EXPLANATORY STATEMENT

Defence Determination 2017/8

This Determination amends Defence Determination 2016/19, 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

Chapter 1 contains definitions for terms used in the Principal Determination.

Chapter 2 sets out provisions dealing with joining and leaving the Australian Defence Force (ADF).

Chapter 3 sets out provisions dealing with salaries and bonuses for members of the ADF.

Chapter 4 sets out provisions dealing with salary–related allowances and non-salary related allowances for members of the ADF.

Chapter 5 sets out provisions dealing with leave for members of the ADF.

Chapter 7 sets out provisions dealing with housing assistance and meals for members of the ADF.

Chapter 10 sets out provisions dealing with clothing related allowances and compensation for loss and damage of effects for members of the ADF.

The purpose of this Determination is to set out conditions of service benefits that apply to a member of the permanent forces for whom the CDF has made a flexible service determination under section 23 of the Defence Act 1903. The flexible service determination is a non-legislative instrument. The conditions for a member that may be determined under a flexible service determination include periods of duty, availability for duty and any other relevant matter. The periods of duty and availability for duty constitute a member's 'pattern of service'. A permanent member subject to a flexible service determination is still required to render continuous full-time service.

The Amending Determination 2016/26 introduced interim arrangements for a member who undertakes a days per fortnight pattern of service. Under these arrangements the member's salary, allowances, contributions and other conditions of service are paid as if they are on part-time leave without pay.

This Determination expands on these interim arrangements to include a member who undertakes a weeks per month pattern of service. A member who undertakes this pattern of service will be granted leave without pay for their nonworking periods. As a consequence, their salary, allowances, contributions and other conditions of service during their non working periods will be treated as if they are on leave without pay. The part-time leave without pay arrangements will continue to apply to members who undertake a days per fortnight pattern of service.

While the treatment of salary, allowances and other conditions of service under leave without pay and part-time leave without pay are generally similar there are a few exceptions. Where there are differences the intention is to treat a member on leave without pay associated with a flexible service determination in the same as a member on part-time leave without pay. Most of the changes in this Determination involve an application of this intent.

Following further policy development, the interim arrangement will be reviewed and amendments may be made to the Principal Determination.

Section 1 of this Determination sets out the manner in which this Determination may be cited.
Section 2 of this Determination provides that the determination commences on the day after registration.

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

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 amends the Principal Determination, *Defence Determination 2016/19, Conditions of service*.

Schedule 1 Part 1 amends Chapter 1 of the Principal Determination, which sets out provisions dealing with definitions and interpretation of concepts relevant to pay and conditions for members of the ADF. It amends or inserts definitions to Chapter 1 Part 3 of the Principal Determination. The following specific changes to the Principal Determination are made by Schedule 1 Part 1:

- Section 1 inserts section 1.3.24A which provides a definition for 'flexible service determination' made under subsection 23(2) of the *Defence Act 1903*. The definition identifies the legislative authority for making a determination and explains the patterns of service currently available.

- Section 2 inserts section 1.3.45A which provides a definition for 'nonworking period' which describes this as the period that is not the member's pattern of service. For a member on a weeks per month pattern of service the member is on leave without pay for the nonworking period.

- Section 3 inserts subsection 1.3.47.3 to the end of the definition for 'normal working hours'. The change provides that in the case of a member undertaking flexible service their normal working hours are stated in their flexible service determination.

- Section 4 inserts section 1.3.50A which provides a definition for the term 'pattern of service'. The definition describes this as the periods of duty prescribed in a member's flexible service determination.

Schedule 1 Part 2 repeals and substitutes Chapter 2 Part 1A of the Principal Determination. The Part sets out the condition of service benefits that apply to a permanent member on a flexible service determination. The following changes are made to the Principal Determination.

- Section 2.1A.1 explains that this Part applies to a permanent member on a flexible service determination.

- Section 2.1A.2 sets out the conditions that apply to a member on a weeks per month pattern of service. It provides that the member is on leave without pay for their nonworking periods.

- Section 2.1A.3 sets out the conditions that apply to a member on a 'days per fortnight' pattern of service. It provides that a member on a flexible service determination is on part-time leave without pay for their nonworking period.

Schedule 1 Part 3 amends Chapter 3 of the Principal Determination, which sets out provisions dealing with salaries and bonuses for members of the ADF. The following changes are made to the Principal Determination.

- Section 1 inserts an exception to subsection 3.2.30.5, which provides that any period when the member is not entitled to salary cannot be counted for salary increments. The exception provides that periods of leave without pay associated with employment with the United Nations or leave without pay (flexible service determination) are included as service towards a member's salary increment.

- Section 2 amends the table at subsection 3.5.10.3 of the Principal Determination. This table lists the leave types and activities that count towards effective service for a retention bonus. The bonus may be paid to retain a member who is considered critical to capability. A member on a flexible service determination has been added to the table and the periods where they are paid will count as effective service for the bonus. This approach is consistent with the current treatment for a member on part-time leave without pay.
Section 3 amends the table at subsection 3.5.24.2, which lists the leave types and activities that count towards effective service for the Navy – Electronics (junior sailor) retention bonus. A member on leave without pay associated with a flexible service determination has been added to the table and the periods where they are not paid do not count as effective service for the bonus. This approach is consistent with the current treatment for a member on part-time leave without pay.

Section 4 amends the table at subsection 3.5.39.2, which lists the leave types and activities that count towards effective service for the Navy – Marine Technical and Electronics Technical (sailors) retention bonus. A member on leave without pay associated with a flexible service determination has been added to the table and the periods where they are not paid do not count as effective service for the bonus. This approach is consistent with the current treatment for a member on part-time leave without pay.

Sections 5 and 6 amend the table at subsection 3.5.70.3 of the Principal Determination, which lists the leave types and activities that count towards effective service for the Navy – Individuals critical to Navy capability retention bonus.

- Section 5 inserts an exception into table item 3 of subsection 3.5.70.3 for members on leave without pay (flexible service determination). These members are now covered by table item 4A inserted by section 6 of this Determination.
- Section 6 inserts table item 4A to subsection 3.5.70.3 for members on leave without pay (flexible service determination) and the periods where they are not paid do not count as effective service for the bonus. This approach is consistent with the current treatment for a member on part-time leave without pay.

Schedule 1 Part 4 amends Chapter 4 of the Principal Determination, which sets out provisions dealing with allowances and reimbursements for members of the ADF. The following changes are made to the Principal Determination.

- Section 1 amends paragraph 4.1.12.2.d of the Principal Determination, which sets out the matters a directing member must consider before directing a member to perform higher duties. It provides that a directing member must be satisfied that the position can be undertaken on a part-time basis in assessing a member's eligibility to the payment of higher duties allowance. The paragraph has been amended to include the provisions apply to a member on a flexible service determination.
- Section 2 amends the title of section 4.1.15, consequential upon the changes made by Schedule 1 Part 4 section 3 of this Determination.
- Section 3 repeals and substitutes subsection 4.1.15.1, which sets out the minimum qualifying period for eligibility to the payment of higher duties allowance. The paragraph has been amended to include a member on a flexible service determination.
- Section 4 inserts an exception into subsection 4.1.17.3, which specifies that the trial period used to assess a member's competence to perform higher duties is limited to 3 months. The exception provides that the trial period may be extended for a member on periods of leave without pay (flexible service determination).
- Sections 5 and 6 amend subsection 4.6.6.4, which specifies that a pro rata amount of the annual executive vehicle allowance is to be paid to a member on part-time leave without pay. The subsection has been amended to include a member on a flexible service determination.

Schedule 1 Part 5 amends Chapter 5 of the Principal Determination, which sets out provisions dealing with leave for members of the ADF. The following changes are made to the Principal Determination.

- Section 1 substitutes table item 11 of subsection 5.1.3.2. The description of leave without pay identifies that leave without pay is a means by which nonworking periods are managed for members on a flexible service determination undertaking a weeks per month pattern of service.
- Section 2 inserts a new section 5.3.10A which provides that when a member on flexible service is unfit for duty for health reasons and they are granted medical absence, the period of medical absence applies during the member's pattern of service. If the member on flexible service determination is unfit for duty for health reasons on a nonworking day, they may not be granted medical absence for that day. This approach is consistent with the current arrangements for members granted medical absence when they are on leave without pay or part-time leave without pay.

- Section 3 inserts subsection 5.4.22.3A, which provides that a member who purchases additional recreation leave credit may repay the amount over a maximum of 26 consecutive pay periods but must make a repayment every pay period. If the repayment occurs in a week where a member is not paid salary under their pattern of service, the member would make alternative payment arrangements with their pay office. These alternative arrangements currently apply to members on leave without pay.

- Section 4 repeals and substitutes the note in paragraph 5.4.22.4.a, which specifies that the maximum additional recreation leave credit that can be purchased by a member in a 12 month period is 20 days. The note has been amended to specify that this 20 day limit applies to a member on flexible service determination as well as a member on part-time service without pay.

- Section 5 repeals and substitutes section 5.4.29, which provides that a member on part-time leave without pay to attend a training course is not eligible for trainee leave. The heading has been amended and a new subsection 2 has been included. The rules at subsection 1 have not been amended. This new subsection provides that trainee leave may not be granted to a member on flexible service determination on a weeks per month pattern of service during their nonworking period.

- Section 6 inserts paragraph 5.4.31.3.c. Section 5.4.3 provides conditions for granting recreation leave including the limitation that recreation leave must be granted as whole days. In the Defence pay system a whole day is taken to be 8 hours. The new paragraph provides that a whole day for a member on a flexible service determination granted recreation leave will be the hours the member would normally work on the day under their pattern of service.

- Section 7 repeals and substitutes the exception to subsection 5.4.33.3, which provides that recreation leave may only be granted in full days. The exception to this is that a member on part-time leave without pay may be granted recreation leave for the hours they would usually have worked on that day. The amendment adds a new exception to provide that a member under a flexible service determination on a weeks per month pattern of service may be granted recreation leave for days within their pattern of service.

- Section 8 inserts an exception to subsection 5.5.9.1, which provides that long service leave may be granted up to the member's long service leave credit. Long service leave cannot be granted on a day for which the member has already been granted another leave type. This subsection has been amended to specify that a member on a flexible service determination cannot be granted long service leave on a nonworking period. This limitation recognises that a member on flexible service is already on either part-time leave without pay or leave without pay on their nonworking period.

- Section 9 repeals and substitutes subsection 5.6.14.1, which provides that the maternity leave arrangements in this section do not apply to a member on Reserve service. This subsection has been amended to clarify that the maternity leave arrangements in this section do not apply to a member on a flexible service determination undertaking a weeks per month pattern of service. The reader is directed to a new section 5.6.14A, consequential upon section 11 of Schedule 1 Part 5 of this Determination, that sets out the maternity leave arrangements for a member on a flexible service determination undertaking a weeks per month pattern of service.
Section 10 inserts a new section 5.6.14A, which provides maternity leave arrangements that apply to the first 14 weeks of paid maternity leave for a member on flexible service. The subsections are set out below.

- Subsection 5.6.14A.1 provides that this section applies to a member on a flexible service determination undertaking a weeks per month pattern of service.
- Subsection 5.6.14A.2 provides how flexible service interacts with paid maternity leave. All nonworking periods that fall within the 14 weeks of maternity leave would remain as leave without pay. The member would not be eligible to be paid during these periods. All working periods that fall within the 14 weeks of maternity leave are taken to be paid maternity leave. The member would be eligible to be paid during these periods. This approach is consistent with the current treatment of permanent members who commence maternity leave when they are on part-time leave without pay or leave without pay.
- Subsection 5.6.14A.3 provides that the period of paid maternity cannot be extended beyond 14 weeks from the day the member started their maternity leave absence.
- Subsection 5.6.14A.4 provides that a member on flexible service determination cannot substitute their leave without pay for another leave type. This is in accordance with the general rules for maternity leave, which specify that paid maternity leave must be taken in the first 14 weeks of maternity leave.
- Subsection 5.8.14A.5 provides that a member is not entitled to paid maternity leave until they have completed 12 months qualifying service. This is in accordance with the general rules for maternity leave. Qualifying service is defined in section 5.6.3 of the Principal Determination.
- Subsection 5.8.14A.6 provides what happens when a member completes their qualifying service after their child has been born. When the member has completed their qualifying service they can start their period of paid maternity leave. This is in accordance with the general rules for maternity leave.
- Subsection 5.8.14A.7 provides that a multiple birth or adoption is treated as a single event for maternity leave. This is in accordance with the general rules for maternity leave.

Section 11 inserts an exception to subsection 5.6.15.1, which provides how paid maternity leave taken at half pay affects the period of paid maternity leave. The exception excludes members on a flexible service determination undertaking a weeks per month pattern of service from taking paid maternity leave at half pay. As a member on flexible service is already restricting their salary through leave without pay, they cannot access another pay restriction at the same time.

Section 12 repeals and substitutes subsection 5.6.20.5 amended to include the requirement for a member on a flexible service determination to apply to resume duty on completion of the period of required absence. The period of required absence applies to the first 6 weeks following the birth of the child.

Section 13 adds a note at the end of subsection 5.9.18.2 to point to other provisions that are relevant to members on flexible service determination undertaking a weeks per month pattern of service. This highlights that these members are dealt with under another provision.

Section 14 inserts section 5.10.5A, which provides the leave without pay conditions for a member on a flexible service determination undertaking a weeks per month pattern of service. The subsections are set out below.

- Subsection 5.10.5A.1 provides that this section applies to a member on a flexible service determination undertaking a weeks per month pattern of service.
- Subsection 5.10.5A.2 provides that the member is on leave without pay during their nonworking periods.
Section 15 inserts an exception to subsection 5.10.6.1, which provides that a member is not eligible to an allowance during a period of leave without pay. The exception provides that subsection 1 does not apply to a member on flexible service determination (weeks per months pattern of service).

Section 16 repeals and substitutes section 5.10.11, which provides that a member on Reserve service is not eligible to part-time leave without pay. The section is amended by the addition of a member on a flexible service determination. As a member on a flexible service determination is either deemed to be on part-time leave without pay or is on leave without pay (flexible service determination), they cannot apply for another part-time leave without pay arrangement at the same time.

Section 17 inserts subsection 5.12.2.5, which provides public holidays that are to be observed by members. The amendment provides that for a member on a flexible service determination, public holidays only apply if they fall on a working day in their pattern of service.

Schedule 1 Part 6 amends Chapter 7 of the Principal Determination, which sets out provisions dealing with housing and meals for members of the ADF. The following changes are made to the Principal Determination.

Section 1 repeals and substitutes section 7.1.7, which provides when an allowance for housing assistance is not payable. The amendment provides that a member on a flexible service determination remains entitled to housing benefits.

Section 2 repeals and substitutes paragraph 7.3.12.1.c, which sets out the eligibility conditions to qualify for the home purchase assistance scheme. Paragraph 7.3.12.1.c specifies that a member must be expected to serve in the location where they purchased their home for 12 months after the purchase. The amendment provides that a member on a flexible service determination who is away from the location of their home during their nonworking periods, is still taken to be serving in the location of that home for the purpose of eligibility to the home purchase assistance scheme.

Section 3 amends subsection 7.4.27.1, which identifies who must make a contribution to living-in accommodation at the leave without pay rate. The amendment excludes members on a flexible service determination (weeks per month pattern of service). Separate contribution arrangements for these members are provided, consequential upon Schedule 1 Part 6 section 4 of this Determination.

Sections 4, 5, 6, 9, 10 and 14 amend the Principal Determination by providing accommodation contribution rates for members on a flexible service determination on a weeks per month pattern of service for the various types of housing members live in. As described in the ADF Military Personnel Manual a member on this pattern of service may undertake the arrangements over a monthly (28 day) cycle:

The amendments provide that for all types of accommodation the member contributes the normal rate for their rank and living arrangements unless their pattern of service is 1 week on, three weeks off. These members must contribute 150% the normal rate. This is based on a 50% threshold where the number of days the member does not work in the period set out in their flexible service determination is less than the number of days they do work. The following specific changes are made to contribution rates for members on a flexible service determination on a weeks per month pattern of service.

- Section 4 inserts section 7.4.27A, which provides contribution rates for living-in accommodation.
Section 5 inserts an exception into subsection 7.6.20.2, which provides contribution rates for a rent band choice home for members who choose to accept an offer above their rank group. The exception provides that a member on a flexible service determination on a weeks per month pattern of service contributes 150% of the normal rate.

Section 6 inserts subsection 7.6.21.2, which provides contribution rates for a rent band choice home for members who choose to accept an offer below their rank group. The exception provides that a member on a flexible service determination on a weeks per month pattern of service contributes 150% of the normal rate.

Section 9 inserts section 7.6.55A, which provides contribution rates for a member in a Service residence or rent band choice accommodation.

Section 10 inserts section 7.7.14A, which provides contribution rates for a member in member without dependants or member with dependants (unaccompanied) choice accommodation.

Section 16 inserts section 7.8.35A, which provides contribution rates for members in a rented home for which rent allowance is payable.

- Section 7 inserts paragraph 7.6.50.2.d. The section provides that a member on leave without pay is not eligible to live in a Service residence. The new paragraph provides that the section does not apply to a member on leave without pay (flexible service determination).
- Section 8 inserts subsection 7.6.51.1A to make it clear that that section 7.6.51 also applies to members in rent band choice accommodation.
- Section 11 inserts paragraph 7.7.19.2.d. The section provides that a member on leave without pay is not eligible for member without dependants or member with dependants (unaccompanied) choice accommodation. The new paragraph provides that the section does not apply to a member on leave without pay (flexible service determination).
- Section 12 amends subsection 7.8.19.2 which provides provisions on working out rent allowance. The formula currently refers to the contribution rates set out in the Annex to Division 3. The amendments extend the rule to cover the contribution rules set out within the Division, as well as the Annex.
- Section 13 inserts paragraph 7.8.34.2.c. The section provides that a member on leave without pay is not eligible for rent allowance. The new paragraph provides that the section does not apply to a member on leave without pay (flexible service determination).

Schedule 1 Part 7 amends Chapter 10 of the Principal Determination, which sets out provisions dealing with clothing and personal effects for members of the ADF. The following changes are made to the Principal Determination.

Section 1 inserts section 10.1.5, which provides that a member on a flexible service determination on a weeks per month pattern of service is eligible for uniform allowance only on the working days of their pattern of service. This approach is consistent with the current treatment for a member on part-time leave without pay.

Consultation

Navy, Army and Air Force were consulted during the development of this Determination.

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 2017/8, Benefits under a flexible service determination – interim arrangements

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 Determination amends Defence Determination 2016/19, Conditions of service.

The purpose of this Determination is to set out conditions of service benefits that apply to a member of the permanent forces for whom the CDF has made a flexible service determination under section 23 of the Defence Act 1903, introduced by the Defence Legislation Amendment (First Principles) Act 2015 on 1 July 2016. Flexible service was introduced to provide greater flexibility for permanent members in line with contemporary community standards of employment.

Pending the finalisation of a comprehensive remuneration and conditions of service arrangement specifically for members undertaking flexible service, this Determination provides interim arrangements which leverage off existing leave without pay provisions.

Human rights implications

Right to the enjoyment of just and favourable conditions of work

The protection of a person's right to remuneration engages Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 guarantees just and favourable conditions of work, including remuneration, safe and healthy conditions, equal opportunity, rest, leisure and reasonable limitation of working hours.

This Determination provides remuneration for members undertaking flexible service that is in proportion to the hours they work. Flexible service allows members of the permanent forces to reduce the hours they normally work but still meet their full-time service obligations. Flexible service may be accessed for many reasons including, having more time for parenting responsibilities, to pursue study or other personal goals, or to transition from working to retirement.

The right of everyone to the opportunity to gain their living by work engages Article 6 of the International Covenant on Economic, Social and Cultural Rights. Article 6 guarantees that parties to the covenant will take appropriate steps to safeguard the right of everyone to the opportunity to gain their living by work which they freely choose or accept.

This Determination introduces a different way for people to work in the permanent forces. Prior to the introduction of flexible service the opportunity to join or remain in the permanent forces was limited to a person who could work on a full-time basis. As a contemporary employment arrangement flexible service enhances the opportunity for a person to serve in the permanent forces but is unable to work on a full-time basis.

Conclusion

This Determination is compatible with human rights because it advances the protection of human rights.

Lisa Annette Arnold, Acting Assistant Secretary People Policy and Employment Conditions