeholders to address, I would nevertheless like to take the opportunity to clarify how the SMRC works and to address some of the assumptions set out in the Commission's draft report.

While the SMRC elected not to make a formal submission to the Commission, your team did speak with the SMRC's Registrar about Council procedures and processes. I am pleased to be able to set out some further details below.

Composition of Council and Institutional Knowledge

On page 346 of its interim report, the Commission comment that, "*the SMRC's structure ...results in a considerable loss of institutional knowledge between reviews*". This is set out as a statement of fact, but does not appear to be based on specific feedback provided in any public submissions received by the Commission.

The Commission went on to surmise that this "loss of institutional knowledge", "*may lead to inconsistent or unpredictable decision making.*"

The Council has always been aware of the risks associated with the requirement to establish a new review council for each review, and we have established a number of processes to mitigate those risks. I provide some detail on these matters below.

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Appointment Process

As originally drafted, the nominations and appointments process for SMRC was cumbersome and time consuming. In December 2017, legislative changes to the VEA were passed that simplified the selection and appointments process. Before these changes, the Act required that councillors must be selected from lists provided by medical colleges. In practice, the colleges advertised vacancies, and once advertised, individual members submitted their availability and interest for the position. The colleges did not endorse candidates nor did they provide any assessment regarding candidates' suitability for vacancies. On that basis, there was limited merit in continuing with that approach. The changes enabled the SMRC to advertise directly online, removing the requirement to involve medical colleges. This practice is consistent with similar agencies that also have medical specialists appointed by the relevant Minister. For example, appointments to the RMA under the VEA require that members are appointed by the Minister for Veterans' Affairs. There is no requirement for the RMA to seek nominations through medical colleges. This amendment aligned the RMA and SMRC appointment processes, and has reduced delays in establishing new review councils

The Role of the Convener

The membership of the Council is set out under clause 196ZE of the Veterans' Entitlements Act 1986 (the Act). The Minister must appoint one of the councillors to be the Convener. The Act is limited to specifying that the Convener is to preside at meetings of a review council constituted for the purposes of a review. In practice, the Convener provides, as a peer, guidance and counsel to the councillors and to presiding councillors. The Convener also provides the continuity and guidance necessary for the operations of the Council to ensure that there is consistency of decision-making. As the current Convener I have been involved in 15 reviews since first being appointed as a Councillor in 1997.

The use of subject matter experts

While the RMA comprises five medical experts drawn from across the medical specialisations, the SMRC, as the appeals body, convenes a new panel or review council for each new review. As well as the Convener (or his nominated appointed presiding councillor), a panel comprises at least three, but not more than five, members who are expert in a medical field relevant to the condition under review.

As well as being a legislative requirement, the membership of subject matter experts on review councils enables the production of quality decisions that have a high level of medical science credibility, supported by comprehensive reasons documents.

To ensure consistency and to mitigate loss of institutional knowledge, the Council has deliberately established a pool of members that can be selected from for new reviews. A number of councillors have now participated in more than one review, some have participated on several reviews.

The Council has also cultivated a small group of experienced presiding councillors who are available when I am not able to preside on a review. Current presiding councillors have between them participated on 12 reviews.

Different Conclusions by the SMRC

The Council's role is to bring its own expertise to bear on the same information that was before the RMA at the time a decision was made. As is the case for the RMA, the Council's review processes involve the investigation of extremely complex and sensitive medical-scientific issues.

It can be argued therefore that it is not unreasonable for the two bodies to at times arrive at different conclusions, given that the RMA is comprised of generalists, and each review council is comprised of experts in the particular field of medical science in question.

Submissions and Oral Hearings

The Council provides notice in the Government Gazette of its intention to carry out a review and the date by which written submissions must be received. Eligible persons or organisations and persons having expertise in a field relevant to the review may make a written submission about any information that was available to RMA and is relevant to the review. Those who make a written submission may make a complementary oral submission. The oral hearing is an important element of the review process, enabling councillors to engage directly with applicants about their contentions.

The Repatriation Commission and the Military Rehabilitation and Compensation Commission (the Commissions) routinely make written and oral submissions to review councils. These papers are prepared by a departmental medical officer. The presentations are of a high quality, and make a very constructive contribution to the review process, giving councillors insight into the Commissions' perspective on the medical science and the practical application of factors or potential factors in the SoPs.

Governance

The Act is silent on how the Council should manage its meetings and conduct its business, but states that the Council determines procedures for meetings and how it is to conduct its business.

As Convener I meet with our experienced presiding councillors, and together we form an informal executive group that considers and provides advice to the Convener on the management, process, and outcomes of council business. This assists me as the Convener to make decisions on for example:

- assisting with the oversight of the Council and the management, scheduling and execution of the reviews
- receiving, considering and assisting in making decisions in relation to reports and recommendations from the Council secretariat, and as requested, from legal advisers
- providing guidance to the separate review councils as required
- assisting with monitoring the implementation and execution of Council business, ensuring that the Council's business is conducted in a manner which strikes the right balance between business need and operational risk
- considering opportunities for enhancements to policies and procedures that impact on review management
- providing advice on councillor nominees.

My capacity to meet with this group from time to time has greatly strengthened the capacity of the Council to consider and provide advice on the management of some complex issues impacting on reviews.

Secretariat

The Convener and the separate review councils are supported in their work by a secretariat, staffed by employees of the Department.

The secretariat has had varying levels of staff support over the life of the council. The secretariat now operates out of Brisbane. The current Registrar has worked in that role since 2009 and is also able to support the retention of institutional knowledge.

Consistency of SMRC Decisions

Legal Advice

The Council has available to it independent legal advice. Its current legal adviser has worked with the SMRC since 2015. He meets with review councils on request and supports councils in the discharge of their statutory functions by providing advice on legal risks and on the content of SMRC declarations and decisions documents.

The Application of Statutory tests

The SMRC also meets from time to time with the RMA. For example, the SMRC liaised with the RMA during the process of preparing a handbook for our members. While prepared for the separate needs of our respective members, the SMRC and RMA documents do contain some common content, including legal advice on the application of the Reasonable Hypothesis test. The SMRC also uses as a guide, the RMA's Levels of Evidence document referred to by the Commission in its report.

An independent Review Body

Pearce and Holman

I note the Commission's references to the review of the RMA and SMRC by Professors Pearce and Holman conducted in 1997.

Pearce and Holman put forward 20 recommendations for improvement which were mainly of an internal administrative or operational nature. The then Minister was in agreement with the ex-service community at the time which was in favour of retaining an independent review body as essential to ensure a continuing fair system for making SoPs.

I am happy to meet with you and your staff, along with the SRMC Registrar, if further clarification is required.

Yours sincerely

Charles Guest
Convener of the SMRC