

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 19

Issued by the authority of the Minister for Defence Science and Personnel

Subject- *Defence Act 1903*

Defence (Personnel) Amendment Regulation 2013 (No. 1)

Subsection 124(1) of the *Defence Act 1903* (the Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the good government of the Australian Defence Force (ADF), or for carrying out or giving effect to the Act.

The *Defence (Personnel) Regulations 2002* (the Principal Regulations) provide for, among other things, the enlistment, appointment, promotion, reduction in rank, retirement, transfer and discharge of members of the ADF.

Several reviews were conducted into aspects of Defence and the ADF culture during 2011-12. The reviews were commissioned to address ongoing areas of concern regarding inappropriate conduct in Defence. One specific review was the "Review into the Treatment of Women in the ADF" by the Australian Human Rights Commission and chaired by Commissioner Broderick (the Broderick Review). The recommendations from this and other reviews were included into the Pathway to Change implementation strategy. *Pathway to Change: Evolving Defence Culture* is Defence's response to the reviews into aspects of Defence and ADF culture. The Pathway to Change aims to provide a clear commitment to shape Defence's collective attitudes, systems and behaviours to improve capability and ensure the continued support of the Australian community.

The implementation of various recommendations from these reforms requires amending the Principal Regulations. The proposals to implement a fit and proper person provision within the mandatory decision making criteria and to have similar termination provisions for both enlisted members and officers are direct from the Pathway to Change recommendations.

The Regulation would implement a fit and proper person provision into the mandatory list of criteria that a decision-maker must consider when making a decision that affects an individual ADF member, for example appointment or enlistment, promotion, posting or termination decisions. Accordingly there are changes to the decision making criteria to ensure that a decision-maker considers that the individual is of good character having regard to their past and present conduct. For example this would require a decision-maker to take into account the criminal and ADF disciplinary record of an individual when making a decision about them under the Regulations.

A separate recommendation of the Broderick Review was to review the termination provisions for enlisted members and officers and address disparities that exist between

enlisted members and officers for specific termination reasons. A new common termination provision for both enlisted members and officers has been added to the Regulation to provide for performance, behaviour or conviction of an offence, as reasons that may lead to termination. Other termination reasons that were exclusive to enlisted members have also been added to the termination reasons for officers. Accordingly the Regulation would provide similar termination reasons for both enlisted members and officers.

The Regulation makes it clear that a decision-maker may impose a financial condition as a condition that must be complied with before granting an application to separate. Financial conditions are appropriate where a Defence member applies to separate while still subject to a service obligation (such as a member who received training opportunities or a lateral recruit with direct transport costs). Service obligations are imposed to ensure the ADF and tax payers recover reasonable value from their investment in the recruitment, initial training and development of its members (for example pilot or medical training). The member who enjoys this career development and opportunities is required to provide a minimum period of service in return for the investment in them. In some instances, a member may seek to prematurely separate while they still have an outstanding service obligation. In such circumstances, the decision-maker considers the individual member's situation and may decline the request, agree to the request and waive any service obligation or decide to refuse the application to separate until a condition has been complied with in lieu of the completion of their service obligation. The Regulation will provide legislative basis for imposition of a financial condition, based on direct costs, where a member applies to separate from the ADF before they have completed their service obligation. The scope of the financial condition, as stated above, will be limited to direct costs.

Details of the Regulation are outlined in the Attachment.

The Act specifies no condition that must be met before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Authority: This Regulation is made under the *Defence Act 1903*.

Consultation- In developing these amendments, consultation was undertaken within Defence and included:

- the three Service Groups and their legal advisers;
- Defence Legal Division;
- Directorate of Military Personnel Policy;
- Chief Finance Officer; and
- Workforce Strategic Planning.

External consultation was undertaken with:

- Attorney-General's Department (Office Parliamentary Counsel and Legislative Scrutiny Unit);
- The Department of the Prime Minister and Cabinet (Executive Council Secretariat); and
- Department of Finance and Deregulation (Office of Best Practice Regulation advised that a Regulation Impact Statement was not required) (14530 refers).

Statement of Compatibility with Human Rights

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

Defence (Personnel) Amendment Regulation 2013 (No. 1)

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 Instrument

The *Defence (Personnel) Regulations 2002* (the Principal Regulations) provide for, among other things, the enlistment, appointment, promotion, reduction in rank, retirement, transfer and discharge of members of the ADF.

Several reviews were conducted into aspects of Defence and the ADF culture during 2011-12. The reviews were commissioned to address ongoing areas of concern regarding inappropriate conduct in Defence. One specific review was the "Review into the Treatment of Women in the ADF" by the Australian Human Rights Commission and chaired by Commissioner Broderick (the Broderick Review). The recommendations from this and other reviews were included into the Pathway to Change implementation strategy. *Pathway to Change: Evolving Defence Culture* is Defence's response to the reviews into aspects of Defence and ADF culture. The Pathway to Change aims to provide a clear commitment to shape Defence's collective attitudes, systems and behaviours to improve capability and ensure the continued support of the Australian community.

The implementation of various recommendations from these reforms requires amending the Principal Regulations. The proposals to implement a fit and proper person provision within the decision making criteria and to have similar termination provisions for both enlisted members and officers are direct from the Pathway to Change recommendations.

This Legislative Instrument incorporates three subject areas:

1. Fit and proper person (good character)-Amend the Principal Regulations to incorporate the addition of a fit and proper person consideration into the list of criteria for decisions affecting individual members. This amendment was a recommendation from Defence reviews, in particular, in relation to combating unacceptable sexual conduct in the ADF and unacceptable sexual conduct towards women.

2. Termination reasons- Amend the Principal Regulations to closely align the termination reasons for officers and enlisted members. This amendment was a recommendation from Defence reviews to remove the disparity and differences that currently exist for specific termination reasons. For example a new common termination provision for both officers and enlisted members has been added to provide for performance, behaviour, or conviction of an offence, as reasons that may lead to termination. Other termination reasons that were exclusive to enlisted members have now also been added to the termination reasons for officers.

3. Financial condition -Amend the Principal Regulations to provide clarity that a decision-maker may impose a financial condition as a condition of separation for a Defence member who applies to separate with a service obligation (such as a member who received a career development opportunity or a lateral recruit with transport costs). Service obligations are imposed to ensure the ADF recovers reasonable value from its investment in the recruitment, initial training and development of its members. It is a commitment by the member to enjoy career development/opportunities and in return they are required to provide a minimum period of service. In some instances, a member may seek to prematurely separate while they still have an outstanding service obligation in which case the decision-maker may refuse the application to separate until the member has satisfied a monetary condition.

Human rights implications

The Legislative Instrument engages the following human rights:

- The right to work, which includes the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted, and will take appropriate steps to safeguard this right. **(Article 6(1) of the International Covenant on Economic, Social and Cultural Rights).(ICESCR)**
- This right shall include technical and vocational guidance and training programmes, policies and techniques to achieve development and employment under conditions safeguarding individual freedom. **(Article 6(2) of the ICESCR).**

The Instrument will limit the right to work with this Article as individuals who fail to meet the fit and proper person criteria may be prevented from joining or remaining in the ADF (Article 6(1)).

The financial condition on a release from a service obligation may limit the conditions of training (Article 6 (2)).

- Just and favourable conditions of work in particular safe and healthy working conditions. **(Article 7(b) of the ICESCR).**
- Just and favourable working conditions in particular equal opportunity to be promoted in employment subject to no considerations other than those of seniority and competence. **(Article 7(c) of the ICESCR).**

The Instrument will engage and promote the just and favourable conditions in this Article. It will promote safety and healthy working conditions by ensuring that ADF personnel, including women, are protected from abuse or harassment in the workplace by ensuring relevant practices and policies are in place to prevent inappropriate workplace conduct. (Article 7(b)).

It will also limit the right to just and favourable conditions by considering a person's past and present behaviour including ADF records and criminal records. (Article 7(c)).

Fit and proper person (good character)-

a. The limitation on the right to work is aimed at promoting safer working conditions for ADF personnel, particularly women. The fit and proper person assessment has regard to the past and present conduct of an individual and will include consideration of both criminal and ADF disciplinary records. The objective is to ensure that all relevant information including criminal history, and in particular sexual criminal history, is available to the decision maker when making a decision whether an ADF member is able to perform the inherent requirements of their job.

b. There is a rational connection between the limitation and the objective. The addition of this fit and proper person assessment for decision-makers will contribute to the overall quality, conduct and character of ADF members. Where an individual has a criminal history or incident which could be clearly considered to impact on the ADF and its members the decision maker can establish the link towards the level of offence and the inherent requirements of the job to provide a safe and healthy workplace and workforce.

c. The limitation is proportional to the objective. The insertion of a fit and proper person assessment in the decision making criteria of the Principal Regulations is to provide the decision maker or determinant with a set of guidelines for their consideration when making decisions affecting an individual. There are a number of mechanisms and reviews in place to assure that the limitation of just and work rights are circumscribed to prevent disproportionate usage. The *Defence Force Regulations* 1952 formally prescribe the legislation for redress of grievances. Departmental policies provide detailed processes for reviews of decisions and specialised Directorates within Defence have responsibility for the management of policies, procedures and expertise in the management of grievances and complaints. Examples of outcome processes could include alternate dispute resolution and a review of the decision making process to ensure fairness and equity. The hierarchical or chain of command is embedded in these grievance handling processes and if required the complainant can be referred to a senior officer for deliberation. There are also external bodies such as the Defence Ombudsman, the Ombudsman and the relevant Human Rights Commissions who are available to assist complainants affected by Defence decision making. In all situations the process of natural justice and individual merit assessment are applicable.

Financial condition on separation with a service obligation-

a. Ensuring that the ADF and tax payers recover reasonable value from their investment in recruitment, training and development of ADF members (for example medical or pilot training). There is a limiting right to the ADF individual on the conditions of such training, and also limits the protection of a person's right to work and the full realisation of this right with training programs, policies and techniques to achieve development and the enjoyment of just and favourable conditions of work.

b. This amendment assures that the career development and opportunities provided to members who entail a service obligation can be potentially recovered based on individual circumstances when a member wished to prematurely separate from Defence. This provides Defence and the tax payer with a reasonable value for the investment and the individual member has an option to be released from any tenure obligation.

c. Most ADF members comply with their respective service obligation. In certain individual circumstances they may need to apply for a premature separation before this obligation has expired. To balance this, a financial re-imbursement based on direct costs only may be stipulated as a condition of separation. As previously outlined above, there are grievance handling, formal redress and complaint handling mechanisms in place to ensure that powers are sufficiently circumscribed to prevent misuse. There are also provisions where compelling and compassionate circumstances may be sufficient to waive any financial penalty.

Additionally this Legislative Instrument engages the following human rights:

- Equality and non-discrimination to all individuals without distinction of any kind, including "other status". **(Article 2(1) and 26 of the International Covenant on Civil and Political Rights) (ICCPR) and Article 2(2) of the ICESCR.**

The rights to equality and non-discrimination are contained in Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR. Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR contain identical lists of prohibited grounds of discrimination. They are: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or "other status". The grounds of prohibited discrimination are not closed. The United Nations Human Rights Committee (HRC) has not attempted to define "other status" preferring instead to decide it on a case-by-case basis. Decisions by the HRC suggest that a clearly definable group linked by their common status is likely to fall under the definition of "other status".

Not all treatment that differs among individuals or groups on the grounds mentioned above will amount to prohibited discrimination. Differential treatment will be justifiable provided that it is aimed at achieving a purpose which is legitimate, based on reasonable and objective criteria, and proportionate to the aim to be achieved.

The Instrument will allow a criminal record or ADF disciplinary record to be taken into account when assessing whether ADF personnel are able to perform the inherent requirements of their job. To the extent that consideration of a criminal record may be considered to constitute differential treatment such to engage the operation of the rights to equality and non-discrimination, the differential treatment is for a legitimate objective, based on reasonable and objective criteria, and is proportionate to the objective to be achieved.

Fit and proper person (good character)-

a. To ensure decision makers have all relevant information before them, including any criminal history, and in particular sexual criminal history, when assessing whether an ADF member is able to perform the inherent requirements of their job. This is aimed at promoting a safe working environment within the ADF, particularly for women.

b. The limitation is based on reasonable and objective criteria. The fit and proper person assessment will apply equally to all ADF personnel. The decision maker must

take into account the individual's character and past and current conduct when making a decision about the individual.

c. Any limitation to the right to equality and non-discrimination is restrictive to the basis of ensuring that the individual is of good character based on their past and present conduct and behaviour. The ADF and the community has expectations that an ADF member is of good character and contributes to the health and safety of their service colleagues and has no behavioural patterns or serious misconduct incidents which would infringe this trust. As previously outlined above, there are grievance handling, formal redress and complaint handling mechanisms in place to ensure that powers are sufficiently circumscribed to prevent misuse.

Termination reasons- This item does not engage any of the applicable rights or freedoms. It provides both officers and enlisted members with similar termination reason provisions. Closely aligning termination provisions removes unequal treatments between enlisted members and officers.

Conclusion

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

Details of the *Defence (Personnel) Amendment Regulation 2013 (No. 1)*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Defence (Personnel) Amendment Regulation 2013 (No. 1)*

Section 2 – Commencement

This section provides for the Regulation to commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3- Authority

This Regulation is made under the *Defence Act 1903*.

Section 4 – Schedule(s)

This section provides that Schedule 1 amends the *Defence (Personnel) Regulations 2002* (the Principal Regulations).

SCHEDULE 1- AMENDMENTS

Item [1] an amended provision into Regulation 7 decision making criteria. The addition of "standards of behaviour and conduct" into the consideration required for the proper performance of duties.

Item [2] a new provision into Regulation 7 decision making criteria. New sub-regulation 7(3): If the decision or determination relates to an individual, the person must consider whether, having regard to the individual's past and present conduct, the individual is of good character.

Item [3] inserts into sub-regulation 58(2) for ADF members who transfer to the Reserves with an outstanding service obligation may incur a monetary condition.

Item [4] inserts into sub-regulation 62(2) for senior officers who transfer to the Reserves with an outstanding service obligation may incur a monetary condition.

Item [5] a minor correction to officer's termination sub-regulation 85(1aa).

Item [6] in officer's sub-regulation 85 (1) (d) to (f) provides a list of new termination reasons which are currently in the enlisted members termination reasons.

Item [7] inserts a new sub-regulation 85(1A) officer's termination reasons to include performance, behaviour or conviction of an offence or service offence.

Item [8] in enlisted member's sub-regulation 87 (1) provides termination reasons which are currently in the officer's termination reasons.

Item [9] inserts a new sub-regulation 87(1A) enlisted member's termination reasons as per the officer's in Item [5] above.

Item [10] to [12] inserts new sub-regulations 91(2), 94(2), 98(2) for ADF members who separate with an outstanding service obligation may incur a monetary condition.