

EXPLANATORY STATEMENT

Defence Force Discipline Act 1982

Defence Force Discipline Regulations 2018

The *Defence Force Discipline Act 1982* (the Act) makes provision for a mechanism, by creating a discipline system, for the maintenance and enforcement of good order and discipline in the Defence Force.

The purpose of the *Defence Force Discipline Regulations 2018* (the Regulations) is to prescribe matters that are incidental for the maintenance and enforcement of good order and discipline in the Defence Force.

Section 197 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Section 178D of the Act provides that the Regulations may make provision for or in relation to the remission of punishments of detention of detainees, and the conduct and administration of detention centres.

Sub-section 146(2) of the Act provides that the Regulations may make rules of evidence to be applied in relation to trials by a court martial or Defence Force magistrate that are in addition to or in substitution for, or that modify, the rules of evidence that, apart from the Regulations, would apply in relation to such trials by virtue of subsection 1 (which provides that the rules of evidence in force in the Jervis Bay Territory apply to a trial by a court martial or Defence Force magistrate as if the court martial or Defence Force magistrate were a court exercising jurisdiction in or in relation to that Territory; and the trial were a criminal proceeding in such a court).

The new Regulations will also repeal the *Defence Force Discipline Regulations 1985* before they sunset on 1 April 2018. The Regulations would replace this sunset instrument in substantially the same form, but with modern language and drafting compliance.

Consultation
Attorney - General's Department
Australian Government Solicitor
Office of Parliamentary Counsel

The Office of Best Practice Regulation was consulted and advised that no Regulation Impact Statement is required (ID 16989).

The authorising Act specifies no conditions that need to be fulfilled before the Regulations can be made.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations would commence on the day after it is registered on the Federal Register of Legislation and the details of the Regulations are set out in the Attachment.

Issued by authority of the Minister for Defence Personnel

Statement of Compatibility with Human Rights

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

Defence Force Discipline Regulations 2018

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Defence Force Discipline Regulations 2018* (the Regulations) is to prescribe matters that are incidental for the maintenance and enforcement of good order and discipline in the Defence Force. The new Regulations will also repeal the *Defence Force Discipline Regulations 1985* before they sunset on 1 April 2018. The Regulations would replace this sunset instrument in substantially the same form, but with modern language and drafting compliance.

Human rights implications

- **Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Prohibition against torture, cruel, inhuman or degrading treatment**

The Regulations note that the basic entitlements enjoyed by community members are necessarily diminished for detainees by reason of the fact that they are imprisoned. However, the general standards of treatment are intended to provide a humane environment with sufficient connectivity with the outside world to ensure a seamless transition back into the community. The proposed Regulations are intended to prescribe the conditions of detention, including the further punishment of detainees for disciplinary matters arising while in detention. The view of Defence is that the Regulations comply with human rights provisions while still providing the ability for disciplinary misdemeanours by detainees to be appropriately punished.

- **Article 9 of the ICCPR, Right to liberty and security of the person**

As above, the measures restricting liberty further than that otherwise expected of a detained person are temporary in nature. It is our view that the relatively short period of time spent serving these disciplinary punishments ensures the Regulations remain consistent with human rights provisions. In particular, the ability for the detainee to maintain regular contact with the outside world (either by telephone or mail or visits) is important.

- **Article 10 of the ICCPR, Right to humane treatment in detention**

The standard of treatment provided to detainees is constantly under review by Defence. These reviews range from ensuring proper monitoring and supervision of detainees within the Chain of Command through to examination of policy and legislative provisions prescribing conditions of detention. Ultimately, the aim of Defence in the detainment process is a combination of rehabilitation and deterrence, and these aims are achieved by ensuring detainees receive excellent training and instruction with the intent of ensuring that detainees can uphold Defence values in the future. All detainees have the right of complaint regarding their treatment. They also have access to the same medical treatment as other ADF members.

- **Article 17 of the ICCPR, Right to privacy**

Detainees will not be subjected to arbitrary or unlawful interference with privacy, family, home, or correspondence, nor to unlawful attacks on honour and reputation. A detainee's dignity and rights are safeguarded to the extent that detention centre operators must have due cause to be concerned for the security, discipline, or good order of the detention centre before detainee correspondence can be opened and inspected. This limitation respects privacy while acknowledging that detention centres may be located in war or warlike operations indicating the potential for a higher level of vigilance against external threats to security, or internal threats to security where detainees may be undergoing detention for serious offences against the safety of others (e.g. assault), the discipline of the Defence Force, or relating to the security of the nation. Where a member has been subject to disciplinary proceedings, conduct records are kept by the Defence Force for the purpose of maintaining discipline and good order and are managed by Defence policy in accordance with privacy principles.

Conclusion

The Regulations are compatible with human rights and to the extent that it may limit human rights, these limitations are reasonable, necessary and proportionate.

Details of the regulations are as follows:

Section 1 – Name

This section provides that the title of the instrument is the *Defence Force Discipline Regulations 2018*.

Section 2 – Commencement

This section provides for the Regulations to commence on 1 April 2018.

Section 3 – Authority

The Regulations are made under the *Defence Force Discipline Act 1982*.

Section 4 – Schedule 1

This section provides that Schedule 1 sets out forms for the purpose of various provisions of the *Defence Force Discipline Act 1982* or regulations.

Section 5 – Schedule 2

This section provides that Schedule 2 specifies places which are prescribed for the purpose of section 101F of the *Defence Force Discipline Act 1982*, to the effect that a legal officer in the vicinity of the specified place may be made contactable by a Defence member who is being held in custody in respect of a service offence.

Section 6 – Schedule 3

This section provides that each instrument as set out in Schedule 3 is repealed as specified, to the effect that *Defence Force Discipline Regulations 1985* will be repealed.

Section 7 – Definitions

This section provides definitions of words and phrases used in the Regulations.

Section 8 – Application of Part

This section provides that the sections under Part 2 of the Regulations are made pursuant to the regulation-making power under section 178D(b) of the *Defence Force Discipline Act 1982*, and apply only in circumstances of active service to the extent that the exigencies of service permit.

Section 9 – Periods of detention

This section provides for limitations on the length of sentence that can be served at unit and area detention centres, taking into account how the period of both concurrent and consecutive sentences are calculated. Detention applies only to members of the Australian Defence Force, for the maintenance and enforcement of good order and discipline. This is consistent with the scheme and intention within the *Defence Force Discipline Act 1982*.

Section 10 – Duties of officer in charge of detention centre

This section provides that the officer in charge of a detention centre is responsible for the management, control, and security of a detention centre and specifies particular obligations of the officer in charge.

Section 11 – Accommodation of detainees

This section provides that each detainee must be provided with a separate bed, and should be held in a separate cell where practicable, but if not, a cell must have a minimum of three detainees. This section also specifies that a cell must have sufficient size, heating, lighting, ventilation and equipment as necessary to maintain the detainees' physical and mental health, and allow detainees the means of communication with detention centre staff at any time.

Section 12 – Cleanliness

This section provides that a detention centre must have facilities to enable the detainee to maintain proper standards of cleanliness and clothing.

Section 13 – Meals

This section provides that a detainee must be provided a quantity and type of food commensurate with normal service, and permits a detainee to purchase extra food.

Section 14 – Purchases

This section provides that a detainee may be permitted to make purchases to the extent that the officer in charge of the detention centre thinks fit.

Section 15 – Exercise

This section provides that a detainee who is either detained under punishment of segregated confinement or confinement to cell (as defined under section 68A of the *Defence Force Discipline Act 1982*) or who is directed to work indoors, must if practicable be permitted to exercise daily in open air.

Section 16 – Newspapers

This section provides that a detainee must be given access to newspapers, television, and radio to the extent that the officer in charge regards as reasonable.

Section 17 – Visiting officers

This section provides that an officer authorised under an authority pursuant to section 3(1) of the *Defence Force Discipline Act 1982* must appoint at least one visiting officer to each area and corrective detention centre. The instrument of appointment under subsection (1) is not a legislative instrument because of item 8 of the table in section 6 of *Legislation (Exemptions and Other Measures) Regulations 2017*.

Section 18 – Duties of visiting officers

This section provides that a visiting officer for an area or corrective detention centre must visit and inspect the detention centre at times and frequencies directed by the authorised officer, and provide a report after each visit, and as far as practicable visit all detainees and hear their complaints or requests, and make a record and report of those complaints, as well as reasonable enquiries into the complaints.

Section 19 – Visits

This section provides that a detainee of an area or corrective detention centre must be allowed to receive visits at reasonable times from specified people, being the visiting officer, a medical officer, a chaplain, a legal practitioner, a police member, and a constable. Subject to conditions set by the officer in charge as he see fit, the detainee must also be allowed visits from other persons.

This section also provides that a visit to a detainee must be within sight but outside of hearing of detention centre staff, and that an officer in charge may refuse or remove a visitor (using such reasonable force as may be necessary) if the officer in charge reasonably believes the visitor is likely to endanger or interfere with security or discipline.

Section 20 – Religion

This section provides that a detainee must as far as is practicable be allowed to practice their religion and have access to books and objects used in the practice of that religion. The section also provides that a detainee must be allowed to practice another religion, with the approval of the officer in charge.

Section 21 – Performing work

This section provides that an officer in charge may direct that a detainee perform work of a reasonable kind, and that if such work is directed, it should be a minimum of six hours daily, if that is practicable, and no more than nine hours daily.

The section also provides that an officer in charge must consider the religion and the mental and physical capacity of the detainee to perform the kind of work, and that a detainee must not perform work against the advice of a doctor, or (unless necessary) on a day of religious observance (including specifically Good Friday and Christmas Day).

Section 22 – Staff members authorised to open letters and parcels

This section provides that an officer in charge or an authorised staff member may open, inspect, and read letters and parcels sent to or proposed to be sent by a detainee. This authority is subject to the provisions of this Part 2 Division 3, in particular noting the limitations applied by section 24. The instrument of appointment which authorises the staff member under subsection (1) is not a legislative instrument because of item 8 of the table in section 6 of the *Legislation (Exemptions and Other Measures) Regulations 2017*.

Section 23 – Receiving and sending letters and parcels

This section provides that a detainee may only send and receive letters and parcels after agreeing to the opening and inspection of those letters and parcels. A detainee must be permitted to send two letters immediately upon being admitted to detention, and in every week thereafter.

The section also protects the confidentiality or privilege, as the case may be, of any letter sent to the detainee or proposed to be sent by the detainee to the Defence Force Ombudsman, a Member of Parliament, a member of the legal profession, or an authorised officer by excluding those letters from being opened and inspected. However if the officer in charge or staff member reasonably believes that such a letter may contain money, contraband, or anything that may adversely affect security, discipline or good order, the letter may be opened and inspected and the offending item impounded.

Section 24 – Letters and parcels to be opened in certain cases

This section provides that if the officer in charge or staff member reasonably believes that a letter or parcel may contain money, contraband, or anything that may adversely affect security, discipline or good order, the letter or parcel may be opened and inspected and the offending item impounded, and if so, the detainee must be informed. This section limits the authority under section 22 to open, inspect, and read letters and parcels by providing that the officer in charge or staff member must have a reasonable belief that the dispatch or delivery of a letter or parcel may adversely affect the security, discipline, and good order of the detention centre.

Section 25 – Impounded Articles

This section provides that impounded articles may be dealt with in accordance with directions given by the Chief of Defence Force or a Service Chief. For these purposes impoundment is for the period of detention only, or as otherwise authorised, to the extent that the impoundment does not constitute an unlawful acquisition of property.

Section 26 – Application of Part

This section provides that the sections under Part 3 of the Regulations are made pursuant the regulation-making power under section 178D(a) of the *Defence Force Discipline Act 1982*.

Section 27 – Remission

This section provides that a detainee serving not less than 28 days is entitled to a one quarter remission, however the amount of remission will not result in such a detainee serving less than 24 days detention. Where a detainee has served custodial punishments, a remission of 3 days may be granted for each day of segregated confinement, 2 days remission may be granted for each day of confinement to a cell, and one day remission for each day of extra drill. Also, where a punishment of restriction of custodial privileges amounts to more than 7 days in aggregate (whether continuous or not), a detainee may be granted one day remission for each period of 7 days of punishment. Remission does not apply to a period of further detention which is imposed as a result of misconduct during the initial period of detention.

Section 28 – Release

This section provides that if a period of detention was due to expire on a Sunday or public holiday, the officer in charge may remit as much detention as is required to release the detainee on the day before the Sunday or public holiday. The section also provides that a detainee may be released at any time during the last day of detention.

Section 29 – Application of Division

This section provides that the sections under Part 4 Division 1 of the Regulations are made pursuant to the regulation-making power under section 146(2) of the *Defence Force Discipline Act 1982*.

Section 30 – Evidence of speed conveyances – use of speed measuring devices

This section provides that a court martial or a Defence Force magistrate must be satisfied that evidence of a speeding offence has been obtained by a speed measuring device which has been operated, tested, and sealed in accordance with *Australian Standard 4691.1-2003 Laser-based speed detection devices, Part 1: Definitions and device requirements* and *Australian Standard 4691.2-2003 Laser-based speed detection devices, Part 2: Operational Procedures* as in force when these Regulations commenced. Defence holds a licence subscription to access and use these standards through the Defence Library Service. The specific version of the Australian Standard 4691 documents as in force at 1 April 2018 will be made readily and freely available to all Defence members via the Defence Force Discipline Instruments Register which is searchable and accessible on the Defence Restricted Network.

Section 31 – Authorised tester

This section provides that an officer at minimum 06 rank (Colonel equivalent) may appoint an appropriately qualified tester using the Form 1 in Schedule 1 of the Regulations. The instrument of appointment under subsection (1) is not a legislative instrument because of item 8 of the table in section 6 of the *Legislation (Exemptions and Other Measures) Regulations 2017*.

Section 32 – Certificates

This section provides that an authorised tester must complete a Form 2 in Schedule 1 of the Regulations after each test, and a police member operating a speed measuring device must complete a Form 3 in Schedule 1 of the Regulations after each operation. Evidentiary certification is considered an important safeguard considering that the relevant offences in the *Defence Force Discipline Act 1982* are strict and absolute liability offences.

Section 33 – Offence in relation to speed measuring devices

This section provides for an offence of tampering, damaging, or interfering with a sealed speed measuring device and that a punishment of two penalty units may apply to a person convicted of such an offence. This provision relies on the regulation-making power pursuant to section 197(2) of the *Defence Force Discipline Act 1982* which implicitly permits the making of offences in the Regulations.

Section 34 – Admissibility of evidence adduced before summary authority

This section provides that a summary authority dealing with a charge may hear evidence in relation to that charge during the dealing phase of summary proceedings in order to determine how the matter should be dealt with, and may consider a record of that evidence, if the summary authority is satisfied that to do so is not unfair to the accused, and the accused so consents.

Section 35 – Evidence of general orders

This section provides that an authorised officer can certify a copy of a general order for the purpose of submitting that general order into evidence before a court martial or Defence Force magistrate.

Section 36 – Modification of the *Evidence Act 1995* in its application to proceedings before a court martial or Defence Force magistrate

This section provides a modified rule of evidence for superior tribunals that has the effect of amending the dictionary definition of ‘business’ in the *Evidence Act 1995* (Cth) so that it includes the control, operation and administration of the Defence Force, with the effect of extending relevant exceptions to the hearsay rules (as set out in Part 3.2 of the *Evidence Act 1995*) to Defence Force documents.

Section 37 – Calculation of daily rate of pay of convicted person

This section provides that, in accordance with paragraph 3(9)(a) of the *Defence Force Discipline Act 1982*, where a convicted person is sentenced to a fine, the fine will be calculated by reference to the daily rate of pay of the convicted person, taking into account relevant determinations under section 58B and (if any) section 58H of the *Defence Act 1903* (Cth). Determinations under sections 58H and 58B of the *Defence Act 1903* (Cth) are legislative instruments and these Regulations may incorporate the determinations as in force from time to time in accordance with subsection 14(3) of the *Legislation Act 2003* (Cth).

Section 38 – Chaplains – notional ranks

This section provides that, in accordance with paragraph 6(2) of the *Defence Force Discipline Act 1982*, chaplains who are subject to disciplinary proceedings are notionally taken to hold the rank specified in the embedded table.

Section 39 – Members receiving instruction or training

This section provides that, in accordance with paragraph 6(2)(b) of the *Defence Force Discipline Act 1982*, the tables of punishments in Schedule 3 of the Act are modified to include punishments for officer cadets as specified in the embedded table.

Section 40 – Form of oath or affirmation

The section provides that the form of oath or affirmation provided in Form 4 in Schedule 1 of the Regulations is the form to be used in accordance with subsections 86A(2) and 101AA(2) of the *Defence Force Discipline Act 1982*.

Section 41 – Service of summons and notices

This section provides for the methods by which a summons or notice may be served upon a person.

Section 42 – Power of Arrest

This section provides that the power of arrest without warrant, under section 89(2)(d) of the *Defence Force Discipline Act 1982*, over an officer is limited to the particular persons and circumstances set out in this section. Officers can only be arrested without warrant by service police (or person acting under the authority of service police) who are also officers, unless the matter involves violence or disorderly conduct, serious offences in relation to military operations against the enemy, or the exigencies of service.

Defence civilians can only be arrested without warrant by an officer, service police officer, service police warrant officers, or service police non-commissioned officers.

Section 43 – Form of caution

This section provides that the form of caution provided in Form 5 in Schedule 1 of these Regulations is the form to be used for the purpose of section 101D of the *Defence Force Discipline Act 1982*. This provision relies on the necessary and convenient aspect of the general regulation-making power under section 197 of the Act.

Section 44 – Prescribed places for purposes of section 101F of the Act

This section provides that the places listed in Schedule 2 of these Regulations are places prescribed for the purpose of section 101F of the *Defence Force Discipline Act 1982*, as promulgated by the Director of Defence Counsel Services, in order to provide a list of local legal officers available to assist a person in detention.

Section 45 – Form of acknowledgement of record of interview

This section provides that a person who is subject to a formal record of interview in accordance with section 101K(3)(a) of the *Defence Force Discipline Act 1982* must acknowledge that the record is full and correct in the manner prescribed.

Section 46 – Form of certificate for purposes of sub-paragraph 101K(4)(d)(ii)(B) of the Act

This section provides that the form of certification provided in Form 6 in Schedule 1 of these Regulations is the form to be used by a witness to a recorded interview for the purpose of sub-paragraph 101K(4)(d)(ii)(B) of the *Defence Force Discipline Act 1982*. That sub-paragraph requires the witness to sign a certificate certifying that the

requirements of the section were complied with in his or her presence and that the record is a full and correct record.

Section 47 – Form of explanation for purposes of paragraph 101K(4)(e) of the Act

This section provides that the form of explanation provided in Form 7 in Schedule 1 of these Regulations is the form to be used by an interviewer of a recorded interview in order to explain procedure to the interviewee for the purpose of sub-paragraph 101K(4)(e) of the *Defence Force Discipline Act 1982*.

Section 48 – Prescribed class of persons for purpose of paragraph 101K(14)(a) of the Act

This section provides a list of prescribed persons that are an appropriate person to be a witness to a recorded interview, which includes officers, warrant officers, and non-commissioned officers not below sergeant rank, and to ensure parity and fairness, the prescribed witness should not be a police member or of a rank junior to the interviewing officer.

Section 49 – Form of acknowledgement for purposes of subsection 101N(2) of the Act

This section provides that the form of acknowledgement provided in Form 8 in Schedule 1 of these Regulations is the form to be used by an investigator proposing to assemble an identification parade in order to explain procedure to the suspect and have the suspect sign an acknowledgement for the purpose of sub-paragraph 101N(2) of the *Defence Force Discipline Act 1982*.

Section 50 – Form of acknowledgement for purposes of subsection 101ZA(2) of the Act

This section provides that the form of acknowledgement provided in Form 9 in Schedule 1 of these Regulations is the form to be used by an investigator proposing to conduct a search with consent, in order to have the person sign an acknowledgement of their consent for the purpose of sub-paragraph 101ZA(2) of the *Defence Force Discipline Act 1982*.

Section 51 – Prescribed service offences for purposes of paragraph 104(b) of the Act

This section provides that a prescribed offence for the purpose of Part VII Division 2 of the *Defence Force Discipline Act 1982* is an offence punishable by more than two years imprisonment as well as certain other offences and ancillary offences.

Section 52 – Prescribed class of officers for the purposes of paragraph 108(4)(a) of the Act

This section prescribes officer cadets as a class of officers who may be dealt with and tried under the jurisdiction of a subordinate summary authority.

Section 53 – Record of previous convictions

This section provides that a conduct record will be maintained by the services and must be produced on request for the Defence member who is the subject of that record. This provision relies on the necessary and convenient aspect of the general regulation-making power under section 197 of the Act. This section mandates a collection and

use that is already justified having regard to the privacy principles. The information is collected for the purpose of maintaining the discipline and good order of the Defence Force. It is necessary information for decision makers who manage the careers of Defence Force members and determine the suitability of members for particular roles. The information is managed under Defence policy in accordance with privacy principles.

Section 54 – Transitional provisions

This section provides that a thing (including a notice, approval or other instrument being given or made) done for a particular purpose under the *Defence Force Discipline Regulations 1985*, as in force immediately before the commencement of the *Defence Force Discipline Regulations 2018* continues to have effect for the purposes of the new Regulations.

Schedule 1 – Forms

This Schedule provides forms which are required under various sections of the *Defence Force Discipline Act 1982* or the Regulations as follows:

Form 1 ‘*Appointment of authorised tester*’ provides the form by which an authorised officer above the ranks of Colonel, Captain (RAN), and Group Captain may appoint a tester to test a speed measuring device (section 31 of the Regulations).

Form 2 ‘*Certificate of testing of speed measuring device*’ provides the form by which an authorised tester may certify the correct operation of a speed measuring device for twelve months after being tested (subsection 32(1) of the Regulations).

Form 3 ‘*Certificate of having operated a speed measuring device*’ provides the form by which a police member certifies that a speed measuring device was operated at a time and place and recorded the speed of a particular conveyance (subsection 32(2) of the Regulations).

Form 4 ‘*Form of oath and affirmation*’ provides the form by which an authorised officer may administer oaths and affirmations (section 40 of the Regulations).

Form 5 ‘*Caution to person charged or summoned*’ provides the form of caution for an investigating officer to give to a person after a decision to charge that person and prior to questioning that person about a service offence (section 43 of the Regulations).

Form 6 ‘*Certificate of appropriate witness*’ provides the form by which an appropriate witness certifies that paragraphs 101K(4)(b) and (c) of the Act were complied with in their presence, and that the record of what was said by and to the accused is a full and correct record, in circumstances where a sound recording of an interview is not made (section 46 of the Regulations).

Form 7 ‘*Explanation to accused*’ provides the form by which an investigator will explain to the accused the procedure for conducting an interview in circumstances where a sound recording is made, and not made (section 47 of the Regulations).

Form 8 *'Acknowledgement of suspect in relation to the holding of an identification parade'* provides the form by which a person under suspicion of having committed a service offence certifies acknowledgement that he has been informed by the investigator that the suspect is entitled to refuse to agree to the holding of an identification parade, but such refusal may result in other forms of identification evidence being entered into proceedings, and if the suspect agrees to participate in an identification parade, that the suspect is entitled to have a legal representative or other person present, and that evidence may be entered into proceedings of any identification or doubts expressed by a witness or of any unfairness (section 49 of the Regulations).

Form 9 *'Acknowledgment of consent to search'* provides the form by which an occupier of land, or the person in charge of entry to a ship, aircraft, or vehicle, may consent or not consent to a search of himself, his clothing, and location, including seizure of anything found that is reasonably suspected of being involved in a service offence (section 50 of the Regulations).

Schedule 2 – Prescribed places for the purposes of section 101F of the Act

This Schedule prescribes locations at which at least one legal officer will be listed by the Director of Defence Counsel Services as being in the vicinity of that location for the purpose of being made contactable by a Defence member who is being held in custody in respect of a service offence.

Schedule 3 – Repeals

This Schedule repeals the *Defence Force Discipline Regulations 1985*.