EXPLANATORY STATEMENT

Defence Determination, Conditions of service Amendment Determination 2020 (No. 3)

This Determination amends Defence Determination 2016/19, Conditions of service (the Principal Determination), made under section 58B of the Defence Act 1903 and in accordance with subsection 33(3) of the Acts Interpretation Act 1901 (AI 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 AI Act.

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

- Chapter 1 sets out provisions dealing with definitions and interpretation of concepts relevant to pay and conditions for members of the ADF.
- Chapter 2 sets out provisions dealing with joining and leaving the ADF.
- Chapter 3 sets out provisions dealing with salaries and bonuses for members of the ADF.
- Chapter 4 sets out provisions dealing with allowances and reimbursements for members of the ADF.
- Chapter 6 sets out provisions dealing with relocations on posting in Australia for members of the ADF.
- Chapter 7 sets out provisions dealing with housing and meals for members of the ADF.
- Chapter 8 sets out provisions dealing with members of the ADF and their dependants.
- Chapter 12 sets out provisions dealing with overseas conditions of service for members of the ADF.
- Chapter 13 sets out provisions dealing with short-term duty overseas for members of the ADF.
- Chapter 14 sets out provisions dealing with relocating to or from long-term posting overseas for members of the ADF.
- Chapter 15 sets out provisions dealing with living and working on long-term posting overseas for members of the ADF.
- Chapter 16 sets out provisions dealing with overseas hardship locations for members of the ADF.

The purpose of this Determination is to provide the following:

- To remove provisions that are specific to members of the Air Force who are officers and have been directed to act in the position of a Commanding Officer for which higher duties allowance would be paid. This amendment is a consequence of changes made to the Air Force employment categories by the Defence Force Remuneration Tribunal which take effect on 5 March 2020.

  Officers in the Air Force who are currently receiving higher duties allowance under section 4.1.28 of the Principal Determination will continue to receive the allowance under the savings provisions of this Determination until the direction to act expires or is revoked. Officers in the Air Force who are subsequently directed to act in the position of a Commanding Officer will still be eligible to receive higher duties allowance under the general higher duties allowance provisions provided in the Principal Determination.

- Rates for travel costs for members who travel to Mali on short term duty. Travel costs are used in the calculation of meals and incidentals for a member.
To provide that days spent on deployment count towards the qualifying period for hardship and location allowances.

To restructure hardship allowance and location allowance provisions to make them clearer for the reader to understand.

To make minor technical amendments.

To update directly conferred powers as a consequence of organisational change.

To contemporise the drafting style to promote consistency across the Principal Determination.

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

Section 2 provides that this instrument commences 5 March 2020.

Section 3 provides that this instrument has authority under section 58B of the Defence Act.

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—Air Force: higher duties allowance amendments

Section 1 amends paragraph 4.1.12.2.a of the Principal Determination which provides the conditions and sets out relevant conditions for the payment of higher duties allowance. The amendment omits the exception that references section 4.1.28, which is being omitted from the Principal Determination by section 3 of this schedule.

Section 2 amends section 4.1.19 of the Principal Determination which provide the basis for the payment of higher duties allowance. The amendment omits table item 2 which relates to higher duties allowance paid under section 4.1.28. Section 4.1.28 is being omitted from the Principal Determination by section 3 of this schedule.

Section 3 omits section 4.1.28 of the Principal determination which sets out the rules for the payment of higher duties allowance to an officer in the Air Force directed at a higher rank in a Commanding Officer position.

Schedule 2—Overseas travel costs amendments

Section 1 amends Part 1 of Annex 13.3.A of the Principal Determination which sets out the travel costs for specific locations that are used for members holding a rank of Brigadier or higher. The amendment inserts a new table item to include travel costs for Mali.

Section 2 amends Part 2 of Annex 13.3.A of the Principal Determination which sets out the travel costs for specific locations that are used for members holding a rank of Colonel or lower. The amendment inserts a new table item to include travel costs for Mali.

Schedule 3—Hardship allowance and location allowance amendments

Section 1 amends section 16.1.9.1 of the Principal Determination which provides a list of criteria the Chief of the Defence Force must consider when making decisions under specific sections of the Principal Determination. Section 1 amends the references to the specific section locations which are changed by sections 2 and 4 of this Schedule.

Section 2 omits and substitutes section 16.2.4 of the Principal Determination which provided the qualifying period for hardship allowance, when a member is eligible to be paid hardship allowance and when a member ceases to be eligible for the allowance. Section 2 divides the provisions into the following three sections:

- Section 16.2.3A provides definitions of terms used in the Division. Defining the terms allows the provisions to be simplified. The amendment permits duty performed in a location for which deployment allowance is payable to be counted towards the qualifying period to be eligible for hardship allowance.
• Section 16.2.3B provides when a member becomes eligible member for hardship allowance, and invokes the dual Commonwealth benefit rule under section 16.1.5.

• Section 16.2.4 provides when an eligible member is paid hardship allowance.

Section 3 omits and substitutes section 16.2.6 of the Principal Determination which provided when a member may be paid hardship allowance if temporarily absent from the hardship location. This is now provided under section 16.2.4, consequential upon section 2 of this Schedule. Section 16.2.6 now provides when eligibility for hardship allowance ceases.

Section 4 omits and substitutes section 16.2A.4 of the Principal Determination which provided the qualifying period for location allowance, when a member is eligible to be paid location allowance and when a member ceases to be eligible for the allowance. Section 4 divides the provisions into the following three sections:

• Section 16.2A.3A provides definitions of terms used in the Division. Defining the terms allows the provisions to be simplified. The amendment permits duty performed in a location for which deployment allowance is payable to be counted towards the qualifying period to be eligible for location allowance.

• Section 16.2A.3B provides when a member becomes eligible for location allowance, and invokes the dual Commonwealth benefit rule under section 16.1.5.

• Section 16.2A.4 provides when an eligible member is paid location allowance.

Section 5 omits and substitutes section 16.2A.6 of the Principal Determination which provided when a member may be paid location allowance if temporarily absent from the hardship location. This is now provided under section 16.2A.4, consequential upon section 4 of this Schedule. Section 16.2A.6 now provides when eligibility for location allowance ceases.

Schedule 4—Miscellaneous amendments

Section 1 amends subsection 1.3.83.1 of the Principal Determination which provides a “See” note that cross-references the section for the definition of “Normally lives with”. The amendment omits the note and substitutes “Note: section 1.3.83 defines ‘Normally lives with’.” which promotes consistency.

Section 2 amends section 1.3.83 of the Principal Determination which provides a definition of “dependants”. The amendment inserts paragraph 1.3.83.1.f to expressly include dependants recognised under section 1.3.84 “Dependant with special needs” and section 1.3.85 “Dependants recognised by CDF” to ensure all categories of dependants are included within this definition of the Principal Determination.

Section 3 omits subsection 1.3.83.2 of the Principal Determination which provides that if a dependant under sections 1.3.84 and 1.3.85 does not live with the member, then the dependant is taken to normally live with the member. This subsection is inserted in subsection 1.3.87.4 by section 4 of this Schedule.

Section 4 amends section 1.3.87 of the Principal Determination which provides the definition for “normally lives with”. The amendment is consequential to section 3 of this Determination and enables a dependant recognised under section 1.3.84 or 1.3.85 who does not normally with the member to be treated as though they do for the purpose of the Principal Determination.

Sections 5, 18 to 29, 33 to 35, 70 and 71, 76 and 77, 79, 84 to 87 omit the text of “nil” when referencing a value throughout the Principal Determination. The amendment substitutes “nil” with “0”, “$0”, or “0%”, as appropriate.

Section 6 omits the related information in subparagraph 3.2.30.1.c.ii of the Principal Determination as the cross-referenced sections no longer exist.

Sections 7 to 10, 32, 47 and 48, 60, 65 to 67 correct minor grammatical errors in the Principal Determination which do not alter the underlying outcome for members.

Sections 11 and 12, 16, 45 and 46 omit the notes in various sections of the Principal Determination that are not legislative in effect. The amendments improve the readability of the Principal Determination and contemporise the drafting style.
Section 13 omits and substitutes section 7.2.8 of the Principal Determination which provides the notification obligations of a member if they own, sell or buy a residential property in or near their posting location. The amendment omits the “Note” which is not legislative in effect. It also omits the “See” note that cross-references the section for the definition of “own home” and “ownership” and substitutes “Note: ‘Own home’ and ‘ownership’ are defined in Section 7.1.14” which promotes consistency.

Sections 14 and 15, 17, 30 and 31, 36 to 44, 49 to 59, and 61 amend various sections throughout the Principal Determination which specify decision makers or locations at which decisions are made. The amendments update the title of the position or location and do not alter the outcome for members. The amendments replace:

- “Housing Management Centre Manager” with “Defence Housing Australia Regional Director”.
- “Housing Management Centre” with “Defence Housing Australia Regional Office”.

Sections 62 to 64 omit the abbreviation “N/A” and substitutes the symbol “–” throughout the Principal Determination. The amendments promote consistency in drafting style across the Principal Determination and do not alter the outcome for members.

Section 68 omits and substitutes section 12.3.14A of the Principal Determination which is used for the purpose of identifying the post index for an overseas posting location. The section has been omitted and substituted on a policy neutral basis, making technical amendments only to improve readability and provide consistent references to table references.

**Post Index explained**

The post index is an indication of the relative cost of living difference between Australia and an overseas location. These figures are provided to Defence twice a year by an independent data provider. Annex 12.3.B lists the data service provider locations that are used for the post index locations under section 12.3.14A.

The data service provider does not provide specific data for each location in which Defence has personnel posted. The rule at 12.3.14A combined with Annex 12.3.B is used to determine which post index will be applied to members based on their posting location. If the post index is less than 100 the rule provides that the post index applied to the calculations cannot be less than 100 and therefore not reduce any salary or allowances.

The figures provided to Defence are based on data obtained and exchange rates at a particular time. In applying these figures Defence modifies them by the exchange rate variation between the data sample period and the time of application to ensure they remain relevant. To not do so would provide unintended benefit or disadvantage to members where there have been significant exchange rate fluctuations. This process is repeated each fortnight until the updated figures are provided.

The post index values are available for the locations listed in Annex 12.3.B column 1 on the Defence intranet. These values are the intellectual property of the data service provider and cannot be disclosed publically as they do not belong to the Commonwealth and would be in breach of the terms and conditions under which it is obtained.

Section 69 omits and substitutes the table in Annex 12.3.B which lists the post index locations and data service provider location used for determining the post index under section 12.3.14A. The amendment inserts a new posting location of New Caledonia and inserts item numbers against each entry for ease of reference.

Sections 72 to 75, 80 to 83, 89 to 92 amend Annexes 13.3.A, 15.6.A, 15.6.B, 16.A and 16.B of the Principal Determination which list locations overseas where members may be provided specific additional benefits. The amendment omits references to “Korea” and the text in the table item and inserts “South Korea” and the associated text into the same tables in the alphabetical order. The amendments do not alter the outcome for members.

Sections 78 and 88 amend sections 15.1.4.2 and 16.4.14 of the Principal Determination respectively, which make provisions for overseas conditions of service and contain powers directly conferred to Director Military People Policy. As a consequence of organisational change, references to Director
Military People Policy have been omitted and substituted with the Director Military Conditions and Housing Policy.

**Schedule 5—Transitional provision**

Section 1 provides a transitional provision of a payment to a member who would have been eligible for hardship allowance or location allowance had a provision not been inadvertently omitted on 1 July 2017 by Defence Determination 2017/18, Overseas conditions of service (Budget measure 2017-18 – Overseas allowances) amendment. Before 1 July 2017, a period of duty at a location for which deployment allowance is payable that occurred immediately before or after duty at a hardship location, also counted towards the 28 day qualifying period a member must meet to be eligible for hardship allowance or location allowance. Section 1 provides a payment equal to what a member would have received had the provision not mistakenly been omitted.

**Schedule 6—Savings**

Section 1 provides savings provisions in relation to the payment of higher duties allowance to officers in the Air Force who are directed to act in the position of a Commanding Officer. An officer who was receiving higher duties allowance under section 4.1.28 of the Principal Determination before the commencement of this Determination will continue to receive the allowance under the savings provisions of this Determination until the direction to act expires or is revoked.

Criteria are provided for the exercise of discretion under the Principal Determination, as amended by this Determination. Adverse decisions may be subject to inquiry under the ADF redress of grievance system provided under Part 7 of the *Defence Regulation 2016*. Also, a person may make a complaint to the Defence Force Ombudsman.

**Consultation**

Before this Determination was made, consultation was undertaken with Navy, Army and Air Force, Head Quarters Joint Operations Command, Defence Finance Group and International Policy Division, the Directorate of Relocation and Housing, Director of Military People Policy, and the Directorate of Military Conditions and Housing Policy.

The rule maker was satisfied that further external consultation was not required.

**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

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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

The purpose of this Determination is to provide the following:

- To remove provisions that are specific to members of the Air Force who have been directed to act in the position of a Commanding Officer for which higher duties allowance would be paid. This amendment is as consequence of changes made to the Air Force employment categories by the Defence Force Remuneration Tribunal which take effect on 5 March 2020.

- Provides travel costs for Mali, a new posting location. Travel costs are used in the calculation of meals and incidentals for a member traveling to Mali on short term duty.

- To provide that days spent on deployment count towards the qualifying period for hardship and location allowances.

- To restructure hardship allowance and location allowance provisions to make them clearer for the reader to understand.

- To make minor technical amendments to the Defence Determination 2016/19, Conditions of service, including updating directly conferred powers as a consequence of organisational change and contemporising the drafting style to promote consistency across the Determination.

Human rights implications

Schedule 1—Air Force: higher duties allowance amendments and Schedule 6 - Savings

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 and reasonable limitations.

While removing a specific form of higher duties allowance applying to members of the Air Force, this Determination ensures that members who were being paid higher duties allowance as a consequence of being directed to act in the position of a Commanding Officer continue to receive higher duties allowance under the same provisions that were in force before the commencement of this Determination.

The Schedule 1 promotes the right to just and favourable conditions of work by ensuring that members continue to receive higher duties allowance when preforming duties that are at a higher rank than that held by the member.

Schedule 2 – Overseas Travel Costs Amendments

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 and reasonable limitations.

Schedule 2 advances the right to just and favourable conditions of work by providing members who travel to Mali on short term duty with a benefit to cover the reasonable costs of meals and incidental expenses. This ensures that members do not have to pay for meals and incidental expenses with their own money when travel for service reasons.
**Schedule 3—Hardship allowance and location allowance amendments and Schedule 5—Transitional provision**

**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 and reasonable limitations.

**Right to an adequate standard of living**

The protection of a person’s right to an adequate standard of living engages Article 11 of the International Covenant on Economic, Social and Cultural Rights. Article 11 recognises the right of everyone to an adequate standard of living for them and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Australian Defence Force (ADF) members who are posted to some overseas locations may experience adverse living conditions during service. This could cause significant adverse effects on the lifestyle or welfare of members and their dependants, as a result of the living conditions at the posting location, compared with those in Australia. Those hardship conditions can include but are not limited to climate, health care facilities, infrastructure and isolation.

Schedule 3 promotes the right to just and favourable conditions of work and an adequate standard of living by ensuring members in the ADF who are posted to locations where they will experience a level of hardship will be paid an allowance to assist them to overcome that hardship.

**Schedule 4 – Miscellaneous amendments**

**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 and reasonable limitations.

**Right to an adequate standard of living**

The protection of a person’s right to an adequate standard of living engages Article 11 of the International Covenant on Economic, Social and Cultural Rights. Article 11 recognises the right of everyone to an adequate standard of living for them and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Schedule 4 amends sections of the Principal Determination that relate to the right to just and favourable conditions of work and the right to an adequate standard of living, but due to the technical nature of the amendments it does not engage with those human rights.

**Conclusion**

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

Fiona Louise McSpeerin, Assistant Secretary People Policy and Employment Conditions