

EXPLANATORY STATEMENT

Issued by authority of the Minister for Veterans and Defence Personnel

Subject – *Defence Act 1903*

Defence Amendment (2020 Measures No. 1) Regulations 2020

1. The *Defence Act 1903* (the Act) prescribes the control, administration, constitution and service of the Australian Defence Force (ADF).
2. The *Defence Regulation 2016* (the Regulation) is made under the Act. The *Defence Amendment (2020 Measures No. 1) Regulations 2020* (the Amending Regulations) amends the Regulation.

Purpose of the *Defence Amendment (2020 Measures No. 1) Regulations 2020*

3. Section 24 of the Regulation provides for early termination of service of ADF members on several grounds. In most circumstances, subsection 24(2) requires that an ADF member must be provided with at least 14 days written notice, and an opportunity to respond, before a decision is made to terminate the member's service. This is a statutory mechanism to provide ADF members with procedural fairness in relation to termination decisions. Written notice is not required if the ADF member has failed to meet a condition of their appointment or enlistment, if the ADF member has been absent without leave for a continuous period of three months or more, or if the ADF member has not completed a period of probation in relation to their appointment or enlistment.
4. Generally speaking the requirement to provide 14 days written notice before making a termination decision is appropriate and desirable, ensuring fairness to individual ADF members and improving the quality of decisions. However, in some circumstances the 14 day delay before a decision can be made to terminate an ADF member's service is detrimental to the ADF's reputation and to the morale of ADF members. A delay in taking action following a criminal conviction can lead to a perception that the ADF is not serious about addressing misconduct by ADF members. The Amending Regulations address this concern by amending the Regulation to provide for two additional circumstances when written notice is *not* required before a decision is made to terminate an ADF member's service.
5. Written notice will no longer be required in the following circumstances:
 - a. The ADF member has been sentenced to imprisonment for an offence. In this case, the ADF member would have pleaded guilty to or been convicted of an offence

that is considered serious enough by a court to warrant a sentence of imprisonment. Provision of written notice, and providing 14 days for the member to respond, would be essentially meaningless in these circumstances. However, a delay of 14 days before terminating an ADF member's service in these circumstances could cause significant damage to ADF members' morale and to the ADF's reputation.

- b. The ADF member has pleaded guilty to, or been convicted of, an offence, and the Chief of the Defence Force (CDF) or a Service Chief is satisfied that it is not in the best interests of the Defence Force for notice to be given to the member. An example of when this circumstance might be relevant is when an ADF member has been convicted of an offence but there is a delay before the sentencing hearing. In rare cases, the nature of the offence or the circumstances of the offending may lead to an assessment that a 14 day delay before terminating the ADF member's service would not be in the interests of the ADF. This assessment can only be made personally by the CDF or a Service Chief delegated by the CDF. It is expected termination of an ADF member's service without notice would in these circumstances be rare.

6. The Amending Regulations also re-structure section 24 and the grounds for termination, to ensure that the Regulation is completely clear when written notice is and is not required before making a decision to terminate a member's service. There is no substantive change to the available grounds for termination.

Authority for Defence Amendment (2020 Measures No. 1) Regulations 2020

7. Paragraph 124(1)(a) of the Act provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the good government of the ADF, or for carrying out or giving effect to the Act, and in particular prescribing matters providing for and in relation to the enlistment, appointment, promotion, reduction in rank, retirement and discharge of members of the ADF.

8. Subsection 33(3) of the Acts Interpretation Act 1901 provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Operation of the Defence Amendment (2020 Measures No. 1) Regulations 2020

9. Attachment A provides a provision-by-provision description of the Amending Regulations.

Regulatory impact statement

10. 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 25299).

Legislative instrument

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

Commencement

12. The Amending Regulations commence on the day after the instrument is registered.

Consultation

13. There was extensive consultation in relation to the Amending Regulations within Defence. As the Amending Regulations only make a small change and will affect only a very small sub-set of ADF members, it was not considered necessary to consult further outside of Defence.

14. The Amending Regulations were drafted by the Office of Parliamentary Counsel.

Attachments

A: Provisions in Defence Amendment (2020 Measures No. 1) Regulations 2020

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence Amendment (2020 Measures No. 1) Regulations 2020

1. These Regulations are 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 Regulations

2. The *Defence Amendment (2020 Measures No. 1) Regulations 2020* (the Amending Regulations) amend the *Defence Regulation 2016* (the Regulation) to provide for additional circumstances when written notice is *not* required before a decision is made to terminate an ADF member's service under section 24 of the Regulation.

3. Ordinarily, before a decision is made to terminate an ADF member's service under section 24 of the Regulation, the member must be given 14 days written notice and an opportunity to respond. However, written notice is not required if the ADF member has failed to meet a condition of their appointment or enlistment, if the ADF member has been absent without leave for a continuous period of three months or more, or if the ADF member has not completed a period of probation in relation to their appointment or enlistment.

4. The Amending Regulations add two new circumstances when written notice will not be required before terminating an ADF member's service:

- a. The ADF member has been sentenced to imprisonment for an offence (paragraph 24(3)(b)(ii)).
- b. The ADF member has pleaded guilty to, or been convicted of, an offence, and the Chief of the Defence Force (CDF) or a Service Chief is satisfied that it is not in the best interests of the Defence Force for notice to be given to the member (paragraph 24(3)(c)).

Human rights implications

5. The Amending Regulations engage the right to work and rights at work in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to work and rights at work

6. Article 6 of the ICESCR recognises the right to work. Article 7 recognises the right to just and favourable conditions of work. The right to work includes the right not to be unjustly deprived 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.

7. The Amending Regulations could be seen as limiting the right to work of ADF members, as it provides, in limited circumstances, for termination of an ADF member's service without written notice. However, to the extent, if any, that the Amending Regulations limits the right to work or rights at work, the limitation is reasonable, necessary and proportionate in pursuit of a legitimate objective.

8. Service in the ADF is unique. The nature of the risks ADF members face in combat and the authority to use armed force give rise to the essential nature of service in the ADF: while a person is a member of the ADF, they have a non-contractual and unlimited liability to serve. The system of command lies at the heart of service in the ADF. ADF members must follow all lawful commands, including orders that involve considerable risk to their life. A member who fails to attend duty can be charged with an offence, and is liable to imprisonment. Morale and discipline of ADF members is essential. These and other differences from civilian employment are essential for the ADF to successfully fulfil its mission as a professional and disciplined force operating in diverse environments.

9. In this context, section 24 of the Regulation provides for early termination of service (service may also be terminated under the *Defence Force Discipline Act 1982* or Part VIIIA of the *Defence Act 1903*). While at common law ADF members serve at the pleasure of the Crown, section 24 enhances ADF members' rights at work by providing for specific grounds for termination and a process that must be followed before deciding to terminate a member's service. Section 24 strikes a balance between the necessities of commanding a professional and disciplined force, and the rights of individual ADF members.

10. The Amending Regulations insert two additional circumstances in which an ADF member's service can be terminated without 14 days written notice, relating to ADF members who have been found guilty of, or pleaded guilty to, an offence.

11. In the first case (paragraph 24(3)(b)(ii)), an offence would have been serious enough to warrant a Court sentencing the ADF member to imprisonment. In these circumstances,

provision of written notice is unlikely to make any practical difference to the outcome, but the 14 day delay could have a considerable impact on the ADF's reputation and the morale and discipline of serving ADF members.

12. In the second case (paragraph 24(3)(c)), the CDF or a Service Chief must be satisfied that providing 14 days written notice is not in the interests of the Defence Force. Reasons for something being or not being in the 'interests of the Defence Force' are outlined in section 6 of the Regulation, and include the morale, welfare and discipline of the ADF and the reputation and community standing of the ADF. An example of when this paragraph might be used is where an ADF member has been convicted of an offence but not yet sentenced. Its use would be rare, as it would only be available in a case where the nature of the offence or circumstances of the offending mean that a 14 day delay before deciding to terminate an ADF member's service would not be in the interests of the Defence Force. Only the CDF or a Service Chief delegated by the CDF can decide to terminate without written notice for this reason, providing a practical safeguard against the possibility that this paragraph will be over-used or abused.

13. While the 'hearing rule' has been abrogated in these limited circumstances, other decision-making principles continue to apply, such as the rule against bias or the requirement for reasonableness.

14. Accordingly, the changes made to notice requirements by the Amending Regulations are reasonable, necessary and proportionate to the pursuit of a legitimate objective.

Conclusion

15. The Amending Regulations are compatible with human rights. To the extent that the Amending Regulations may limit the right to work and rights at work, that limitation is in pursuit of a legitimate objective, and is reasonable and necessary to achieve that purpose.

Darren Chester
Minister for Veterans and Defence Personnel

ATTACHMENT A – PROVISIONS IN DEFENCE AMENDMENT (2020 MEASURES NO. 1) REGULATIONS 2020

Section 1 – Name

1. Section 1 provides for the Amending Regulations' name: Defence Amendment (2020 Measures No. 1) Regulations 2020.

Section 2 – Commencement

2. Section 2 provides for the whole of the instrument to commence the day after it is registered.

Section 3 – Authority

3. Section 3 provides that the Amending Regulations are made under the Defence Act 1903.

Section 4 – Schedules

4. Section 4 provides that instruments specified in a Schedule to the Amending Regulations are amended or repealed as set out in the Schedule. Other items in a Schedule to the Amending Regulations have effect according to their terms.

Schedule 1 – Amendments

5. Schedule 1 provides for amendments to the Defence Regulation 2016 (the Regulation), including changes to the meaning of 'interests of the Defence Force' in section 6, the termination provision in section 24, and the delegation provision in section 84, as well as the insertion of a transitional provision.

Item 1

6. This item inserts a new paragraph in subsection 6(2), which provides reasons why something may be, or may not be, in the interests of the Defence Force. New paragraph 6(2)(ca) provides for the additional reason of a member's failure to meet one or more conditions of their enlistment, appointment or promotion. This language is taken from paragraph 24(1)(d), which has now been repealed. Previously, failure to meet one or more conditions was a discrete ground for termination. Changes to re-structure section 24 of the Regulation mean that this ground is now subsumed into the ground that retention of the member is not in the interests of the Defence Force. Insertion of paragraph 6(2)(ca) makes it absolutely clear that failure to meet a condition of appointment, enlistment or promotion is encompassed by the phrase 'interests of the Defence Force'.

Items 2 and 3

7. These items remove the grounds for termination in paragraphs 24(1)(d) and (e). Paragraph 24(1)(d) provided for termination on the ground that a member had failed to meet a condition of their appointment or enlistment, while paragraph 24(1)(e) provided for termination on the ground that a member had been absent without leave for a continuous period of three months or more.

8. These two discrete grounds for termination are now subsumed in the more general ground that retention of the member is not in the interests of the Defence Force in paragraph 24(1)(c). These grounds were previously described separately because decisions to terminate on these grounds could be made without written notice. However, the notice requirement in section 24 has been re-structured by the Amending Regulations, so it is no longer necessary to maintain these two grounds for termination separately.

9. There has been no substantive change to the available grounds for termination under section 24.

Item 4

10. This item amends subsection 24(2) which provides for the requirement that a member must be given notice of a termination and at least 14 days to respond. Previously, this subsection required written notice only where termination was for the grounds in paragraphs 24(1)(a), (b) or (c). It was implicit that termination for the grounds in paragraphs 24(1)(d) and (e) did not require written notice.

11. New subsection 24(2) provides an absolute requirement for written notice and at least 14 days to respond no matter the ground for termination.

Item 5

12. This item replaces subsection 24(3), providing for the circumstances in which notice under subsection (2) is not required. This subsection effectively abrogates the 'hearing rule' in relation to termination decisions made in the circumstances outlined. Other decision-making principles, such as the rule against bias and the requirement for reasonableness, are unaffected.

13. Paragraph 24(3)(a) provides that notice is not required if the member's appointment or enlistment is subject to a probationary period that has not ended. This is substantially the same as previous subsection 24(3).

14. Paragraph 24(3)(b)(i) provides that notice is not required if the member has failed to meet a condition of their appointment or enlistment. This is substantially the same as the combined effect of previous paragraph 24(1)(d) and subsection 24(2).

15. Paragraph 24(3)(b)(ii) provides that notice is not required if the member has been sentenced to imprisonment for an offence (whether or not the sentence has been suspended). This is a new circumstance in which notice is not required. It applies whenever the sentence is imprisonment, however that imprisonment is to be served. For example, it would include a situation where imprisonment is to be served by way of a home detention order.

16. Paragraph 24(3)(b)(iii) provides that notice is not required if the member has been absent without leave for a continuous period of three months or more. This is substantially the same as the combined effect of previous paragraph 24(1)(e) and subsection 24(2).

17. Paragraph 24(3)(c) provides that notice is not required if the member has pleaded guilty to or been convicted of an offence, and the Chief of the Defence Force (CDF) is satisfied that it is not in the interests for notice to be given to the member. This is a new circumstance in which notice is not required.