

EXPLANATORY STATEMENT

***Work Health and Safety Act 2011*
(application to Defence activities and Defence
members)
Declaration 2012₁**

ISSUED BY THE AUTHORITY OF

THE CHIEF OF THE DEFENCE FORCE

Pursuant to subsection 12D(2) of the *Work Health and Safety Act 2011* ('the Act'), the Chief of the Defence Force may, after consulting with, and obtaining the approval of, the Minister for Employment and Workplace Relations, by notice in writing, declare that specified provisions of the Act do not apply, or apply subject to such modifications and adaptations as are set out in the declaration, in relation to a specified Defence activity, a specified Australian Defence Force member, or Australian Defence Force members included in a specified class of such members.

This declaration does not limit the generality of subsection 12(D)(1).

Subsection 12D(4) of the Act provides that in making a declaration under subsection 12D(2), the Chief of the Defence Force must take into account the need to promote the objects of the Act to the greatest extent consistent with the maintenance of Australia's defence.

The Australian Government has decided that Australia's defence policy should continue to be founded on the principle of self-reliance in the direct defence of Australia and in relation to our unique strategic interests, but with a capacity to do more when required, consistent with those strategic interests that we might share with others, and within the limits of our resources. This position entails the maintenance of alliances and international defence relationships that enhance our own security and allows us to work with others when we need to pool our resources.

The maintenance of Australia's defence is therefore a broad, complex business and the *Defence White Paper 2009 - Defending Australia in the Asia Pacific Century: Force 2030* (released 2 May 2009) provides an indication of the range of activities that the Australian Government requires the Australian Defence Force to undertake in Australia's defence. First and foremost, the Australian Defence Force is required to defend Australia. This includes defending Australia against direct armed attacks by foreign state and non-state actors with the capacity to employ strategic capabilities, including weapons of mass destruction (WMD). However, the Australian Defence Force is also given a vital and unique role in supporting domestic security, including border protection and emergency response efforts.

After ensuring the defence of Australia, the second priority task for the Australian Defence Force is to contribute to stability and security in the South Pacific and East Timor. This involves conducting military operations in coalition with others as required to protect our

nationals, provide disaster relief and humanitarian assistance and, on occasion, by way of stabilisation interventions.

The next priority task for the Australian Defence Force is to contribute to military contingencies in the Asia-Pacific region, including assisting our Southeast Asian partners to meet external challenges and meeting our alliance obligations to the United States as determined by the Australian Government at the time. This involves conducting combined exercises in coalition with others as required and other forms of defence cooperation.

Finally, the Australian Defence Force has to be prepared to contribute to military contingencies in the rest of the world, in support of efforts by the international community to uphold global security and a rules-based international order, where our interests align and where we have the capacity to do so.

The concept of specified activities in the Declaration is intended to capture the more hazardous of our overseas military activities for example, combat operations such as in Afghanistan and UN peace-enforcement and peace-keeping commitments.

After consulting with, and obtaining the approval of, the Minister for Employment and Workplace Relations, the Chief of the Defence Force declares that the following sections do not apply to Australian Defence Force warlike and non-warlike operational deployments:

- 38 Incident notification
- 39 Site preservation

In respect to a particular overseas operational deployment, the officer appointed as Chief of Joint Operations will be responsible for making the initial determination for the purposes of this Declaration whether an overseas operational deployment will be considered warlike or non-warlike.

Further, after consulting with, and obtaining the approval of, the Minister for Employment and Workplace Relations, the Chief of the Defence Force declares that the following sections do not apply to Australian Defence Force members:

- 47-49 Consultation with workers
- 50-79 Health and safety representatives and work groups
- 84-89 Right to cease or direct cessation of unsafe work

Section 38 of the Act provides for the immediate notification and reporting of the death, or serious personal injury or illness of a person, or a dangerous incident, to the Commonwealth regulator, Comcare. The effect of this Declaration is that, in relation to Australian Defence Force members and Defence civilians deployed in an overseas warlike or non-warlike operation, there is no requirement to immediately report the death, or serious personal injury or illness of a person, or a dangerous incident, to Comcare.

The nature of military activities in warlike or non-warlike operations means that, absent this Declaration, section 38 creates a significant reporting obligation on the Australian Defence Force in terms of the number of incidents requiring notification to Comcare. For example, in an armed conflict situation the Australian Defence Force, consistent with the principle of military necessity, may deliberately cause the death or serious injury of other persons, expose

Australian Defence Force members, Defence civilians and others to the risk of death or serious injury caused by others, and encounter dangerous incidents created by the acts of others. Moreover, in both warlike and non-warlike operations dangerous incidents can be expected to be a routine characteristic of these operations.

In such military activities, the Australian Defence Force also faces significant challenges complying with immediate reporting. For example, where Australian Defence Force members and/or Defence civilians are embedded with coalition forces or on exchange with foreign forces overseas (whether on operations, exercises or other activities), direct communications with its members can sometimes be intermittent, limited to certain types of technology or reliant entirely upon the foreign forces lines of communication. Another example is where Australian Defence Force units must by necessity maintain radio communication silence and report only periodically due to the nature of the activity then engaged in. In the latter case, the Australian Defence Force normally requires reporting as soon as practicable.

In relation to the activities in question, the requirements for notification and reporting to Comcare would also impose substantial clerical workloads on troops deployed with limited administrative resources. In addition to the potential physical difficulties of reporting the incident within the timeframe, to do so could entail a decrease in the safety of working conditions for these personnel.

The Declaration notwithstanding, all Australian Defence Force notifiable incidents will continue to be centrally reported within Defence and, where appropriate, internally investigated. Records of these reports and investigations will be made available to Comcare on request.

Section 39 of the Act establishes the duty, as far as is reasonably practicable, to preserve the incident site until an inspector arrives or directs otherwise. The result of this Declaration is that, in relation to Australian Defence Force members and Defence Civilians in an overseas warlike or non-warlike operation, there is no requirement to preserve the incident site.

The rationale for the Declaration is twofold. First, compliance with section 39 presents a significant problem for the Australian Defence Force on any activity in a foreign State particularly where conflict or sporadic acts of violence is occurring. For example, where the Australian Defence Force undertakes a services protected evacuation in a foreign State, it will invariably not have effective control over the territory where a notifiable incident occurs particularly if the evacuation is occurring in a non-permissive hostile environment. There will therefore be significant difficulty in preserving an incident site where 'management or control' of the site by the Australian Defence Force may be tenuous, transitory and/or regulated by international arrangement or agreement and it is not desirable to further increase risk to Australian Defence Force members, Defence civilians and their evacuees by asking them to deliberate upon whether they can or can't secure an incident site.

Sections 47-49 of the Act impose the duty for a business to consult with their workers on health and safety matters. Sections 50-79 make provision for the establishment and operation of health and safety representatives and work groups. Sections 84-89 of the Act provide the right to cease or direct cessation of unsafe work.

The consequence of this Declaration is that Australian Defence Force members will not have health and safety representatives nor establish work groups in their workplaces regardless of

the location of that workplace. Additionally, Australian Defence Force members do not have the right to cease work where they are concerned about risks to their health or safety, including from an immediate or imminent exposure to a hazard. The requirements for consultation with Australian Defence Force members in a formal workplace bargaining framework, coupled with the powers granted to health and safety representatives and workers generally, are considered inimical to the discipline of the Australian Defence Force and the nature of military service. While Australian Defence Force commanders will consult where time permits with their subordinates before making any decision, on occasion this is not possible due to the nature of military activities and the legal obligation on Australian Defence Force members to obey the lawful orders of superior officers. While risk analysis and force protection are fundamental and inherent to the way the Australian Defence Force plans and conducts military activities, the exigencies of military service may ultimately require Australian Defence Force members to be ordered into harms way in Australia's defence. It would be contrary to the public interest to permit them to be able to cease or direct cessation of work if they disagreed with the decision of their superior officer on the basis of risk to health or safety.

Australian Defence Force members are required to comply with reasonable health and safety instructions, policies and procedures issued by the Australian Defence Force. Defence aims to ensure no person will suffer a serious preventable work related injury or illness. The protection of its personnel is a paramount consideration. This includes those working in Australia, deployed in an operational environment or carrying out training exercises whether in Australia or overseas. To that end, Defence has a robust Safety Management System designed to give all its workers the highest level of protection that is reasonably practicable against harm to their health, safety and welfare from hazards and risks arising at work. At times Defence will require its personnel to operate in environments of extreme risk and hazard due to the nature of military activities. However, at all times Defence is committed to managing risk to ensure that when risks are taken they are understood, accounted for, and integrated into its plans and the way it conducts military activities. This declaration is intended to preserve the key exemptions Defence had under the 1991 and 1995 Chief of Defence Force declarations to the *Occupational Health and Safety Act 1991*.

This Declaration is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Department of Education, Employment and Workplace Relations, Comcare and the Customs and Border Protection Service were consulted during the classification process.

Statement of Compatibility with Human Rights

This Declaration 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*.

This Declaration engages the following human rights:

- *The right to health is the right to the enjoyment of the highest attainable standard of physical and mental health* (article 12(1) International Covenant on Economic, Social and Cultural Rights),

- *The right to social security requires a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme* (article 9 International Covenant on Economic, Social and Cultural Rights),
- *The prohibition on interference with privacy and attacks on reputation* (article 17 of the International Covenant on Civil and Political Rights),
- *The rights to freedom of opinion, expression assembly and association* (articles 19, 20, and 21 of the International Covenant on Civil and Political Rights),
- *The right to just and favourable conditions of work, including safe and healthy working conditions* (article 7 of the International Covenant on Economic, Social and Cultural Rights).

Work Health and Safety Act 2011 (application to Defence activities and Defence members) Declaration 2012 declares that specified provisions of the Act do not apply, or apply subject to such modifications and adaptations as are set out in the declaration, in relation to specified Defence activities and Australian Defence Force members.

Legitimate objective: These rights are limited because of military necessity, both in terms of the discipline and nature of military service and for operational reasons such as where radio silence is required or where Defence is undertaking a hazardous activity in a foreign State and does not have 'management or control' of a site.

Reasonable, necessary and proportionate: The limitations on these rights are considered necessary for efficient operation and functionality of the military and consequently in the public interest, that is to meet the Australian Government's defence policy.

The Defence Safety Management System is designed to give all Department of Defence workers the highest level of protection that is reasonably practicable against harm to their health, safety and welfare from hazards and risks arising at work. With respect to Australian Defence Force warlike and non-warlike operational deployments, Defence continues to notify, report and where appropriate, investigate notifiable incidents internally and records of these reports and investigations will be made available to the Regulator on request.

Conclusion

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