EXPLANATORY STATEMENT

Defence Determination 2016/15

This Determination amends Defence Determination 2005/15, Conditions of service (the Principal Determination), 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 AIA Act, as modified by section 58B of the Defence Act.

This Determination amends the following Chapters of the Principal Determination which set out provisions for members of the Australian Defence Force (ADF).

- Chapter 1, which sets out provisions dealing with required information on Australian Defence Force (ADF) pay and conditions of service;
- Chapter 6, which sets out provisions dealing with relocations for members of the ADF;
- Chapter 7, which sets out provisions dealing with housing for members of the ADF;
- Chapter 8, which sets out provisions dealing with conditions for members of the ADF and their dependants;
- Chapter 9, which sets out provisions dealing with travel for members of the ADF;
- Chapter 12, which sets out an overview of overseas conditions for members of the ADF; and
- Chapter 14, which sets out provisions dealing with relocating to a posting overseas for members of the ADF.

The purposes of this Determination are:

- to revise and restructure the definitions relating to a member's dependants and a member's categorisation;
- to include a new provision to recognise partnerships, including registered relationships, for Defence-provided benefit purposes, which rely upon the claim of a relationship by the member and reduces the amount of paperwork from that which was previously required; and
- to amend various cross references within the Principal Determination that have changed because of the restructure.

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

Clause 2 of this Determination provides that the Determination commences on 1 July 2016.

Clause 3 specifies that the amendment is made to the Principal Determination, as amended.

Clause 4 makes a variety of changes of terms used throughout the Principal Determination.

- It omits the term ‘interdependent partner’ and replaces it with ‘partner’. It also makes a variety of associated changes (partners, partnership etc). Partner is thought to be a simpler term, and one more allied with current community usage.
- It makes a number of changes to cross references. Some existing ideas have changed clause number as a result of the changes made by clause 6 of this Determination.

Clause 5 amends clause 1.3.2 of the Principal Determination by updating the reference to Division 2 to reflect a change in the title. The change of title is made by clause 6 of this Determination.
Clause 6 substitutes Chapter 1 Part 3 Division 2 of the Principal Determination. The Division sets out definitions relating to dependants and categorisation that are used throughout the Principal Determination. It has been restructured into a more user-friendly order. It contains the following clauses.

- Clause 1.3.74 of the Principal Determination sets out the purpose of the Division. It includes an index of definitions, concepts and categorisation used throughout the Division.

- Clause 1.3.75 of the Principal Determination provides a contemporary definition of the term 'child'. The definition has been aligned with that used in the *Family Law Act 1975*. This will provide more certainty and Defence-provided benefit outcomes that reflect community standards. Subclause 1.3.75.2 extends the definition for adult children who are disabled.

- Clause 1.3.76 of the Principal Determination provides a new definition of the term 'couple'.

- Clause 1.3.77 of the Principal Determination provides an updated definition of the term 'dependants', formerly covered by clause 1.3.76. The definition has been extended to include children under 21 years of age who are in full-time education but not living in the member's home. Other definitions changed by this Determination are also captured by this new definition.

- Clause 1.3.78 of the Principal Determination defines the term 'dependant with special needs' previously defined by clause 1.3.82. The definition itself has not changed.

- Clause 1.3.79 of the Principal Determination sets out arrangements for the CDF to recognise a person as a dependant. The clause has been restructured into a more user-friendly order, no policy has been changed.

- Clause 1.3.80 of the Principal Determination has been renumbered. It was previously clause 1.3.84.

- Clause 1.3.81 of the Principal Determination provides a definition of the term 'normally lives with'. This concept is a mandatory element of the general definition of 'dependant' at 1.3.77. This limit does not apply to certain situations where it would be unreasonable for the dependants to remain in the same household as the member, such as temporary separation due to illness.

- Clause 1.3.82 of the Principal Determination defines the term 'partner'. It sets out who can be recognised as a member's partner and reflects the changes made to registered relationships and de facto relationships in the *Acts Interpretation Act 1901*. This policy has replaced Defence Instruction (General) Personnel 53-1, *Recognition of interdependent partnerships*. The definition has replaced the defined term 'interdependent partner', formerly in clause 1.3.77A of the Principal Determination.

- Clause 1.3.83 of the Principal Determination sets out a process for recognising a de facto relationship for the purpose of eligibility for Defence benefits. It contains a process for making an application, powers to de facto relationship status and relevant considerations for the CDF. The policy is broadly similar to the former clause 1.3.79 of the Principal Determination.

- Clause 1.3.84 of the Principal Determination permits a registered de facto relationship to be recognised without the member's need to apply under the Principal Determination.

- Clause 1.3.85 of the Principal Determination introduces a definition for a member's primary emergency contact.

- Clause 1.3.86 of the Principal Determination defines the term 'Spouse'. It provides the same definitions as the former clause 1.3.77 of the Principal Determination, Spouse.
Clause 1.3.87 sets out some helpful information about the process by which applications may be assessed for eligibility in three broad classes. There is also residual discretion in the CDF to decide a person is eligible for Defence-provided benefits even if no application is made. This ensures a family will not miss out on benefits based on a member omitting to lodge an application or becoming unable to lodge it. Subclause 5 provides that for a limited period before commencement of this determination a member may apply for categorisation using the previous rules or the rules set out in this determination, whichever is more beneficial to the member. This provision protects a member who requires retrospective application of categorisation (due to extenuating circumstances) being subject to the discriminatory aspects of the previous rules.

Clause 1.3.88 of the Principal Determination defines the term 'member without dependants'. The policy is unchanged from that in the former clause 1.3.83 of the Principal Determination.

Clause 1.3.89 of the Principal Determination defines the term 'member with dependants'. The policy is restructured to be more user-friendly but is generally unchanged from that in the former clause 1.3.80 of the Principal Determination. A reasonable limitation has been introduced that prevents a member from claiming dependant benefits for more than one spouse or partner.

Clause 1.3.90 of the Principal Determination defines the term 'member with dependants (unaccompanied)'. The policy is unchanged from that in the former clause 1.3.81 of the Principal Determination.

Clause 7 inserts a new clause into the Principal Determination. The new clause 1.5.1A makes clear that a member is obligated to provide accurate information in their application to ensure that correct benefits are delivered in relation to the member's service. The new subclause 1.5.1A.3 provides that the CDF may ask the member from time to time to provide information about their relationships and living arrangements to verify the member's continuing eligibility for benefits and decide which category a member is in. Subclause 1.5.1A.4 invokes sections 137.1 and 137.2 of the Criminal Code (Schedule to the Criminal Code Act 1995) and section 56 of the Defence Force Discipline Act 1982.

Clauses 8 to 42 (apart from clauses 10, 11, 12, 13, 14, and 35) amend clauses within the Principal Determination to update the cross references to Chapter 1 Part 3 Division 2 to reflect the new structure of the Division and to remove references to Defence Instruction (General) Personnel 53-1, Recognition of interdependent partnerships.

Clause 8 substitutes clause 1.5.2 of the Principal Determination. The new clause 1.5.2 sets out the member's responsibility for informing themselves, their Commanding Officer, and the relevant housing administrator when their circumstances change. This requirement to inform is necessary to ensure that correct benefits are provided to the member. Subclauses 1.5.2.3 and 1.5.2.4 prescribe a 14 day timeframe on the member for providing this information to the relevant authorities. An exception has been provided under the new subclause 1.5.2.3 to permit the information being accepted beyond 14 days if the delay is reasonable.

An administrative note has also been included in the new subclause 1.5.2.3 that explains that the reason for the prescribed timeframe is to help the Commonwealth avoid overpayments being made to the member. If the relevant systems are not updated in a timely fashion, the member may continue to receive benefits to which they are not entitled, and which would need to be repaid.

The new subclause 1.5.2.5 provides that a member is required to complete the relevant form at Annex 1.5.A if the number of their dependants change or their posting location changes. Because posting changes generally relate to a future event, the notice may not directly result in a change to benefits, but it puts the Defence administrator on notice so that action to adjust benefits is prompted if it is needed. This change could be expected to consequently result in more timely and accurate classification of ADF members.

Clause 9 omits paragraph 6.2.24.3 of the Principal Determination. This clause contained a discretion to allow the provision of a benefit from 1 December 2005. The clause had the effect of applying a deeming arrangement to same sex couples who lacked the initial home purchase or sale needed to begin a benefit cycle because they were not recognised before 1 December 2005. The transitional clause no longer has any application because couples have now had seven years to enter the sale and purchase cycle on posting. Accordingly, it has been omitted.
Clause 10 substitutes clause 6.6.54 of the Principal Determination, which sets out the purpose of Chapter 6 Part 6 Division 8. The clause has been recast to reflect the adoption of the term 'partner' and to correct cross references that have changed as a result of the structural changes made by clause 6 of this Determination.

Clauses 11, 12 and 13 modify rules that provide for the recovery of a removal cost, for a member who was posted before a planned marriage or recognition of an interdependent partnership, granted a removal in anticipation of that, and the relationship did not go as planned.

Clause 11 substitutes paragraph 6.6.55.1.a of the Principal Determination. The clause sets out the member's obligations to repay the cost of a removal if a planned marriage did not occur. The policy has been amended to allow for a planned registered relationship that also does not occur.

Clause 12 substitutes subclause 6.6.55.3 of the Principal Determination. The clause sets out the member's obligations to repay the cost of a removal if a planned marriage did not occur. The policy has been changed so that the obligation arises if the member's spouse or partner does not move to the member's posting location. This clause provides coverage for all couple relationships and changes the test to one that relies only on objective facts that can be notified without the need to disclose sensitive personal information.

Clause 13 omits subclause 6.6.55.4 of the Principal Determination. The subclause formerly set out an obligation to repay the cost of removal where an application for interdependent partnership was not approved. Members in this situation are now covered by subclause 6.6.55.3 of the Principal Determination, following a change made by clause 12 of this Determination.

Clause 14 substitutes clause 6.6.58 of the Principal Determination. The clause provides removal entitlements for a member who marries or has a partnership recognised with a person outside their posting location (either within Australia or while serving in a seagoing ship). The clause has been redrafted to better integrate the conditions for both types of relationship. References to Defence Instruction (General) Personnel 53-1, Recognition of interdependent partnerships have been removed, as recognition of de facto partnerships that are not registered relationships is provided for under clause 1.3.83 of the Principal Determination.

Clause 15 substitutes paragraph 6.6.61.4.b of the Principal Determination. Clause 6.6.61 provides an entitlement to a removal, in some circumstances, if a member gains a dependant. Reference to Defence Instruction (General) Personnel 53-1, Recognition of interdependent partnerships have been removed from the paragraph, as recognition of de facto partnerships that are not registered relationships is provided for under clause 1.3.83 of the Principal Determination.

Clause 16 substitutes clause 7.1.25 of the Principal Determination, which sets out an entitlement to a pre-posting visit for a member with a dependant with special needs. References in the clause have been updated to reflect structural changes made by clause 6 of this Determination.

Clause 17 substitutes the cross references in subparagraph 7.5.4.1.b.i of the Principal Determination. The subparagraph outlines factors that contribute to suitability of a Service residence. References in the clause have been updated to reflect structural changes made by clause 6 of this Determination, and to correct an error in the number given for a housing reference.

Clause 18 substitutes the cross references to subclause 7.5.6.1 of the Principal Determination. A reference in the clause has been updated to reflect structural changes made by clause 6 of this Determination.

Clause 19 substitutes the cross reference in subclause 7.5.31.2 of the Principal Determination. A reference in the clause has been updated to reflect structural changes made by clause 6 of this Determination.

Clause 20 omits Part 2 from the list of Divisions in clause 8.0.2 of the Principal Determination, which sets out the contents of Chapter 8. Chapter 8 Part 2 of the Principal Determination formerly contained guidance information which referred to Defence Instruction (General) Personnel 53-1, Recognition of Interdependent Partnerships. This information is now included in clause 1.3.82 of the Principal Determination through the operation of clause 6 of this Determination.
Clauses 21 to 31 each omit a cross reference in the following references in the Principal Determination. All of the references describe Defence benefits for a member with dependants (unaccompanied), in different circumstances. Each former cross reference was to clause 1.3.78 or clause 1.3.79 of the Principal Determination. This clause was omitted by the structural changes made by clause 6 of this Determination.

- Clause 21 amends a table in subclause 8.3A.10.1 of the Principal Determination.
- Clause 22 amends clause 8.3A.11 of the Principal Determination.
- Clause 23 amends clause 8.3A.12 of the Principal Determination.
- Clause 24 amends paragraph 8.3A.13.c of the Principal Determination.
- Clause 25 amends clause 8.3A.14 of the Principal Determination.
- Clause 26 amends paragraph 8.3A.15.b of the Principal Determination.
- Clause 27 amends paragraph 8.3A.16.b of the Principal Determination.
- Clause 28 amends paragraph 8.3A.17.b of the Principal Determination.
- Clause 29 amends paragraph 8.3A.18.b of the Principal Determination.
- Clause 30 amends paragraph 8.3A.19.b of the Principal Determination.
- Clause 31 amends clause 8.3A.20 of the Principal Determination.

Clause 32 substitutes the cross references in clause 8.5.1 of the Principal Determination. Clause 8.5.1 sets out the purpose of Chapter 8 Part 5. The cross references have been varied to reflect the structural changes made by clause 6 of this Determination.

Clause 33 substitutes clause 8.6.3 of the Principal Determination, which sets out the members to whom Chapter 8 Part 6, Dependants with special needs applies. A reference to the definition of dependant with special needs has been added for the reader's convenience.

Clause 34 substitutes clause 8.6.4 of the Principal Determination. The clause sets out a range of assistance available to a member with special needs on removal. The clause has been restructured to make the eligibility requirements clearer. Benefits for the member remain unchanged.

Clauses 35 and 36 omit the cross references in paragraph 8.7.3.1.a of the Principal Determination, and substitute the cross references in paragraph 8.7.3.1.e of the Principal Determination, respectively. Subclause 8.7.3.1 sets out the persons who are covered by Chapter 8 Part 7 of the Principal Determination. Both paragraphs formerly cross referenced to Chapter 1 Part 3 Division 2 of the Principal Determination which has been renamed as one of the changes made by clause 6 of this Determination.

Clause 37 substitutes clause 9.3.3 of the Principal Determination, which sets out the purpose of Chapter 9 Part 3 Division 1, Travel on marriage or ADF recognition of interdependent partnership. References to Defence Instruction (General) Personnel 53-1, Recognition of Interdependent Partnerships have been changed. This information is now included in clause 1.3.82 of the Principal Determination through the operation of clause 6 of this Determination.

Clause 38 substitutes item 1 of the table in subclause 9.4.31.2A of the Principal Determination. The item sets out a circumstance in which a member may be approved vehicle allowance as a remote location leave travel entitlement. Cross reference to Defence Instruction (General) Personnel 42-5, Support to families with special needs has been changed to the definition of 'dependant with special needs' in clause 1.3.78 of the Principal Determination. This is a more helpful reference for the reader.

Clause 39 substitutes paragraph 9.4.37.1.a of the Principal Determination. The revised paragraph changes the term 'interdependent partner' to partner, and revises cross references to the definitions that have changed clause number as a result of the structural changes made by clause 6 of this Determination.
Clause 40 substitutes paragraph 12.3.5.1.ba of the Principal Determination. The paragraph is part of a definition of 'dependant', used in the administration of overseas conditions. It contains a reference to the definition of 'dependant with special needs', one of the definitions that changed clause number as a result of the structural changes made by clause 6 of this Determination.

Clauses 41 and 42 substitute subclauses 14.2.4.5A and 14.2.4.5B of the Principal Determination, respectively. The subclauses deal with arrangements for assessing suitability of a posting location for a member with a dependant with special needs. References to the definition of 'dependant with special needs' have been varied. This definition has moved as a result of the structural changes made by clause 6 of this Determination. The subclauses are otherwise unchanged.

Criteria are provided for the exercise of discretions under the Principal Determination, as amended by this Determination. Adverse decisions are subject to merits review under the ADF redress of grievance system, including an appeal to the Defence Force Ombudsman.

**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

Defence Determination 2016/15, Dependants – amendment

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

This sets out a range of definitions that assist in establishing eligibility for a range of benefits provided by Defence to assist members with some of the costs arising from service, such as mobility and separation from the family with whom they would otherwise routinely share a household.

Human rights implications

This Determination engages the following human rights:

- (General) rights of equality and non-discrimination contained in articles 2, 16 and 26 of the International Convention on Civil and Political Rights; noting that discrimination is also prohibited under domestic law on certain other grounds including marital status and sexual orientation;
- Right to respect for the family (article 23) and the prohibition on unlawful or arbitrary interference with the family (article 17) of the International Convention on Civil and Political Rights; and
- Right to an adequate standard of living (article 11(1) International Convention on Civil and Political Rights).

This Determination does not represent a significant change from current practice. Language has been updated to reflect changes made to registered relationships and de facto relationships in the Acts Interpretation Act 1901. The Division has also been restructured and some information has been made clearer, for example the requirement for the member to tell Defence when their household circumstances change. The CDF is now able to examine whether the member, or a person in their family, meets any of the definitions in this Part and to assess eligibility for benefits on that basis. This clause provides for those circumstances where a member’s eligibility may not be up-to-date or accurate and the payment of benefits needs to be amended accordingly. It also gives Defence the ability to look behind the paperwork to ensure the dependants of a member are not disadvantaged by the member’s failure to apply for benefits.

This Determination aligns with equity and human rights by removing marital status discrimination from Defence processes. It will also meet the recommendations of the Australian National Audit Office, Delivery of Bereavement and Family Support Services through the Defence Community Organisation, Audit Report No 9, 2012-13 as it will enable older processes that were indirectly discriminatory, in requiring a greater evidentiary burden for de factos, to be replaced with a much reduced process of declaration or assessment for Defence-provided benefits.

Information disclosed to Defence is treated in accordance with the Information Privacy Principles.

Legitimate Objective: The Commonwealth provides special benefits to assist a member's family with costs arising out of Service needs. Most benefits are only provided for persons who are dependants of the member or living in the member's household. The purpose of this Determination is to define and categorise the member's relationships, only so as to work out eligibility for benefits. Therefore, there are people in a relationship with the member, including in their family group, who may be excluded from recording or receiving special benefits as a dependant for Defence benefit purposes. These people may, however, still be recorded by the member for personal emergency contact purposes.

Reasonable, necessary and proportionate: The purpose of providing these special measures is to assist members to meet their family responsibilities. While these special benefits are additional to those received by members who do not live together with their dependants, the benefits are considered necessary to assist the member and their family to meet costs that arise out of activities such as relocation on posting.
Conclusion

This Determination is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Justine Elizabeth Greig, Head People Policy and Culture