

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument 2016 No.**

Issued by the authority of the Attorney-General

Subject - *Defence Force Discipline Appeals Act 1955*

*Defence Force Discipline Appeals Regulation 2016*

The *Defence Force Discipline Appeals Act 1955* establishes the Defence Force Discipline Appeal Tribunal (the Tribunal). It sets out important formalities in relation to the constitution, structure and procedure of the Tribunal and the determination of appeals.

Section 60 of the Defence Force Discipline Appeals Act provides that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect of the relevant Act.

The *Defence Force Discipline Appeals Regulations 1957* will sunset on 1 October 2016.

The *Defence Force Discipline Appeals Regulation 2016* (the Regulation) will remake the *Defence Force Discipline Appeals Regulations 1957* in substantially the same form with modifications to ensure the Regulation will remain fit for purpose.

The Regulation will:

- update phrasing and references throughout the Regulation to conform to current drafting practices
- provide clarity by inserting a definition of naval vessel, part headings and transitional provisions
- modernise references to aspects of practice and procedure such as the keeping of records by the Registrar, and
- otherwise preserve the existing arrangements and procedures of the Tribunal.

The Tribunal and the Department of Defence (including the Registrar of Military Justice and the Judge Advocate General) were consulted on the Regulation through the exchange of correspondence.

Details of the Regulation are set out in the Attachment.

The Regulation will commence on the day after registration.

The Office of Best Practice was consulted on the measures and advised that no Regulation Impact Statement was required.

The authorising Act contains no conditions that need to be fulfilled before the Regulation can be made.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

Authority: Section 60 of the  
*Defence Force Discipline Appeals Act 1955*

## **Statement of Compatibility with Human Rights**

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

### ***Defence Force Discipline Appeals Tribunal Regulation 2016***

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 Legislative Instrument**

The Regulation will remake the *Defence Force Discipline Appeals Regulations 1957* in their current form. The Regulation preserves existing arrangements outlined in the *Defence Force Discipline Appeals Regulations 1957*. The Regulation has been remade in accordance with current drafting practices.

#### **Human rights implications**

The Regulation preserves existing arrangements and does not engage any of the applicable rights or freedoms.

#### **Conclusion**

The Regulation is compatible with human rights and does not raise any human rights issues.

**Senator the Hon George Brandis QC, Attorney-General**

Details of the Regulation are as follows:

**Part 1 – Preliminary**

Section 1 – Name

This section will provide that the name of the Regulation is the *Defence Force Discipline Appeals Regulation 2016*.

Section 2 – Commencement

This section will provide timing for commencement of the Regulation on the day after its registration.

The section will explain that the commencement information contained in the table relates only to the provisions of the Regulation as originally made. It will not be amended to address any later amendments associated with the Regulation.

Section 3 – Authority

This section will list the Act under which the Regulation will be made. The Regulation will be made under the *Defence Force Discipline Appeals Act 1955*.

Section 4 – Schedules

This section will provide that each instrument specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items of the relevant Schedule. Any other item in a Schedule to the Regulation will have effect according to its terms.

Section 5 – Definitions

This section will define the terms; ‘Act’, ‘Deputy Registrar’, ‘detention centre’, ‘legal practitioner’, ‘naval vessel’, ‘Registrar’ and ‘Registrar of Military Justice’.

The term ‘Act’ will be defined as meaning the *Defence Force Discipline Appeals Act 1955*. ‘Deputy Registrar’ will mean a Deputy Registrar appointed under subsection 19(2) of the Act. The term ‘detention centre’ will have the same meaning contained in the *Defence Force Discipline Act 1982*. A ‘legal practitioner’ will have the same meaning as section 39 of the Act. The term ‘naval vessel’ will mean a warship or other vessel operated for naval or military purposes by Australia that is under the command of the Defence Force, bears external marks of nationality and is manned by seafarers under armed forces discipline or a Government vessel that is used only on government non-commercial service as a naval auxiliary. The term ‘Registrar’ will mean the Registrar of the Tribunal but would not include a Deputy Registrar. The ‘Registrar of Military Justice’ will mean the Registrar appointed under section 188FB of the *Defence Force Discipline Act 1982*.

## **Part 2 – Appeals to the Tribunal**

### Section 6 – Period for appeal from a decision of a single member of the Defence Force Discipline Appeal Tribunal (the Tribunal)

This section will clarify the period of appeal from a decision for the purposes of subsection 17(2) of the Act. A person affected by a decision referred to in that subsection may appeal to the Tribunal within 10 days from the day on which the person is notified of the decision.

### Section 7 – Lodgement of appeals etc.

This section will provide that if an appeal or application for leave to appeal is lodged with a person referred to in subsection (1) of the Regulation, the person must forward the appeal or application to the Registrar.

### Section 8 – Giving records of court martial proceedings etc. to the Tribunal

This section will provide that if an appeal, or application for leave to appeal, against a conviction or acquittal by a court martial or Defence Force magistrate is lodged under the Act, the Registrar of Military Justice must, on request by the Registrar, provide to the Tribunal a record of the proceedings of the court martial or Defence Force magistrate, a record of any review and copies of documents with respect to that proceeding.

This section will also clarify that the Registrar must return the requested record or document to the Registrar of Military Justice once they are no longer required.

### Section 9 – Legal Aid

This section will provide that an appellant may apply to the Tribunal for approval of the Tribunal to grant legal aid to the appellant. The application must be made within 14 days, or a period determined by the Tribunal, after the day in which the appellant's appeal or application for leave to appeal was lodged. The appellant must provide a statutory declaration with the application which sets out information necessary to enable the Tribunal to determine whether the appellant's means are insufficient to allow them to prosecute the appeal or application for leave to appeal.

This section will provide that if the Tribunal is satisfied that the appellant has insufficient means to enable them to prosecute the appeal or application for leave to appeal and it appears desirable in the interests of justice that legal aid should be granted to the appellant, the Tribunal may by order, approve the granting of legal aid to the appellant.

If the Tribunal approves the granting of legal aid, the Attorney-General may arrange for one or more legal practitioners to represent the appellant at the hearing of the appeal or the application for leave to appeal or of a matter preliminary or incidental to the appeal. This section will also clarify that if the Attorney-General arranges for a legal practitioner to represent the appellant, the Commonwealth must pay the legal practitioner an amount for fees and disbursements as determined by the Attorney-General.

### Section 10 – Discontinuance of appeals etc

This section will outline that an appellant may, by written notice to the Registrar, withdraw an application for leave to appeal or discontinue an appeal at any time before the hearing of the application or the appeal commences.

### Section 11 – Manner of enforcing order for payment of costs

This section will clarify that an order made under subsection 37(3) of the Act for the payment of costs by an appellant may be enforced either by the amount, or part of the amount, being recovered as a debt due to the Commonwealth by order of a court of competent jurisdiction or by deducting the amount, or a part of the amount, from any pay and allowances earned by the appellant as a member of the Defence Force.

The use of the term ‘court of competent jurisdiction’ is required in these circumstances as it may be more appropriate to bring a proceeding for the recovery of a small debt in a state Magistrate or Local Court.

### Section 12 – Appellant in custody

This section will provide that if an appellant in custody is entitled to be present at the hearing of their appeal, application for leave to appeal, or a matter preliminary or incidental to the appeal, the Registrar must give the person who has custody of the appellant a signed certificate that states the appellant is so entitled and specify the details of the place and time(s) of the hearing.

If a person who has custody of an appellant receives such a certificate, this section will provide that the person must ensure that the appellant is taken to the place specified at the required time and that the appellant will continue to be present at that place throughout the hearing.

This section will clarify that if an appellant in custody is to be taken to a place at which the appellant is entitled to be present for the purposes of the Act, the person who has custody of the appellant must ensure that the appellant is under guard during the travel time and during the time the appellant is present at that place, unless otherwise ordered by the Tribunal.

## **Part 3 – Administration of the Tribunal**

### Section 13 – Registry

This section will provide that there is to be a Registry of the Tribunal. The Registry is to be located as such place as the President directs. The Registrar will have custody of any records of the Tribunal kept in the Registry and documents lodged or filed with the Registrar or a Deputy Registrar.

This section will clarify that the Registrar must keep proper records of proceedings before the Tribunal and documents in the custody of the Registrar.

### Section 14 – Notification of hearing

This section will provide as soon as practicable after a time, date and place for a hearing before the Tribunal is fixed, the Registrar must give written notice of the time, date and place to the appellant or legal practitioner (who will represent the appellant at the hearing) and the Chief of the Defence Force (or service chief) whose duty it is to undertake the defence of the appeal, application or matter the subject of the hearing and the Registrar of Military Justice.

## Section 15 – Acting Registrar

This section will provide that the assistant Registrar is to act as the Registrar during a vacancy in the office of Registrar (regardless of whether an appointment has previously been made to the office) or during any or all periods, when the Registrar is absent from duty or Australia or is, for any reason, unable to perform the duties of the office.

This section will clarify who the assistant Registrar would be for the purposes of this section. If there is only one Deputy Registrar, then the Deputy Registrar would be the assistant Registrar or, if there is more than one Deputy Registrar, then the assistant Registrar would be the Deputy Registrar as nominated by the President.

This section will provide a note to see section 33A of the *Acts Interpretation Act 1901* to explain the applicable rules for persons acting as the Registrar. Subsection 33A(2) of the Acts Interpretation Act applies when a provision of an Act provides for a person to act in an office (without the need for an appointment). In that situation, except so far as that Act otherwise provides, while the person is acting in the office, the person has and may exercise all powers, and must perform all functions and duties, of the holder of the office. In addition, the Act, or any other Act, applies in relation to the person acting as if the person were the holder of the office. Subsection 33A(3) of the Acts Interpretation Act provides that anything done by or in relation to a person purporting to act in the office is not invalid merely because the occasion to act had not arisen or had ceased.

Due to paragraph 13(1)(a) of the *Legislation Act 2003*, section 33A of the Acts Interpretation Act applies to the Regulation as if it were an Act and as if each provision of the Regulation were a section of an Act. This means that it is not necessary to provide in this section that the assistant Registrar has all the powers and functions, and shall perform all the duties of the Registrar during the absence or vacancy because the Acts Interpretation Act addresses this issue.

## Section 16 – Fees to witnesses

This section will provide that the allowances payable to a witness (except a member of the Defence Force rendering services) under subsection 34(1) of the Act are the fees and travelling expenses that the Registrar determines in accordance with the scale in Schedule 2 to the *Public Works Committee Regulations 1969*.

## Section 17 – Fees for supplying copies

This section will clarify that the fees for the Registrar to supply an appellant of a copy of a document in relation to their appeal. For documents not more than 50 pages the fee is \$12. For documents more than 50 pages, the fee is \$12 plus 10 cents per page for each page in excess of 50.

## Section 18 – Procedure following decision of Tribunal

This section will provide that, as soon as practicable after making a decision in a proceeding, the Tribunal must prepare a written statement that sets out the decision. As soon as practicable after preparing the written statement, the Tribunal must provide a copy of the statement to the Registrar. The section will also clarify that as soon as practicable after receiving the written statement, the Registrar must give the Registrar of Military Justice a copy of the statement and a copy of the orders of the Tribunal to which the decision relates.

## **Part 4 – Application, savings and transitional provisions**

### Section 19 – Definitions

This section will define the terms ‘commencement day’ and ‘old law’ for the purposes of Part 4 of this instrument. The term ‘commencement day’ will mean the day that this instrument commences. The term ‘old law’ will mean the Defence Force Discipline Appeals Regulations 1957 as they were in force immediately before the commencement day of this instrument.

### Section 20 – Transitional - appeals to the Tribunal made, but not determined, before commencement

This section will apply to an appeal or an application that was made to the Tribunal under the Act before the commencement day that had not yet been determined before that commencement day. In that situation, despite the repeal of the old law (pursuant to Schedule 1 of this instrument), the old law will continue to apply in relation to the old appeal or application as if the repeal had not happened.

### Section 21 – Transitional - Registry

This section will provide that if a document was kept in the Registry under regulation 17 of the old law immediately before the commencement day of this instrument, then that document will be taken to be kept in the Registry under section 13 of this instrument on and after that day.

### Section 22 – Transitional - things done under the old law

This section will provide that, subject to sections 20 and 21, if a thing was done for a particular purpose under the old law and that thing could be done for that purpose under this instrument, then that thing will have effect, for the purposes of this instrument, as if it has been done under this instrument. A reference to a thing being done will include a reference to a notice, application or other instrument being given or made.

## **Schedule 1 – Repeals**

### Item 1 – The whole of the Regulations

This item will repeal the *Defence Force Discipline Appeals Regulations 1957* as they will be replaced by this instrument.