

## EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence

Subject – *Defence Act 1903*

Defence Regulation 2016

1. The *Defence Act 1903* (the Act) prescribes the control, administration, constitution and service of the Australian Defence Force.
2. Subsection 124(1) of the Act provides 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 Defence Force, or for carrying out or giving effect to the Act. The *Defence Regulation 2016* (the Regulation) is made under the Act.

### **Purpose of the *Defence Regulation 2016***

3. The Regulation replaces three instruments made under the *Defence Act 1903* (the Act): the *Defence (Personnel) Regulations 2002*, the *Defence Force Regulations 1952*, and the *Defence (Prohibited Words and Letters) Regulations 1957* (the old Regulations). The old Regulations have been replaced for the following reasons:
  - To enhance the CDF's position as the sole commander of the Defence Force, in accordance with the agreed recommendations of the report *First Principles Review – Creating One Defence*, and consistent with the *Defence Legislation Amendment (First Principles) Act 2015*
  - To provide greater flexibility in personnel decision-making in line with the requirement for a capable, agile and potent future force, while retaining essential protections against unfairness
  - To insert new substantive provisions, or to replace provisions in the old Regulations that are no longer fit for purpose, including to implement decisions arising from the *Pathway to Change* recommendations and the *Re-Thinking Systems Review*
  - To begin the process of consolidating the bulk of regulations made under the Act into a single instrument
  - To modernise, clarify and simplify provisions, and to remove redundant provisions
  - To replace the old Regulations before they sunset in accordance with the *Legislation Act 2003*.

### ***First Principles Review***

4. The report (*First Principles Review – Creating One Defence*) of the Committee that undertook the First Principles Review of Defence, completed in 2015, made 76 recommendations that it considered would make Defence the most effective and efficient organisation to enable it to deliver the outcomes desired of it by the Government.
5. To this end, the Committee recommended that Defence evolve into a single integrated system by becoming one end-to-end organisation – One Defence – effectively incorporating the separate arms of the Defence Force (that is the three services which were established under separate legislation) into one organisation: the Australian Defence Force.
6. Recommendation 1.8 was that legislative change be made to formally recognise the authority of the Chief of the Defence Force (CDF) and the Vice Chief of the Defence Force (VCDF). That recommendation also included removing the statutory authority of the service chiefs (that is, the Chiefs of Navy, Army and Air Force).

### *Previous arrangements for the command of the Defence Force*

7. The previous command arrangements for the Defence Force were set out in the Act and the *Defence Force Regulations 1952*, and essentially dated from the reorganisation of Defence between 1973 and 1976 when the Departments of Navy, Army and Air Force were integrated into one Department (Defence) and structural changes were made to the higher management of the Defence Force. Separate legislative arrangements for each arm of the Defence Force continued, with arrangements for the Navy in the *Naval Defence Act 1910*, for the Army in the *Defence Act 1903*, and for the Air Force in the *Air Force Act 1923*. Regulations under each Act also continued.
8. Part II of the Act set out the command arrangements for the Defence Force. The Minister had the general control and administration of the Defence Force. Command of the Defence Force was vested in the CDF and service chiefs (who, under the CDF, commanded their respective arm of the Defence Force). Administration of the Defence Force was jointly vested in the CDF and Secretary, subject to any directions of the Minister. The VCDF did not have any explicit command authority.
9. Subsection 9(1) of the Act provided for the Governor-General to appoint an officer of an arm of the Defence Force as the CDF. It also provided for the Governor-General to appoint an officer from each arm of the Defence Force to be the service chief of their respective arm. Subsection 9(2) gave the CDF command of the Defence Force and each service chief command (under the CDF) of their respective arm. Section 9AA provided for the Governor-General to appoint an officer of an arm of the Defence Force to be the VCDF, but did not provide the VCDF with any command authority, only a role to assist the CDF in the administration of the Defence Force.
10. In the First Principles Review, the Committee recognised that the Act did not, on its face, give the CDF full command over the Defence Force. Further, it was suggested that the CDF's powers may be interpreted as being subject to (and potentially constrained by) the authority of the service chiefs to command their

respective arm of the Defence Force. Further, the Act did not fully reflect the current practice of having the VDCF perform the functions of a true ‘deputy’ CDF.

11. The uncertainty over the scope of the CDF’s command power was compounded by other provisions, including paragraph 124(1)(qd) of the Act and regulation 4 of the *Defence Force Regulations 1952*, which provided power to make regulations for and in relation to the command, control and administration of bodies made up of two or more arms of the Defence Force acting together or a of a part of the Defence Force consisting of members of two or more arms of the Defence Force.

12. The various provisions, when taken together, ran the risk of being perceived as creating uncertainty in relation to command arrangements.

#### *Defence Legislation Amendment (First Principles) Act 2015*

13. The *Defence Legislation Amendment (First Principles) Act 2015* (First Principles Act), which commenced on 1 July 2016, amended the Act to clarify the CDF’s role as the sole commander of the Defence Force. It also consolidated relevant provisions of the *Naval Defence Act 1910* and the *Air Force Act 1923* into the Act, repealing those Acts.

14. The amendments have given full command of the Defence Force to the CDF by removing legislative limitations in the Act. The VDCF is also now recognised as the deputy of the CDF. Reference to the service chiefs in the Act is now limited to recognising them as part of their respective arm of the Defence Force.

15. There is no longer any doubt that the CDF is the sole commander of the Defence Force. As a result of these changes, the CDF is able to make standing or general orders or give directions to put in place the appropriate arrangements for command, control and administration of the Defence Force. This includes where members of different arms of the Defence Force are working or acting together.

16. The provisions in Part II of the Act providing for the offices and appointments of the service chiefs have been repealed. The service chiefs’ command over their respective arms of the Defence Force now clearly derives from the CDF – the CDF may provide directions to, or authorise, the service chiefs to issue orders in relation to their service.

#### *The First Principles Review in the Defence Regulation 2016*

17. Commensurate with the amendments in the First Principles Act, the Regulation has made the following changes to the old Regulations:

- Part II of the *Defence Force Regulations 1952* has not been re-made. Part II dealt with the command of different parts of the Defence Force working together. It provided for the CDF to make an order declaring that members or parts of different arms of the Defence Force are acting together, and for command arrangements between members in different arms of the Defence Force when this occurred. The CDF, as sole commander of the Defence Force, is now able to make standing or general orders or give directions to put in place the appropriate arrangements for command, control and administration of the Defence Force, including where members of different arms of the Defence Force are working or acting together. Accordingly, there was no need to re-make Part II of the *Defence Force Regulations 1952*.

- Discretionary powers in the old Regulations that were vested in the service chiefs have now been vested in the CDF. The *Defence (Personnel) Regulations 2002*, in particular, included a range of decision-making powers that were vested in the service chiefs, including in relation to the enlistment, promotion, posting, reduction in rank and termination of service of members. Under the *Defence (Personnel) Regulations 2002*, the make-up of the Defence Force, including who was in the Defence Force and how members progressed through the ranks, was legally outside of the CDF's control. While in practice most personnel decisions will continue to be made by delegates of the CDF in a member's own service, vesting these powers in the CDF means that the CDF is able to provide binding direction on how they are exercised, including direction about qualifications, experience and conduct.
- The provisions in the Act dealing with the appointment of service chiefs were repealed by the First Principles Act. The Regulation includes provisions for the Governor-General to appoint the service chiefs, as well as provisions relating to acting appointments, resignation, termination of appointment, and remuneration and allowances. These provisions are modelled on the provisions in the Act that deal with the appointment of the CDF and VCDF. In addition, the Minister is required to take into account the CDF's recommendations in appointing and terminating a service chief's appointment, reflecting that they are subject to the CDF's command. Under section 68 of the Constitution, the Governor-General, as the Queen's representative, is vested with the command-in-chief of the Australian armed forces. This is reflected in the Governor-General's role in appointing the CDF, VDF and service chiefs.

### ***Flexible personnel decision-making***

18. The mission of Defence Force is to defend Australia and its national interests. To fulfil this role, the Defence Force must generate capability, not only for the direct defence of Australia, but to support and enhance regional stability, to contribute to global and coalition responses to threats, and to support peacekeeping, humanitarian assistance and disaster relief operations worldwide. The foundation of the Defence Force's capability, effectiveness and reputation is its people.

19. Service in the Defence Force is unique. The nature of the risks Defence Force members face in combat and the authority to use armed force give rise to the essential nature of service in the Defence Force: while a person is a member of the Defence Force, they have a non-contractual and unlimited liability to serve. The system of command lies at the heart of service in the Defence Force. Defence Force members must follow all lawful commands, including orders that involve considerable risk to their life. Members in the Permanent Forces are required to render whatever service is required of them by the Defence Force, in whatever location the Defence Force requires them to be. Defence Force members can only leave the Defence Force if they reach the end of their agreed period of service or if the Defence Force agrees to release them from service – there is no right to resign unilaterally. A member who fails to attend duty can be charged with an offence, and is liable to imprisonment. These differences from civilian employment are essential for the Defence Force to successfully fulfil its mission as a professional and disciplined force operating in diverse environments.

20. In this context, recruiting, developing and retaining sufficient capable and motivated people is crucial, and requires innovative and flexible approaches to build the capable, diverse, agile and potent force that will be required in the future.

21. One initiative has been to develop a new ‘Total Workforce Model’, being delivered through Project Suakin. It provides an over-arching tri-service framework that defines future categories of service. In essence, the model involves seven service categories (SERCATs) describing different levels of service provided by Defence Force members. This includes two SERCATs in the Permanent Forces and four SERCATs in the Reserves (with the remaining SERCAT referring to Defence civilians under the *Defence Force Discipline Act 1982*). The intent is to provide greater mobility across full-time and part-time service categories as members’ personal circumstances change, offering improved access to flexible career options. The model also enhances the Defence Force’s capability, by allowing the CDF to draw on a more diverse pool to deliver the right force, in the right place, at the right time. The Defence Force will be able to make greater use of latent but proven capabilities inherent in the members of the Reserves.

22. Previously, the *Defence (Personnel) Regulations 2002* provided for appointment, enlistment, promotion, reduction in rank, transfer between parts of the Defence Force, and the end of service in the Defence Force. These provisions were, in many cases, too prescriptive, hampering the Defence Force’s ability to take innovative approaches to personnel management, and potentially undermining the CDF’s ability to effectively command the Defence Force, as envisaged in the First Principles Review. The provisions in the Regulation that deal with these matters are far less prescriptive than in the *Defence (Personnel) Regulations 2002*, and give personnel decision-makers greater flexibility to adapt decision-making processes to the Defence Force’s requirements as they change over time.

23. For example, to support the Total Workforce Model, some changes have been made to the way the Reserves are dealt with in the Regulation:

- The *Defence (Personnel) Regulations 2002* set out several Reserve categories, including the High Readiness Active Reserve, the High Readiness Specialist Reserve, the Active Reserve, the Specialist Reserve, the Standby Reserve, and any other categories established by a service chief. Apart from the Standby Reserve, it was not required to maintain all categories in each service, and the three services have traditionally maintained and used different Reserve categories in different ways. These categories are no longer set out in the Regulation. This means that the Defence Force can fully implement the new SERCATs in the Total Workforce Model.
- The *Defence (Personnel) Regulations 2002* explicitly provided for transfer between different Reserve categories. However, the Total Workforce Model is intended to provide greater mobility between the SERCATs, as a person’s circumstances require. Accordingly, transfer between the Reserve SERCATs will be done administratively, and is not included in the Regulation. Transfer between the Permanent Forces and the Reserves remains in the Regulation, reflecting the different legal liability to serve that members in these parts of the Defence Force have under the Act.

24. While the Regulation provides greater flexibility to meet future needs, it is also important to make personnel decisions fairly and transparently. The common law

position remains that Defence Force members serve at the pleasure of the Crown. This means that decisions about a member's service could be made without any notice, and without reason. This position has been altered for some decisions made under regulations, including in the *Defence (Personnel) Regulations 2002*. Consistent with the *Defence (Personnel) Regulations 2002*, the Regulation includes requirements to give members an opportunity to respond before making most decisions about termination of service, reduction in rank, compulsory transfer from the Permanent Forces to the Reserves, and suspension from duty without pay or on part pay, reflecting that these decisions may have a significant adverse effect on the member.

### **Substantive changes**

25. Some new provisions have been added or substantially changed in the Regulation. Attachment B outlines provisions that did not have an equivalent in the old Regulations, or that are substantially different from the equivalent provisions in the old Regulations. These include:

- A provision about 'service obligation debts' has been added, creating debts to the Commonwealth when a member leaves the Defence Force before completing an 'initial minimum period of service' or 'return of service obligation'. Under the *Defence (Personnel) Regulations 2002*, debts were created as a condition on a member resigning. The new provision is far more transparent, and gives Defence Force members greater certainty about what, if anything, they will owe if they want to leave the Defence Force early.
- A provision about suspension from duty pending termination of service, including without pay, has been added. In one of the Defence Culture Reviews conducted during 2011, the former Inspector-General Australian Defence Force (Inspector-General ADF), Mr Geoff Earley, recommended that Defence's policies should be amended to allow for administrative suspension from duty, and when this can occur (*Review of the Management of Incidents and Complaints in Defence including Civil and Military jurisdiction*, recommendation 22). While commanders can stand a Defence Force member down from duty for operational reasons, suspension without pay or for extended periods should be supported by legislation. The new provision fills some of the gaps in the administrative suspension scheme in sections 98 to 100 of the *Defence Force Discipline Act 1982*, which apply when a member is being investigated for a service offence or has been charged with a service or civilian offence.
- The redress of grievance scheme in Part 15 of the *Defence Force Regulations 1952* has been substantially replaced. In *Re-Thinking Systems of Inquiry, Investigation, Review and Audit in Defence*, Defence conducted a detailed review of all of Defence's review processes. One outcome was a conclusion that redress of grievance arrangements for the Defence Force were unnecessarily complex and inefficient. The process in Part 15 of the *Defence Force Regulations 1952* has been replaced by a single layer of formal review by the Inspector-General ADF, while enabling the member's chain of command to address complaints in whatever way they consider appropriate in all the circumstances. This has completed the changes begun by amendments to the Act in 2014 (*Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Act 2014*).

### ***Consolidation of regulations under the Act***

26. Previously, regulations made under the Act have been made in many different instruments including the old Regulations. This has largely been an accident of history. Further, regulations were also made under the *Naval Defence Act 1910* and the *Air Force Act 1923*, which were repealed by the First Principles Act. It is intended to move the bulk of these regulations into a single instrument, the Regulation. The old Regulations have been consolidated first, as they either required significant revision in any case or were due to sunset under the *Legislation Act 2003*. As other regulations made under the Act are reviewed over the coming years, consideration will be given to re-making their content in the Regulation.

27. There are several advantages to consolidation of most regulations made under the Act. It will be easier to locate Defence-related regulations. It will also assist in the simplification of substantially similar provisions that have previously been made in different instruments. However, some provisions may continue to be made in a separate instrument. For example, the *Inspector-General of the Australian Defence Force Regulation 2016* has been made in a separate instrument to reflect the statutory independence of the Inspector-General ADF from the ordinary chain of command.

### ***Simplification of provisions***

28. The old Regulations contained significant material that was out of date, duplicate, or redundant. The Regulation has updated these provisions, including by removing or consolidating provisions. For example:

- Provisions of the *Defence (Personnel) Regulations 2002* that dealt with senior officers, officers and enlisted members respectively have been consolidated where possible, recognising the significant overlap between these provisions. Similarly, provisions dealing with different types of appointment, enlistment and promotion (such as provisional, temporary and probationary appointment, enlistment and promotion) have also been consolidated.
- Provisions that provided unnecessary and inflexibly detailed processes or schemes have been removed. For example, the provisions in the *Defence (Personnel) Regulations 2002* that dealt with arrangements for chaplains have been removed. These arrangements will now be addressed in internal Defence policy documents, without changing the nature of their service.
- Defence prohibited areas and Defence practice areas, dealt with in Part VII and Part XI of the *Defence Force Regulations 1952* respectively, have been dealt with as a single concept. Under Part 11 of the Regulation, ‘Defence areas’ cover the situations previously dealt with as either prohibited or practice areas, including with consistent offence and compensation provisions. The language relating to Defence areas has also been simplified, for example by replacing the word ‘undertaking’, which had an obscure meaning, with language that accurately describes the intent of the provision.
- Several parts of the *Defence Force Regulations 1952* are no longer considered necessary, and have not been re-made. In particular, Part II – Command of Forces acting together, Part V – Powers of attorney, Part VI – Disposal of dead bodies of members of the Defence Force (apart from a provision dealing with war graves), Part VIII – Attachment of members, Part IXA – Salvage claims,

Part XII – Surveys, Part XIV – Payment of fines and Part XVI - Miscellaneous have not been replaced.

- The schedule of prohibited words and letters has been reviewed and updated.
29. Attachment C is a table outlining how provisions in the old Regulations have been treated in the Regulation, including an explanation of any significant differences in their operation.

### ***Sunset instruments***

30. Section 50 of the *Legislation Act 2003* provides that a legislative instrument is automatically repealed on a specific day. Each of the old Regulations, apart from the *Defence (Personnel) Regulations 2002*, was scheduled to sunset on 1 October 2016. The Regulation has repealed the old Regulations and re-made relevant provisions, which would otherwise have ceased to have effect on 1 October 2016.

### **Authority for Defence Regulation 2016**

31. Sub-section 124(1) of the Act provides that the Governor-General may make regulations 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 Defence Force, or for carrying out or giving effect to the Act. Relevantly, the Governor-General may in particular prescribe matters providing for and in relation to:

- the enlistment, appointment, promotion, reduction in rank, retirement and discharge of members of the Defence Force (paragraph 124(1)(a))
- the transfer of members between different arms, or parts of arms, of the Defence Force (paragraph 124(1)(aa))
- the training of members (paragraph 124(1)(ab))
- conditions of service of members (paragraph 124(1)(ac))
- forfeiture, or assignment, of the whole or part of the remuneration of a member or of allowances or other pecuniary benefits referred to in paragraph 58B(1)(b) or (c) (paragraph 124(1)(b))
- deductions from the remuneration of a member or from allowances or other pecuniary benefits referred to in paragraph 58B(1)(b) or (c) (paragraph 124(1)(c))
- the liability of a member to pay an amount to the Commonwealth and the manner of recovery of an amount so payable (paragraph 124(1)(e))
- medical or dental treatment of a member (including the provision of services or goods (including pharmaceuticals) related to medical or dental treatment) (paragraph 124(1)(i)) and subsection 124(1C))
- the declaration of a prohibited area of a place (including a place owned by, or held in right of, the Commonwealth or a State) used or intended to be used for a purpose of defence, the prohibition of a person entering, being in or remaining in the prohibited area without permission and the removal of any such person from the area (paragraph 124(1)(nb))



- the prohibition of the use, except as prescribed, of a word, group of letters, object or device which is descriptive or indicative of a part of the Naval, Military or Air Forces of the King's dominion, or a service or body of persons associated with the defence of Australia (paragraph 124(1)(nc))
- the regulation of any naval, military or air-force operation or practice, including any naval, military or air-force operation or practice in or adjacent to Australia or a country other than Australia (paragraph 124(1)(p))
- the preservation of public safety in or at any naval, military or air-force operation or practice (paragraph 124(1)(q))
- the entry upon and survey of lands for defence purposes (paragraph 124(1)(qa))
- the declaration and use of any area (by whomever owned or held) as a practice area for any naval, military or air force operation or practice and the regulation or prohibition of any entry upon or use of a practice area, including the prohibition of a person entering, being in or remaining in a practice area and the removal of any such person from the area (paragraph 124(1)(qaa))
- the administration of oaths to, the taking of affidavits of, and the attestation of the execution of documents by, members of the Defence Force while on service outside Australia (paragraph 124(1)(qe))
- providing for penalties, not exceeding a fine of \$2,000 or imprisonment for a period not exceeding 12 months, or both, for offences against the regulations (paragraph 124(1)(w))
- the certification or proof of the death of a member of the Defence Force who has died, or is presumed to have died, while on service (paragraph 124(2)(a)).

### **Operation of Defence Regulation 2016**

32. Attachment A provides a provision-by-provision description of the operation of the Regulation.

### **Regulatory Impact Statement**

33. The Office of Best Practice Regulation advised that no regulatory impact statement was required as the proposed changes do not appear to have any impact on the business or not-for-profit sectors (reference OBPR ID 16538; OBPR ID 19411).

### **Legislative instrument**

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

### **Commencement**

35. The Regulation commences on 1 October 2016.

### **Consultation**

36. In addition to extensive consultation within Defence, the following agencies were consulted in the development of the Regulation:

- Office of Best Practice Regulation (who advised that a regulatory impact statement would not be required as there was no impact on the business or not-for-profit sectors)
- Commonwealth Ombudsman's office (in relation to Part 7 – Redress of grievance)
- Attorney-General's Department
- Department of Prime Minister and Cabinet
- Department of Veterans' Affairs
- Australian Public Service Commission

37. The Regulation was drafted by the Office of Parliamentary Counsel.

### **Attachments**

A: Provisions in *Defence Regulation 2016*

B: Substantially new or altered provisions in *Defence Regulation 2016*

C: Treatment of old Regulations in *Defence Regulation 2016*

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### **Defence Regulation 2016**

1. This Regulation 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 Regulation**

2. The *Defence Regulation 2016* (the Regulation) replaces three instruments made under the *Defence Act 1903*: the *Defence (Personnel) Regulations 2002*, the *Defence Force Regulations 1952*, and the *Defence (Prohibited Words and Letters) Regulations 1957* (the old Regulations). The old Regulations have been replaced for the following reasons:

- To enhance the CDF's position as the sole commander of the Defence Force, in accordance with the agreed recommendations of the report *First Principles Review – Creating One Defence*, and consistent with the *Defence Legislation Amendment (First Principles) Act 2015*.
- To provide greater flexibility in personnel decision-making in line with the requirement for a capable, agile and potent future force, while retaining essential protections against unfairness.
- To insert new substantive provisions, or to replace provisions in the old Regulations that are no longer fit for purpose, including to implement decisions arising from the *Pathway to Change* recommendations and the *Re-Thinking Systems Review*.
- To begin the process of consolidating the bulk of regulations made under the Act into a single instrument.
- To modernise, clarify and simplify provisions, and to remove redundant provisions.
- To replace the old Regulations before they sunset in accordance with the *Legislation Act 2003*.

3. The Regulation includes provisions that deal with the appointment, enlistment, promotion, transfer, suspension and end of service of Defence Force members, the provision of medical services to Defence Force members, complaint procedures available to Defence Force members, the declaration of prohibited areas, the prohibition of the use of words and letters associated with the Defence Force without permission, and Defence Force aid to civilian authorities.

#### **Human rights implications**

4. The Regulation engages the following human rights:

- right to work and rights at work in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

- right to equality and non-discrimination in Article 2 of the International Covenant on Civil and Political Rights (ICCPR)
- right to health in Article 12 of the ICESCR
- right to freedom of expression in Article 19 of the ICCPR.

### ***The right to work and rights at work***

5. Article 6 of the ICESCR recognises the right to work. Article 7 recognises the right to just and favourable conditions of work. The United Nations Committee on Economic Social and Cultural Rights has stated that the right to work:

affirms the obligation of State parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding his choice to work, while emphasising the importance of work for personal development as well as for social and economic inclusion.

6. The Regulation advances this right by providing the framework for personnel decision-making in the Defence Force. Under the Regulation, Defence Force members are appointed, enlisted, and promoted, and they can transfer between different parts of the Defence Force. It also provides for the end of a member's service, including provisions dealing with termination of service. At common law, a Defence Force member serves at the pleasure of the Crown. This meant that they could be dismissed at any time, for any reason. Under the Regulation, a member's service can only be terminated for one of the listed reasons, and in most cases the member must be given a notice of the proposed decision and an opportunity to respond before a decision is made. Under the Regulation, a member can make a complaint about a decision to terminate their service, which will include review of the decision by the statutorily independent Inspector-General ADF. These provisions mean that Defence Force members will not be deprived of work unfairly.

### ***The right to equality and non-discrimination***

7. Discrimination is impermissible differential treatment that results in a person or group being treated less favourably, based on a prohibited ground for discrimination. Prohibited grounds include age and disability. However, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose.

#### *Age discrimination – retirement age (section 23)*

8. Section 23 of the Regulation provides that a member's period of service in the Defence Force ends when they reach their retirement age. Retirement ages are 60 years of age for members of the Permanent Forces, 63 years of age for members of the Permanent Forces who hold the rank of Admiral, General or Air Chief Marshal, and 65 years of age for members of the Reserves. These are the same retirement ages that were previously provided for in the *Defence (Personnel) Regulations 2002*. Unless the CDF allows a member to serve beyond their retirement age, a member of the Permanent Forces will transfer to the Reserves when they reach their retirement age, and a member of the Reserves will cease to be a member of the Defence Force

when they reach their retirement age. The concept of a compulsory retirement age in the Defence Force is a limitation on a person's right not to be discriminated against on the basis of age that is reasonable, necessary and proportionate in the circumstances.

9. The Defence Force's capability is dependent on the health and fitness of its members. Ensuring that Defence Force members are fit for duty and can be deployed at short notice without medical limitations is a legitimate purpose, and the retirement age in section 23 of the Regulation is a necessary, reasonable and proportionate measure to achieve this purpose.

10. The concept of retirement age acts as an institutional milestone that restricts service beyond that age. It does not guarantee that a member will be given an opportunity to serve to that age, and extensions of service beyond the retirement age are possible. In most respects, retirement age in section 23 operates as if every member is on a fixed period of service that ends when they reach the relevant age.

11. Service in the Defence Force is arduous, and there are much higher demands on Defence Force members' medical fitness than members of the general population. Retaining Defence Force members at less than optimal fitness results in increased risks both to the individual member and to others, including in both training and operational environments. An inherent requirement of service in the Defence Force is that a member is fit for duty and can be deployed at short notice without medical limitations. The realities of aging mean that, as members of the Defence Force become older, they also become less likely to be able to meet the necessary medical and fitness standards that must apply to Defence Force members. This is not to say that every individual who reaches retirement age is unable to meet the necessary physical and medical requirements, but fewer and fewer members can do so as they approach and pass retirement age. Older Defence Force members represent invaluable years of experience. However, this is balanced against increased costs associated greater healthcare requirements and ensuring that older members have the requisite health and fitness standards.

12. Retirement age is a necessary and reasonable mechanism used to manage increased risks as members age. Retirement age in the Defence Force has long been recognised as an exception to the ordinary prohibition against discrimination on the basis of age (Schedule 1 of *Age Discrimination Act 2004*). The retirement ages in the Regulation represent a balance between the need to manage the risk of an aging Defence Force, with the need to not unfairly discriminate against people on the basis of age. The retirement ages have increased over time, reflecting improvements in the average health and fitness of older people.

*Disability discrimination – termination for medical unfitness (paragraph 24(1)(a))*

13. Paragraph 24(1)(a) provides that the CDF may terminate a member's service in the Defence Force if they are medically unfit for service in the Defence Force. The ability to terminate a member's service for this reason is a limitation on a person's right not to be discriminated against on the basis of disability that is reasonable, necessary and proportionate in the circumstances.

14. The Defence Force's capability is dependent on the health and fitness of its members. Ensuring that Defence Force members are fit for service in the Defence Force is a legitimate purpose, and the ability to terminate a member's service if they are medically unfit for service is a necessary, reasonable and proportionate measure to facilitate this purpose.

15. Service in the Defence Force is arduous, and there are much higher demands on Defence Force members' medical fitness than is the case for members of the general population. Retaining Defence Force members at less than optimal medical fitness results in increased risks both to the individual member and to others, including in both training and operational environments. An inherent requirement of service in the Defence Force is that a member is fit for duty and can be deployed at short notice without medical limitations. A person who is medically unfit for service in the Defence Force is unable to meet the inherent requirements of service. An inability to meet inherent requirements has long been recognised as a legitimate basis to discriminate against a person on the basis of disability (section 21A of *Disability Discrimination Act 1992*).

### ***The right to health***

16. The right to health is the right to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic Social and Cultural Rights has stated that the right to health is not to be understood as a right to be healthy. It includes the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

17. Part 8 of the Regulation provides that the Commonwealth must arrange the provision medical and dental treatment to Defence Force members rendering continuous full time service. The required standard of treatment is as necessary to keep the member fit for the performance of their duties.

18. Service in the Defence Force is arduous. Members of the Defence Force can expect to be engaged in extensive physical training activities, including 'tough training', and to be deployed in dangerous operational environments. In addition to requiring higher standards of medical fitness than might be required from the general population, it also puts them at greater risk of injury, including mental health injuries. Part 8 supports the right to health of Defence Force members by ensuring that they are entitled to healthcare commensurate with the nature of their duties.

### ***The right to freedom of expression***

19. The right to freedom of expression is the right to express ideas and opinions freely. It extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right to freedom of expression is not absolute. Freedom of expression carries with it special responsibilities, and may be restricted on several grounds. Article 19(3) of the ICCPR provides that freedom of expression may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by legislation necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.

20. Part 14 of the Regulation (dealing with prohibited words and letters) provides that certain words and letters cannot be used in trade, business, a calling or profession, or by an organisation or body of persons, without the consent of the Minister. The prohibited words and letters describe current or former parts of the Defence Force. Part 14 is a permissible limitation on a person's right to freedom of expression, as it is reasonable, necessary and proportionate to a legitimate purpose.

21. The purpose of prohibiting the use of these words and letters is to prevent people from claiming an association with the Defence Force for the purposes of commercial gain, to avoid causing confusion to consumers who might otherwise think that a particular business or organisation is sponsored by or associated with the Defence Force, and to protect the Defence Force's reputation from a situation where they are inadvertently associated with a business or organisation. These are legitimate purposes for limiting the right to freedom of expression under Article 19(3) of the ICCPR.

22. Part 14 provides a proportionate mechanism for achieving these purposes. The offence is limited to commercial situations or situations involving organisations. This directs its effect squarely at the type of situation where a business or organisation might inadvertently be thought to be associated with the Defence Force. There is no limitation on using the words or letters in other contexts, including in the context of public debate, political communication, or academic writing. Further, any business or organisation seeking to use the prohibited words or letters may seek the consent of the Minister. Under the *Defence (Prohibited Words and Letters) Regulations 1957*, most applications for consent were granted, and it is expected that this will continue under Part 14. In any event, if a person disagrees with a decision to refuse consent or to impose conditions on consent, they can apply to the Administrative Appeals Tribunal for review of the decision. This provides a safety net in the unlikely event of an unreasonable decision to refuse consent.

23. Accordingly, the limitation on freedom of expression in Part 14 is prescribed in legislation for the purposes of achieving a legitimate purpose, and is proportionate to that purpose. This is permissible under Article 19 of the ICCPR.

### **Conclusion**

24. The Regulation is compatible with human rights because it supports the right to work, rights at work, and the right to health. Limitations on the right to non-discrimination and the right to freedom of expression are to achieve legitimate objectives, and are reasonable, necessary and proportionate to those objectives.

**Marise Payne**  
**Minister for Defence**

## ATTACHMENT A – PROVISIONS IN *DEFENCE REGULATION 2016*

### **Part 1 – Preliminary**

1. Part 1 provides preliminary information about the Regulation, including its name, commencement, and authority. It also provides for the objects of the Regulations and definitions used in the Regulation.

#### ***Section 1 – Name***

2. Section 1 provides for the Regulation’s name: *Defence Regulation 2016*.

#### ***Section 2 – Commencement***

3. Section 2 provides that the whole of the Regulation commences on 1 October 2016.

#### ***Section 3 – Authority***

4. Section 3 provides that the Regulation is made under the Act.

#### ***Section 4 – Schedules***

5. Section 4 provides that instruments specified in a Schedule to the Regulation are amended or repealed as set out in the Schedule. Other items in a Schedule to the Regulation have effect according to their terms. This section, together with Schedule 2 of the Regulation, operates to repeal the *Defence Force Regulations 1952*, the *Defence (Personnel) Regulations 2002* and the *Defence (Prohibited Words and Letters) Regulations 1957*, all of which are replaced by this Regulation.

#### ***Section 5 – Objects of this regulation***

6. Section 5 provides that the Regulation’s objects are to facilitate the good governance and effective and efficient operation of the Defence Force (subsection 5(a)), to provide the CDF with flexibility to deliver capability and preparedness outcomes (including developing force structure options) (subsection 5(b)), to achieve the Government’s objectives and provide stewardship of the Defence Force (subsection 5(c)), and to provide personnel management that supports the appointment, enlistment, promotion and retention of appropriate persons for service in the Defence Force (subsection 5(d)).

7. This section includes a note that the Governor-General remains the commander-in-chief of the Defence Force under section 68 of the Constitution.

#### ***Section 6 – Definitions***

8. Section 6 provides definitions of words and phrases used throughout the Regulations. In particular, subsection 6(1) provides:

- ‘Act’ means the *Defence Act 1903*.
- ‘Australian Government officer’ means a person who holds an office or appointment under a Commonwealth law, an Australian Public Service employee, a person employed by a body corporate incorporated for a public



purpose under a Commonwealth law, or a contractor engaged by the Commonwealth. This phrase is used in Part 11 as one of several types of people who can remove people or items from a defence area.

- ‘authorised complaint recipient’ has the meaning given in subsection 39(2). It is a person authorised by the CDF to receive a complaint under Part 7 of the Regulation.
- ‘change a period of service’ has the meaning given in subsection 18(3). It includes an extension or reduction to a period of service. It also includes converting a fixed period of service to an indefinite period of service and vice versa.
- ‘committee of management’, in relation to an unincorporated association or body of persons, means the body (however described) that governs, manages or conducts the affairs of the association or body. This phrase is used in Part 14 of the Regulation to describe who would be accountable for committing the offences relating to the use of prohibited words and letters in relation to an unincorporated association or body of persons.
- ‘Commonwealth land’ means land owned or occupied by the Commonwealth. It does not include land leased from the Commonwealth (to someone else) unless the lease is subject to a condition that the land may be used by the Defence Force for carrying out a defence operation or practice. This phrase is used in Part 11 of the Regulation in the context of when the Minister can declare a defence area.
- ‘competent officer’ has the meaning given in section 52. It means Defence Force officers, certain members of the armed forces of foreign countries, and official representatives of prisoners of war. The phrase is used in Part 9 to describe a person who may administer an oath or affirmation, take an affidavit, or witness the signing of a document, for a Defence Force member serving outside Australia.
- ‘covered service’ has the meaning given in paragraph 25(1)(c). It is a period of service that is an initial minimum period of service or a period of service required under a return of service obligation. The phrase is used in the context of describing ‘service obligation debts’, which arise when a member voluntarily reduces a period of service with the effect that they will not complete the covered service.
- ‘death certificate’ means a death certificate or corrected death certificate issued under Part 10.
- ‘defence area’ has the meaning given in sub-section 58(1). It is an area of land, sea or airspace in or adjacent to Australia that is declared for use for a defence purpose under section 58.
- ‘defence award’ and ‘defence honour’ have the meanings given in sections 36 and 35 respectively. They mean the honours and awards listed in the tables in those sections.
- ‘defence materiel’ means goods used for defence purposes. It includes goods being developed for defence purposes, goods being tested for defence purposes, and goods being tested for the use of similar goods for defence

purposes. The phrase is used in Part 11 in the context of declaring defence areas.

- ‘enlisted member’ means a member other than an officer. ‘Officer’ is defined in section 4 of the Act. The term is used in Part 3 in the context of enlisting members in the Defence Force.
- ‘enlisted rank’ means, in relation to the Navy, a rank below the rank of Midshipman. In relation to the Army and Air Force, it means a rank below the rank of Officer Cadet. The term is used in Part 4 in the context of honorary ranks.
- ‘initial obligation amount’ has the meaning given in subsection 25(3). It is the amount determined by the CDF for a period of covered service, which is notified to a member when they begin their initial minimum period of service or when they begin the training or other activities or events that give rise to a return of service obligation. The phrase is used in the context of calculating a member’s service obligation debt if they voluntarily reduce their period of service so that they do not complete a period of covered service.
- ‘interests of the Defence Force’ is defined in subsection 6(2).
- ‘pay’ includes all remuneration, allowances and other benefits under Part IIIA of the Act. This includes a Defence Force member’s salary. The term is used in sections 28 and 29 in the context of suspending a member from duty without pay, and forfeiture of pay during a period of absence without leave.
- ‘police officer’ means a member or special member of the Australian Federal Police, or a member of the police force of a State or Territory. This term is used in Part 11 as one of several types of people who can remove people or items from a defence area.
- ‘prohibited letters’ and ‘prohibited words’ have the meanings given in sections 75 and 74 respectively. These sections list words and letters whose use is prohibited under Part 14.
- ‘service chief’ has the meaning given in subsection 7(2). It is a person appointed under subsection 7(1) as the Chief of Navy, Chief of Army or Chief of Air Force.
- ‘service debt calculation method’ has the meaning given in subsection 25(4). It is the method used to reduce an initial obligation amount, depending on what portion of a period of covered service has been served. It is determined by the CDF, and notified to the member before they begin their initial minimum period of service or before the member begins the training or other activities or events that give rise to a return of service obligation.
- ‘service obligation debt’ has the meaning given in subsection 25(1). It is a debt owed to the Commonwealth that arises if a member voluntarily changes their period of service so that they do not complete a period of covered service.
- ‘service offence’ has the same meaning as in the *Defence Force Discipline Act 1982*.

9. Subsection 6(2) provides the meaning of ‘interests of the Defence Force’. This phrase is relevant as it is one of the decision-making criteria for decisions to reduce a

member's rank under section 14, compulsorily move a member from the Permanent Forces to the Reserves under section 16, and terminate a member's service under section 24. Reasons for something being or not being in the interests of the Defence Force include reasons relating to:

- A member's performance, behaviour (including any convictions for criminal or service offences), or suitability to serve in the Defence Force or in their particular role or rank (paragraphs 6(2)(a), (b) and (c))
- Workforce planning in the Defence Force (paragraph 6(2)(d))
- The effectiveness and efficiency, morale, welfare and discipline, and the reputation and community standing of the Defence Force (paragraphs 6(2)(e), (f) and (g)).

10. 'Interests of the Defence Force' is a phrase that encompasses the requirements of the Defence Force from time to time. It includes considerations of the personal qualities of a member (that is, their individual performance, behaviour and suitability), and considerations relating to the Defence Force as a whole and the capacity of the Defence Force to develop and maintain capability to fulfil the requirements of the government of the day (that is, decision-making for workforce planning, efficiency and effectiveness, morale and discipline, or reputational reasons). For this reason, a member whose performance, behaviour and suitability are not in question may, nevertheless, be the subject of one of these decisions because of the interests of the Defence Force. An example might include a member whose performance is not in question, but who is nevertheless transferred to the Reserves because they are no longer widely employable in the Permanent Forces or because they are restricting the promotion opportunities of other Defence Force members. (In this type of situation, a transfer could be accompanied by payment of a special benefit in accordance with a determination under section 58B of the Act. Such payments are not governed by the Regulation.)

11. The list in subsection 6(2) is not exhaustive, and other factors may be relevant in deciding whether something is or is not in the interests of the Defence Force. The objects outlined in section 5 may assist when considering the interests of the Defence Force. That is: facilitating the effective and efficient operation of the Defence Force, providing the CDF with flexibility to deliver capability and preparedness outcomes (including developing force structure options); delivering the Government's objectives; and providing personnel management that supports the appointment, enlistment, promotion and retention of appropriate persons for service in the Defence Force.

## **Part 2 – Service chiefs**

12. Part 2 provides for the appointment, resignation, termination of appointment, and remuneration and allowances of the three service chiefs. Previously, provisions for these matters were included in the Act. However, apart from recognising each service chief as a part of their respective service, the Act no longer provides for the appointment of the service chiefs. These provisions were removed from the Act as part of the formal recognition of the authority of the CDF and VCDF, and removing the statutory authority of the service chiefs. However, in recognition of the important role the service chiefs will continue to play in the Defence Force, the Regulation provides for them to be appointed by the Governor-General, and to be paid

remuneration determined by the Remuneration Tribunal, as was previously the case under the Act.

13. The provisions in Part 2 are modelled on the provisions in the Act that deal with the appointment, acting appointment, resignation, termination of appointment, and remuneration and allowances of the CDF and VCDF. In addition, Part 2 includes requirements for the Minister to take into account recommendations of the CDF when appointing and terminating the appointment of a service chief, reflecting the fact that service chiefs are subject to the CDF's command.

### ***Section 7: Appointment as service chief***

14. Section 7 provides for the statutory appointment of the three services chiefs (the Chiefs of Navy, Army and Air Force) by the Governor-General (usually on the recommendation of the Minister). Each service chief is to be appointed from the officer ranks of the Navy, Army or Air Force, as relevant (subsections 7(1) and (2)).

15. Recommendations of the CDF must be taken into account before a service chief is appointed (subsection 7(3)). This reflects that, while section 7 provides for statutory appointment, service chiefs will be subject to the command of the CDF, who will have a clear interest in who is appointed under this section.

16. A service chief holds office for the period and on the conditions set out in their instrument of appointment (subsection 7(4)), and can only hold the office while they are officers of the relevant service (subsection 7(5)).

### ***Section 8: Acting appointments***

17. Section 8 enables the CDF to appoint another officer in the relevant service to act as a service chief during any vacancy in the office or during any period when the service chief is absent from duty or Australia, or is unable to perform the duties of the office for any reason. This might occur, for example, when the service chief is acting as the VCDF or is medically or physically incapacitated. The CDF may cancel an appointment under section 8 to act as a service chief at any time.

### ***Section 9: Resignation***

18. Section 9 provides for a service chief to be able to resign their appointment by giving written notice to the Governor-General (subsection 9(1)). The resignation will take effect when it is accepted by the Governor-General (subsection 9(2)).

### ***Section 10: Termination of appointment as service chief***

19. Section 10 provides for the Governor-General to terminate the appointment of a service chief by written notice (subsection 10(1)). However, before a service chief's appointment is terminated, the Minister must have received a report about the proposed termination from the CDF (subsection 10(2)). This reflects that, as a service chief's commander, the CDF will often be best-placed to assess and advise on whether a service chief's appointment should be terminated.

### ***Section 11 – Remuneration and allowances***

20. The Remuneration Tribunal is to determine the remuneration of the service chiefs, but if no determination is in place, the service chiefs are to be paid the remuneration set by regulations (subsection 11(1)). In addition to remuneration

determined by the Remuneration Tribunal, subsection 11(2) provides for the service chiefs to be paid allowances determined under Part IIIA of the Act. That is, service chiefs may be paid allowances determined by the Minister under section 58B of the Act or by the Defence Force Remuneration Tribunal under section 58H. However, the Defence Force Remuneration Tribunal does not determine service chiefs' salaries. Subsection 11(3) provides for this section to have effect subject to the *Remuneration Tribunal Act 1973*.

### **Part 3 – Service in the Defence Force**

21. Part 3 provides for entry into and separation from the Defence Force, promotion and reduction in rank while serving in the Defence Force, transfer between different parts of the Defence Force, and some other essential matters relating to personnel management in the Defence Force.

22. Most of the provisions in this part replace the *Defence (Personnel) Regulations 2002*. Additional provisions relating to personnel management in the Defence Force have been added (as outlined in Attachment B), and the provisions from the *Defence (Personnel) Regulations 2002* have been significantly modernised, simplified and consolidated (as outlined in Attachment C).

23. The powers in Part 3 are vested in the CDF, reflecting the CDF's role as the overall commander of the Defence Force. In practice, most decisions under this Part will be made by delegates (see subsection 84(1), which provides for the CDF to delegate his or her powers under Part 3).

#### ***Division 1 – Appointment and enlistment***

24. This Division provides for the appointment and enlistment of all Defence Force members, including both officers and enlisted members.

25. The *Defence (Personnel) Regulations 2002* made provision for the appointment, provisional appointment, probationary appointment and temporary appointment of officers. They made provision for enlistment and provisional enlistment. These concepts have been consolidated into a single provision for appointment and enlistment. The effect of the numerous provisions in the *Defence (Personnel) Regulations 2002* associated with appointment and enlistment can be achieved under this much simpler provision. Attachment C outlines how each concept in the *Defence (Personnel) Regulations 2002* has been addressed.

#### ***Section 12 – Appointment and enlistment***

26. Section 12 provides for the CDF to appoint people as officers in the Defence Force and to enlist people in the Defence Force (subsection 12(1)).

27. Under the *Defence (Personnel) Regulations 2002*, officers were appointed by the Governor-General. However, current practice suggests that the Governor-General would never exercise this power personally, and all decisions to appoint officers are made by delegates within the Defence Force. Accordingly, appointment of officers will now be by the CDF (or the CDF's delegate). The Governor-General will continue to personally issue commissions to officers, in accordance with current practice and reflecting the historic relationship between officers and the Crown (subsection 12(2)).

28. Under the *Defence (Personnel) Regulations 2002*, enlisted members were enlisted by the relevant service chief. However, consistent with the CDF's role as the

sole commander of the CDF, as outlined in the First Principles Review, the power to enlist members is now vested in the CDF.

29. Before a person is appointed or enlisted in the Defence Force, consideration must be given to whether they are a fit and proper person to perform duties as an officer or enlisted member (subsection 12(3)). A range of matters may be relevant when considering if a person is ‘fit and proper’ for service in the ADF, including a person’s skills, qualifications, experience, citizenship, and their previous conduct and behaviour (including any criminal convictions, subject to requirements associated with spent convictions). Inclusion of a ‘fit and proper person’ test for appointment and enlistment is consistent with recommendation 20 of the Phase 2 report of the *Review into the Treatment of Women in the Australian Defence Force* (Australian Human Rights Commission, 2012).

30. The CDF may specify conditions on a person’s appointment or enlistment in the Defence Force (subsection 12(4)). There is no limit on the types of conditions that can be imposed. Standard conditions could include:

- A requirement that a person complete a particular course or courses of training within a certain period of their appointment or enlistment
- A requirement that a person maintain a particular standard of behaviour during their appointment or enlistment
- A requirement that a person obtain Australian citizenship within a certain period of their appointment or enlistment (relevant for recruits from foreign militaries)
- A requirement that a person complete a period of probation.

31. Failure to meet a condition of appointment or enlistment can be a reason for terminating a member’s service under section 24.

32. A person’s appointment or enlistment may be for a specified period (paragraph 12(5)(a)) or, if no period is specified, for an indefinite period (paragraph 12(5)(b)). Divisions 4 and 5 deal with changes to a member’s period of service and when a member’s service ends if they are on an indefinite period of service.

33. Once a person has begun service in the Defence Force following their appointment or enlistment under section 12, they will only leave the service at the end of a period of service (including a period of service that has been changed under section 18), when they reach compulsory retirement age, or if their service is terminated under section 24. However, between a decision to appoint or enlist a person in the Defence Force, and the decision taking effect (that is when the person commences service), the decision may be cancelled or varied (for example, by changing conditions on the appointment or enlistment). This may be necessary, for example, if additional information about the person comes to light that has a bearing on their appointment or enlistment.

34. Subsection 12(6) requires that, before or as soon as practicable after a person’s appointment or enlistment, the person must take the oath or make the affirmation set out in Schedule 1, before one of the people mentioned in Schedule 1. In the oath or affirmation, a member of the Defence Force promises to serve and discharge duties according to law. The form of the oath or affirmation is in Schedule 1, and is in substantially the same form as was previously in the *Defence (Personnel) Regulations*

2002. In the *Defence (Personnel) Regulations 2002*, the oath or affirmation applied only to enlisted members, and was the mechanism by which a member was enlisted. Under section 12, the oath or affirmation is required of all members, including both officers and enlisted members. The mechanism for entry into the Defence Force is a decision by the CDF (or delegate) under subsection 12(1) to appoint or enlist the person (noting that under section 22 of the Act, members of the Defence Force must be persons who volunteer and are accepted for service in the Defence Force), rather than the taking of the oath or affirmation itself.

### ***Division 2 – Promotion and reduction in rank***

35. This Division provides for the promotion and reduction in rank of all Defence Force members, including both officers and enlisted members, and including promotion and reduction in rank between officer and enlisted ranks.

36. The *Defence (Personnel) Regulations 2002* made provision for promotion, provisional promotion, temporary promotion and limited-tenure promotion of officers and, separately, of enlisted members. These concepts have been consolidated into a single provision for promotion. The effect of the numerous provisions in the *Defence (Personnel) Regulations 2002* associated with promotion can be achieved under this much simpler provision. Reduction in rank was also dealt with in separate provisions for officers and enlisted members. The Regulation has a single provision for reduction in rank. Attachment C outlines how each concept in the *Defence (Personnel) Regulations 2002* has been addressed in the Regulation.

### ***Section 13 – Promotion***

37. A member may be promoted to a higher rank by the CDF (paragraph 13(1)(a)).

38. Under the *Defence (Personnel) Regulations 2002*, officers were promoted by the Governor-General. However, in line with current practice, the power to promote officers will now be vested in the CDF. Promotion of enlisted members was previously vested in the service chiefs, but this will now be vested in the CDF consistent with the First Principles Review.

39. As with a member's appointment or enlistment, a member's promotion may be subject to conditions (subsection 13(2)). There are no limits on the types of conditions that can be placed on promotion. Common examples would include a period of probation at the higher rank, or a requirement to complete a particular course or courses within a particular timeframe. Failure to meet a condition of promotion can be a reason for reducing a member's rank under section 14.

40. The CDF may also direct a member to act in a higher rank (paragraph 13(1)(b)), which can be subject to conditions (subsection 13(2)). The effect of acting in the higher rank can be addressed in the conditions. For example, a condition may be that the effect of acting in the higher rank is that the person is taken to be, for all purposes, in the higher rank for a specified period (similar to a temporary promotion under the *Defence (Personnel) Regulations 2002*). Alternatively, a condition may be that the effect is for limited purposes only. Typically, a direction to act in a higher rank would be for a particular period, until a particular date or event, for example, or until the member finishes a particular posting. A direction to act in a higher rank may also end at any time, because the CDF (or delegate) decides to cancel the direction to act in the higher rank.

41. Before a Defence Force member is promoted or directed to act in a higher rank, consideration must be given to whether they are a fit and proper person to perform duties at the higher rank (subsection 13(3)). A range of matters may be relevant when considering if a person is 'fit and proper' for a higher rank, including a person's performance reviews, seniority, qualifications, and previous conduct and behaviour (including any criminal or disciplinary convictions, subject to requirements associated with spent convictions). Inclusion of a 'fit and proper person' test for promotion is consistent with recommendation 20 of the Phase 2 report of the *Review into the Treatment of Women in the Australian Defence Force* (Australian Human Rights Commission, 2012).

42. Once a member's promotion under section 13 has taken effect, the promotion can only be reversed by using the reduction in rank procedure in section 14. However, between a decision to promote a member, and the decision taking effect, it may be appropriate to cancel or vary the promotion. For example, for workforce planning reasons, a decision may be made to reduce the number of promotions to a particular rank in a particular year.

#### ***Section 14 – Reduction in rank***

43. Section 14 provides that the CDF may reduce a member's rank if:

- retention at their current rank is not in the interests of the Defence Force (paragraph 14(1)(a))
- they cannot usefully serve at their current rank because of redundancy (paragraph 14(1)(b))
- they have failed to meet a condition of their appointment or promotion to their current rank (paragraph 14(1)(c))
- they have applied for, or agreed to, the reduction in rank (paragraph 14(1)(d)).

44. If a proposal to reduce a member's rank is because of the interests of the Defence Force or redundancy, the member must be given a notice about the proposal, and given at least 14 days to make a written response (subsection 14(2)). A decision must not be made for these reasons without providing notice in accordance with section 30. Notice is not required if the reduction in rank is because the member has failed to meet a condition of their promotion or if the member has applied for or agreed to the reduction in rank. Notice is also not required if the reduction in rank occurs during a period of probation associated with the member's promotion, and the reduction in rank is to the rank they held immediately prior to promotion (subsection 14(3)).

45. A decision to reduce a member's rank may be adverse to them, as it will have implications for pay, career progression and reputation. The requirement to give notice is the means by which members are provided with procedural fairness in relation to these adverse decisions. Notice is not required if the reason for reduction in rank is because the member has failed to meet a condition or during a period of probation. Failure to meet a condition of promotion under paragraph 14(1)(c) equates to the concept of 'provisional promotion' under the *Defence (Personnel) Regulations 2002*. Under the *Defence (Personnel) Regulations 2002*, a provisional promotion could be revoked without notice if a member failed to meet a condition. Not providing notice of a proposal to reduce a member's rank is not unfair in these limited



circumstances, as members will be aware that their promotion is subject to conditions, including any period of probation, from the outset.

46. Similarly, notice is not required if the member applies for or agrees to the reduction in rank (paragraph 14(1)(d)). A decision to reduce a member's rank in these circumstances is not adverse to the member, as it is in accordance with their wishes.

47. If necessary, for example as the result of a complaint made under Part 7 of the Regulation, a decision to reduce a member's rank can be reversed or amended.

### ***Division 3 – Transfers***

48. This Division provides for the transfer of Defence Force members between the services and between the Permanent Forces and the Reserves.

### ***Section 15: Transfer between arms of the Defence Force***

49. This section provides for transfer from one arm of the Defence Force to another; that is between the Navy, Army and Air Force (subsection 15(1)). The CDF may specify conditions for the transfer (subsection 15(2)). A member may be transferred between arms of the Defence Force under this section as many times as necessary during their career in the Defence Force.

50. Section 15 simplifies a number of provisions in the *Defence (Personnel) Regulations 2002* that provided for transfer between the services.

51. Transfer under section 15 may be voluntary or compulsory. In most cases, a decision to transfer a member from one service to another would be in response to an application by that member. However, as sole commander of the Defence Force, an ability to compulsorily transfer members between services gives the CDF enhanced flexibility in how the Defence Force is structured. This is consistent with the One Defence model outlined in the First Principles Review. An example where this power might be used is where the CDF decides to move an entire capability from one service to another (to enhance efficiency or interoperability for instance). It is expected that this power would be used sparingly, and any impact on affected members, including their morale, would be considered before the decision was made.

### ***Section 16: Transfer from Permanent Forces to Reserves***

52. Section 16 provides that the CDF may transfer a member of the Permanent Forces to the Reserves if the transfer is in the interests of the Defence Force (subsection 16(1)). 'Interests of the Defence Force' is defined in subsection 6(2). This power gives the CDF options beyond termination of service if a member is no longer widely employable in the Permanent Forces or if they are restricting the promotion opportunities of other Defence Force members. (In this type of situation, a transfer could be accompanied by payment of a special benefit in accordance with a determination under Part IIIA of the Act. Such payments are not governed by the Regulation.)

53. Before deciding to transfer a member under section 16, the member must be provided with a notice and given at least 14 days to respond (subsection 16(2)). A decision to transfer a member from the Permanent Forces to the Reserves may be adverse to them, as it will have implications for pay. The requirement to give notice is the means by which members are provided with procedural fairness in relation to these adverse decisions.

54. Voluntary transfer from the Permanent Forces to the Reserves occurs by operation of section 18 and section 20 of the Regulation.

55. In some cases, it may be appropriate to cancel or vary a decision to transfer a member from the Permanent Forces to the Reserves (for example, if the member makes a complaint under Part 7 of the Regulation in relation to the decision). However, once the transfer to the Reserves has occurred, the member can only be moved back to the Permanent Forces under section 17, which requires the member's agreement.

***Section 17: Voluntary transfer from Reserves to Permanent Forces***

56. Section 17 provides for members to voluntarily transfer from the Reserves to the Permanent Forces (subsection 17(1)), including with conditions (subsection 17(2)).

57. Members cannot be compelled to transfer from the Reserves to the Permanent Forces, as this would be inconsistent with the voluntary nature of service in the Defence Force and the nature of service in the Reserves, as outlined in sections 22 to 26 of the Act.

58. Once a transfer to the Permanent Forces under this section has taken effect, it can only be reversed if the member fails to meet a condition under subsection 17(2). Otherwise, to transfer the member back to the Reserves, decisions will need to be made under section 16 (for compulsory transfer), or sections 18 and 20 (for voluntary transfer).

***Division 4 – Changing periods of service***

59. This Division provides for changes to a member's period of service. A member's period of service can be changed voluntarily. A member's period of service can also be extended without the member's agreement in very limited circumstances.

***Section 18: Voluntary change***

60. Section 18 provides for the CDF to change a member's period of service if the member applies for or agrees to the change (subsection 18(1)). The CDF may impose conditions on the change (subsection 18(2)). Failure to meet a condition on a change in a member's period of service would be a basis for cancelling or varying the change.

61. Changing a period of service includes:

- extending the period of service (paragraph 18(3)(a)). This might occur, for example, when a member is approaching the end of a specified period of service and wishes to serve longer in the Defence Force.
- reducing the period of service (paragraph 18(3)(b)). This enables a member on a specified period of service to apply to reduce the period, effectively resigning from the Defence Force with effect at the end of the reduced period of service. A member's period of service can only be reduced if the CDF agrees – that is, a member cannot unilaterally resign from the Defence Force.
- converting a fixed period of service to an indefinite period of service (paragraph 18(3)(c)).

- converting an indefinite period of service to a fixed period of service (paragraph 18(3)(d)). This would enable members on an indefinite period of service to apply to change to a short fixed period, effectively resigning from the Defence Force with effect at the end of the short fixed period. A member's period of service can only be changed if the CDF agrees – that is, a member cannot unilaterally resign from the Defence Force.

62. With the member's agreement, their period of service can be changed as many times as required during the member's career in the Defence Force. Notwithstanding any change to a member's period of service under section 18, their period of service will end when they reach retirement age under section 23 unless the CDF directs that the member may serve beyond their retirement age under paragraph 23(2)(b).

63. The *Defence (Personnel) Regulations 2002* provided a detailed process for extending and converting periods of service, which is simplified in this provision. The extensive processes in the *Defence (Personnel) Regulations 2002* allowing for a member to apply to resign are also covered by this provision.

### ***Section 19: Time of war or defence emergency***

64. Section 19 provides that during a time of war or defence emergency, a member's period of service is extended until the CDF releases the member from service (subsection 19(1)).

65. 'Time of war' is defined in the Act, and means 'any time during which a state of war actually exists, and includes the time between the issue of a proclamation of the existence of war or of danger thereof and the issue of a proclamation declaring that the war or danger thereof, declared in the prior proclamation, no longer exists'. Similarly, 'time of defence emergency' is defined in the Act as 'the period between the publication of a proclamation declaring that a state of defence emergency exists in relation to Australia and the publication of a proclamation that that state of defence emergency no longer exists'.

66. Section 19 ensures ongoing ADF capability in the unlikely event of a proclaimed war or defence emergency. The CDF must release a member from service as soon as practicable after the end of the time of war or defence emergency (subsection 19(2)). The existence of a time of war or defence emergency does not prevent a member's period of service being changed under another provision, such as section 18 (subsection 19(3)).

### ***Section 20: Defence Force discipline***

67. Section 20 provides that the CDF may extend a member's period of service to ensure that a process under the *Defence Force Discipline Act 1982* relating to the member is completed before their period of service ends.

68. While former Defence Force members can continue to be charged with some offences under the *Defence Force Discipline Act 1982* for up to six months after they leave the Defence Force (in relation to offences they committed while in the Defence Force), the relevant offences and the punishments that can be imposed are more limited than is the case with serving members. Prosecuting members who commit service offences under the *Defence Force Discipline Act 1982* is an important aspect of maintaining and enhancing discipline in the Defence Force. There is concern that, in a situation where a member commits an offence a short time before their period of

service ends (including a situation where the member has applied for and been granted a reduction of their period of service), the limited options available under the *Defence Force Discipline Act 1982* might give the impression that the member has ‘got away with it’, which could have a significant effect on morale and discipline more generally.

69. Section 20 provides a limited power for the CDF to unilaterally extend a member’s period of service to address this type of scenario, for the purposes of maintaining and enhancing the discipline of the Defence Force. It is consistent with long-standing Defence practice, whereby, in the interests of the Defence Force, an application to resign may not be accepted from a member who is the subject of *Defence Force Discipline Act 1982* proceedings.

#### ***Division 5 – End of service or period of service***

70. This Division provides for matters relating to the end of a member’s service or period of service, including automatic transfer from the Permanent Forces to the Reserves, retirement age, early termination of service, service obligation debts, and changing the reason for the end of service.

#### ***Section 21: Becoming member of Reserves after service in Permanent Forces***

71. Section 21 provides for members of the Permanent Forces to automatically transfer to the Reserves at the end of their period of service (subsection 21(1)).

72. Under the *Defence (Personnel) Regulations 2002*, a member of the Permanent Forces would automatically transfer to the Standby Reserve at the end of their period of service. Section 21 simplifies and enhances these provisions.

73. When a member transfers to the Reserves under this section, their period of service in the Reserves may be specified (paragraph 21(2)(a)). If no period is specified, they will be on an indefinite period of service (paragraph 21(2)(b)), although this is subject to the ‘5 year rule’ in section 22.

74. The default position for members transferring to the Reserves under section 21 of the Regulation will be that they transfer to a part of the Reserves in which members are not required to render any service (including training) under the Act (equivalent to the Standby Reserve under the *Defence (Personnel) Regulations 2002* or SERCAT 2 in the Total Workforce Model). These members will typically remain in the Reserves for five years, at which time their service will end under section 22, except in the unlikely event that the Governor-General calls out the Reserves under section 28 of the Act. Members may also choose to transfer to another part of the Reserves, where they will be required to render service under section 25 or section 26 of the Act.

75. Subsection 21(3) provides several exceptions to the automatic transfer of members from the Permanent Forces to the Reserves at the end of their period of service. The CDF may direct that a member is not to become a member of the Reserves (paragraph 21(3)(a)). For example, the CDF may form the view that the member’s skills and experience will not be relevant to Reserve service in the future. Alternatively, the CDF may grant a member’s request not to transfer to the Reserves for personal reasons. If a member’s service is terminated under section 24, except for redundancy, they do not transfer to the Reserves (paragraph 21(3)(b)). Similarly, if a member’s service is terminated under the Act (for example under Part VIIIA of the Act) or the *Defence Force Discipline Act 1982* (where the sentence for a service

offence includes dismissal from the Defence Force), they do not transfer to the Reserves (paragraph 21(3)(c)).

76. Under the *Defence (Personnel) Regulations 2002*, members who joined the Permanent Forces before particular dates (1 July 2003 and, for certain members of the Air Force, 1 January 1996) were not required to transfer to the Standby Reserve at the end of their period of service. Similarly, members in the Australian Defence Force Gap Year program were not required to transfer to the Reserves at the end of their Gap Year. As a matter of policy, directions under paragraph 21(3)(a) will mean that these members will not be required to transfer to the Reserves under section 21 unless they wish to.

### ***Section 22: End of service in the Reserves – 5 year rule***

77. Section 22 provides that an indefinite period of service in the Reserves ends if the member has not been required to render service as a member of the Reserves for a continuous period of five years (subsection 22(1)). Members of the Reserves are required to render service under section 25 (Training for Reserves), section 26 (Volunteer service by Reserves) and section 28 (Governor-General may call out Reserves) of the Act. However, a significant number of members of the Reserves are not required to render service, particularly members who have automatically transferred to the Reserves at the end of their service in the Permanent Forces. The ‘5 year rule’ has been introduced to address the ever-growing list of members in the Reserves who do not provide any service, particularly those members who have automatically transferred from the Permanent Forces. This leaves little visibility of who is actually in the Reserves and so, who is liable to be called out under Part III of the Act.

78. The CDF may direct that the ‘5 year rule’ is not to apply to a particular member – that is, that their service in the Reserves continues beyond five years notwithstanding that they have not been required to render service during that period (subsection 22(2)).

### ***Section 23: Retirement age***

79. Section 23 provides for a member’s period of service to end when they reach their retirement age (subsection 23(1)). This is subject to section 19 (time of war or defence emergency), and any direction by the CDF that a member should serve beyond their retirement age (subsection 23(2)). The CDF may cancel or vary a direction under subsection 23(2) that they should serve beyond their retirement age.

80. The retirement ages listed in subsections 23(3) and (4) are the same as those previously provided for in the *Defence (Personnel) Regulations 2002*: no retirement age for an Admiral of the Fleet, a Field Marshal or a Marshal of the Royal Australian Air Force (subsection 23(3)); 63 years of age for a member of the Permanent Forces who holds the rank of Admiral, General or Air Chief Marshal (paragraph 23(4)(a)); 60 years of age for all other members of the Permanent Forces (paragraph 23(4)(b)); and 65 years for members of the Reserves (paragraph 23(4)(c)).

81. Retirement ages for Defence Force members have increased over time. For example, amendments to the *Defence (Personnel) Regulations 2002* in 2007 increased the retirement age for most members in the Permanent Forces from 55 years of age to 60 years of age. Section 88 of the Regulation provides a transitional provision for

members who, under the *Defence (Personnel) Regulations 2002*, had a younger compulsory retirement age from an earlier iteration of the regulations.

82. The concept of retirement age acts as an institutional milestone that restricts service beyond that age. It does not guarantee that a member will be given an opportunity to serve to that age (for example if the member is on a fixed period of service that ends before they reach retirement age, or if the member's service is terminated under section 24). Extensions of service beyond the retirement age are possible (paragraph 23(2)(b)). In most respects, retirement age in section 23 operates as if every member in the Defence Force is on a fixed period of service that ends when they reach the relevant age.

83. Defence's capability is dependent on the health and fitness of its members. Service in the Defence Force is arduous, and there are much higher demands on a Defence Force member's medical fitness than members of the general population, noting the risks both to an individual member and to others in both training and operational environments. There is a requirement that Defence Force members are fit for duty and can be deployed at short notice without medical limitations. The reality is, as members of the Defence Force become older, they also become less likely to be able to meet the necessary medical and fitness standards that must apply to Defence Force members. The cost to Government of ensuring that they do so increases. This is not to say that every individual who reaches retirement age is unable to meet the necessary physical and medical requirements, but fewer and fewer members can do so as they approach and pass retirement age.

84. One way this risk is managed in Defence is to increase the required frequency of periodic medical examinations as Defence Force members get older (this policy is currently included in the internal Defence document: *Health Manual*, Volume 3). Retirement age is another mechanism used to manage the increased risk. A decision to permit a member to serve beyond their retirement age under paragraph 23(2)(b) is an acceptance of the risk in relation to a particular member. This is likely to be influenced by the particular characteristics of the member, including their health and fitness.

85. Retirement age in the Defence Force is recognised as an exception to the ordinary prohibition against discrimination on the basis of age (Schedule 1 of *Age Discrimination Act 2004*). The retirement ages in the Regulation represent a balance between the need to manage the risk of an aging Defence Force, with the need to retain experience in the Defence Force and to not unfairly discriminate against people on the basis of age.

#### ***Section 24: Early termination of service***

86. This section provides that the CDF may terminate a member's service if the member is medically unfit for service (paragraph 24(1)(a)), if the member cannot be usefully employed because of redundancy (paragraph 24(1)(b)), if the member's retention is not in the interests of the Defence Force (paragraph 24(1)(c)), if the member has failed to meet a condition of their appointment or enlistment (paragraph 24(1)(d)), or if the member has been absent without leave for a continuous period of three months or more (paragraph 24(1)(e)).

87. Medical unfitness under paragraph 24(1)(a) covers both physical and mental health conditions that mean a member is unfit to serve in the Defence Force. The

physical and health requirements of a member's particular service and category will be relevant to whether they are medically unfit for service in the Defence Force – this provision does not require that the member be medically unfit for every conceivable job in the Defence Force before it can be used.

88. Section 24 contemplates that there may be more than one reason for termination. This allows for situations, for example, where a member is medically unfit for service, but where for reasons of morale and discipline it is also considered necessary to terminate their service because their behaviour means their retention is not in the interests of the Defence Force. All of the reasons previously available under the *Defence (Personnel) Regulations 2002* to terminate a member's service are covered by the reasons in subsection 24(1) (see Attachment C).

89. Before deciding to terminate a member's service because of medical unfitness, redundancy or the interests of the Defence Force, the member must be provided with a notice of the proposed decision and given at least 14 days to provide a written response (subsection 24(2)). This is how members are provided with procedural fairness in relation to a proposed termination decision. The notice requirement does not apply in relation to decisions to terminate because a member has breached a condition of their appointment or enlistment or because a member has been continuously absent without leave for three months or more. Further, no matter what the reason for termination, there is no notice requirement if the decision to terminate a member's service is made during a period of probation (subsection 24(3)). This is consistent with provisional and probationary appointment and enlistment under the *Defence (Personnel) Regulations 2002*. Not providing notice of a proposal to terminate a member's service is not unfair in these limited circumstances, as members will be aware that their appointment or enlistment is subject to conditions, and to any period of probation, from the outset.

90. If the reason for termination is because of redundancy in the Defence Force, the termination must not occur until at least five weeks after the member is given the notice, unless the member agrees to earlier termination (subsection 24(4)). The five week period is consistent with the longest statutory notice requirements for civilian employees in relation to redundancy. In this type of situation, a termination decision could be accompanied by a redundancy payment in accordance with a determination under Part IIIA of the Act. Such payments are not governed by the Regulation. If the service of a member in the Permanent Forces is terminated due to redundancy, they will automatically transfer to the Reserves under section 21 (paragraph 21(4)(b)).

91. In some cases, it may be appropriate to reverse or vary a decision under section 24 to terminate a member's service. A common variation would be to change the date the termination decision is to take effect. Another common scenario when a termination decision might be reversed or varied is if a member makes a complaint about the decision under Part 7. Once a termination decision has taken effect, the logistics of reversing the decision may mean that it is more appropriate to re-appoint or re-enlist the member under section 12. The appropriate course of action in this situation will depend on the circumstances of the case, having regard to the effect of any breaks in service on the member.

### ***Section 25: Service obligation debts***

92. Section 25 provides for a member who applies for, and is granted, a reduction to their period of service, if the reduction means that the member will not complete an

‘initial minimum period of service’ (IMPS) or a ‘return of service obligation’ (ROSO).

93. An IMPS is a period of time determined when a member is first appointed to or enlisted in the Defence Force. It is the minimum period of time a member is expected to serve in the Defence Force, regardless of whether their appointment or enlistment is for a fixed or indefinite period of service under subsection 12(4). IMPS vary for different types of service. At present, most direct entry officers have an IMPS of three years, while officers who go through the Australian Defence Force Academy have a longer IMPS. Direct entry pilots have an IMPS of 11.5 years, reflecting the extensive and expensive training they are required to undertake. The standard IMPS for an enlisted member is four years. The imposition of IMPS on members provides the Defence Force with greater certainty for workforce and capability planning purposes. Training new Defence Force members is expensive, and often imparts highly marketable skills. Imposing IMPS means that the Defence Force receives a reasonable return on its investment. This is particularly important for some categories of service, where members obtain highly marketable skills at the Commonwealth’s expense, often requiring years of training.

94. A ROSO is similar to an IMPS, but is not imposed at the beginning of a member’s service. Instead, a ROSO may be imposed when a member begins a particular course of training, or is promoted to a particular rank. Again, the purpose of a ROSO is to provide the Defence Force with certainty for workforce and capability planning, and to ensure that it receives a reasonable return on its investment in training.

95. Under the *Defence (Personnel) Regulations 2002*, there were two ways the Defence Force could ‘enforce’ an IMPS or ROSO if a member applied to resign before it ended. First, a service chief (or delegate) could refuse the application. Unlike civilian employment, it is not possible to unilaterally resign from the ADF – the resignation must be approved. However, rather than refusing a member’s application to resign to be refused outright, a service chief (or delegate) could, under the *Defence (Personnel) Regulations 2002*, impose conditions that must be met before the application to resign was granted. The conditions might be directed at bridging capability gaps, or ensuring proper handovers. However, when a member applied to resign before the end of their IMPS or ROSO, the most common condition to be met before resigning was a financial condition, based on Defence recouping money lost in training and similar expenses. In practical terms, these financial conditions would often work to discourage members from resigning before completion of their IMPS or ROSO.

96. Under the *Defence (Personnel) Regulations 2002*, the amount of the financial condition would be calculated on a case by case basis. While members would be informed at the time of their appointment or enlistment, or when they began the particular training associated with a ROSO, that they might be liable to re-pay training and other costs if they resigned before the end of their IMPS or ROSO, members were frequently unaware how much money this could involve.

97. The policy intent of IMPS and ROSOs, and requiring members to re-pay a reasonable amount of their training and other costs if they voluntarily separate before completion of their IMPS or ROSO, remains in the Regulation. However, it uses much clearer language, and requires members to be informed upfront of the amount of



money they will be required to re-pay. This creates a fairer and more transparent mechanism to achieve the policy goal.

98. Under the Regulation, a ‘service obligation debt’ is owed to the Commonwealth if a member applies for a reduction of their period of service, which is approved by the CDF, and the reduction means that the member will not complete an IMPS or ROSO (subsection 25(1)). The amount of money owed to the Commonwealth is determined using the ‘initial obligation amount’ and the ‘service debt calculation method’ (subsection 25(2)).

99. The ‘initial obligation amount’ is the amount of money determined by the CDF in respect of the particular IMPS or ROSO (paragraph 25(4)(a)). This amount will be a reasonable pre-estimate of the expenses the Defence Force will incur. It is not a penalty, and is intended to compensate the Defence Force for the lost investment, opportunity cost and loss of capability associated with the member not completing the service they had agreed to. The determined amounts will typically be estimated for the IMPS or ROSO in question, rather than for the individual member. Many amounts will only be imposed after a grace period, during which a member can leave without incurring a debt.

100. The ‘service debt calculation method’ is a method for reducing the initial obligation amount according to the portion of the IMPS or ROSO that the member has served, which is determined by the CDF (paragraph 25(4)(a)). This would typically be a pro rata reduction – that is, a member who has served half of their IMPS or ROSO period would only be expected to pay half of the initial obligation amount.

101. Imposition of a debt under section 25 requires that a member is informed at the outset of the length of the IMPS or ROSO, the initial obligation amount determined by the CDF (paragraph 25(3)(b)), and the service debt calculation method determined by the CDF (paragraph 25(4)(b)). If the member is not informed of these matters at the outset, the debt cannot be imposed under this section.

102. At the time the Regulation commences, many Defence Force members will already be subject to an IMPS or ROSO, and they will not have been informed of the initial obligation amount or service debt calculation method as required in subsections 25(3) and (4). In this situation, the amount of the service obligation debt will be determined by the CDF as if the *Defence (Personnel) Regulations 2002* continued in effect, and that the service obligation debt were a condition on resignation under those regulations that the member pay a specified amount of money (subsection 25(5)).

103. The CDF can waive a service obligation debt in whole or in part (subsection 25(6)). This discretion would be exercised where there are exceptional compelling or compassionate circumstances leading to the member’s early departure from the Defence Force. This would include situations where a member has decided to leave the Defence Force after being subject to sexual abuse or harassment, so that they can leave expeditiously and without financial consequences, as outlined in recommendation 21 of the Phase 2 report of the *Review into the Treatment of Women in the Australian Defence Force* (Australian Human Rights Commission, 2012).

### ***Section 26: Change of reason for end of service***

104. Section 26 provides that the CDF may ensure that a former member’s service is treated as having been terminated or ended for a reason other than the actual reason. The CDF may do this if satisfied that the member’s service could properly have been

terminated or ended for another reason (subsection 26(1)), and provided the member or the member's family agrees (subsection 26(2)). In some situations, additional facts about a member's medical condition, for example, come to light after their service has been terminated for behavioural reasons. Treating the member as if they had been terminated for another reason can provide considerable comfort to members and their families.

105. A decision under section 26 to treat a member as if they had been terminated for another reason is separate from decisions under other legislation in relation to a member's or former member's entitlements. Those decisions will be based on the relevant criteria outlined in that legislation.

### ***Division 6 – Service in the Reserves***

#### ***Section 27: Service in the Reserves***

106. Section 27 provides that members of the Reserves are bound to render service (including training periods) as required by the CDF. Different parts of the Reserves will have different requirements (including the four Reserves SERCATs in the Total Workforce Model). The requirements can be adjusted as needed in relation to the Reserves as a whole, to a particular part of the Reserves, or to individual Reserve members, to meet the requirements of the Defence Force and members of the Reserves.

### ***Division 7 – Suspension from duty***

107. This division provides for the CDF to suspend a member from duty in limited circumstances.

108. In one of the Defence Culture Reviews conducted during 2011, the former Inspector-General Australian Defence Force (Inspector-General ADF), Mr Geoff Earley, recommended that Defence's policies should be amended to allow for administrative suspension from duty, and when this can occur (*Review of the Management of Incidents and Complaints in Defence including Civil and Military jurisdiction*, recommendation 22). While commanders can stand a Defence Force member down from duty for operational reasons, suspension without pay or for extended periods should be supported by legislation. The new provision partially fills the gaps in the administrative suspension scheme in sections 98 to 100 of the *Defence Force Discipline Act 1982*, which apply when a member is being investigated for a service offence or has been charged with a service or civilian offence. Inclusion of this provision in the Regulation is not intended to derogate from a commander's ability, as an ordinary exercise of command, to stand a member down from duty for other reasons.

#### ***Section 28: Suspension from duty***

109. A member may be suspended from duty if they have received a notice of a proposed termination under either sub-section 24(2) of the Regulation or section 100 of the Act (which deals with positive prohibited substance tests) (paragraphs 28(1)(a) and (b)), or if a decision has been made to terminate the member's service but the decision has not yet taken effect (paragraph 28(1)(c)). A member may be suspended with pay, without pay, or on part pay (paragraph 28(2)(a)). The suspension may be ended or varied at any time (paragraph 28(2)(b)).

110. A suspended member remains a member of the Defence Force at all times. This means that requirements to follow commands will continue to apply to them. Members may also continue to receive medical and dental care, and other support, that they would have received if they were not suspended.

111. Suspension of a member under this section ends if the member is informed that the proposed termination under the Regulation or the Act will not proceed (subsection 28(3)).

112. If a member is to be suspended without pay or on part pay, they must be given notice and at least 7 days after the date of the notice to provide a written response (subsection 28(4)). Loss of pay is adverse to the member, and the notice requirement for decisions to suspend a member without pay or on part pay is the means to provide the member with procedural fairness in relation to the proposed adverse decision. A member may be suspended with pay without any notice, as the member does not lose any pay or benefits as a result. A member may be suspended with pay during the period they are provided notice of a proposed decision to suspend them without pay or on part pay.

113. A suspension decision may be varied retrospectively so that a member who was suspended without pay or on part pay can receive some or all of their pay (subsection 28(5)). This enables members to be repaid money lost during a period suspension in appropriate cases. For example, in a case where a member was suspended without pay under section 28, but their service was not ultimately terminated, it may be considered appropriate in some cases, in the interests of fairness, to re-pay the member some or all of the salary they did not receive while suspended.

#### ***Division 8 – Forfeiture of pay – absent without leave***

114. This Division replaces Part XIII of the *Defence Force Regulations 1952*, which included lengthy provisions governing circumstances in which a member's pay was automatically forfeited. Under the *Defence Force Regulations 1952*, a member's pay was forfeit if they were absent without leave or if they were in civil custody. The new provision is limited to absence without leave, which may include time spent in civil custody.

#### ***Section 29: Forfeiture of pay – absent without leave***

115. Section 29 provides that a member's pay is forfeited to the Commonwealth while they are absent from duty without leave (subsection 29(1)). This does not require that a member is charged with or convicted of the service offence associated with being absent from duty without leave (paragraph 29(2)(a)). The provision also clarifies that they may apply to a member who is in civil custody – that is, to a member who is absent from duty without leave because they are in civil custody (paragraph 29(2)(b)). The CDF may determine that some or all of the pay otherwise forfeited under this section is not forfeited (subsection 29(3)). For example, if a member's dependants are living in Defence provided housing, the CDF may determine that this aspect of the member's pay should continue notwithstanding that the member is absent without leave. If there turns out to be a good reason for a member to have been absent without leave, this subsection can be used to reimburse a member for pay that was otherwise lost under this section.

***Division 9 – Notice to members***

116. This Division provides for notices that are required to be given to a member before a decision is made to reduce their rank under section 14, to transfer them from the Permanent Forces to the Reserves under section 16, to terminate their service under section 24, or to suspend them from duty without pay or on part pay under section 28.

***Section 30: Notice to members***

117. Section 30 provides that the content of a notice must include:

- the proposed action
- the reason for the proposed action
- an invitation to the member to provide a written response as to why the proposed action should not be taken
- the facts and circumstances necessary for the member to prepare the written response
- the period for providing the written response (subsection 30(1)).

118. The minimum period that must be given for the member to provide a written response is 14 days in the case of reduction in rank (subsection 14(2)), transfer from the Permanent Forces to the Reserves (subsection 16(2)), and termination of service (subsection 24(2)), and 7 days in the case of suspension from duty (subsection 28(4)).

119. A decision must not be made until either the member provides a written response, states in writing that they do not intend to provide a written response, or the period for providing a written response ends (subsection 30(2)).

***Part 4 – Honorary ranks***

120. Part 4 provides for the appointment of people, including members of the Defence Force, to honorary rank. Honorary rank does not confer or imply any right to command. Chaplains, who are appointed as officers but may not have a rank, may be given an honorary rank that equates to one of the ordinary officer ranks.

***Section 31: Honorary officer ranks***

121. Section 31 provides for either the Governor-General or the CDF to appoint people to an officers' rank to be held as an honorary rank (subsection 31(1)). Honorary rank does not confer or imply a right to command, except whatever command is conferred by the CDF (subsection 31(2)). A decision to appoint a person to honorary officer rank can be revoked at any time (subsection 31(3)).

***Section 32: Honorary enlisted ranks***

122. Section 32 provides for the CDF to appoint people to an enlisted rank that is to be held as an honorary rank (subsection 32(1)). Honorary rank does not confer or imply a right to command, except whatever command is conferred by the CDF (subsection 32(2)). A decision to appoint a person to honorary enlisted rank can be revoked at any time (subsection 32(3)).

## **Part 5 – Privileges after end of service**

123. Part 5 provides for members of the Defence Force to be granted honorary titles and to wear Defence Force uniforms after their service in the Defence Force ends.

### ***Section 33: Title after end of service***

124. Section 33 provides that, if a member's service in the Defence Force has ended, the CDF may grant the former member an honorary title relating to their former appointment (subsection 33(1)). It does not confer or imply a right to command or membership of the Defence Force (subsection 33(2)). The CDF may revoke the grant of an honorary title at any time (subsection 33(3)).

### ***Section 34: Wearing of uniform after end of service***

125. Section 34 provides that, if a Defence Force member's service has ended, the CDF may permit them to wear a uniform relating to their former service, including any conditions to which wearing the uniform is subject (subsection 34(1)). The CDF may revoke the permission at any time (subsection 34(2)).

## **Part 6 – Defence honours and awards**

126. Part VIIC of the Act provides for the establishment and functions of the Defence Honours and Awards Appeals Tribunal. The Tribunal has power to review some decisions to refuse defence honours or defence awards. If directed by the Minister, the Tribunal must also hold inquiries into specified matters concerning honours or awards. Section 110T of the Act defines 'defence honour' and 'defence award' as having the meaning given by the regulations. Part 6 of the Regulation includes lists of defence honours and defence awards for the purposes of section 110T of the Act, and establishes an offence relating to the disclosure of information. It replaces Part 15A of the *Defence Force Regulations 1952*.

### ***Section 35: Defence honours***

127. Section 35 provides a list of honours that are 'defence honours' for the purposes of section 110T of the Act. The list is identical to the list previously included in Schedule 3 of the *Defence Force Regulations 1952*.

### ***Section 36: Defence awards***

128. Section 36 provides a list of awards that are 'defence awards' for the purposes of section 110T of the Act. The list is identical to the list previously included in Schedule 3 of the *Defence Force Regulations 1952*, subject to the addition of '27 Australian Operational Service Medal'.

### ***Section 37: Disclosure of information about honours and awards***

129. Section 37 provides that it is an offence for a Tribunal member or person assisting the Tribunal to disclose information obtained in relation to an application for review (subsection 37(1)). Exceptions to this offence include where the disclosure is to the person to whom the information relates (subsection 37(2)). The maximum punishment for this offence is 10 penalty units.

130. This section is substantively identical to the offence provision that was in section 93D of the *Defence Force Regulations 1952*, subject to the addition of an

exception to the offence where the person disclosing the information does so in the performance of their duties as a Tribunal member or in assisting the Tribunal (paragraph 37(2)(a)).

### **Part 7 – Redress of grievances**

131. This Part replaces Part 15 of the *Defence Force Regulations 1952*, which provided a formal mechanism for a member of the Defence Force to make a complaint about a decision, act or omission that related to the member's service in the Defence Force. The process in the *Defence Force Regulations 1952* was a complex, multi-layered process based entirely in a member's chain of command. Following a review of all inquiry, investigation and review processes in Defence (*Re-Thinking Systems of Inquiry, Investigation, Review and Audit in Defence*), it was decided to replace this complex process with a single layer of formal internal review, undertaken by the Inspector-General ADF, while enabling a member's chain of command to consider complaints in whatever manner is considered appropriate in the circumstances. The process outlined in Part 7 of the Regulation will provide a quicker, more independent and expert mechanism for Defence Force members to seek formal review of decisions affecting their service.

132. Under Part 7, a Defence Force member may submit a complaint about a decision, act or omission to their commanding officer or an authorised complaint recipient. The commanding officer or authorised complaint recipient can address the complaint in whatever way seems appropriate, including by resolving the matter immediately or referring the matter elsewhere in the member's chain of command. However, the complaint must be referred to the Inspector-General ADF within 14 days. The Inspector-General ADF must consider the complaint, unless they decide in all the circumstances not to consider it, for example because the complaint has been satisfactorily resolved by the commanding officer or because the matter would be better dealt with under another complaint handling procedure. Once the Inspector-General ADF has considered a complaint, they may make recommendations to decision-makers in Defence on how the matter should be resolved.

133. This simplified process gives the chain of command the opportunity to resolve Defence Force members' complaints informally, using whatever methods are appropriate in the circumstances. At the same time, Defence Force members are protected because the Inspector-General ADF has the opportunity to consider all complaints and make recommendations on their resolution. The Inspector-General ADF's independence from the ordinary chain of command was enhanced in the *Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Act 2015*, which included features such as a requirement for the Inspector-General ADF to prepare an annual report for presentation to Parliament.

#### ***Section 38: Object of this Part***

134. Section 38 provides that the object of the Part is to provide a process for a member to make a complaint about a grievance they have concerning a decision, act or omission that relates to their service in the Defence Force.

#### ***Section 39: Chief of the Defence Force may authorise person to receive complaints***

135. Section 39 provides for the CDF to authorise Defence Force officers or Defence APS employees at or above the APS 6 level, in writing, to receive complaints

(subsection 39(1)). A person authorised under subsection 39(1) is an ‘authorised complaint recipient’ (subsection 39(2)).

136. Under Part 15 of the *Defence Force Regulations 1952*, a complaint had to be submitted to the member’s commanding officer. This was problematic for some members, and in relation to some complaints. In some cases, particularly in joint and integrated environments where Defence Force members and civilians are working together, a member’s nominal commanding officer has very little to do with their day to day service. Under section 39, in this situation, an authorised complaint recipient who has the ability to consider and resolve complaints from the work area could be appointed, rather than requiring a member to submit a complaint to their commanding officer. Further, in some cases, a complaint relates to a decision, act or omission of the commanding officer, and a member may be reluctant to submit the complaint directly to its subject. Appointing authorised complaint recipients gives a member a choice to submit the complaint to someone other than the subject of the complaint in this scenario.

#### ***Section 40: Making a complaint***

137. Section 40 provides that a member of the Defence Force may make a complaint about a decision, act or omission in relation to the member’s service in the Defence Force that is adverse or detrimental to them (paragraph 40(1)(a)). The adverse or detrimental effect of the decision, act or omission must be capable of being redressed by: the CDF or another member of the Defence Force; the Secretary or an employee of the Department; or a delegate or person authorised by the CDF or Secretary (paragraph 40(1)(b)). This slightly expands the scope of the redress of grievance process from that in regulation 75(1)(b) of the *Defence Force Regulations 1952*, to reflect the fact that some decisions that affect Defence Force members are made by Defence contractors or other government agency employees who have been delegated to or authorised by the CDF or the Secretary.

138. A member cannot make a complaint about: a decision, act or omission relating to a redress of grievance complaint (paragraph 40(2)(a)); a decision, act or omission of the Inspector-General ADF (paragraph 40(2)(b)); a decision, report, finding or recommendation of an inquiry under the *Defence (Inquiry) Regulations 1985* (paragraph 40(2)(c)); a decision to give, or not to give, a particular assessment, grade or rating as the result of performance appraisal reporting (paragraph 40(2)(d)); a decision, judgment or order made by a civil or criminal court, a service tribunal or the Defence Force Discipline Appeal Tribunal (paragraph 40(2)(e)); a liability arising under section 68 or 69 of the *Public Governance, Performance and Accountability Act 2013* (paragraph 40(2)(f)); or an act that is part of the administrative process for making a decision except as part of a complaint about the decision (paragraph 40(2)(g)). This final situation prevents a Defence Force member from submitting a complaint when they receive a notice of a proposed decision (for example a notice under subsection 24(2) of the Regulation that it is proposed to terminate a member’s service), but the decision has not yet been made. Once the decision is made, they can submit a complaint about the decision, including any relevant complaints about the process followed to make the decision.

### ***Section 41: Manner of making complaint***

139. Section 41 provides that a complaint must be made in the form approved by the CDF (paragraph 41(1)(a)). For example, the CDF may require that a complaint be made in writing (including by email), or on a particular form. A complaint must include information about the decision, act or omission concerned (paragraph 41(1)(b)), must specify the redress sought (paragraph 41(1)(c)), and must be given to the member's commanding officer or an authorised complaint recipient (paragraph 41(1)(d)).

140. This section also provides for time limits to make complaints. A complaint about a termination decision must be made within 14 days after the day on which the member was notified of the decision (subsection 41(2)). Any other complaint must be made within 6 months after the day on which member was notified of, or could reasonably be expected to have known about, the decision, act or omission (paragraph 41(3)(a)). Except in the case of termination decisions, if the Inspector-General ADF is satisfied that there are exceptional circumstances, they may extend the time for making the complaint (paragraph 41(3)(b)). The time limits in section 41 are identical to those that existed under Part 15 of the *Defence Force Regulations 1952*.

### ***Section 42: Action to consider complaint or redress grievance***

141. Section 42 provides options for the commanding officer or authorised complaint recipient who receives the complaint. They may: consider the complaint (paragraph 42(a)); take action to redress the member's grievance (paragraph 42(b)); refer the complaint to another person for consideration (paragraph 42(c)); refer the complaint to another person who is capable of redressing the member's grievance (paragraph 42(d)); and refer the complaint to be dealt with under another complaint handling procedure (paragraph 42(e)).

142. Section 42 gives a commanding officer or authorised complaint recipient considerable flexibility in how to manage a Defence Force member's complaint. This is in contrast to Part 15 of the *Defence Force Regulations 1952*, which required a commanding officer to inquire into a complaint and make a decision, regardless of whether this made sense in all the circumstances. In some situations, a commanding officer will be able to quickly resolve a complaint. In others, the complaint relates to something that is not within the commanding officer's power, so can more usefully be referred to someone else or be dealt with using some other established complaint handling procedure.

### ***Section 43: Referral to Inspector-General ADF***

143. Regardless of any other action that the commanding officer or authorised complaint recipient takes in relation to a complaint, this section provides that the complaint must be referred to the Inspector-General ADF within 14 days (subsection 43(1)). The member must be notified that the complaint has been referred (paragraph 43(1)(b)).

144. The commanding officer or authorised complaint recipient may also provide the Inspector-General ADF with any other information or material they consider relevant (subsection 43(2)). The commanding officer or authorised complaint recipient who receives a complaint will often have considerable additional information about how the matter has been managed in the past, and how it is



intended to manage the matter in the future. The purpose of subsection 43(2) is to encourage them to provide this information to the Inspector-General ADF at the outset, rather than requiring the Inspector-General ADF to compel them to provide it using powers in the *Inspector-General of the Australian Defence Force Regulation 2016*.

145. If the commanding officer or authorised complaint recipient fails to refer a complaint to the Inspector-General ADF, the member may give the complaint directly to the Inspector-General ADF (subsection 43(3)).

#### ***Section 44: Inspector-General ADF to consider complaint***

146. Section 44 provides that the Inspector-General ADF must consider the complaint (subsection 44(1)), subject to section 46 of the Regulation and subsection 110DB(1) of the Act (subsection 44(2)). Section 46, as outlined below, provides for the Inspector-General ADF to decide not to consider a complaint in certain circumstances. Subsection 110DB(1) of the Act provides that the Inspector-General ADF may end an inquiry or investigation if he or she is satisfied that it is not warranted having regard to all the circumstances. The Inspector-General ADF may adopt any procedures considered appropriate in the circumstances (subsection 44(3)). For example, the Inspector-General ADF can use powers in the *Inspector-General of the Australian Defence Force Regulation 2016* to establish a formal inquiry into a complaint. However, there is no requirement to use a formal inquiry process – the Inspector-General ADF may decide to undertake a more flexible fact finding review process (including in some cases a review on the papers).

#### ***Section 45: Action by Inspector-General ADF***

147. Section 45 provides for the actions that the Inspector-General ADF must take once a complaint has been considered. The Inspector-General ADF must inform the member's commanding officer or a more senior officer in the member's chain of command of any findings (paragraph 45(1)(a)). One example where a more senior officer might be informed of findings rather than the commanding officer would be where there are adverse findings about the commanding officer. The Inspector-General ADF may also inform the Minister, the CDF, a service chief, the Secretary, a member of the Defence Force, an employee of the Department, or any other person affected by a finding, of the findings (paragraph 45(1)(b)). The Inspector-General ADF may also give a report about the complaint, including findings and recommendations, to any of these people, and to any other person affected by a recommendation (subsection 45(2)).

148. This section also provides that the Inspector-General ADF's recommendations may include, but is not limited to, action that may be taken to provide redress (subsection 45(3)).

149. This section makes it mandatory for the Inspector-General ADF to inform the member who made the complaint of: the findings made by the Inspector-General ADF in relation to the complaint; who has been informed of the findings in relation to the complaint; and whether other persons have been given a report about the complaint, and if so who has been given the report (subsection 45(4)).

***Section 46: Inspector-General ADF may decide not to consider complaint***

150. Section 46 provides discretion to the Inspector-General ADF not to consider a complaint (or to stop considering a complaint) in certain circumstances: the complaint has been, or will be able to be, satisfactorily resolved by the commanding officer or authorised complaint recipient (paragraph 46(1)(a)); the matter has already been considered under this Part or another complaint handling procedure (paragraph 46(1)(b)); another complaint handling procedure is more appropriate to deal with the complaint (paragraph 46(1)(c)); the member has not made reasonable efforts to resolve the grievance before submitting the complaint under this Part (paragraph 46(1)(d)); the complaint does not include sufficient information to be able to be considered (paragraph 46(1)(e)); the complaint is frivolous or vexatious (paragraph 46(1)(f)); or, in all the circumstances, consideration of the complaint is not warranted (paragraph 46(1)(g)).

151. This section allows the Inspector-General ADF to consider the particular circumstances of a complaint. For example, if the Inspector-General ADF takes the view that the matter is being adequately dealt with in the chain of command, he or she may decide not to consider it. This encourages the chain of command to manage and resolve complaints as quickly as possible, especially if they are relatively simple complaints that can be dealt with at a low level. This section also allows the Inspector-General ADF to avoid duplication in considering a complaint, for example if a member has made substantially the same complaint to another agency (such as the Australian Human Rights Commission or Defence Force Ombudsman).

152. The section requires that, if the Inspector-General ADF decides not to consider a complaint, the member must be notified of the decision and reasons for it (subsection 46(2)).

***Section 47: Withdrawing complaint***

153. Section 47 provides that a member may withdraw their complaint (subsection 47(1)). If the complaint has already been referred to the Inspector-General ADF, the member withdraws the complaint by written notice to the Inspector-General ADF (paragraph 47(1)(a)). If the complaint has not yet been referred to the Inspector-General ADF, the member withdraws the complaint by written notice to the commanding officer or authorised complaint recipient who received the complaint (paragraph 47(1)(b)). A common example of where a member might withdraw their complaint is if they are satisfied with the way it has been addressed by their chain of command, and they do not think it necessary for the Inspector-General ADF to consider it.

154. If a member withdraws their complaint before it is referred to the Inspector-General ADF, the commanding officer or authorised complaint recipient is not required to refer it to the Inspector-General ADF. However, the Inspector-General ADF must be informed that the complaint was made and then withdrawn (subsection 47(2)).

***Section 48: Victimisation***

155. This section provides for offences by Defence Force members and Defence Department employees if a member is victimised because they intend to submit, or have submitted, a complaint under this Part.

156. It is an offence for a Defence Force member or Defence Department employee to engage in conduct that causes detriment to a person, when they intend to cause detriment because the person has made or proposes to make a complaint under this Part, has redressed or proposes to redress a member's grievance, or has taken any other action under this Part (subsection 48(1)). It is also an offence for a Defence Force member or Defence Department employee to threaten to cause detriment if they intend to cause or are reckless as to causing the other person fear that the threat will be carried out, and they make the threat because the person has made or proposes to make a complaint under this Part, has redressed or proposes to redress a member's grievance, or has taken any other action under this Part (subsection 48(2)). The maximum punishment for both offences is 10 penalty units. A threat may be express or implied, or conditional or unconditional (subsection 48(3)), and it is not necessary that the threatened person actually feared that the threat would be carried out (subsection 48(4)).

157. These offences do not prevent a Defence Force member or Defence employee from providing good faith advice to a person about a redress of grievance, for example advising that making a complaint under this Part is not their best option. In this scenario, there is no intention to cause detriment. It also does not prevent a person from taking action against a person for other reasons – for example requiring a person to re-pay money that has been overpaid to them, even if those reasons only came to light when the person made a complaint under this Part. In this scenario, the reason for any detriment is not because the member has made the complaint, but because the member was not legally entitled to the money. Ordinary management action, including posting decisions, would not be the basis for offences under this section, because there is no intention to cause detriment.

## **Part 8 – Medical and dental treatment**

158. This Part provides for the provision of medical and dental treatment to Defence Force members. It replaces Division 3 of Part 12A of the *Defence Force Regulations 1952*.

### ***Section 49: Provision of medical and dental treatment***

159. Section 49 provides that the Commonwealth must arrange the provision of medical and dental treatment to members rendering continuous full time service. This covers the medical and dental treatment of members of the Permanent Forces (see section 23 of the Act), and members of the Reserves who have volunteered to render continuous full time service (see section 26 of the Act). The requirement is for medical and dental treatment necessary to keep the member fit for the performance of their duties (subsection 49(1)).

160. Medical treatment provided to Defence Force members is not required to comply with State or Territory laws if it complies with a Defence Instruction made under section 11 of the Act (subsection 49(2)). This enables the Defence Force to authorise trained Defence Force medics to provide medical treatment, even though they may not be certified as a health practitioner under relevant State or Territory laws. It also enables the provision of consistent care across the whole Defence Force, even if relevant State or Territory laws are inconsistent.

161. The section also provides that the Commonwealth must arrange for the supply of pharmaceuticals required for the provision of medical and dental treatment,

including arranging for the transport, storage and possession of the pharmaceuticals (subsection 49(3)). The supply of pharmaceuticals does not need to comply with State or Territory laws if it complies with a Defence Instruction (subsection 49(4)). This enables the authorisation of trained Defence Force medics, for example, to supply pharmaceuticals to Defence Force members even if they are not certified as a health practitioner under relevant State or Territory laws.

162. While the language has been modernised, the substantive effect of section 49 is relevantly identical to regulation 58E of the *Defence Force Regulations 1952*.

***Section 50: Recovery of the costs of treatment in certain circumstances***

163. Section 50 provides that the Commonwealth may recover the costs of treating a Defence Force member if the treatment is in relation to an illness or injury for which the member has an enforceable claim for damages against a third party. This provision means compensation a Defence Force member receives from a third party for an injury may be recovered by the Commonwealth to the extent necessary to cover the costs of treating the injury.

164. In this situation, the Secretary may require the member to pay an amount to the Commonwealth for the treatment (subsection 50(1)). The amount to be paid must not exceed the expense incurred in providing the treatment (subsection 50(2)), and is a debt due to the Commonwealth (subsection 50(3)). The amount may be deducted from a member's salary (subsection 50(4)). The section also makes it clear that treatment costs may be recovered from a person, no matter when the relevant illness or injury occurred, and from a person who ceases to be a member after receiving the treatment (subsection 50(5)).

165. This section is based on regulation 58F of the *Defence Force Regulations 1952*, which had substantially the same effect. There have been some minor changes – the power to require a member to pay an amount, which is now vested in the Secretary, was previously vested in the Minister. Out of date provisions relating to the costs of service and Repatriation hospitals have not been re-made.

**Part 9 – Oaths and affirmations etc. for members serving overseas**

166. Part 9 provides a mechanism for members serving overseas to swear oaths, make affirmations, make affidavits, and sign documents that require a witness, for the purposes of any Commonwealth, State or Territory law. It replaces Part IV of the *Defence Force Regulations 1952*.

167. When a Defence Force member is posted or deployed outside Australia, they may need to swear an oath, make an affirmation, make an affidavit, or sign some other document that requires a witness, for the purpose of legal or other proceedings that are underway in Australia. Typically, Commonwealth, State and Territory law requires that an oath or affirmation is administered, and an affidavit or other document is witnessed, by a particular type of person (such as an Australian legal practitioner). The relevant type of person may not be available in the Defence Force member's location. This Part enables any Defence Force officer and officers of some foreign militaries to perform these functions.

### ***Section 51 – Oaths and affirmations etc. for members outside Australia***

168. Section 51 provides that a competent officer may administer an oath or affirmation, take an affidavit, or witness the signing of a document, for a member of the Defence Force who is serving outside Australia (subsection 51(1)). A member of the Defence Force includes, for the purposes of this part, a person who accompanies a part of the Defence Force (paragraph 51(5)(a)). The section also clarifies that Defence Force members who are prisoners of war, or interned or in custody in a place outside Australia, are also covered (paragraph 51(5)(b)).

169. The competent officer must include their signature, name and rank with any writing (subsection 51(2)), but is not required to include the place (subsection 51(3)). This protects potentially sensitive information about Defence Force operations from disclosure.

170. An oath, affirmation, affidavit, or document that is administered, taken or witnessed in this manner, and which is substantially in accordance with a form provided by the Commonwealth, State or Territory, has effect for the purposes of any law of the Commonwealth, State or Territory (subsection 51(4)).

### ***Section 52: Meaning of competent officer***

171. Section 52 defines ‘competent officer’ for the purposes of section 51. Any officer in the Defence Force is a competent officer (subsection 52(a)). Officers in the Canadian, New Zealand and United States of America armed forces are also competent officers (subsection 52(b)). This enables Defence Force members who are deployed or posted with coalition forces to take advantage of this Part. In addition, if a Defence Force member is a prisoner of war, or is interned or in custody in a place outside Australia, the person who is the official representative of prisoners of war or other persons detained or interned in that place is a competent officer (subsection 52(c)).

### **Part 10: Certification of deaths**

172. Part 10 enables the Minister to issue death certificates for Defence Force members who have died, or have become missing and presumed to have died, while on service. This enables the certification of death for legal purposes outside of ordinary State and Territory requirements, which may not always be suitable in the operational context. This Part replaces Part 5A of the *Defence Force Regulations 1952*, and has the same substantive effect.

### ***Section 53: Minister may issue death certificates***

173. Section 53 provides that the Minister may issue a death certificate for a Defence Force member who has died, or has become missing and is presumed to have died, while on service (subsection 53(1)). For the purposes of this Part, a Defence Force member includes a person who accompanies a part of the Defence Force (paragraph 53(4)(a)). The section also clarifies that Defence Force members who are prisoners of war, or interned or in custody in a place outside Australia, are covered (paragraph 53(4)(b)).

174. A certificate issued under section 53 must state either the date on which the member died or is presumed to have died, or a date before or after which the member died or is presumed to have died (subsection 53(2)). The certificate is evidence in all

courts and for all purposes of the death, and time of death, of the member (subsection 53(3)).

***Section 54: Cancellation and correction of death certificates***

175. Section 54 provides for a situation where the Minister is satisfied that a death certificate is incorrect (subsection 54(1)), including where a particular in the certificate is incorrect (such as an incorrect date) or the certificate is incorrect as to the death of the member (subsection 54(2)). In this situation, the Minister must require the certificate to be returned and either cancel the certificate or issue a corrected certificate (subsection 54(1)). Cancelling the original death certificate or issuing a corrected certificate does not affect the rights of a person acting in good faith in reliance on the original certificate (subsection 54(3)).

176. The section provides for an offence if a person has possession or control of a death certificate, and the Minister requires the person to return it, and the person fails to comply with the requirement (subsection 54(4)). Another offence provides that a person who has possession or control of a death certificate, who has been required to return it or who knows that the Minister will require its return, must not make use of, or purport to act in reliance on, the death certificate (subsection 54(5)). The maximum punishment for these offences is a fine of 10 penalty units.

***Section 55: Dealing with property***

177. Section 55 applies if there is a death certificate under this Part in effect for a member (subsection 55(1)). If probate of the member's will has been granted or is proposed to be granted, or if administration of the member's estate has been granted or is proposed to be granted, distribution or administration of the member's estate does not require leave of the court (subsection 55(2)). The section also provides that no bond, surety or other security is to be required in relation to money or other property forming part of the member's estate that would not have been required if the member's death had been proved conclusively (subsection 55(3)).

***Section 56: No civil or criminal liability for reliance on certificate or cancellation***

178. Section 56 provides that a person who has paid money or transferred property in good faith in reliance on a certificate or cancellation under this Part is not civilly or criminally liable only for that reason.

**Part 11 – Defence areas**

179. This Part consolidates the provisions from Part VII and Part XI of the *Defence Force Regulations 1952*, which covered prohibited areas and practice areas respectively. Given the considerable similarity of treatment between prohibited and practice areas under the *Defence Force Regulations 1952*, the Part establishes a new scheme for defence areas which may be prohibited at all times or during particular periods. People can be prohibited from entering a defence area (or be required to leave it) for defence purposes, for example to enable the Defence Force to conduct testing of defence materiel, or to carry out a defence operation or practice, in the area. Prohibiting entry for these purposes is important for public safety, for the safety of personnel involved in the operations or practices, and for national security reasons.

### ***Division 1 – Application of Part***

180. This Division provides that Part 11 does not apply in the Woomera Prohibited Area, which will continue to be administered under Part VIB of the Act and Part VII of the *Defence Force Regulations 1952*.

#### ***Section 57: Application***

181. Section 57 provides that Part 11 does not apply to a person if, immediately before the repeal of the *Defence Force Regulations 1952*, Part VII of those regulations applied to the person in accordance with sub-section 72TB(1) of the Act (subsection 57(1)). For those people, Part VII of the *Defence Force Regulations 1952* will continue to apply (subsection 57(2)).

182. This section covers certain people in the Woomera Prohibited Area, which is subject to a different arrangement from other prohibited areas. The arrangements for the Woomera Prohibited Area are contained in Part VIB of the Act, which was passed by Parliament in August 2014, following consultation with stakeholders, including native title holders, pastoral lease holders, and the South Australian Government. The effect of section 57 is that the arrangements for the Woomera Prohibited Area will continue exactly as before the *Defence Force Regulations 1952* was repealed.

### ***Division 2 – Defence areas***

183. This Division provides for the declaration of defence areas, the use of defence areas for defence purposes, determination of periods during which entry to a defence area is prohibited, directions to remove movable property from a defence area, authority to install equipment in a defence area, authority to remove people and property from defence areas, and offences relating to defence areas.

#### ***Section 58: Declaration of defence area***

184. Section 58 provides that the Minister may, by legislative instrument, declare an area of land, sea or airspace in or adjacent to Australia to be a defence area for use for a defence purpose (subsection 58(1)). Under the *Defence Force Regulations 1952*, prohibited areas and practice areas could be declared in relation to areas of land or sea. Airspace has been added to reflect its increased relevance for the modern Defence Force.

185. A declaration under section 58 must specify the kind of defence purpose for which the area is required, and specify whether entry into the area is to be prohibited at all times, or during particular periods (subsection 58(2)).

186. The Minister may only declare an area under this section in one of four situations: the area is Commonwealth land; the occupier's consent has been obtained; it is necessary or expedient in the interests of the safety or defence of Australia to use the area for the purpose of testing defence materiel or carrying out a defence operation or practice; or the area is a depot, factory, laboratory, store or other facility used by or on behalf of the Commonwealth in relation to defence materiel (subsection 58(3)). This list clarifies the situations that were available under Parts VII and XI of the *Defence Force Regulations 1952* to declare a prohibited area or practice area.

187. A defence area may be used for the defence purpose specified in the declaration (subsection 58(4)). If a defence area is to be used for a new purpose that

was not included in the original declaration, it would be necessary to make a new declaration under section 58.

***Section 59: Prohibition of entry into defence area***

188. Section 59 provides that, for defence areas that are to be prohibited during particular periods, the CDF or the Secretary may determine a period when entry is prohibited (subsection 59(1)). A note gives the example that entry may be prohibited while a defence operation or practice takes place.

189. This section also requires the CDF or the Secretary to cause notice to be given of a prohibition of entry into a defence area as is reasonably required (subsection 59(2)). In deciding what notice is reasonably required, regard should be had to whether entry is prohibited at all times, the need to protect people and property that might be affected by activities in the area, the nature of activities to be undertaken in the area, the equipment likely to be used in the area, and the forms of communication available for notifying the public (subsection 59(2)). This section enables the notice given to members of the public that an area is prohibited to be adapted to the circumstances, including taking an approach that is proportionate to the nature of the risks in the defence area at the relevant time. Some common forms of notice would include signs at the perimeter of a defence area, notices published in local newspapers, or correspondence sent to local residents.

190. The section creates an offence if a person is in a defence area while entry to the area is prohibited (subsection 59(3)) (including entry to a defence area that is prohibited at all times). The maximum punishment for this offence is 20 penalty units. The offence does not apply if the person has permission to be in the area from a person authorised by the CDF or the Secretary, or from an officer participating in an activity being undertaken in the prohibited area (subsection 59(4)). A note references section 62, which covers requirements for permission.

***Section 60: Requirement to remove property from defence area***

191. Section 60 provides for the CDF or the Secretary to direct that a person is required to ensure that an item of movable property is not present in the area during a period that entry is prohibited (subsection 60(1)). The direction may apply to a class of persons, and to a class of property (subsection 60(2)). A note includes the example of a direction to require owners of vehicles, vessels and aircraft to ensure that these items are not present in the area. A direction under section 60 may apply to all periods that the area is prohibited, or to a particular period (subsection 60(3)). The CDF or the Secretary are required to give reasonable notice of a direction under section 60, having regard to whom the direction applies, the kind of property to which it applies, the period during which it applies and the available forms of communication (subsection 60(4)).

192. The section creates an offence if a direction requires that a person ensure an item of movable property is not present, and the item is present in the area during the period (subsection 60(5)). The maximum punishment for this offence is 20 penalty units. The offence does not apply if the person has permission from a person authorised by the CDF or the Secretary, or from an officer participating in an activity being undertaken in the prohibited area during the period, for the property to be in the area (subsection 60(6)).



193. Section 60 replaces a complex series of offences that existed in Part XI of the *Defence Force Regulations 1952* in relation to practice areas. The new offence, which is tied to a direction to remove property, is much simpler to understand while achieving the same objective of ensuring that cars, boats and similar property is not left in a defence area during an operation or practice if this would endanger people or property.

### ***Section 61: Installation of equipment***

194. This section provides for the CDF to authorise the installation, placement or construction of equipment for defence purposes within a defence area, including on the sea-bed or subsoil beneath an area (subsection 61(1)). Examples include construction of roads and airfields, laying of electricity or communications networks, and installation of radar equipment.

195. If entry to an area is not prohibited at all times, it is necessary to give reasonable notice of the location of equipment, and of activities that would be likely to interfere with the operation of the equipment (subsection 61(2)). Matters relevant to what is reasonable notice include the nature of the equipment, the risk of damage to the equipment, the risk of other interference with the operation of the equipment, and the forms of communication available in reasonable proximity to the equipment (subsection 61(2)).

196. The section creates an offence if a person interferes with the operation of equipment installed, placed or constructed in a prohibited area (subsection 61(3)). The maximum punishment for this offence is 20 penalty units. The offence does not apply if the person has permission from a person authorised by the CDF or the Secretary, or from an officer participating in a kind of activity for which the equipment was installed, to engage in conduct that might interfere with the operation of the equipment (subsection 61(4)).

### ***Section 62: Permission requirements***

197. Section 62 outlines the requirements of permission for the purposes of sections 59, 60 and 61. Permission must be in writing, and must specify the period for which the permission is effective (subsection 62(1)). Permission may be subject to conditions, as is reasonably required for the protection of people and property in the prohibited area, for the safety or defence of Australia, or for the protection of official secrets (subsection 62(2)). It is an offence to engage in conduct that is a breach of a condition of permission under this section (subsection 62(3)). The maximum punishment for this offence is 20 penalty units.

### ***Section 63: Removal from defence area***

198. Section 63 provides authority to remove people and property from a defence area. If a person is in a defence area during a period when entry is prohibited, or if a person fails to comply with a condition of permission given to be in the area or to interfere with equipment, they can be removed from the defence area (subsection 63(1)). Similarly, if an item of movable property is in a defence area contrary to a direction given under section 60, or contrary to a condition of permission given under section 62, it can be removed from the area (subsection 63(2)).

199. Under this section, a person or item of property may be removed by or under the direction of a Defence Force member, a police officer, an Australian Government officer, or a person authorised by the Minister (subsection 63(3)).

200. The power to remove a person or property is without prejudice to any proceedings that may be taken against a person (subsection 63(4)). For example, removal of a person under section 63 does not prevent the person from being prosecuted for an offence under section 59.

***Section 64: Offence of obstructing or hindering***

201. Section 64 creates an offence if a person obstructs a Defence Force member, a police officer, an Australian Government official or a person authorised by the Minister under section 63, from removing a person or item of property from a prohibited area under section 63 (subsection 64(1)). The maximum punishment for this offence is 20 penalty units.

202. This section also creates an offence if a person obstructs or hinders a person acting under a direction given under section 63 (subsection 64(2)). The maximum punishment for this offence is 20 penalty units.

***Section 65: Other defence operations or practices***

203. Section 65 confirms that nothing in the Division affects the power of the Commonwealth to conduct defence operations and practices outside of a defence area.

***Section 66: Division binds the Crown***

204. Section 66 provides that the Division binds the Crown in each of its capacities. This means, for example, that a defence area can be declared in respect of Crown land belonging to a State.

***Division 3 – Compensation***

205. This Division provides a statutory mechanism to pay compensation to people who suffer loss or damage, or whose property is acquired, because of the operation of this Part.

***Section 67: Compensation for loss or damage***

206. Section 67 provides that the Commonwealth is liable to pay a reasonable amount of compensation to a person who suffers certain kinds of loss or damage as a result of the operation of this Part (subsection 67(1)). The kinds of loss or damage covered are personal injury (paragraph 67(1)(a)), damage to property (paragraph 67(1)(b)), and loss of income (paragraph 67(1)(c)). For example, if bombing activities in a defence area accidentally cause injury, damage a person's house, or cause loss of livestock, the Commonwealth would be required to pay reasonable compensation to cover the loss or damage.

207. The following situations are listed as examples of when loss or damage might occur giving rise to the Commonwealth's liability to pay reasonable compensation: if a person is ordinarily resident in a place when it is declared a defence area, and suffers loss or damage because of that declaration (paragraph 67(2)(a)); or if a person suffers loss or damage because of the use of land for an activity in a defence area (paragraph 67(2)(b)).

208. The basis for compensation is a modernised, consolidated and clarified version of the basis for compensation in regulations 36, 36A and 57 of the *Defence Force Regulations 1952* (covering prohibited areas and practice areas). The section is not intended to provide compensation for mere loss of amenity resulting from the ordinary use of a defence area.

209. In most cases, it is expected that the Commonwealth and the person who suffered loss or damage would come to an agreement on the amount of compensation. However, if there is no agreement, the person may institute proceedings in a court of competent jurisdiction for the recovery of such reasonable amount of compensation as the court determines (subsection 67(3)). The compensation provisions in regulations 36 and 36A of the *Defence Force Regulations 1952* provided for an identical process for compensation relating to prohibited areas, but the compensation scheme in Part XI of the *Defence Force Regulations 1952* provided a more complex process involving an application for compensation, a decision to accept or refuse the application, an internal review process involving a reviewing authority, and an external review by the Administrative Appeals Tribunal. In consolidating the provisions relating to prohibited areas and practice areas, the compensation process from regulation 36 was preferred. This process is simpler, is more consistent with claims for other types of compensation in Defence, and is consistent with the standard drafting of provisions that cover compensation for acquisition of property (as in section 68).

### ***Section 68: Compensation for acquisition of property***

210. This section provides that the Commonwealth is liable to pay a reasonable amount of compensation to a person if the operation of this Part would result in an acquisition of property otherwise than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution) (subsection 68(1)). If the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings in a court for recovery of such reasonable compensation as the court determines (subsection 68(2)). This section ensures that the Regulation is consistent with the Constitution, (which enables the Commonwealth to make laws for the acquisition of property on just terms (paragraph 51(xxxi) of the Constitution)), to the extent, if any, that section 67 does not provide just terms for acquisition of property.

### **Part 12 – Aid to civilian authorities**

211. This Part provides for restrictions on the use of the Defence Force to protect Commonwealth interests or a State or Territory from domestic violence. Domestic violence in this context has the same meaning as in section 119 of the Constitution (and see section 51 of the Act). The Part replaces Part 3 of the *Defence Force Regulations 1952*, and has the same substantive effect.

### ***Section 69: Aid to civilian authorities***

212. Section 69 applies when the Defence Force is called out to protect a State or Territory or Commonwealth interests in Australia (including the external territories – see section 5A of the Act) against domestic violence, other than under Part IIIAAA of the Act (subsection 69(1)). Part IIIAAA of the Act relates to the calling out of the Defence Force in certain circumstances, and enables assault powers or broad area security powers, or both, to be conferred on the Defence Force when called out under that Part. In some cases, however, a situation might arise where it is appropriate to

call out the Defence Force, but it would not be appropriate to confer the significant powers set out in Part IIIAAA on the Defence Force. Part IIIAAA is not an exhaustive code on when the Defence Force can be called out to protect against domestic violence – for example, the Defence Force may also be called out for this purpose using the executive power in section 61 of the Constitution. Under section 69 of the Regulation, Part 12 only applies when the Defence Force has been called out otherwise than under Part IIIAAA of the Act, and only when it is called out to protect Commonwealth interests, States or Territories against domestic violence. For example, it does not apply if the Defence Force is to be used for disaster relief or community assistance that does not amount to protection against domestic violence.

213. If the Part applies, the CDF must use the Defence Force in a way that is reasonable and necessary to protect Commonwealth interests, or the State or Territory, as relevant (subsection 69(2)). The CDF must comply with any directions by the Minister about the use of the Defence Force (subsection 69(3)). However, the Defence Force must not be used to stop or restrict any protest, dissent, assembly or industrial action unless there is a reasonable likelihood of the death, serious injury, or serious damage to property (paragraph 69(3)(a)). Further, the Reserves must not be used unless the Minister, after consulting the CDF, is satisfied that sufficient members of the Permanent Forces are not available (paragraph 69(3)(b)).

214. When using the Defence Force to protect a State or Territory, the CDF must, as far as reasonably practicable, ensure that the Defence Force cooperates with the State or Territory police force, and undertakes particular tasks only if requested in writing to do so by a member of the police force or an officer of a civil authority specified by the Minister (subsection 69(4)).

215. Subsection 69(5) makes it clear that the CDF is not required or permitted to transfer any command of the Defence Force under this section.

### **Part 13 – Visiting Forces**

216. This Part declares countries and prescribes a form of warrant for the purposes of Part IXA of the Act, which makes provisions relating to the forces of other countries. In particular, Part IXA provides for the attachment of Defence Force personnel to foreign militaries, and vice versa, and for the apprehension of foreign military personnel who are absent from duty without leave inside Australia. Part 13 of the Regulation also provides for the enforcement in Australia of a sentence imposed by a foreign military tribunal on a Defence Force member who is attached to the foreign military.

217. This Part replaces Part X of the *Defence Force Regulations 1952*. While the list of countries has been updated and there has been a minor change to clarify that sentences of corporal punishment will not be enforced in Australia, the effect of the Part is otherwise identical to Part X of the *Defence Force Regulations 1952*.

#### ***Section 70: Countries to which provisions of Part IXA of the Act apply***

218. Section 70 provides a list of countries to which provisions in Part IXA of the Act apply. The listed countries are the same as in regulations 4 and 5 of the *Defence (Visiting Forces) Regulations 1963*, which are made under the *Defence (Visiting Forces) Act 1963*.

***Section 71: Form of warrant***

219. Section 71 prescribes the form in Schedule 2 of the Regulation for the purposes of section 116F, which enables the arrest of foreign military personnel who are absent from duty without leave inside Australia.

***Section 72: Sentences imposed by service tribunals of other countries***

220. Section 72 provides for the enforcement of a sentence imposed by a service tribunal of a country listed in section 70 if a Defence Force member is attached to the forces of the country (subsection 72(1)). If a Defence Force member has been sentenced by another country's service tribunal, existence of this section improves the chances of negotiating with the foreign country to bring the member back to Australia to serve their sentence. To the extent it has not already been enforced, a sentence imposed by a service tribunal of the other country may be enforced in Australia as if it was imposed by a court martial under the *Defence Force Discipline Act 1982* (subsection 72(2)). However, carrying out a sentence of death or corporal punishment is not authorised (subsection 72(3)).

***Section 73: Evidence of facts by certificate***

221. Section 73 provides for the Minister to certify certain facts for the purposes of enforcing sentences imposed by service tribunals of other countries. It provides that the Minister may, for the purpose of legal proceedings in Australia, certify in writing that a person was a member of the Defence Force attached to the forces of a specified country on a specified date, being a country to which section 116B applies, that a specified service tribunal passed a sentence on the person as set out in the certificate, and that the sentence, or some part of it, has not been enforced (subsection 73(1)). This certificate is sufficient evidence of the certified facts unless the contrary is proved (subsection 73(2)).

**Part 14 – Prohibited words and letters**

222. This Part replaces the *Defence (Prohibited Words and Letters) Regulations 1957*. The Part provides that certain words and letters cannot be used in trade, business, a calling or profession, or by an organisation or body of persons, without the consent of the Minister. The prohibited words and letters describe current or former parts of the Defence Force. The purpose of prohibiting the use of these words and letters is to prevent people from claiming an association with the Defence Force for the purposes of commercial gain, to avoid causing confusion to consumers who might otherwise think that a particular business or organisation is sponsored by or associated with the Defence Force, and to protect the Defence Force's reputation from a situation where they are inadvertently associated with a business or organisation.

***Section 74: Prohibited words***

223. Section 74 provides a list of words whose use is prohibited under this Part. The list of words is based on the words that were prohibited under the *Defence (Prohibited Words and Letters) Regulations 1957*, although some words have been removed as being too general (such as 'Naval' and 'Navy) or out of date.

### ***Section 75: Prohibited letters***

224. Section 75 provides a list of groups of letters whose use is prohibited under this Part. The letters are acronyms for some of the words listed in section 74 (for example HMAS – an acronym for Her Majesty’s Australian Ship which is a protected word).

### ***Section 76: Use of prohibited words and letters***

225. Section 76 makes it an offence to use a prohibited word or letter in connection with a trade, business, calling or profession, or in connection with an organisation or body of persons, unless the use is in accordance with consent obtained under section 76 (subsection 76(1)). The maximum punishment for this offence is 10 penalty units. Strict liability applies to the element of the offence that the use is not in accordance with a consent obtained under section 77 (sub-section 76(2)).

### ***Section 77: Consent to use prohibited words and letters***

226. Section 77 provides for a person to make an application to the Minister for consent to use prohibited words and letters (subsection 77(1)). The application is required to be in writing, must set out the words or letters to which it applies, and must describe the proposed use of the words or letters (subsection 77(2)).

227. In deciding whether to approve an application for consent, the Minister must have regard to: as relevant, the trade, business, calling or profession of the applicant, or the purposes, constitution and structure of the applicant; the way in which the applicant has used the words or letters under any previous consent; and the period for which the consent is sought (subsection 77(3)). The Minister may require the applicant to give further information in connection with the application (subsection 77(4)).

228. The consent may be subject to conditions, including in relation to: notifying the Minister about any change to the applicant’s trade, business, calling or profession, or purposes, constitution or structure of the applicant organisation or body of persons, or any other matter; notifying any change to the period for which the consent is given; notifying any change of the way in which the applicant may use the prohibited words or letters; or notifying any change to the protection and use of the prohibited words or letters to which the consent relates (subsection 77(5)). Failure to comply with a condition of consent would be a basis for cancelling the consent.

229. Most applications for consent under the *Defence (Prohibited Words and Letters) Regulations 1957* are made by applicants who have been referred to Defence by IP Australia (when the applicant attempted to lodge a trademark), or by ASIC (when the applicant attempted to register a business name). In most cases, consent has been granted, as the use of the words or letters are either unrelated to the Defence Force or are purely descriptive of the activities to be undertaken by the applicant. A situation where consent might be refused is where the use of the words or letters suggests an endorsement by the Defence Force of the applicant’s activities, or an association with the Defence Force, where that endorsement or association does not exist.

***Section 78: Review by the Administrative Appeals Tribunal***

230. Section 78 provides that a decision to refuse an application for consent under section 77, or a decision to consent with conditions, can be reviewed by the Administrative Appeals Tribunal.

***Section 79: Treatment of partnerships***

231. Section 79 provides that partnerships are to be treated as if they are a legal person for the purposes of this Part (subsection 79(1)). It provides for partners in the partnership to be taken to have committed offences under this Part if they: did the relevant act or made the relevant omission; aided, abetted, counselled or procured the relevant act or omission; or was in any way knowingly concerned in the relevant act or omission (subsection 79(2)).

***Section 80: Treatment of unincorporated associations and bodies***

232. Section 80 provides that an unincorporated association or body is to be treated as if they are a legal person for the purposes of this Part (subsection 80(1)). It provides for members of the management committee of an unincorporated association or body to be taken to have committed offences under this Part if they: did the relevant act or made the relevant omission; aided, abetted, counselled, or procured the relevant act or omission; or was in any way knowingly concerned in the relevant act or omission (subsection 80(2)).

**Part 15 – War graves**

233. This Part replaces regulation 31 of the *Defence Force Regulations 1952*, which was in a Part dealing with the disposal of dead bodies of members of the Defence Force. The rest of the Part has not been re-made, as it is considered unnecessary for the purposes of modern practices.

***Section 81 – War graves***

234. Section 81 authorises the Director of War Graves (or a Defence Force officer in charge of a unit specifically raised for the purposes of dealing with the graves of deceased members of the Defence Force) to: establish cemeteries for the purposes of burying the bodies of people who have died while on service; authorise and direct the exhumation and reinterment, cremation or other disposal of bodies; and enter and inspect, maintain or execute any work in connection with the grave of a person who has died while on service. This section is identical to the provision in regulation 31 of the *Defence Force Regulations 1952*.

**Part 16 – Delegations**

235. This Part provides for the Minister's, Secretary's and CDF's powers in the Regulation to be delegated. The Governor-General's powers, which relate to the appointment and termination of service chiefs, are not delegable.

***Section 82: Delegation of Minister's powers***

236. Section 82 provides for the delegation of the Minister's powers.

237. The Minister's powers in Part 10 of the Regulation (dealing with the certification of the death of Defence Force members) may be delegated to: an officer

in the Navy at or above the rank of Commodore; an officer in the Army at or above the rank of Brigadier; an officer in the Air Force at or above the rank of Air Commodore; and an employee in the Senior Executive Service (SES) performing duty in the Department (subsection 82(1)).

238. The Minister's powers in Part 14 (dealing with providing consent for the use of prohibited words and letters) may be delegated to: an officer in the Navy at or above the rank of Lieutenant Commander; an officer in the Army at or above the rank of Major; and officer in the Air Force at or above the rank of Squadron Leader; and an Australian Public Service (APS) employee who holds, or performs the duties of, a position not below APS 6 in the Department (subsection 82(2)).

239. The Minister's other powers, such as the powers to declare a defence area under Part 11 or to provide direction about the use of the Defence Force when providing aid to civilian authorities under Part 12, are not delegable.

### ***Section 83: Delegation of Secretary's powers***

240. Section 83 provides for the delegation of the Secretary's powers.

241. The Secretary's powers in Part 8 of the Regulation (dealing with requiring members to re-pay the cost of medical and dental treatment in certain circumstances) may be delegated to: an officer in the Navy at or above the rank of Commodore; an officer in the Army at or above the rank of Brigadier; an officer in the Air Force at or above the rank of Air Commodore; and an employee in SES performing duty in the Department (subsection 83(1)).

242. The Secretary's powers in Part 11 of the Regulation (for example dealing with prohibiting entry, requiring the removal of property and installing equipment in defence areas) may be delegated to: an officer in the Navy at or above the rank of Lieutenant Commander; an officer in the Army at or above the rank of Major; and officer in the Air Force at or above the rank of Squadron Leader; and an APS employee who holds, or performs the duties of, a position not below APS 6 in the Department (subsection 83(2)).

### ***Section 84: Delegation of Chief of the Defence Force's powers***

243. Section 84 provides for the delegation of the CDF's powers.

244. The CDF's powers in Part 3 (dealing with Defence Force personnel decision-making), Part 4 (dealing with the granting of honorary rank) and Part 5 (dealing with privileges after the end of service) may be delegated to: any officer in the Defence Force; an enlisted member in the Navy at or above the rank of Chief Petty Officer; an enlisted member in the Army at or above the rank of Warrant Officer Class 2; an enlisted member in the Air Force at or above the rank of Flight Sergeant; and an APS employee who holds, or performs the duties of, a position not below APS 4 in the Department (subsection 84(1)).

245. The CDF's powers in Part 7 of the Regulation (dealing with redress of grievance) may be delegated to: an officer in the Navy at or above the rank of Commodore; an officer in the Army at or above the rank of Brigadier; an officer in the Air Force at or above the rank of Air Commodore; and an employee in SES performing duty in the Department (subsection 84(2)).



246. The CDF's powers in Part 11 of the Regulation (for example dealing with prohibiting entry, requiring the removal of property and installing equipment in defence areas) may be delegated to: an officer in the Navy at or above the rank of Lieutenant Commander; an officer in the Army at or above the rank of Major; and officer in the Air Force at or above the rank of Squadron Leader; and an APS employee who holds, or performs the duties of, a position not below APS 6 in the Department (subsection 84(3)).

### **Part 17 – Transitional provisions**

247. This Part provides for transitional arrangements to deal with the replacement of the old Regulations with the Regulation.

#### ***Section 85: Processes begun under Defence Force Regulations 1952 or Defence (Personnel) Regulations 2002***

248. Section 85 provides that the *Defence Force Regulations 1952* and the *Defence (Personnel) Regulations 2002* continue to apply if an application or process was begun under those regulations before they were repealed. This means, for example, that if a Defence Force member has submitted a redress of grievance complaint under Part 15 of the *Defence Force Regulations 1952*, it will continue to be dealt with under that Part notwithstanding the repeal of the old Regulations. Similarly, if an officer applied to resign from the Defence Force under regulation 88 of the *Defence (Personnel) Regulations 2002*, the application will be considered and decided in accordance with the process outlined in the *Defence (Personnel) Regulations 2002*.

#### ***Section 86: Applications relating to prohibited words or letters***

249. Section 86 provides that any application for consent to use a prohibited word or letter under the *Defence (Prohibited Words or Letters) Regulations 1957*, which has not been decided before 1 October 2016 (when the Regulation commences), is to be taken to be an application under section 77 of the Regulation (subsection 86(1)).

250. It also provides that consent to use prohibited words or letters given under the *Defence (Prohibited Words or Letters) Regulations 1957*, which has not expired before 1 October 2016, has effect as if it were given under section 77 of the Regulation (subsection 86(2)). That is, consents given under the old Regulations continue in effect.

#### ***Section 87: Defence areas***

251. Section 87 provides that an authorisation under regulation 34 of the *Defence Force Regulations 1952* continues in effect despite the regulations having been repealed, and may be revoked as if they had not been repealed (subsection 87(1)). This means that any existing authorisations under regulation 34 continue in effect after 1 October 2016, unless they are revoked.

252. Section 87 provides that Part VII of the *Defence Force Regulations 1952* continues to apply in relation to a prohibited area that was declared under that part (subsection 87(2)). That is, all prohibited areas declared before 1 October 2016 will continue to be treated as prohibited areas under the *Defence Force Regulations 1952* unless and until they are re-declared as defence areas under Part 11 of the Regulation.

253. Similarly, Part XI of the *Defence Force Regulations 1952* will continue to apply to a practice area that was declared under that part before 1 October 2016 (subsection 87(3)). All practice areas declared before 1 October 2016 will continue to be treated as practice areas under the *Defence Force Regulations 1952* unless and until they are re-declared as defence areas under Part 11 of the Regulation.

254. The section also provides that a claim for compensation in relation to an authorisation under regulation 34 or a prohibited area or practice area declared under the *Defence Force Regulations 1952* will be dealt with under the *Defence Force Regulations 1952* as if the regulations were not repealed. This applies even if the authorisation or declaration is revoked before the claim arises (subsection 87(4)). That is, a person who suffers loss, damage or acquisition of property within the meanings of regulations 36, 36A or 57 of the *Defence Force Regulations 1952*, in relation to an authorisation or area declared under those regulations, will be entitled to compensation under those provisions, instead of the new provisions in Part 11 of the Regulation. The loss or damage must occur while the authorisation or declared area is extant, but the claim for compensation can be made after the relevant authorisation or declaration is revoked.

### ***Section 88: Retirement age***

255. Section 88 provides for preservation of compulsory retirement ages that existed in earlier iterations of the *Defence (Personnel) Regulations 2002*, and which were saved in transitional provisions in those regulations. This allows certain affected members to retain their existing retirement age, or to make an election to retain the earlier retiring age (subsections 88(1) and (2)). Section 88 also provides the CDF to revoke an extension of compulsory retirement age made under subsection 11(1) or 12(1) of the *Defence (Personnel) Regulations 2002*, with the retirement age for the purposes of the Regulation to be what it would have been if the extension of retirement age was revoked under those regulations (subsection 88(3)).

### ***Section 89: Medical and dental treatment***

256. Section 89 enables the Secretary to exercise the power in section 50 of the Regulation, requiring a member to reimburse the Commonwealth for medical and dental treatment costs, in relation to treatment provided before 1 October 2016, as if the treatment had been provided under section 49. This means that the ability to require members to pay for medical and dental treatment will continue without interruption.

### **Schedule 1 – Oath and affirmation**

257. Schedule 1 provides the form of the oath or affirmation that is required when a person enters the Defence Force (see subsection 12(6)). Clause 1 provides the form of the oath, which is available when a person wants to take a religious oath. Clause 2 provides the form of the affirmation, which is available when a person does not want to take a religious oath. The forms are substantially identical to the forms that were previously in Schedule 1 of the *Defence (Personnel) Regulations 2002*.

258. Clause 3 provides a list of people before whom the oath or affirmation can be taken (see subsection 12(7)), which is identical to the lists previously provided for in Schedule 1 of the *Defence (Personnel) Regulations 2002*.

**Schedule 2 – Form of warrant**

259. This schedule provides the form of warrant for the purposes of section 71 of the Regulation. This is the form of warrant required for the arrest of a member of a foreign military who is absent from duty without leave, in accordance with section 116F of the Act. The schedule is substantively the same as the form of warrant in Schedule 1 of the *Defence Force Regulations 1952*, but removes references to service chiefs and also recognises that the person to be arrested may not be a man.

**Schedule 3 – Repeals**

260. This Schedule provides for the repeal of the old Regulations.

***Clause 1: Repeal of Regulations***

261. This item repeals:

- the *Defence Force Regulations 1952*
- the *Defence (Personnel) Regulations 2002*
- the *Defence (Prohibited Words and Letters) Regulations 1957*.

## **ATTACHMENT B – SUBSTANTIALLY NEW OR ALTERED PROVISIONS IN DEFENCE REGULATION 2016**

1. The Defence Regulation 2016 (the Regulation) replaces the *Defence (Personnel) Regulations 2002*, the *Defence Force Regulations 1952* and the *Defence (Prohibited Words and Letters) Regulations 1957* (the old Regulations). While, for the most part, the substantive effect of the Regulation is the same as the old Regulations, the following is a list of substantially new or altered provisions that did not have an equivalent in the old Regulations.

### **Objects provision**

2. Section 5 of the Regulation provides the objects of the instrument, which were not specified in any of the old Regulations. The objects of the Regulation are:

- To facilitate the good governance and the effective and efficient operation of the Defence Force
- To provide the Chief of the Defence Force (CDF) with the flexibility to deliver capability and preparedness outcomes (including developing force structure options)
- To achieve the Government's objectives and to provide stewardship of the Defence Force
- To provide personnel management that supports the appointment, enlistment, promotion and retention of appropriate persons for service in the Defence Force.

### **Service chiefs**

3. Part 2 of the Regulation provides for the appointment, acting appointment, resignation, termination of appointment and remuneration and allowances of service chiefs. Previously, the three service chiefs (Chief of Navy, Chief of Army and Chief of Air Force) were appointed under provisions in the *Defence Act 1903* (the Act). However, the *Defence Legislation Amendment (First Principles) Act 2015* amended the Act so that only the CDF and the Vice Chief of the Defence Force (VCDF) are appointed under the Act. This was to emphasise the CDF's role as the sole commander of the Defence Force, and the VCDF's role as the CDF's deputy.

4. The provisions in Part 2 of the Regulations are modelled on the provisions in the Act that deal with the appointment of the CDF and VCDF. In addition, the Minister is required to take into account the CDF's recommendations in appointing and terminating a service chief's appointment, reflecting that they are subject to the CDF's command.

### **Personnel decision-making powers in relation to officers vested in CDF**

5. Under the *Defence (Personnel) Regulations 2002*, most personnel decision-making powers in relation to officers were vested in the Governor-General. This reflected the Governor-General's role under section 68 of the Constitution, as well as the historic relationship between officers and Crown. In the Regulation, all decision-making powers for Defence Force members, including both officers and enlisted members, are vested in the CDF. This reflects what actually occurred in practice

under the *Defence (Personnel) Regulations 2002*, where decisions in relation to officers were made by the Governor-General's delegates in the Defence Force, rather than personally made by the Governor-General. As well as reflecting actual practice, the change has also enabled considerable simplification of the Regulation, as most provisions now apply identically to officers and enlisted members.

6. The Governor-General, as the Queen's representative, retains command-in-chief of the Defence Force, through the non-delegable powers to appoint the CDF and VCDF under the Act, and to appoint the three service chiefs under the Regulation. Further, the Governor-General will continue to personally issue commissions to Defence Force officers under subsection 12(2) of the Regulation.

### **Promotion / reduction in rank through officer and enlisted ranks**

7. Under the Regulation, any member who is moving from the enlisted ranks to be an officer will do so by being promoted to a higher rank under section 13. Similarly, an officer who is moving to be an enlisted member will do so by having their rank reduced under section 14. This is a new concept. Previously, to move from being an officer to an enlisted member, and vice versa, it was necessary to resign (or be terminated) from the Defence Force, and then be appointed or enlisted as relevant. The new process is possible because of the simplified approach to promotion in the Regulation, which applies equally to officers and enlisted members.

### **Compulsory transfer between services**

8. Section 15 provides for the CDF to transfer a member from one arm of the Defence Force to another, including with conditions. Under the *Defence (Personnel) Regulations 2002*, transfer between services was limited to situations where the member applied for or agreed to the transfer.

9. As sole commander of the Defence Force, an ability to compulsorily transfer members between services gives the CDF enhanced flexibility in how the Defence Force is structured. This is consistent with the One Defence model outlined in the First Principles Review. An example where this power might be used is where the CDF decides to move an entire capability from one service to another (to enhance efficiency or interoperability for instance). It is expected that this power would be used sparingly, and any impact on affected members, including their morale, would be considered before the decision was made.

### **Compulsory transfer to Reserves**

10. Section 16 provides a new power to transfer a member from the Permanent Forces to the Reserves without their consent, if the transfer is in the interests of the Defence Force. A member must be provided with notice of a proposed decision to transfer them under this section, and an opportunity to respond, before the decision is made.

11. This power gives the CDF options beyond termination of service if a member is no longer widely employable in the Permanent Forces or if they are restricting the promotion opportunities of other Defence Force members. In this type of situation, a transfer could be accompanied by payment of a special benefit in accordance with a determination under Part IIIA of the Act. Such payments are not governed by the Regulation.

### **Departure from Reserves after five years without providing service**

12. Section 22 provides for a member's period of service in the Reserves to end if the member has not been required to render service for a continuous period of five years (unless the CDF has specified otherwise).

13. This new provision has been added to address the growing number of members in the Reserves who have not been required to render service for many years. This is particularly prevalent among members who have automatically transferred to the Reserves at the end of their period of service in the Permanent Forces. Technically, these members of the Defence Force may be called out by the Governor-General under Part III, Division 3 of the Act. However, there are significant difficulties in determining exactly who is liable for call out, as maintaining a list of Reserves who are not required to render service is difficult at best. Accordingly, members of the Reserves will, in most cases, only remain in the Reserves for five years after they were last required to render service, including any requirements to render service during training periods (section 25 of the Act), to render service voluntarily (section 26 of the Act), and to render service following call-out by the Governor-General (section 28 of the Act).

### **Extension of period of service for discipline reasons**

14. Section 20 provides a new power for the CDF to extend a member's period of service to ensure that a process under the *Defence Force Discipline Act 1982* relating to the member is completed before the member's period of service ends.

15. Prosecuting members who commit service offences under the *Defence Force Discipline Act 1982* is an important aspect of maintaining and enhancing discipline in the Defence Force. There is concern that, in a situation where a member commits an offence a short time before their period of service ends (including a situation where the member has applied for and been granted a reduction of their period of service), the limited options available under the *Defence Force Discipline Act 1982* might give the impression that the member has 'got away with it', which could have a significant effect on morale and discipline more generally.

16. Section 20 provides a limited power for the CDF to unilaterally extend a member's period of service to address this type of scenario, for the purposes of maintaining and enhancing the discipline of the Defence Force. It is consistent with long-standing Defence practice, whereby, in the interests of the Defence Force, an application to resign may not be accepted from a member who is the subject of *Defence Force Discipline Act 1982* proceedings.

### **Service obligation debts**

17. Section 25 provides for 'service obligation debts', and creates debts to the Commonwealth when a member leaves the Defence Force before completing an 'initial minimum period of service' or 'return of service obligation'. These are periods that are imposed, typically on members of the Permanent Forces, to ensure Defence receives an adequate return on the investment in the member's training. Under the *Defence (Personnel) Regulations 2002*, debts were imposed as a condition on a member resigning. The new provision is far more transparent, and gives Defence Force members greater certainty about what, if anything, they will owe if they want to leave the Defence Force early.

18. An IMPS is a period of time determined when a member is first appointed to or enlisted in the Defence Force. It is the minimum period of time a member is expected to serve in the Defence Force. The imposition of IMPS on members provides the Defence Force with greater certainty for workforce and capability planning purposes. Training new Defence Force members is expensive, and often imparts highly marketable skills. Imposing IMPS means that the Defence Force receives a reasonable return on its investment. This is particularly important for some categories of service, where members obtain highly marketable skills at the Commonwealth's expense, often requiring years of training.
19. A ROSO is similar to an IMPS, but is not imposed at the beginning of a member's service. Instead, a ROSO may be imposed when a member begins a particular course of training, or is promoted to a particular rank. Again, the purpose of a ROSO is to provide the Defence Force with certainty for workforce and capability planning, and to ensure that it receives a reasonable return on its investment in training.
20. Under the *Defence (Personnel) Regulations 2002*, there were two ways the Defence Force could 'enforce' an IMPS or ROSO if a member applied to resign before it ended. First, a service chief (or delegate) could refuse the application. For policy reasons, it is rare for a member's application to resign to be refused outright. Instead, under the *Defence (Personnel) Regulations 2002* a service chief (or delegate) could impose conditions that must be met before the application to resign was granted. When a member applied to resign before the end of their IMPS or ROSO, the most common condition to be met before resigning was a financial condition, based on Defence recouping money lost in training and similar expenses.
21. Under the *Defence (Personnel) Regulations 2002*, the amount of the financial condition would be calculated on a case by case basis. While members would be informed at the time of their appointment or enlistment, or when they began the particular training associated with a ROSO, that they might be liable to re-pay training and other costs if they resigned before the end of their IMPS or ROSO, members were frequently unaware how much money this could involve.
22. The policy intent of IMPS and ROSOs, and requiring members to re-pay a reasonable amount of their training and other costs if they voluntarily separate before completion of their IMPS or ROSO, remains in the Regulation. However, it uses much clearer language, and requires members to be informed upfront of the amount of money they will be required to re-pay. This creates a fairer and more transparent mechanism to achieve the policy goal.
23. Under the Regulation, a 'service obligation debt' is owed to the Commonwealth if a member applies for a reduction of their period of service, which is approved by the CDF, and the reduction means that the member will not complete an IMPS or ROSO. The amount of the debt will be a reasonable pre-estimate of the expenses the Defence Force will incur, and will be determined in relation to the IMPS or ROSO as a whole, rather than the individual member. It will reduce at a rate commensurate with the amount of service the member has provided. A service obligation debt can be waived in whole or in part.

### **Suspension from duty**

24. A provision about suspension from duty pending a termination decision, including without pay, has been added at section 28. Suspension without pay or on part pay requires a member to be given a notice of the proposed suspension, as well as an opportunity to respond before a decision is made. In one of the Defence Culture Reviews conducted during 2011, the former Inspector-General Australian Defence Force (Inspector-General ADF), Mr Geoff Earley, recommended that Defence's policies should be amended to allow for administrative suspension from duty, and when this can occur (*Review of the Management of Incidents and Complaints in Defence including Civil and Military jurisdiction*, recommendation 22). While commanders can stand a Defence Force member down from duty for operational reasons, suspension without pay or for extended periods should be supported by legislation. The new provision fills some of the gaps in the administrative suspension scheme in sections 98 to 100 of the *Defence Force Discipline Act 1982*, which apply when a member is being investigated for a service offence or has been charged with a service or civilian offence.

### **Notice periods**

25. If it is proposed to make a decision to reduce a member's rank, to transfer them to the Reserves, to terminate their service, or to suspend them from duty without pay or on part pay, the Regulation in prescribed circumstances requires that the member be given a notice in accordance with section 30 and an opportunity to respond. The minimum period for a member to respond in each case is as follows:

- Reduction in rank: 14 days
- Transfer to the Reserves: 14 days
- Termination of service: 14 days
- Suspension from duty: 7 days.

26. The minimum notice period for reduction in rank and termination of service has been reduced from 28 days to 14 days (there were no equivalent provisions in relation to transfer to the Reserves and suspension from duty in the *Defence (Personnel) Regulations 2002*). This reduction provides Defence with greater flexibility to make decisions quickly where this will not cause unfairness to the affected individual. It is likely that in many cases, the time provided to respond to a notice will be longer than the minimum period in the Regulation.

27. If a decision is made to terminate a member's service because of redundancy, they must be given a minimum period of five weeks notice, which is a reduction from the 12 months required under the *Defence (Personnel) Regulations 2002*. Five weeks is equivalent to the longest minimum notice period associated with termination of employment for redundancy under the *Fair Work Act 2009*. In practice, it is expected that the notice period will in fact be longer than five weeks in many cases, to allow for relevant transition processes to be completed before the member leaves the Defence Force.

### **Redress of grievance process**

28. The redress of grievance scheme in Part 15 of the *Defence Force Regulations 1952* has been substantially replaced. In *Re-Thinking Systems of Inquiry*,



*Investigation, Review and Audit in Defence*, Defence conducted a detailed review of all of Defence's review processes. One outcome was a conclusion that redress of grievance arrangements for the Defence Force were unnecessarily complex and inefficient. The process in Part 15 of the *Defence Force Regulations 1952* has been replaced by Part 7 of the Regulation. It provides for a single layer of formal review by the Inspector-General ADF, while enabling the member's chain of command to consider complaints in whatever way it considers appropriate in all the circumstances. This has completed the changes begun by amendments to the Act in 2015 (*Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Act 2015*).

### **Compensation for loss or damage suffered in relation to defence areas – no review by Administrative Appeals Tribunal**

29. Part 11 of the Regulation consolidates the effect of Parts VII and XI of the *Defence Force Regulations 1952*, which dealt with prohibited areas and practice areas respectively. Section 67 provides for compensation if a person suffers loss or damage as a result of anything done under Part 11, and in particular as a result of the declaration or use of a defence area. The basis for compensation in section 67 is a modernised, consolidated and clarified version of the basis for compensation in regulations 36 and 57 of the *Defence Force Regulations 1952* (covering prohibited areas and practice areas respectively). Section 68 provides for compensation in the event anything done under Part 11 that results in an acquisition of property, ensuring Constitutional validity in the event that the acquisition of property is not covered by section 67. This replaces an equivalent provision in regulation 36A of the *Defence Force Regulations 1952* for prohibited areas. There was no equivalent provision for practice areas under the *Defence Force Regulations 1952*.

30. Under section 67, it is expected that the Commonwealth and the person who has suffered loss or damage would come to an agreement on the amount of compensation. If there is no agreement, the person may institute proceedings in a court of competent jurisdiction for the recovery of such reasonable amount of compensation as the court determines. This is exactly the same process as provided for in regulations 36 and 36A of the *Defence Force Regulations 1952*, relating to prohibited areas. It is also the standard drafting for provisions like section 68 that cover compensation for acquisition of property.

31. However, regulation 57 of the *Defence Force Regulations 1952* provided a more complex process for compensation for loss and damage relating to practice areas. This required a person to make an application to the Secretary for compensation, a decision to accept or refuse the application, a formal internal review process involving a reviewing authority, and an external merits review by the Administrative Appeals Tribunal.

32. In consolidating the provisions relating to prohibited areas and practice areas, the compensation process from regulation 36 was preferred. This process is simpler, is more consistent with claims for other types of compensation in Defence, and is consistent with the standard drafting for or provisions that cover compensation for acquisition of property (as in section 68).

**ATTACHMENT C – TREATMENT OF OLD REGULATIONS IN *DEFENCE REGULATION 2016***

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<i>Chapter 1 – Preliminary (1-3)</i>	This chapter provided for the name of the regulations, when they commenced, and definitions used in the regulation. An important definition was ‘senior officer’ (any officer with a substantive rank of Rear-Admiral of higher, Major-General or higher, or Air Vice-Marshal or higher).	Part 1 – Preliminary	Part 1 of the Regulation includes information about the name, commencement, authority, schedules and objects of the regulation. It also includes 6: Definitions. Definitions of compulsory retirement age and senior officer in the <i>Defence (Personnel) Regulations 2002</i> have not been re-made, as they are no longer necessary. Senior officers are treated the same as all other officers for the purposes of the Regulation.
<i>Chapter 2 – General arrangements for the Defence Force</i>  4: Ranks  5: Reserves	Regulation 4 provided that the ranks of members of the Defence Force were set out in Schedule 1.  Regulation 5 provided for several different categories of Reserves, and provided that a service chief must ensure that the Standby Reserve is raised at all times.	N/A  N/A	New <i>Schedule 1 – Ranks and corresponding ranks</i> was inserted into the Act by the First Principles Act. Accordingly, there is no need to include a table of ranks in the Regulation.  Under the Total Workforce Model, Reserve categories are described in terms of SERCAT 2 to 6, rather than using the old descriptors in regulation 5 of the <i>Defence (Personnel) Regulations 2002</i> . To allow flexibility into the future, Reserve categories, whether described in terms of SERCATs or Standby / Active Reserve etc, will be addressed in Defence policy documents, rather than the Regulation.
<i>Chapter 3 – Arrangements for service in the Defence</i>			

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<i>Force</i>			
Part 1 – Overview (6)	Regulation 6 provided an overview of the different types of service in the Defence Force, and when that service ends.	N/A	The provisions in the Regulation dealing with service in the Defence Force are much shorter and simpler than in the <i>Defence (Personnel) Regulations 2002</i> . It is not considered necessary to re-make this provision in the Regulation.
Part 2 – Criteria for making determinations (7)	Regulation 7 provided criteria that decision-makers were to have regard to when making decision under the <i>Defence (Personnel) Regulations 2002</i> .	5: Objects of this Regulation 6(2): Meaning of interests of the Defence Force 12(3), 13(3): Fit and proper person test for appointment, enlistment and promotion	Mandatory criteria for decision-making are included in relation to particular decisions in the Regulation, rather than a single list applying to all decisions. Decision-makers appointing, enlisting or promoting people must consider whether the person is ‘fit and proper’. Decisions on reduction in rank, transfer from the Permanent Forces to the Reserves, and termination of service may be made for reasons associated with the interests of the Defence Force, which is defined to include performance, behaviour, suitability, workforce planning, effectiveness and efficiency of the Defence Force, morale, discipline and reputation. The matters that were listed in regulation 7 of the <i>Defence (Personnel) Regulations 2002</i> are adequately addressed in the Regulation, but in a way that is more relevant to the particular decisions being made. An objects clause has also been included in section 5. Decision-makers can have regard to the objects of the Regulation when making decisions.
Part 3 – Retirement age (8-12)	Regulation 8 provided that the compulsory retirement age for each rank of member was set out in Schedule 1. Regulations 9-10 provided for alternative retirement ages for members who were members before certain dates (when the compulsory retirement ages changed).	23: Retirement age 88: Retirement age (transitional provision)	Section 23 provides that a member’s service ends when they reach their retirement age, which is defined. The retirement ages given in section 23 are the same as the table at Schedule 1 of the <i>Defence (Personnel) Regulations 2002</i> . Paragraph 22(2)(b) provides for a member’s retirement age to be extended.  Under the <i>Defence (Personnel) Regulations 2002</i> , a number of

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
	Regulations 11-12 provided for service chiefs to extend officers' and enlisted members' compulsory retirement ages.		members were either on younger compulsory retirement ages or could elect to stay on a younger compulsory retirement age. This was because they joined the Defence Force before the compulsory retirement age was raised. A transitional provision in section 88 of the Regulation allows for these members to retain the younger retirement age (or elect it), if they choose. That is, no member will be required to serve longer than they would have been required to serve under the <i>Defence (Personnel) Regulations 2002</i> .
<p><b>Chapter 4 – Appointment and enlistment</b></p> <p>Part 1 – Appointment of officers</p> <p>Division 1 – Appointment – general (13-15)</p> <p>Division 2 – Determination of seniority (16)</p>	<p>This Division provided for the appointment of officers, apart from chaplains. The Governor-General could appoint a person to be an officer. If the person was above the maximum retirement age, they could only be appointed if they had a particular required skill, and had to be appointed in the Reserves. Service chiefs could determine conditions that a person must meet to be eligible for appointment.</p> <p>This Division provided for service chiefs to determine officers' seniority at appointment.</p>	<p>12: Appointment and enlistment</p> <p>12(4): Appointment and enlistment</p>	<p>Paragraph 12(1)(a) provides for the CDF to appoint officers. Eligibility criteria for appointment, and treatment of people who are appointed after reaching retirement age, are matters of policy.</p> <p>Subsection 12(4) provides for an officer's appointment to be subject to conditions, which could include the officer's seniority at appointment.</p>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
Division 3 – Appointment on provisional basis (17-18)	This Division provided for the Governor-General to appoint members on a provisional basis. A provisional appointment was subject to compliance with specified conditions, and the appointment could be terminated at any time during the provisional appointment at which the officer did not comply with a condition. The period of provisional appointment could be extended.	12(4): Appointment and enlistment 24(1)(d): Early termination of service	Subsection 12(4) provides for an officer’s appointment to be subject to conditions. Paragraph 24(1)(d) provides that a member’s service may be terminated if they fail to meet a condition of appointment. Consistent with a provisional appointment under the <i>Defence (Personnel) Regulations 2002</i> , it is not necessary to provide a written notice of the proposed termination when a member’s service is terminated for failing to meet conditions (subsection 24(2)).
Division 4 – Appointment on probation (19-20)	This Division provided for the Governor-General to appoint officers with a period of probation. A probationary appointment could be terminated at any time during the period of probation. The period of probation could be extended.	12(4): Appointment and enlistment 24(3): Early termination of service	Subsection 12(4) provides for an officer’s appointment to be subject to conditions. A condition may be that the appointment is subject to a period of probation. Consistent with probationary appointment under the <i>Defence Personnel Regulations 2002</i> , subsection 24(3) provides that a member’s service may be terminated without notice during a period of probation, although it must be for one of the reasons listed in subsection 24(1).
Division 5 – Temporary appointment of officers (21)	This Division provided for the Governor-General to temporarily appoint an enlisted member to be an officer. The temporary appointment could be terminated at any time, and the period of appointment could be extended.	13(1)(b): Promotion	Paragraph 13(1)(b) provides for the CDF to direct a member to act in a higher rank. This includes directions for enlisted members to act in an officer rank for a period of time. A direction under paragraph 13(1)(b) is subject to any conditions specified at the time of the direction (subsection 13(2)), and consideration must be given to whether the person is a fit and proper person to act in the higher rank (subsection 13(3)). A direction to act in a higher rank under paragraph 13(1)(b) can be for a specified period, for the length of a particular posting, until a particular event occurs, or until further notice. A direction to act in a higher rank can be revoked at any time.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
Division 6 – Confirmation of appointment (22)	This Division provided that officers appointed provisionally or on probation must have their appointment confirmed as soon as practicable after they have met the conditions of appointment or the period of probation has ended.	N/A	If an officer's appointment is subject to conditions, the appointment will continue for the specified or indefinite period of service, unless either: the officer applies for the period of service to be changed; the officer reaches retirement age; or the officer's service is terminated. There is no need to confirm an officer's appointment.
Part 2 - Enlistment			
Division 1 – Enlistment – general (23-25)	This Division provided for the enlistment of members. Service chiefs could determine conditions that people must meet to be eligible for enlistment. Before being accepted for enlistment, a person must take the oath or make the affirmation of enlistment. A person was enlisted by taking the oath or making the affirmation.	12: Appointment and enlistment	Paragraph 12(1)(b) provides for the CDF to enlist members. Eligibility criteria for enlistment will be matters of policy. All members will be required to take an oath or affirmation upon entry to the Defence Force (subsection 12(6)). However, the oath or affirmation will no longer be the mechanism by which a member enlists – a member enlisted under section 12 will be a member even if they have not taken the oath or made the affirmation.
Division 2 – Determination of seniority (26)	This Division provided for service chiefs to determine enlisted members' seniority.	12(4): Appointment and enlistment	Subsection 12(4) provides for a member's enlistment to be subject to conditions, which could include their seniority.
Division 3 – Enlistment on provisional basis (27-28)	This Division provided for service chiefs to enlist members on a provisional basis. A provisional enlistment was subject to compliance with specified conditions, and the member's service could be terminated at any time during the provisional enlistment at which the member did not comply with a condition.	12(4): Appointment and enlistment 24(1)(d): Early termination of service	Subsection 12(4) provides for a member's enlistment to be subject to conditions. Paragraph 24(1)(d) provides that a member's service may be terminated if they fail to meet a condition of enlistment. Consistent with provisional enlistment under the <i>Defence (Personnel) Regulations 2002</i> , it is not necessary to provide a written notice of the proposed termination when a member's service is

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
	The period of provisional enlistment could be extended.		terminated for failing to meet conditions (subsection 24(2)).
Division 4 – Confirmation of enlistment (29)	This Division provided that members enlisted provisionally must have their enlistment confirmed as soon as practicable after they have met the conditions of enlistment.	N/A	If a member’s enlistment is subject to conditions, the enlistment will continue for the specified or indefinite period of service, unless: the member applies for the period of service to be changed; the member reaches retirement age; or the member’s service is terminated. There is no need to confirm a member’s enlistment.
<p><b>Chapter 5 – Promotion</b></p> <p>Part 1 – Promotion – officers</p> <p>Division 1 – Promotion – general (30-32)</p> <p>Division 2 – Provisional, temporary and limited-tenure promotion (33-35)</p>	This Division provided for the Governor-General to promote officers. An officer was not entitled to be promoted as a right. Service chiefs could determine conditions with which an officer must comply to be eligible for promotion.	13: Promotion	Paragraph 13(1)(a) provides that the CDF <u>may</u> promote a member to a higher rank (there is no obligation to promote a member). Before promoting a member, consideration must be given to whether the member is a fit and proper person to be promoted to the higher rank (s 13(3)). Eligibility criteria for promotion are matters of policy.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
33: Provisional promotion	Under this regulation, an officer could be promoted provisionally. A provisional promotion was subject to conditions, and the promotion could be revoked if the officer failed to comply with conditions.	13(2): Promotion 14(1)(c): Reduction in rank	Under subsection 13(2), a member's promotion can be subject to conditions. If a member fails to meet conditions of promotion, their rank may be reduced (without notice) under paragraph 14(1)(c).
34: Temporary promotion	Under this regulation, an officer could be temporarily promoted. A temporary promotion could be revoked at any time.	13(1)(b): Promotion	Paragraph 13(1)(b) provides for the CDF to direct a member to act in a higher rank. A direction under section 13(1)(b) is subject to any conditions specified at the time of the direction (subsection 13(2)), and consideration must be given to whether the person is a fit and proper person to act in the higher rank (subsection 13(3)). A direction to act in a higher rank under paragraph 13(1)(b) can be for a specified period, for the length of a particular posting, until a particular event occurs, or until further notice. A direction to act in a higher rank can be revoked at any time.
35: Limited-tenure promotion	Under this regulation, an officer could be promoted to certain ranks for a specified period. Regulation 66 operated to transfer members to the Standby Reserve at the end of a limited-tenure promotion. An officer could decline to be promoted under this regulation.	13: Promotion 18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces	To achieve the same effect as a limited-tenure promotion, an agreement can be reached with a member that they are promoted under section 13, and simultaneously have their period of service changed to the relevant period under section 18. A change to the period of service under section 18 is voluntary, and a member cannot be forced to accept a promotion on this basis. At the end of the member's period of service, they automatically transfer to the Reserves under section 21.
Part 2 – Promotion – enlisted members			



Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<p>Division 1 – Promotion – general (36-38)</p> <p>Division 2 – Provisional, temporary and limited-tenure promotion</p> <p>39: Provisional promotion</p> <p>40: Temporary promotion</p>	<p>This Division provided for the service chiefs to promote enlisted members. A member was not entitled to be promoted as a right. Service chiefs could determine conditions with which a member must comply to be eligible for promotion.</p> <p>Under this regulation, an enlisted member could be promoted provisionally. A provisional promotion was subject to conditions, and the promotion could be revoked if the member failed to comply with conditions.</p> <p>Under this regulation, an enlisted member could be temporarily promoted. A temporary promotion could be revoked at any time.</p>	<p>13: Promotion</p> <p>13(2): Promotion</p> <p>14(1)(c): Reduction in rank</p> <p>13(1)(b): Promotion</p>	<p>Subsection 13(1) provides that the CDF <u>may</u> promote a member to a higher rank (there is no obligation to promote a member). Before promoting a member, consideration must be given to whether the member is a fit and proper person to be promoted to the higher rank (s 13(3)). Eligibility criteria for promotion are matters of policy.</p> <p>Under subsection 13(2), a member’s promotion can be subject to conditions. If a member fails to meet conditions of promotion, their rank may be reduced (without notice) under paragraph 14(1)(c).</p> <p>Paragraph 13(1)(b) provides for the CDF to direct a member to act in a higher rank. A direction under paragraph 13(1)(b) is subject to any conditions specified at the time of the direction (subsection 13(2)), and consideration must be given to whether the person is a fit and proper person to act in the higher rank (subsection 13(3)). A direction to act in a higher rank under paragraph 13(1)(b) can be for a specified period, for the length of a particular posting, until a particular event occurs, or until further notice. A direction to act in a higher rank can be revoked at any time.</p>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
41: Limited-tenure promotion	Under this regulation, an enlisted member could be promoted to certain ranks for a specified period. Regulation 66 operated to transfer members to the Standby Reserve at the end of a limited-tenure promotion. A member could decline to be promoted under this regulation.	13: Promotion 18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces	To achieve the same effect as a limited-tenure promotion, an agreement can be reached with a member that they are promoted under section 13, and simultaneously have their period of service changed to the relevant period under section 18. A change to the period of service under section 18 is voluntary, and a member cannot be forced to accept a promotion on this basis. At the end of the member's period of service, they automatically transfer to the Reserves under section 21.
<b>Chapter 6: Posting of members (42)</b>	Under regulation 42, a service could post a member of their service to a place in or outside Australia, or to a position in or outside the service.	N/A	Posting decisions are no longer governed by the Regulation. As an exercise of command under section 9 of the Act, the CDF is able to post Defence Force members to any location or to any position in the Defence Force.
<b>Chapter 7: Reduction in rank</b>  43: Reduction - general	This regulation provided that a member's rank could be reduced because of their inefficiency, unsuitability or unsatisfactory performance.	14: Reduction in rank	Subsection 14(1) provides that the CDF may reduce a member's rank for one or more of the following reasons: a) retention of the member at their current rank is not in the interests of the Defence Force b) the member cannot be usefully employed at their current rank because of redundancy c) the member has failed to meet a condition of their promotion to their current rank d) the member applies for, or agrees to, the reduction.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
			The interests of the Defence Force includes reasons relating to a member's performance, behaviour or suitability, as well as reasons relating to workforce planning in the Defence Force, the effectiveness and efficiency of the Defence Force, the morale, welfare and discipline of the Defence Force, and the Defence Force's reputation (subsection 6(2)).
44: Reduction in rank – officers	This regulation provided for the Governor-General to give officers a notice of a proposed reduction in rank, inviting them to respond. Following this process, the Governor-General could reduce the officer's rank.	14: Reduction in rank 30: Notice to members	If it is proposed to reduce a member's rank because of the interests of the Defence Force or because of redundancy, the member must be given a notice and at least 14 days after the date of the notice to provide a written response (subsection 14(2)). The content of the notice is described in subsection 30(1). A decision to reduce the member's rank can be made after the notice process outlined in section 30 is followed. A notice is not required if the proposed reduction in rank is for a failure to meet a condition of promotion. If a member has been promoted subject to a probationary period, then during the period of probation their rank can be reduced to the rank held immediately before the promotion without notice (subsection 14(3)). There is also no requirement for a notice if the member applied for or agreed to the reduction in rank.
45: Cancellation of reduction in rank – officers	This regulation provided that the Governor-General could cancel the reduction of an officer's rank. The officer would be restored to the rank and seniority they held before the reduction.	13: Promotion 14: Reduction in rank	To reverse a decision to reduce a member's rank under section 14, the CDF can either revoke the reduction in rank decision or promote the member under section 13.
46: Reduction in rank – enlisted	This regulation provided for service chiefs to give enlisted members a notice of a proposed	14: Reduction in rank 30: Notice to	If it is proposed to reduce a member's rank because of the interests of the Defence Force or because of redundancy, the member must be

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
members	reduction in rank, inviting them to respond. Following this process, the service chief could reduce the member's rank.	members	given a notice and at least 14 days after the date of the notice to provide a written response (subsection 14(2)). The content of the notice is described in subsection 30(1). A decision to reduce the member's rank can be made after the notice process outlined in section 30 is followed. A notice is not required if the proposed reduction in rank is for a failure to meet a condition of promotion.
47: Cancellation of reduction in rank  48: Voluntary reduction in rank	This regulation provided that a service chief could cancel the reduction of a member's rank. The member would be restored to their previous rank and seniority.  The regulation provided for officers to apply to the Governor-General, and for enlisted members to apply to their service chief, to have their rank reduced. The member's rank could be reduced, or the application could be refused.	13: Promotion 14: Reduction in rank  14(1)(d): Reduction in rank	To reverse a decision to reduce a member's rank under section 14, the CDF can either revoke the reduction in rank decision or promote the member under section 13.  Paragraph 14(1)(d) provides that the CDF may reduce a member's rank if they apply for, or agree to, the reduction.
<b>Chapter 8 – Alteration of the service obligation</b>  Part 1 – Voluntary alteration of the service obligation  Division 1 – Voluntary alteration of period of service			

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
49: Extension and conversion of appointments	Regulation 49 provided that, before the end of their period of service, an officer could apply to serve for another limited period or an indefinite period. Service chiefs could accept or refuse the application. Officers could also apply to convert an indefinite period of service to a fixed period, which could be accepted or refused by the service chief.	18: Voluntary change	Section 18 provides that the CDF may change a member's period of service if the member applies for or agrees to the change. The CDF may put conditions on the change.
50: Extension and conversion of enlistments	Regulation 50 provided that, before the end of their period of service, an enlisted member could apply to serve for another limited period or an indefinite period. Service chiefs could accept or refuse the application. Enlisted member could also apply to convert an indefinite period of service to a fixed period, which could be accepted or refused by the service chief.	18: Voluntary change	Section 18 provides that the CDF may change a member's period of service if the member applies for or agrees to the change. The CDF may put conditions on the change.
51: Fixed tenure appointments	Regulation 51 provided that a service chief could offer members at certain ranks an appointment to a particular position for a specified period, on the condition that the member's period of service was changed to a fixed period. If the member accepted the offer, their period of service would change. Regulation 67 operated so that a member would transfer to the Standby Reserve at the end of the fixed tenure appointment.	18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces	To achieve the same effect as a fixed tenure appointment, the CDF may change a member's period of service under section 18. A period of service may only be changed under section 18 if the member applies for or agrees to the change. The CDF may put conditions on the change. This means that the CDF can offer to post members to a particular position if they accept a change in their period of service, and members can accept this offer. When the member's changed period of service ends, they will automatically transfer to the Reserves under section 21.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<p>Division 2 – Voluntary transfer of members</p> <p>Subdivision 1 – Transfer between Services (52-54)</p> <p>Subdivision 2 – Transfer within Service (other than senior officer) (55-58)</p>	<p>Under this subdivision, service chiefs could transfer members between services, provided the member agreed. Transferred members were required to comply with any conditions associated with their service in the original service, unless their new service chief determined otherwise. Service in the original service was taken to have been rendered in the service to which they were transferred.</p> <p>Under this subdivision, members (other than senior officers) could apply to their service chief to transfer between parts of the Permanent Forces, between Reserve categories, and between the Permanent Forces and the Reserves. The member could apply to withdraw their application for transfer at any time before the transfer took effect, but the service chief could refuse to permit the member to withdraw the application. The service chief could grant or refuse the application for transfer, including</p>	<p>15: Transfer between arms of the Defence Force</p> <p>17: Voluntary transfer from Reserves to Permanent Forces</p> <p>18: Voluntary change</p> <p>21: Becoming member of Reserves after service in Permanent Forces</p>	<p>Section 15 provides that the CDF may transfer members between the services, and may make the transfer subject to any conditions. This section goes further than regulations 52-54 of the <i>Defence (Personnel) Regulations 2002</i>, as the member does not need to consent to the transfer. As sole commander of the Defence Force, an ability to compulsorily transfer members between services gives the CDF enhanced flexibility in how the Defence Force is structured. This is consistent with the One Defence model outlined in the First Principles Review. An example where this power might be used is where the CDF decides to move an entire capability from one service to another (to enhance efficiency or interoperability for instance). It is expected that this power will be used sparingly, following consideration of the effect on member (including their morale).</p> <p>Section 17 provides that the CDF may transfer a member from the Reserves to the Permanent Forces if the member applies for, or agrees to, the transfer. The transfer can be subject to conditions.</p> <p>Under section 18, a member of the Permanent Forces can apply for the period of service to be reduced so that it ends in the very near future. When they reach the end of their new period of service, they will automatically transfer to the Reserves under section 21.</p> <p>Transfer between different parts of the Permanent Forces and between Reserve categories is no longer governed by the Regulation. The CDF and commanders in the Defence Force will make decisions about these types of transfers administratively, as an ordinary</p>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
	granting the transfer subject to conditions.		exercise of command. Transfer between Reserve categories, for example, may be managed in accordance with the Total Workforce Model.
<p>Subdivision 3 – Transfer within Service (senior officer) (59-62)</p> <p>Part 2 – Compulsory alteration of the service obligation</p>	<p>Under this Subdivision, senior officers could apply to the Governor-General to transfer between parts of the Permanent Forces, between Reserve categories, and between the Permanent Forces and the Reserves. The member could apply to withdraw their application for transfer at any time before the transfer took effect, but the Governor-General could refuse to permit the senior officer to withdraw the application. The Governor-General could grant or refuse the application for transfer, including granting the transfer subject to conditions.</p>	<p>17: Voluntary transfer from Reserves to Permanent Forces</p> <p>18: Voluntary change</p> <p>21: Becoming member of Reserves after service in Permanent Forces</p>	<p>Section 17 provides that the CDF may transfer a member from the Reserves to the Permanent Forces if the member applies for, or agrees to, the transfer. The transfer can be subject to conditions.</p> <p>Under section 18, a member of the Permanent Forces can apply for the period of service to be reduced so that it ends in the very near future. When they reach the end of their new period of service, they will automatically transfer to the Reserves under section 21.</p> <p>Transfer between different parts of the Permanent Forces and between Reserve categories is no longer governed by the Regulation. The CDF and commanders in the Defence Force will make decisions about these types of transfers administratively, as an ordinary exercise of command. Transfer between Reserve categories, for example, may be managed in accordance with the Total Workforce Model.</p>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<p>Division 1 – Compulsory transfer of members – general (63)</p> <p>Division 2 – Transfer to Standby Reserve at end of period of service (64)</p> <p>Division 3 – Other transfers to Standby Reserve</p>	<p>Regulation 63 provided that a service chief could transfer a member between parts of the Permanent Forces and between categories of the Reserves.</p> <p>Regulation 64 provided that when a member completed a period of service in the Permanent Forces or in a category of the Reserves other than the Standby Reserve, they would automatically transfer to the Standby Reserve. The member could apply to transfer to a different category of the Reserves. If a member who transferred to the Standby Reserve applied to resign after 5 years in the Standby Reserve, their application must be accepted.</p>	<p>N/A</p> <p>21: Becoming member of Reserves after service in Permanent Forces</p> <p>22: End of service in the Reserves – 5 year rule</p>	<p>Transfer between parts of the Permanent Forces and between Reserve categories is no longer governed by the Regulation. The CDF and commanders in the Defence Force will make decisions about these types of transfers administratively, as an ordinary exercise of command. Transfer between Reserve categories, for example, may be managed in accordance with the Total Workforce Model.</p> <p>Under section 21, when a member’s period of service in the Permanent Forces ends, they automatically transfer to the Reserves. However, the CDF may direct that a member is not to transfer to the Reserves. The member’s period of service will be indefinite, or as otherwise specified at the time of transfer. However, if the member has not been required to render service during a continuous period of five years, they cease to be a member of the Reserves (section 22). As a matter of policy, the default position will be that, subject to them requesting otherwise, members transfer to a part of the Reserves that is not required to render any service under section 25 of the Act (that is, a part of the Reserves that is equivalent to the Standby Reserve under the <i>Defence (Personnel) Regulations 2002</i> or to SERCAT 2 in the Total Workforce Model).</p>



Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
65: Transfer to Standby Reserve of senior officers appointed under Part II of Defence Act	Regulation 65 provided that the CDF, VCDF and service chiefs who were appointed under Part II of the Act were to transfer to the Standby Reserve when their appointment ended.	16: Transfer from Permanent Forces to Reserves 18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces	The CDF, VDCF and service chiefs would, at the end of their appointment to those positions, be treated the same as any other members in the Defence Force. That is, if they reach the end of their period of service (including because they reach retirement age), they automatically transfer to the Reserves under section 21. Ideally, appointees to these positions would agree to change their period of service under section 18 so that it ends at the same time as their appointment to the relevant position. However, if necessary, the CDF could compulsorily transfer former appointees to the Reserves under section 16, as being in the interests of the Defence Force.
66: Transfer to Standby Reserve after limited-tenure promotion	Regulation 66 provided that a member who was the subject of a limited-tenure promotion was to transfer to the Standby Reserve at the end of the period of promotion.	13: Promotion 18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces	To achieve the same effect as a limited-tenure promotion, an agreement can be reached with a member that they are promoted under section 13, and simultaneously have their period of service changed to the relevant period under section 18. A change to the period of service under section 18 is voluntary, and a member cannot be forced to accept a promotion on this basis. At the end of the member's period of service, they automatically transfer to the Reserves under section 21.
67: Transfer to Standby Reserve after fixed tenure appointment	Regulation 67 provided that a member who was the subject of a fixed tenure appointment under regulation 51 was to transfer to the Standby Reserve at the end of the period of appointment.	18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces	To achieve the same effect as a fixed tenure appointment, the CDF may change a member's period of service under section 18. A period of service may only be changed under section 18 if the member applies for or agrees to the change. The CDF may put conditions on the change. This means that the CDF can offer to post members to a particular position if they accept a change in their period of service, and members can accept this offer. When the member's changed period of service ends, they will automatically transfer to the

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
			Reserves under section 21.
68: Transfer to Standby Reserve during redundancy	Regulation 68 provided that a service chief could declare that a member could not be usefully employed because of redundancy, and transfer that member to the Standby Reserve. A member was to be given at least 12 months notice of such a transfer, unless they consented to a shorter time.	21: Becoming member of Reserves after service in Permanent Forces 24: Early termination of service	Paragraph 24(1)(b) provides that the CDF may terminate a member's service in the Defence Force because of redundancy. This requires particular notice requirements to be met, including a minimum five week notice based on the equivalent requirements for terminating civilian employment on the basis of redundancy. Section 21 provides that a member of the Permanent Forces whose period of service ends automatically transfers to the Reserves. This includes if the member's service ends because of termination due to redundancy under section 24 (paragraph 21(3)(b)).
69: Transfer within Reserves for non-performance of training obligation	Regulation 69 provided that a service chief could transfer a member in the Reserves to another category in the Reserves with lesser training or other obligations (including the Standby Reserve) if the member has failed to carry out their training or other obligations.	N/A	Transfer between Reserve categories will not be governed under the Regulation. Instead, it will be dealt with administratively as part of an ordinary exercise of command. The intent of regulation 69 can be achieved through policy.
Division 4 – Other arrangements (70)	Regulation 70 provided that a service chief could terminate a member's service in the Standby Reserve at any time.	22: End of service in the Reserves – 5 year rule 24: Early termination of service	Under section 22, a member of the Reserves will cease to be a member of the Reserves if they are not required to render service for a continuous period of five years. Otherwise, a member's service in the Reserves will end if they reach the end of their period of service (including because they have agreed to change it under section 18 or have reached retirement age under section 23), or their service has been terminated for one of the reasons in section 24.
Part 3 – Alteration of the	The Part applied to members above certain	16: Transfer from	The effect of Part 3 can be achieved by offering a member a special

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
service obligation by payment of special benefit (71-80)	ranks. It provided for a detailed process to offer members a 'special benefit' (determined under Part IIIA of the Act) if they agree to be transferred to the Reserves within a particular period. If the member declined the offer, they could be transferred or have their service terminated after a longer period of at least 13 months.	Permanent Forces to Reserves 18: Voluntary change 21: Becoming member of Reserves after service in Permanent Forces 24: Early termination of service Determinations under Part IIIA of the Act	benefit determined under Part IIIA of the Act on the condition that the member agrees to have their period of service reduced under section 18. If the member agrees, their period of service will be reduced and they will automatically transfer to the Reserves under section 21. If the member refuses the offer, the CDF can transfer the member to the Reserves under section 16 or terminate their service under section 24 on the basis that the transfer or termination is in the best interests of the Defence Force. The interests of the Defence Force include matters relating to workforce planning, which is the reason these special benefits are offered.
<b>Chapter 9 – Completion of the service obligation</b>  Part 1 – Completion of service (81)  Part 2 – Compulsory termination of service	Regulation 81 provided that a member's service in the Defence Force ends at the end of their period of service, except during time of war or defence emergency.	19: Time of war or defence emergency	Section 19 provides that, if a member's period of service would end during time of war or defence emergency, the period of service is extended until the CDF releases the member from service.
Division 1 – Arrangements for members			

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<p>82: Termination of service of member who becomes permanent resident of another country</p> <p>83: Termination of service during redundancy</p> <p>Division 2 – Additional arrangements for officers</p>	<p>Regulation 82 provided that a member who proposes to become, or has become, a permanent resident of another country must notify their service chief as soon as practicable. A service chief could terminate the member's service in the Defence Force.</p> <p>Regulation 83 provided for a service chief to declare that a member could not be usefully employed due to redundancy, and to terminate their service. Twelve months notice (or a time agreed by the member) was required.</p>	<p>24: Early termination of service Defence Instruction</p> <p>24(1)(b): Early termination of service</p>	<p>The requirement to notify Defence when a member becomes a resident of another country is no longer in the Regulation. Instead, this requirement will be included in a Defence Instruction issued under section 11 of the Act. This requirement will amount to a general order under the <i>Defence Force Discipline Act 1982</i>, and failure to comply may be a service offence.</p> <p>The CDF may terminate the service of a member who has become a permanent resident of another country under section 24, on the basis that their retention is not in the interests of the Defence Force.</p> <p>Paragraph 24(1)(b) provides that the CDF may terminate a member's service in the Defence Force because of redundancy. This requires particular notice requirements to be met, including a minimum five week notice based on the equivalent requirements for terminating civilian employment on the basis of redundancy. Section 21 provides that a member of the Permanent Forces whose period of service ends automatically transfers to the Reserves. This includes if the member's service ends because of termination due to redundancy under section 24 (paragraph 21(3)(b)).</p>
<p>84: Termination of appointment of officer for absence</p>	<p>Regulation 84 provided that the Governor-General could terminate an officer's service if they had been absent without leave for a</p>	<p>24(1)(e): Early termination of service</p>	<p>Paragraph 24(1)(e) provides that the CDF may terminate a member's service if they have been absent without leave for a period of three months or more. There are no notice requirements if termination is</p>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments										
<b>Defence (Personnel) Regulations 2002</b>													
<p>without leave</p> <p>85: Termination of service of officer for other reasons</p>	<p>continuous period of at least three months.</p> <p>Regulation 85 provided that the Governor-General could issue a termination notice to an officer, stating that it was proposed to terminate the member's service for one of the reasons listed in regulation 85(1) and giving the officer at least 28 days to respond. Once the period had passed, the Governor-General was required to, if satisfied that the reason for termination was made out, terminate the officer's service.</p>	<p>24: Early termination of service</p>	<p>for this reason.</p> <p>Subsection 24(1) provides that the CDF may terminate a member's service if they are medically unfit for service, cannot be usefully employed due to redundancy, their retention is not in the interests of the Defence Force, they have failed to meet a condition of their appointment or enlistment, or they have been absent without leave for three months or more. Subsection 24(2) requires notice under section 30, and at least 14 days to respond, if a proposed termination is for medical unfitness, redundancy, or the interests of the Defence Force. If a proposed termination is for breaching conditions of appointment / enlistment, or because a member has been absent without leave for three months, notice is not required.</p> <p>All of the reasons available for termination under regulation 85 of the <i>Defence (Personnel) Regulations 2002</i> are incorporated in subsection 24(1) as follows:</p> <table border="0" data-bbox="1301 970 2047 1289"> <tr> <td style="text-align: center;"><b>D(P)R reg 85(1)</b></td> <td style="text-align: center;"><b>DR16 s 24(1)</b></td> </tr> <tr> <td>(aa) less than 18 years old</td> <td>(c) retention is not in the interests</td> </tr> <tr> <td>(a) physical / mental incapacity</td> <td>(a) medically unfit</td> </tr> <tr> <td>(b) medically unfit</td> <td>(a) medically unfit</td> </tr> <tr> <td>(c) inefficient / incompetent</td> <td>(c) retention not in the interests</td> </tr> </table>	<b>D(P)R reg 85(1)</b>	<b>DR16 s 24(1)</b>	(aa) less than 18 years old	(c) retention is not in the interests	(a) physical / mental incapacity	(a) medically unfit	(b) medically unfit	(a) medically unfit	(c) inefficient / incompetent	(c) retention not in the interests
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Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
			<p>(d) retention not in the interests      (c) retention not in the interests</p> <p>(e) false or misleading information at appointment      (c) retention not in the interests</p> <p>(f) has not been granted citizenship      (d) breach of condition of appointment / (c) retention not in the interests</p> <p>(g) failed to render service      (c) retention not in the interests</p>
<p>Division 3 – Additional arrangements for enlisted members</p> <p>86: Termination of enlisted member’s enlistment for absence without leave</p> <p>87: Termination of service of enlisted member for other reasons</p>	<p>Regulation 86 provided that a service chief could terminate a member’s service if they had been absent without leave for a continuous period of at least three months.</p> <p>Regulation 87 provided that a service chief could issue a termination notice to a member, stating that it was proposed to terminate the member’s service for one of the reasons listed in regulation 87(1) and giving the member at least 28 days to respond. Once the period had passed, the service chief was required to, if satisfied that</p>	<p>24(1)(e): Early termination of service</p> <p>24: Early termination of service</p>	<p>Paragraph 24(1)(e) provides that the CDF may terminate a member’s service if they have been absent without leave for a period of three months or more. There are no notice requirements if termination is for this reason.</p> <p>Subsection 24(1) provides that the CDF may terminate a member’s service if they are medically unfit for service, cannot be usefully employed due to redundancy, their retention is not in the interests of the Defence Force, they have failed to meet a condition of their appointment or enlistment, or they have been absent without leave for three months or more. Subsection 24(2) requires notice under section 30, and at least 14 days to respond, if a proposed termination</p>

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<b>Defence (Personnel) Regulations 2002</b>																	
	the reason for termination was made out, terminate the member's service.		<p>is for medical unfitness, redundancy, or the interests of the Defence Force. If a proposed termination is for breaching conditions of appointment / enlistment, or because a member has been absent without leave for three months, notice is not required.</p> <p>All of the reasons available for termination under regulation 87 of the <i>Defence (Personnel) Regulations 2002</i> are incorporated in subsection 24(1) as follows:</p> <table border="0"> <tr> <td data-bbox="1317 695 1653 724"><b>D(P)R reg 87(1)</b></td> <td data-bbox="1688 695 1839 724"><b>DR16 s 24(1)</b></td> </tr> <tr> <td data-bbox="1317 759 1653 788">(a) less than 18 years old</td> <td data-bbox="1688 759 2024 788">(c) retention not in the interests</td> </tr> <tr> <td data-bbox="1317 823 1653 884">(b) the member is appointed as an officer</td> <td data-bbox="1688 823 2024 948">N/A (enlisted members will be promoted under section 13 to officer ranks – there is no need to terminate their enlistment)</td> </tr> <tr> <td data-bbox="1317 983 1653 1011">(c) medically unfit</td> <td data-bbox="1688 983 1890 1011">(a) medically unfit</td> </tr> <tr> <td data-bbox="1317 1046 1653 1107">(d) does not comply with medical standard</td> <td data-bbox="1688 1046 2002 1107">(a) medically unfit / (c) retention not in the interests</td> </tr> <tr> <td data-bbox="1317 1142 1653 1203">(e) not suited to be an enlisted member</td> <td data-bbox="1688 1142 2024 1171">(c) retention not in the interests</td> </tr> <tr> <td data-bbox="1317 1238 1653 1299">(f) not suited for further training</td> <td data-bbox="1688 1238 2024 1267">(c) retention not in the interests</td> </tr> </table>	<b>D(P)R reg 87(1)</b>	<b>DR16 s 24(1)</b>	(a) less than 18 years old	(c) retention not in the interests	(b) the member is appointed as an officer	N/A (enlisted members will be promoted under section 13 to officer ranks – there is no need to terminate their enlistment)	(c) medically unfit	(a) medically unfit	(d) does not comply with medical standard	(a) medically unfit / (c) retention not in the interests	(e) not suited to be an enlisted member	(c) retention not in the interests	(f) not suited for further training	(c) retention not in the interests
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<b>Defence (Personnel) Regulations 2002</b>			
			<p>(g) retention not in the interests      (c) retention not in the interests</p> <p>(h) false or misleading information at enlistment      (c) retention not in the interests</p> <p>(i) has not been granted citizenship      (d) breach of condition of enlistment / (c) retention not in the interests</p> <p>(j) failure to render service      (c) retention not in the interests</p>
Part 3 – Voluntary termination of service	Under this Part, officers, senior officers and enlisted members could apply to resign from the Defence Force. The member could apply to withdraw the application, but that could be refused. An application to resign could be granted, granted on conditions, or refused. Conditions could include a condition requiring the member to pay a specified amount of money.	18: Voluntary change 25: Service obligation debts	<p>Section 18 provides for the CDF to change a member's period of service, if the member has applied for or agreed to the change. If the period of service is reduced sufficiently, or if an indefinite period of service is changed to a sufficiently short fixed period, this has the same effect as resignation. A change of period of service is subject to any conditions specified by the CDF.</p> <p>Section 25 provides for 'service obligation debts', which exist if the CDF changes a member's period of service following the member's application, and the effect of the change is that the member does not complete an initial minimum period of service or return of service obligation. The amount of the debt is worked out using an initial obligation amount determined by the CDF and a service debt calculation method determined by the CDF. The member must be notified of the amount and calculation method before beginning the initial minimum period of service or the training or other events giving rise to the return of service obligation. The CDF can waive all or part of a service obligation debt.</p>



Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
Part 4 – Other matters about termination of service of member (99)	Regulation 99 provided for a service chief to ensure that a member’s service is treated as having been terminated for a reason other than the actual reason for termination, if the member agrees.	26: Change of reason for end of service	Section 26 provides for the CDF to ensure that a member’s service is treated as having been terminated or ended for a reason other than the reason for which it was actually terminated or ended, if the member or the member’s family agrees.
<b><i>Chapter 10 – Other matters relating to appointment, promotion, transfer etc</i></b>			
Part 1 – Training periods (100)	Regulation 100 provided that a service chief could determine training periods for each category in the Reserves, training requirements during these periods, and that a member is not required to comply with training requirements. A member was bound to render, in each training period, service for the required period.	27: Service in the Reserves	Section 27 provides that a member of the Reserves is bound to render service (including periods of training) as required by the CDF.
Part 2 – Uniforms (101)	Regulation 101 provided that a service chief must determine the uniforms to be worn in their service.	N/A	Determination of uniforms is no longer governed by the Regulation. Instead, uniforms will be determined, and wearing of uniforms enforced, as an ordinary exercise of command.
Part 3 – The Retired List (102)	Regulation 102 provided that the Retired List in force before the <i>Defence (Personnel) Regulations 2002</i> commenced continued in force.	N/A	This provision has been removed as no longer necessary.
Part 4 – Honorary rank	This Part provided for the Governor-General to	31: Honorary officer	Section 31 provides for the Governor-General and CDF to appointed

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
(103-104)  Part 5 – Privileges after end of service (105-107)  Part 6 – Service of foreign country (108)	<p>appoint people to honorary officer ranks, and for service chiefs to appoint people to honorary non-commissioned ranks. An honorary rank did not imply any right to command.</p> <p>This Part provided for service chiefs to grant former officers honorary titles relating to their former appointment, and to permit former members to wear uniform subject to conditions. These privileges could be revoked at any time.</p> <p>Regulation 108 provided that a member must not enter the service of a foreign country unless their service chief had approved entry to that service, including with conditions.</p>	<p>ranks</p> <p>32: Honorary enlisted ranks</p> <p>33: Title after end of service</p> <p>34: Wearing of uniform after end of service</p> <p>Defence Instruction</p>	<p>people to honorary officer ranks. Section 32 provides for the CDF to appoint people to honorary enlisted ranks. An honorary rank does not imply any right to command. A decision to appoint a person to an honorary rank can be revoked at any time.</p> <p>Section 33 provides for the CDF to grant a former member an honorary title relating to their former service, which can be revoked at any time. Section 34 provides for the CDF to permit former members to wear uniform, on conditions, which can be revoked at any time.</p> <p>The requirement to obtain permission before entering the service of a foreign country is no longer in the Regulation. Instead, this requirement will be included in a Defence Instruction issued under section 11 of the Act. This requirement will amount to a general order under the <i>Defence Force Discipline Act 1982</i>, and failure to comply may be a service offence.</p>
<b>Chapter 11 – Chaplains (109-116)</b>	Chapter 11 provided for the appointment, rank, and retirement of chaplains in the Defence Force. It included requirements that chaplains' appointments be recommended by the Religious Advisory Committee before a chaplain was appointed, the equivalent notional ranks of chaplains compared to other officers, and requirements that recommendations of the Principal Chaplain be taken into account when making decisions about chaplains. It also provided that a chaplain does not have military	N/A	Under the Regulation, chaplains are treated like other officers. They are appointed as officers under section 12, but do not need to be appointed with an ordinary officer rank as is the case for other officers. Eligibility criteria for appointment, including recommendations of the Religious Advisory Committee, will be matters of policy. Chaplains may be given honorary rank under section 31. The CDF will determine what, if any, authority chaplains have, including over each other, which will likely not include any command authority. The CDF may also direct that chaplains are not to serve on courts martial or inquiries.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
	executive command, and must not be appointed to a court martial or inquiry.		
<p><i>Chapter 12 – General</i></p> <p>117: No civil contract</p> <p>118: Service for a period of less than one day</p> <p>119: Delegation</p>	<p>Regulation 117 provided that no civil contract was created with the Crown or the Commonwealth as a result of the appointment, enlistment, promotion, transfer or posting of a member.</p> <p>Regulation 118 described how to calculate the period of service rendered by a Reserve member if they worked for part-days.</p> <p>Regulation 119 provided for the delegation of decision-making authority in the <i>Defence (Personnel) Regulations 2002</i>.</p>	<p>N/A</p> <p>N/A</p> <p>84(1): Delegation of Chief of the Defence Force’s powers</p>	<p>Section 27 of the Act now provides that no civil contract of any kind is created with the Crown or the Commonwealth in connection with the member’s service.</p> <p>For pay purposes, part-days will be dealt with in the relevant pay determination. For all other purposes, this will be dealt with through policy documents.</p> <p>Subsection 84(1) provides that the CDF may delegate powers under Parts 3, 4 and 5 of the Regulation, which relate to personnel decision-making, honorary rank and privileges after end of service. These powers can be delegated to any Defence Force officer, to enlisted members at or above the rank of Chief Petty Officer (Navy), Warrant Officer Class 2 (Army) and Flight Sergeant (Air Force), and to Australian Public Service employees in the Department who hold positions not below APS 4.</p>
<p><i>Chapter 13: Transitional arrangements (120-127)</i></p>	<p>Chapter 13 consisted of transitional provisions that were relevant at the time the <i>Defence (Personnel) Regulations 2002</i> commenced.</p>	<p>N/A</p>	<p>The transitional provisions in Chapter 13 of the <i>Defence (Personnel) Regulations 2002</i> are no longer relevant.</p>
<p><i>Schedule 1 – Ranks and</i></p>	<p>Schedule 1 provided a table of ranks in the three</p>	<p>23: Retirement age</p>	<p>Schedule 1 of the Act now contains a table of ranks in the three</p>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Personnel) Regulations 2002</b>			
<i>compulsory retirement ages (not including chaplains)</i>	services and compulsory retirement ages for those ranks.	Schedule 1 of the Act	services. Section 23 of the Regulation provides retirement ages for all members.
<i>Schedule 2 – Oath or affirmation for enlistment of member</i>	Schedule 2 set out the form of the oath or affirmation that was required to be taken or made under regulation 24.	Subsections 12(6) and 12(7) Schedule 1 – Oath and affirmation	Under subsection 12(6), all Defence Force members are required to take an oath or make an affirmation before or as soon as practicable after their appointment or enlistment. This replaces the enlistment oath or affirmation that was required under regulation 24 of the <i>Defence (Personnel) Regulations 2002</i> , and extends the requirement to all members, including officers. The form of the oath or affirmation is set out in Schedule 1 of the Regulation, and is the same as was previously set out in relation to enlisted members in the <i>Defence (Personnel) Regulations 2002</i> .

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
<i>Part I – Preliminary (1-3A)</i>	This Part provided for the name of the regulations, interpretation of certain words and the ability to delegate certain powers.	Part 1 – Preliminary Part 16 – Delegations	Part 1 of the Regulation includes information about the name, commencement, authority, the repeal of regulations (in schedule 2), and the objects of the Regulation. It also includes 6: Definitions. The definitions from regulation 3 of the <i>Defence Force Regulations 1952</i> have not been re-made, as they are no longer relevant.  Part 16 of the Regulation outlines what powers in the Regulation can

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
			be delegated, and to whom they may be delegated.
<b><i>Part II – Command of Forces acting together</i></b>	This Part provided for the situation where members of Navy, Army and Air Force were acting together. In particular, it outlined the command arrangements for these situations. Regulation 8 also included a table of corresponding ranks in the three services.	N/A	Part II of the <i>Defence Force Regulations 1952</i> has not been re-made. The CDF, as sole commander of the Defence Force under the Act, is now able to make standing or general orders or give directions to put in place the appropriate arrangements for command, control and administration of the Defence Force, including where members of different arms of the Defence Force are working or acting together. Accordingly, there was no need to re-make Part II of the <i>Defence Force Regulations 1952</i> .  A table of ranks and corresponding ranks has also been incorporated in Schedule 2 of the Act, so this did not need to be included in the Regulation.
<b><i>Part 3 – Aid to civilian authorities</i></b>	This Part dealt with a situation where the Defence Force is called out other than under Part IIIAAA of the Act. It provided for the CDF's responsibilities, Ministerial directions, and requirements to cooperate with State and Territory authorities.	Part 12 – Aid to civilian authorities	Part 12 of the Regulation re-makes Part III of the <i>Defence Force Regulations 1952</i> in full. The language has been simplified and modernised, but the substantive effect of the Part is identical.
<b><i>Part IV – Administration of oaths etc</i></b>	This Part provided a mechanism for Defence members to swear oaths, make affidavits and execute documents before competent officers while on service outside Australia, even if the ordinary requirements required in relevant Commonwealth, State or Territory laws could not be met.	Part 9 – Oaths and affirmations etc for members serving overseas	Part 9 of the Regulation re-makes Part IV of the <i>Defence Force Regulations 1952</i> in full. The language has been simplified and modernised, but the substantive effect of the Part is virtually identical. Part 9 clarifies that the Part applies to affirmations as well as oaths, and extends the meaning of 'competent officer' to all Defence Force officers.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
<i>Part V – Powers of attorney</i>	This Part provided for members of the Defence Force who were under the age of 21 years to execute a power of attorney.	N/A	Part V of the <i>Defence Force Regulations 1952</i> has not been re-made as it is redundant (noting that in Australia, the age at which a person can make a power of attorney is 18 years).
<i>Part 5A – Certification of deaths</i>	This Part provided for the issuing of death certificates in relation to Defence Force members who died or went missing while on service, which could be used as evidence that the member had died on the specified date.	Part 10 – Certification of deaths	Part 10 of the Regulation re-makes Part 5A of the <i>Defence Force Regulations 1952</i> in full. The language has been simplified and modernised, but the substantive effect of the Part is identical.
<i>Part VI – Disposal of dead bodies of members of the Defence Force</i>	<p>This Part provided for Defence Force officers to give directions for the disposal of a Defence Force member’s body who died while on service, displacing State and Territory laws relating to coroners and registration of deaths. It also provided for post mortems to be conducted by Defence Force medical officers.</p> <p>Regulation 31 provided for the establishment of war cemeteries, the exhumation and reinterment, cremation or other disposal of the body of a Defence Force member who has died while on service, and the inspection, maintenance and work in connection with a war grave.</p>	Part 15 – War graves	<p>The bulk of Part VI of the <i>Defence Force Regulations 1952</i>, relating to the disposal of Defence Force members’ bodies, has not been re-made. These provisions do not reflect current Defence practice in relation to the bodies of members who die while on service overseas. Current practice is that these bodies will be re-patriated to Australia, and then dealt with in accordance with State and Territory laws.</p> <p>Regulation 31 of the <i>Defence Force Regulations 1952</i>, which deals with war graves, has been re-made in the same terms in Part 15 of the Regulation.</p>
<i>Part VII – Defence areas</i>	This Part provided for the Minister to authorise the entry upon and use of any area of land of water to carry out operations for the testing of war material, and to declare prohibited areas for	Part 11 – Defence areas 87: Defence areas (transitional	Part 11 of the Regulation consolidates Part VII – Defence areas and Part XI – Defence practice areas of the <i>Defence Force Regulations 1952</i> into a single part. Part 11 provides for the declaration of defence areas for defence purposes, and their use. A defence area

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
	the purpose of an ‘undertaking’ or to carry out operations for the testing of war materiel. The Part provided for offences if a person entered a prohibited area without permission. It also included compensation provisions for people who suffered loss or damage by reason of the operation of the Part.	provision)	<p>may be prohibited at all times or only during particular periods. Offence and compensation provisions from Part VII and Part XI have been clarified and harmonised, and the language has otherwise been modernised and simplified. However, the effect of Part 11 in the Regulation is substantially the same as the effect of Parts VII and XI in the <i>Defence Force Regulations 1952</i>.</p> <p>The Woomera Prohibited Area will continue to be governed by Part VIB of the Act and Part VII of the <i>Defence Force Regulations 1952</i>, notwithstanding the Regulation.</p> <p>All other prohibited areas and practice areas declared under the <i>Defence Force Regulations 1952</i> will continue to be governed by the <i>Defence Force Regulations 1952</i>, unless and until they are re-declared under the Regulation.</p>
<b><i>Part VIII – Attachment of members</i></b>	This Part provided for members of one of three services to be attached to another service.	N/A	<p>Part VIII of the <i>Defence Force Regulations 1952</i> has not been re-made. The CDF, as sole commander of the Defence Force under the Act, is now able to make standing or general orders or give directions to put in place the appropriate arrangements for command, control and administration of the Defence Force, including the attachment of members of one service to another service. Accordingly, there was no need to re-make Part VIII of the <i>Defence Force Regulations 1952</i>.</p>
<b><i>Part IXA – Salvage claims</i></b>	This Part provided for the apportionment of salvage between crew members of a navy ship, under section 117AB of the Act.	N/A	Part IXA of the <i>Defence Force Regulations 1952</i> has not been re-made. Provisions relating to salvage claims by crew members are considered out-of-date.
<b><i>Part X – Visiting forces</i></b>	This Part declared certain countries for the	Part 13 – Visiting	Part 13 of the Regulation re-makes Part X of the <i>Defence Force</i>

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
	purposes of Part IXA of the Act, provided for a form of warrant for the purposes of section 116F of the Act, and provided for sentences imposed by service tribunals in other countries to be applied to Defence Force members. The Part gave effect to aspects of Part IXA of the Act, which is concerned with the attachment of members of foreign militaries to the Defence Force and vice versa.	forces	<i>Regulations 1952</i> in full. The language has been simplified and modernised, but the substantive effect of the Part is virtually identical. The list of countries in Part 13 has been updated, and now reflects the lists of countries in regulations 4 and 5 of the <i>Defence (Visiting Forces) Regulations 1963</i> . A reference to corporal punishment has also been added as a type of sentence that cannot be enforced under Part 13.
<b><i>Part XI – Defence practice areas</i></b>	This Part provided for the declaration of Defence practice areas for the carrying out of defence operations or practices. The CDF, the Secretary or a service chief could authorise the carrying out of a defence operation or practice in a practice area. Offences relating to practice areas included being in a practice area without permission during an authorised operation or practice. The Part also provided for removal from a practice area and compensation for loss or damage caused by anything done under the Part.	Part 11 – Defence areas  87: Defence areas (transitional provision)	Part 11 of the Regulation consolidates Part VII – Defence areas and Part XI – Defence practice areas of the <i>Defence Force Regulations 1952</i> into a single part. Part 11 provides for the declaration of defence areas for defence purposes, and their use. A defence area may be prohibited at all times or only during particular periods. Offence and compensation provisions from Part VII and Part XI have been clarified and harmonised, and the language has otherwise been modernised and simplified. However, the effect of Part 11 in the Regulation is substantially the same as the effect of Parts VII and XI in the <i>Defence Force Regulations 1952</i> .  The Woomera Prohibited Area will continue to be governed by Part VIB of the Act and Part VII of the <i>Defence Force Regulations 1952</i> , notwithstanding the Regulation.  All other prohibited areas and practice areas declared under the <i>Defence Force Regulations 1952</i> will continue to be governed by the <i>Defence Force Regulations 1952</i> , unless and until they are re-declared under the Regulation.



Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
<b><i>Part XII – Surveys</i></b>	This Part provided authority to enter upon and survey land for the purposes of the Act or Regulations.	N/A	Part XII of the <i>Defence Force Regulations 1952</i> has not been re-made, as it effectively duplicated powers that existed in other legislation (in particular, the <i>Land Acquisitions Act 1989</i> ).
<b><i>Part 12A – Provision of certain goods and services for Defence Force members</i></b>	<p>This Part provided that the Commonwealth could recover the cost of providing furniture and electricity for use in married quarters occupied by a Defence Force member or their family.</p> <p>This Part also provided that the Commonwealth must arrange for the provision of medical and dental treatment for Defence Force members, and provided for recovering the costs of treatment if the member has an enforceable claim against a third party for damages in relation to the treatment.</p>	Part 8 – Medical and dental treatment	<p>The provisions in Part 12A of the <i>Defence Force Regulations 1952</i> relating to furniture and electricity have not been re-made, as they do not represent current Defence practice in relation to the provision of housing and related goods to Defence Force members.</p> <p>The provisions in Part 12A of the <i>Defence Force Regulations 1952</i> relating to the provision of medical and dental treatment, including the recovery of treatment costs in certain circumstances, have been re-made in full. The language has been simplified and modernised, but the substantive effect of Part 8 of the Regulation is virtually identical. The power to require a member to reimburse the Commonwealth for the cost of medical and dental treatment if they are able to make a claim for damages from a third party is now vested in the Secretary (it was previously vested in the Minister).</p>
<b><i>Part XIII – Suspension and forfeiture of salary and allowances</i></b>	This Part provided that, when a member was in civil custody or absent without leave, their salary and allowances would be forfeited.	29: Forfeiture of pay – absent without leave	The effect of Part XIII of the <i>Defence Force Regulations 1952</i> has been achieved in section 29 of the Regulation. The provisions have been significantly simplified and clarified. In particular, the complicated process outlined in Part XIII of the <i>Defence Force Regulations 1952</i> for when forfeiture ends, and review of forfeiture decisions, has been removed. Section 29 provides that if a member is absent from duty without leave, their pay is forfeited to the Commonwealth. Pay is defined in section 6 as all remuneration, allowances and other benefits under Part IIIA of the Act. Subsection 29(2) clarifies that, to enliven the section, the member does not need

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
			<p>to be charged or convicted or the relevant offence under the <i>Defence Force Discipline Act 1982</i>. It also clarifies that a member may be absent from duty without leave while they are in civil custody.</p> <p>Subsection 29(3) is a new provision that enables the CDF to determine that some or all pay otherwise forfeited is not forfeited. This alleviates the situation in some cases under Part XIII of the <i>Defence Force Regulations 1952</i> where there is no mechanism to re-pay a member if their absence was justified or if forfeiture causes unreasonable hardship to a member's dependants.</p> <p>Section 29 complements section 98 to 100 of the <i>Defence Force Discipline Act 1982</i> and section 28 of the Regulation which deal with suspension of members from duty, including without pay.</p>
<b><i>Part XIII A – Delegations by the Minister</i></b>	This Part provided for the Minister to delegate powers under Part IIIA of the Act.	N/A	The power to delegate powers in Part IIIA of the Act has been moved into the Act, so this regulation was redundant.
<b><i>Part XIV – Payment of fines</i></b>	This Part provided for Defence Force members to re-pay the Commonwealth if the Commonwealth had paid an amount that the member had been ordered by a court to pay.	N/A	Part XIV of the <i>Defence Force Regulations 1952</i> has not been re-made as it does not reflect current Defence practice.
<b><i>Part 15 – Redress of grievances</i></b>	This Part provided for Defence Force members to make complaints to their commanding officer, which could also be referred to a member's service chief and, in some cases, the CDF, if the member was dissatisfied with the outcome.	Part 7 – Redress of grievances	Part 7 of the Regulation provides for Defence Force members to make complaints to their commanding officer or an authorised complaint recipient. However, the process after the complaint is made differs significantly from the process that was in Part 15 of the <i>Defence Force Regulations 1952</i> . Under Part 7, the member's chain of command is able to address the complaint in whatever way seems

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
			most appropriate. However, the complaint must also be referred to the Inspector-General ADF, who is independent from the ordinary chain of command, and who may consider the complaint and make recommendations on how to address the complaint. This provides a more flexible complaint mechanism for Defence Force members with independent oversight.
<b><i>Part 15A – Defence Honours and Awards Appeals Tribunal</i></b>	This Part provided for Defence honours and Defence awards for the purposes of section 110T of the Act. It also provided for an offence relating to disclosure of information obtained by the Defence Honours and Awards Tribunal, and remuneration and travel allowance for Tribunal members.	Part 6 – Defence honours and awards	The list of Defence honours and awards for the purposes of section 110T of the Act are listed in Part 6 of the Regulation. The Australian Operational Service Medal has been added to the list of Defence awards. The offence in Part 15A of the <i>Defence Force Regulations 1952</i> relating to disclosure of information received by the Defence Honours and Awards Tribunal has also be re-made.  The provisions relating to the remuneration and travel allowance of Tribunal members have not been re-made, as they are no longer required.
<b><i>Part XVI – Miscellaneous</i></b>	This Part provided for an administration fee for the purposes of section 120B(4) of the Act, and declared a body corporate for the purposes of section 123(2) of the Act.	N/A	Part XVI of the <i>Defence Force Regulations 1952</i> has not been re-made, as these provisions are redundant.
<b><i>Schedule 1 – Form of warrant</i></b>	Schedule 1 provided a form of warrant for the purposes of regulation 45 of the <i>Defence Force Regulations 1952</i> .	Schedule 1 – Form of warrant	Schedule 1 of the Regulation re-makes Schedule 1 of the <i>Defence Force Regulations 1952</i> in full. The substantive effect is identical.
<b><i>Schedule 2 – Charge for each day on which member was n in-patient</i></b>	Schedule 2 provided for daily charges that could be recovered from a Defence Force member in some circumstances if they had been an in-	N/A	This Schedule has not been re-made as it is redundant.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence Force Regulations 1952</b>			
<i>at a service or Repatriation hospital in a State</i>	patient in a service or Repatriation hospital in a state.		
<i>Schedule 3 – Defence honours and awards</i>	This Schedule provided the list of Defence honours and awards.	Part 6 – Defence honours and awards	The content of this schedule has been re-made in Part 6 of the Regulation.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
<b>Defence (Prohibited Words and Letters) Regulations 1957</b>			
<i>1 Name of Regulations</i>	This regulation provided the name of the regulations.	N/A	Section 1 of the <i>Defence (Prohibited Words and Letters) Regulations 1957</i> did not need to be re-made.
<i>2 Use of words and groups of letters prohibited without consent</i> <i>3 Applications for consent</i> <i>4 Consent</i>	The <i>Defence (Prohibited Words and Letters) Regulations 1957</i> made it an offence to use certain words and letters in connexion with trade, business, calling or profession or by an organisation or body of persons, unless consent had been obtained. An application for consent was to the Minister, who could seek additional information, and could consent (including with conditions) or refuse the application). A person	Part 14 – Prohibited words and letters	Part 14 of the Regulation re-makes the offence in the <i>Defence (Prohibited Words and Letters) Regulations 1957</i> . The provisions relating to applying for consent, giving or refusing consent, and applying to the Administrative Appeals Tribunal have also been re-made. While the language has been modernised, the substantive effect is identical. The penalty for the offence has been increased from 5 penalty units to 10 penalty units.

Provision/s in old Regulations	Effect of provision/s in old Regulations	Corresponding provision/s in Defence Regulation 2016	Comments
	could apply to the Administrative Appeals Tribunal in relation to a decision to refuse consent or in relation to conditions.		
<b>5 Delegation</b>	This regulation provided that the Minister could delegate their powers to Defence Force officers at or above the rank of Colonel (or equivalent).	82: Delegation of Minister's powers	The power to delegate in section 82 of the Regulation enables the Minister to delegate the powers in Part 14 Prohibited words and letters to officers in the Navy at or above the rank of Lieutenant Commander, officers in the Army at or above the rank of Major, officers in the Air Force at or above the rank of Squadron Leader, and Australian Public Service employees in positions at or above APS 6.
<b>Schedule 1 Prohibited words and letters</b>	This Schedule listed the words and letters whose use was prohibited.	74: Prohibited words 75: Prohibited letters	The lists of prohibited words and letters from Schedule 1 of the <i>Defence (Prohibited Words and Letters) Regulations 1957</i> have been consolidated into a single list of prohibited words and a single list of prohibited letters. Some words and letters have been removed. For example, the words 'Navy' and 'Naval' were considered to be too general a meaning, so were removed. Other words were considered to be out of use, and were removed for that reason.

