

# EXPLANATORY STATEMENT

## Defence Determination, Conditions of service Amendment (Parental leave) Determination 2021 (No. 12)

This Determination amends Defence Determination 2016/19, Conditions of service (the Principal Determination), made under section 58B of the *Defence Act 1903* (Defence Act) 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* (Legislation Act). These instruments are also subject to the interpretation principles in the AI Act.

The Determination makes references to the *Maternity Leave (Commonwealth Employees) Act 1973*. This Instrument is incorporated into the Determination as in force from time to time. Section 1.2.5A of the Principal Determination specifies that a reference to an Act of Parliament or a legislative instrument to which section 14(3) of the Legislation Act applies are incorporated as in force from time to time, unless otherwise stated.

Chapter 5 of the Principal Determination sets out provisions dealing with leave for members of the Australian Defence Force (ADF).

The purpose of this Determination is to align the rules relating to additional paid parental leave with the original policy intent. Additional paid parental leave, which is being renamed to 'special paid parental leave,' is intended to provide a type of paid parental leave similar to paid maternity leave to members in limited circumstances. The leave is to be taken within the first 14 weeks of the member becoming a parent and cannot be taken if the child's other parent, if there is one, is able to care for the child. The member must be the primary care giver of the child while they are on special paid parental leave.

The Determination also makes structural amendments to Chapter 5 Part 7 of the Principal determination to aid readability. These do not affect the benefits provided under the Principal Determination, as otherwise amended by this Determination.

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

Section 2 provides that this instrument commences on 8 July 2021.

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Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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

Section 1 inserts a new division heading in Chapter 5 Part 7 of the Principal Determination. Inserting the heading "Division 1: General provision" indicates that the provisions apply to all divisions within Part 7 and reflects contemporary drafting standards.

Section 2 omits and substitutes section 5.7.1 of the Principal Determination, which provides the purpose of paid parental leave. The section has been redrafted to reflect contemporary drafting standards.

Section 3 omits section 5.7.2 of the Principal determination which provided who Part 7 applies to. This has been removed as it is now provided under each division within Part 7.

Section 4 omits and substitutes the definition of parental leave from section 5.7.4 of the Principal Determination. The definition has been redrafted to insert a new definition of dual serving parent. This definition provides that a person is a dual serving parent if they have a child, and the child's other parent is also a member.

Section 5 inserts the following into Chapter 5 Part 7 Division 1 of the Principal Determination:

- section 5.7.4A which requires a member to apply for parental leave using the approved form. This was previously provided under section 5.7.11 of the Principal Determination and is removed by section 11 of this Schedule.
- section 5.7.4B which provides the maximum amount of parental leave a member can take, and in what circumstances this amount is reduced. This was previously provided under section 5.7.10 of the Principal Determination and is removed by section 10 of this Schedule. The section also provides that when a member becomes a parent of more than one child as a consequence of a multiple birth, the adoption of more than one child at the same time, or because more than one child has been placed in the member's or their partner care under the same permanent care order, the member is only eligible for one benefit in respect to the children.
- section 5.7.4C which specifies that dual serving parents are eligible for a combined total of 18 weeks of paid maternity leave, paid parental leave and special paid parental leave in relation to a child. This was previously provided under section 5.7.9 of the Principal Determination and is removed by section 9 of this Schedule. As a consequence of this rule, the total amount of the specified leave types for the child's parents is 18 weeks, for example: one parent may take 14 of the 18 weeks' leave which means the other parent can only take up to the remaining 4 weeks' leave.
- section 5.7.4D which provides that members on a flexible service determination can only taken parental leave on days that are in their pattern of service, and that a nonworking period does not break a period of leave. This was previously provided under section 5.7.8 of the Principal Determination and is removed by section 8 of this Schedule.

Section 5 also:

- creates Division 2: Paid parental leave by inserting the title under the new section 5.7.4D. The amendment helps distinguish between the different types of parental leave provided by Chapter 5 Part 7.
- inserts Section 5.7.4E which specifies who paid parental leave applies to.

Section 6 omits and substitutes subsection 5.7.6 of the Principal Determination which provided additional paid parental leave, including when a member is eligible, how much leave they are eligible for, how to apply for the leave, and when a member does not have to complete their qualifying service to access the benefit. This section has been replaced by Division 3: Special paid parental leave, which replaces additional paid parental leave. The new division includes:

- section 5.7.6 which provides the purpose of special paid parental leave.
- section 5.7.6A which identifies members who Division 3 applies to. To be able to receive special paid parental leave members:
  - must not be eligible for paid maternity leave,
  - must be the primary caregiver of the child for the duration of the special paid parental leave, and
  - must have completed their qualifying service.

In addition to the above, the child in relation to whom the special paid parental leave will be taking must be a dependant of the member, and have lived with the member for less than 66 weeks. The latter applies particularly in cases when the child has been living with the member before an adoption or court order has been issued. It has been inserted because leave in relation to a child who has been living with the member for more than 66 weeks would be inconsistent with the purpose of special paid parental leave.

- section 5.7.6B which identifies members who are not eligible for special paid parental leave.
- section 5.7.6C which provides that members who are a dual serving parent are eligible for up to 10 weeks special paid parental leave. The section also provides that despite one of the child's

parents being on maternity leave, the other parent may still be eligible for up to 10 weeks of special paid parental leave if the member on maternity leave is not capable of providing care for the child.

- section 5.7.6D which provides special paid parental leave to members who are not a dual serving parent (the other parent is not a member, or the member is a single, or sole parent). These members are eligible for up to 10 weeks special paid parental leave if the child does not have another parent or if the other parent is not capable of providing care for the child. The section also provides what must be considered in determining the amount of special paid parental leave the member will be provided.
- section 5.7.6E provides how special paid parental leave must be taken, including that it must be taken within 14 weeks of the birth of a child, the adoption of a child or the child being placed in the member's or their partner's care under a permanent care order. The section also provides that special paid parental leave must be taken in a single continuous period, and can be taken in any combination of full pay or half pay that is not more than the equivalent amount of full-time leave. Taking special paid parental leave at half pay does not extend the period in which the leave can be taken.
- section 5.7.6F provides that special paid parental leave counts as effective service.

Section 6 also:

- creates Division 4: Unpaid parental leave by inserting the title under the new section 5.7.6F. The amendment helps distinguish between the different types of parental leave provided by Chapter 5 Part 7.
- inserts section 5.7.6G which provides when a member is eligible for unpaid parental leave.

Section 7 inserts the term "effective" into subsection 5.7.7.2 of the Principal Determination, which makes clear that unpaid parent leave does not count as effective service.

Sections 8, 9 10 and 11 omit sections 5.7.8, 5.7.9, 5.7.10 and 5.7.11 of the Principal Determination which have been incorporated into the Principal Determination by section 5 and 6 of this Schedule.

### Schedule 2—Savings

Section 1 provides that if an application for additional paid parental leave has been received before 8 July 2021 a decision made on the application is to be made under Defence Determination 2016/19, Conditions of service, as in force immediately before the commencement of this Determination.

Section 2 provides that for a person who was approved additional paid parental leave before 8 July 2021, section 5.7.6 of Defence Determination 2016/19, Conditions of service, as in force immediately before the commencement of this Determination applies as though Schedule 1 of this Determination has not commenced.

Decisions that are made under the Principal Determination, as amended by this Determination, 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.

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*

## ***Defence Determination, Conditions of service Amendment (Parental leave) Determination 2021 (No. 12)***

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 align the rules relating to additional paid parental leave with the original policy intent. Additional paid parental leave, which is being renamed to 'special paid parental leave,' is intended to provide a type of paid parental leave similar to paid maternity leave to members in limited circumstances. The leave is to be taken within the first 14 weeks of the member becoming a parent and cannot be taken if the child's other parent, if there is one, is able to care for the child. The member must be the primary care giver of the child during while they are on special paid parental leave.

### **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 and reasonable limitations.

This Determination is compatible with human rights as it provides up to 10 weeks of 'special paid parental leave' to members in limited circumstances. Despite being more limited in availability than the currently named 'additional paid parental leave,' as a condition of service, special paid parental leave continues to be compatible with human rights in that it provides a type of paid parental leave to members who would not ordinarily be eligible for the leave. It enables members to take leave in the early days of becoming a parent of a child in circumstances when maternity leave would not be available to the member or the child's other parent, or if the birthing parent, despite being on maternity leave, is unable to care for the child.

### **Conclusion**

This Determination is compatible with human rights because it promotes the protection of human rights by providing just and favourable conditions of service.

Fiona Louise McSpeerin, Assistant Secretary People Policy and Employment Conditions