

EXPLANATORY STATEMENT

Issued by authority of the Chief of Defence Force

Defence Force Discipline Act 1982

Defence Force Discipline (Consequences of Punishment) Rules 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.

Section 68(2) of the Act, provides that the Chief of the Defence Force may, by legislative instrument, make rules with respect to the consequences, in relation to a member of the Defence Force, that are to flow from the imposition by a service tribunal on that member of any of a number of prescribed punishments.

Section 68A(2) of the Act, provides that the Chief of the Defence Force may, by legislative instrument, make rules with respect to the consequences, in relation to a defence member who is a detainee, that are to flow from the imposition by a service tribunal on that detainee of any custodial punishment.

Section 169FB(1) of the Act, provides that the Chief of the Defence Force or a service chief may, by legislative instrument, make rules with respect to the consequences, in relation to a prescribed defence member, that are to flow from the imposition by a discipline officer on that member of any of the following punishments: restriction of privileges, stoppage of leave, extra duties, and extra drill.

The purpose of the *Defence Force Discipline (Consequences of Punishment) Rules 2018* (the Rules) is to prescribe the consequences of certain minor disciplinary punishments imposed by service tribunals under the Act. The Rules consist of the consequences of certain ordinary minor punishments as provided by section 68(2) of the Act, the consequences of certain minor custodial punishments as provided by section 68A (2) of the Act, and the consequences of certain minor punishments imposed by a discipline officer upon a prescribed defence member.

The new rules will also repeal the *Defence Force Discipline (Consequences of Punishment) Rules 1986* before they sunset on 1 April 2018. The Rules would replace this sunset instrument in substantially the same form, but with modern language and drafting compliance.

Consultation

The Services

The 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 Rules can be made.

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

The Rules would commence at the same time as the *Defence Force Discipline Regulations 2018* and the details of the Rules are set out in the Attachment.

Statement of Compatibility with Human Rights

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

Defence Force Discipline (Consequences of Punishment) Rules 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 (Consequences of Punishment) Rules 2018* (the Rules) is to prescribe the consequences of certain minor disciplinary punishments imposed by service tribunals under the Act. The Rules consist of consequences of certain ordinary minor punishments as provided by section 68(2) of the Act and consequences of certain minor custodial punishments as provided by section 68A (2) of the Act. The new rules will also repeal the *Defence Force Discipline (Consequences of Punishment) Rules 1986* before they sunset on 1 April 2018. The Rules 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 Rules 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 Rules are intended to prescribe the consequences of certain disciplinary punishments, including the further punishment of detainees for disciplinary matters arising while in detention. These additional, more onerous, period of custody have been considered with respect to human rights provisions. With particular reference to the temporary nature of the punishments (maximum 6 days extra drill, 10 days in further confinement or 14 days with restricted privileges) and the robust review system in place, the view of Defence is that the act complies 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 Rules 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 visits) despite the additional disciplinary punishments 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 legislative provisions prescribing methods of punishment. 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.

Conclusion

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

Authorised by the **Chief of the Defence Force**

Details of the Rules are as follows:**Section 1 – Name**

This section provides that the title of the instrument is the *Defence Force Discipline (Consequences of Punishment) Rules 2018*.

Section 2 – Commencement

This section provides for the Rules to commence at the same time as the *Defence Force Discipline Regulations 2018*.

Section 3 – Authority

The Rules are made under sections 68(2), 68A(2), and 169FB(1) of the *Defence Force Discipline Act 1982*.

Section 4 – Schedules

This section provides that each instrument as set out in the Schedule is amended or repealed as specified.

Section 5 – Definitions

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

Section 6 – Consequences of punishment of reduction in rank

This section provides for the practical application of the punishment of reduction of rank pursuant to subsection 68(2) of the Act. This provision is a continuation of section 4 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments. The section further outlines how seniority in rank following the punishment is to be calculated.

Section 7 – Consequences of punishment of forfeiture of seniority

This section provides for the practical application of the punishment of forfeiture of seniority pursuant to subsection 68(2) of the Act. This provision is a continuation of section 5 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments. The section further outlines how seniority in rank following the punishment is to be calculated.

Section 8 – Consequences of punishment of restriction of privileges

This section provides for the possible application of the punishment of restriction of privileges pursuant to subsections 68(2) and 169FB(1) of the Act. This provision is a continuation of section 6 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments. The section details a list of privileges to be restricted for a member under punishment of restriction of privileges. The section also prescribes limits on duration and regularity of extra duties and drill to be given to a member under punishment of restriction or privileges, as well as reporting arrangements and appropriate dress outside working hours.

Section 9 – Consequences of punishment of stoppage of leave

This section provides for the practical application of the punishment of stoppage of leave pursuant to subsections 68(2) and 169FB(1) of the Act. This provision is a continuation of section 7 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments. The section specifies

that a member under punishment of stoppage of leave must not leave the unit, ship or establishment in which the punishment is served. The section also prescribes reporting arrangements and appropriate dress outside working hours.

Section 10 – Consequences of punishment of extra duties

This section provides for the practical application of the punishment of extra duties pursuant to subsections 68(2) and 169FB(1) of the Act. This provision is a continuation of section 8 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments. The section prescribes limits on the duration and regularity of extra duties and drill to be given to a member under punishment of extra duties, as well as reporting arrangements and appropriate dress outside working hours.

Section 11 – Consequences of custodial punishment of segregated confinement

This section provides for the practical application of the punishment of segregated confinement pursuant to subsection 68A(2) of the Act. This provision is a continuation of section 9 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments and the addition of restrictions on the use of social media and other forms of digital entertainment.

The inclusion of a provision expressly providing limits on the use of social media or other forms of digital entertainment is particularly important given technological advancements made since the previous Rules commenced. The use of social media or digital entertainment would severely limit the effectiveness of punishments under subsection 68A of the Act. Particular consideration was given to ensuring that the provision did not introduce an inhumane restriction on communication, which is often conducted digitally via e-mail or internet based telephone links, with the outside world.

The section also prescribes that a defence member who is a detainee who is serving a punishment of segregated confinement must be accommodated in a part of the detention centre that is set apart from the regular accommodation of detainees, and must be confined to his cell other than being permitted to exercise in accordance with section 15 of the *Defence Force Discipline Regulations 2018*, must be denied visitors other than being permitted in accordance with subsection 19(1) of the *Defence Force Discipline Regulations 2018*, must be denied access to books other than being permitted in accordance with section 20 of the *Defence Force Discipline Regulations 2018*, and must not perform periods of drill that cumulatively exceed one hour per day.

Section 12 – Consequences of custodial punishment of confinement to cell

This section provides for the practical application of the punishment of confinement to cell pursuant to subsection 68A(2) of the Act. This provision is a continuation of section 10 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments and the addition of restrictions on the use of social media and other forms of digital entertainment.

The inclusion of a provision expressly providing limits on the use of social media or other forms of digital entertainment is particularly important given technological advancements made since the previous Rules commenced. The use of social media or digital entertainment would severely limit the effectiveness of punishments under

subsection 68A of the Act. Particular consideration was given to ensuring that the provision did not introduce an inhumane restriction on communication, which is often conducted digitally via e-mail or internet based telephone links, with the outside world.

The section also prescribes that a defence member who is a detainee who is serving a punishment of confinement to cell must be confined to his cell other than being permitted to exercise in accordance with section 15 of the *Defence Force Discipline Regulations 2018*, must be denied visitors other than being permitted in accordance with subsection 19(1) of the *Defence Force Discipline Regulations 2018*, must be denied access to books other than being permitted in accordance with section 20 of the *Defence Force Discipline Regulations 2018*, and must not perform periods of drill that cumulatively exceed one hour per day.

Section 13 – Consequences of custodial punishment of extra drill

This section provides for the practical application of the custodial punishment of extra drill pursuant to subsection 68A(2) of the Act. This provision is a continuation of section 11 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments. The section provides daily time limitations to the period of drill to be performed by a member who is a detainee. The detained member must not perform periods of drill that cumulatively exceed one hour per day.

Section 14 – Consequences of custodial punishment of restriction of custodial privileges

This section provides for the practical application of the custodial punishment of restriction of custodial privileges pursuant to subsection 68A(2) of the Act. This provision is a continuation of section 12 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments and the addition of restrictions on the use of social media and other forms of digital entertainment.

The inclusion of a provision expressly providing limits on the use of social media or other forms of digital entertainment is particularly important given technological advancements made since the previous Rules commenced. The use of social media or digital entertainment would severely limit the effectiveness of punishments under subsection 68A of the Act. Particular consideration was given to ensuring that the provision did not introduce an inhumane restriction on communication, which is often conducted digitally via e-mail or internet based telephone links, with the outside world.

This section also prescribes that a defence member who is a detainee who is serving a punishment of restriction of custodial privileges must be denied visitors other than being permitted in accordance with subsection 19(1) of the *Defence Force Discipline Regulations 2018*, and must be denied access to books other than being permitted in accordance with section 20 of the *Defence Force Discipline Regulations 2018*

Section 15 – Conditions governing the performance of drill

This section provides clarification to the performance of drill pursuant to sections 8 and 10 to 13, with particular regard to the type, regularity and continuity of the punishment. The section specifies that the nature and type of drill is to be

promulgated in unit orders, and that the member under punishment must perform the drill in accordance with the order given by an authorised member. One period of drill must not exceed 30 minutes duration and periods must be at least at four hourly intervals. This provision is a continuation of section 13 of the *Defence Force Discipline (Consequences of Punishment) Rules 1986* with minor grammatical amendments.

Part 5 – Transitional provisions

This Part provides clarification as to the transition from the *Defence Force Discipline (Consequences of Punishment) Rules 1986* ('old rules') to the *Defence Force Discipline (Consequences of Punishment) Rules 2018* ('new rules'). The transitional provisions allow for punishments which were imposed upon a member under the old rules to continue to apply, and allow for the continuing appointment of authorised members under the old rules.

Schedule 1 – Repeals

This provision repeals *the Defence Force Discipline (Consequences of Punishment) Rules 1986*.