

EXPLANATORY STATEMENT

Defence Determination, Conditions of service Amendment (COVID-19 response) Determination 2020 (No. 6)

This Determination amends Defence Determination 2016/19, *Conditions of service* (the Principal Determination), made under section 58B of the *Defence Act 1903* (the Defence Act) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (AI Act).

Determinations made under section 58B of the Defence Act are disallowable legislative instruments subject to the *Legislation Act 2003*. These instruments are also subject to the interpretation principles in the AI Act.

This Determination amends the following Chapters of the Principal Determination for members of the Australian Defence Force (ADF).

- Chapter 1 which sets out provisions dealing with definitions and interpretation of concepts relevant to pay and conditions.
- Chapter 5 which sets out provisions dealing with leave.
- Chapter 14 which sets out provisions dealing with relocating to or from long-term posting overseas.
- Chapter 15 which sets out provisions dealing with living and working on long-term posting overseas.
- Chapter 16 which sets out provisions dealing with living in hardship locations.

The purpose of this Determination is to enable the ADF to respond to the Coronavirus (COVID-19), particularly in relation to a member and their family posted overseas by providing a bespoke set of conditions for ADF members in, or who have been evacuated from, high risk locations. The conditions set out in this Determination generally reflect those provided by the Department of Foreign Affairs, who has led the Whole of Government response in relation to Australian Government officials posted overseas.

The Determination also makes provisions for members of the ADF to be absent from their place of duty if they are required to isolate themselves from the workplace without the requirement to use recreation leave credits. This is consistent with the Whole of Government response to managing APS employees who are required to isolate themselves and encourages self-isolation of people at risk and in support of the advice provided by the Department of Health.

The new Chapter 14A Part 3 recognises events that preceded the commencement of this Determination and provides additional benefits to specified persons in relation to those events from the commencement of this Determination. The provisions provided in this Part do not retrospectively affect any benefits available to a member or their dependants that would have been available under Chapter 14 Part 6 Division 1 and are not to the detriment of the member or their dependants. The purpose of the additional benefits is to ensure that benefits under Chapter 14 Part 6 Division 1 are available to members and to mirror benefits provided to staff of other Government agencies who were also evacuated from China during the same period without reducing existing benefits.

Section 1 of this Determination sets out the manner in which this Determination may be cited.

Section 2 provides that this Determination commences on the day after it is registered.

Section 3 provides that this instrument has authority under section 58B of the Defence Act.

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Domestic conditions amendment

Sections 1 and 2 insert new sections into Chapter 1 Part 3 Division 2 of the Principal Determination which provides defined terms used within the Principal Determination. The sections include new definitions for the terms 'isolation period' and 'required to isolate themselves'.

Section 3 inserts a new section after section 5.2.5 of the Principal Determination. The new section provides that section 5.2.5 of the Principal Determination does not apply to a member who was in a destination that was not restricted immediately before 18 March 2020. If the member enters a restricted destination on or after 18 March 2020, other than for the purpose of returning to Australia, the member's leave is cancelled. This enables the member to return to Australia while still being on leave.

Section 4 inserts a new paragraph into subsection 5.4.35.2 of the Principal Determination which provides for the re-credit of recreation leave in specific circumstances. The new paragraph provides that a member may be re-credited any leave days they did not take if they are required to isolate themselves on return to Australia.

Section 5 inserts two new Divisions into Chapter 5 of the Principal Determination which establishes the types of leave available to members of the ADF. The new Divisions extend the availability of short absence leave to include members who are required to isolate themselves, supervise a dependant who is a child and is required to isolate themselves or to supervise their child because their school or child care provider has been closed in response to an infectious disease.

The new Division 3 only applies to matters where the Department of Health have directed that a person or a class of persons are to undergo a period of self-isolation. A member can only take a short absence from duty under this Division for the duration of the isolation period and for periods the person is not required to perform duty. If practical, the member may be required to undertake periods of duty during the period of isolation, for example: by working from home. The new Division 3 provides the following.

- Section 5.11.11 sets out the purpose of Division 3.
- Section 5.11.12 provides that for the purpose of the Division the definition of 'isolation period' also includes a period described in section 14A.2.2, which applies to members posted overseas.
- Section 5.11.13 specifies who the Division applies to.
- Section 5.11.14 provides that a member is eligible for short absence from duty for their isolation period.
- Section 5.11.15 provides that a member is eligible for short absence from duty if they are required to supervise a dependant who is required to complete an isolation period.

The new Division 4 only applies to matters where a member's child's school or child care provider has been closed in response to COVID-19. A member can only take a short absence from duty under this Division when the dependant's school or child care provider is closed because of COVID-19 and the member must supervise the dependant. The new Division 4 provides the following.

- Section 5.11.16 sets out the purpose of Division 4.
- Section 5.11.17 specifies who the Division applies to.
- Section 5.11.18 provides that the member is eligible for a period of short absence from duty for an approved period if their dependant child's school or day care provider is closed because of COVID-19 and they must supervise the dependant. If the member is able to perform duty at the place where they are supervising the dependant, they are not eligible for short absence from duty. The section also provides that if the member's spouse or partner is also eligible for the same or similar benefit, the member is not eligible for short absence from duty for the same period.

Schedule 2—Overseas conditions amendments

Section 1 inserts after section 14.6.4 of the Principal Determination a new section that limits the benefits provided under Chapter 14 Part 6 Division 1 which provides benefits for members and their dependants who are evacuated from a long-term posting location overseas. The new section means that these

benefits will not apply to a member who is eligible under Chapter 14A Part 1 which is made as a consequence of section 2 of this Schedule.

Section 2 inserts after section 14.6.23 of the Principal Determination a new Chapter that provides bespoke benefits to a member and their dependants in response to COVID-19. The new Chapter is set out in three parts and provides the following.

Part 1

- Section 14A.1.1 sets out the purpose of Part 1 of the Chapter as providing benefits for a member who is in an overseas location for work and is evacuated, or has a dependant evacuated, from that location on a voluntary or involuntary basis because of COVID-19.
- Section 14A.1.2 provides defined terms that are used in the Part, including defining when a person is required to isolate themselves by reference to information provided by the Department of Health. Information about when a person must self-isolate is provided on the Department of Health website at www.health.gov.au and is updated regularly.

Part 1 Division 1

- Section 14A.1.3 sets out who may receive benefits provided under the Division. It includes members on short-term duty overseas, on long-term posting overseas and any dependants who have accompanied them and who have been permitted or required to evacuate from the location. The decision to trigger an evacuation is a decision to be made by personally by the CDF.
- Section 14A.1.4 provides for flights from the person's overseas location to a location in Australia, being the place they have their own home or where they may be provided accommodation under section 14A.1.8. Provisions are made for the flights to be broken if people are required to complete a period of isolation. Flights are to be taken in economy class unless the person is required to vacate the location and economy class is not available.
- Section 14A.1.5 provides for economy class flights back to the member's place of duty once the evacuation period has ended.
- Section 14A.1.6 reimburses a person for the costs of up to 20 kg for excess baggage that may have been taken on a flight either from the overseas location or back to the overseas location.

Part 1 Division 2

- Section 14A.1.7 provides a person who is required to isolate themselves with hotel accommodation when they return to Australia. People who are part of a family group that are required to isolate themselves are to live together, where it is reasonable to do so.
- Section 14A.1.8 provides a person with an allowance to assist with the cost of meals for each day of the isolation period. Members are not able to receive the allowance for a day on which their meals were provided by another source at no cost to the member or the dependants. The rate of allowance is consistent with the Whole of Government rate.

Part 1 Division 3

- Section 14A.1.9 provides that the Division applies to a person who was required to evacuate.
- Section 14A.1.10 provides reasonable temporary accommodation to a person who has been evacuated and does not have their own home where they can live. If the person is a member of the ADF and does not have dependants they are able to occupy living-in accommodation on, or within 30 km radius of, the place where they would be expected to work on return to Australia. If no living-in accommodation is available or they are living with dependants, they and their dependants may live in reasonable temporary accommodation that is within 30 km radius of the place where they will be expected to work within Australia. If the dependants return without the member, they can occupy a place that is agreed by the Director of Attaché and Overseas Management (DAOM) or within 30 km radius of where the member would be expected to work if they are evacuated to Australia.

- Section 14A.1.11 provides a person with an allowance to assist with the cost of meals for each day of the isolation period. Members are not able to receive the allowance for a day on which their meals were provided by another source at no cost to the member or their dependants. The rate of allowance is consistent with the Whole of Government rate. The allowance ceases to be paid on the later of 16 April 2020, 28 days after the person returned to Australia or a later day specified by the DOAM.
- Section 14A.1.12 provides a larder establishment payment for a person who was getting meal supplement allowance which has ceased. The rate of payment is consistent with the Whole of Government larder allowance rate.
- Section 14A.1.13 provides a person who has been evacuated with an incidentals payment. This is a one-off payment to cover the costs of items that are incidental to the evacuation.

Part 1 Division 4

- Section 14A.1.14 provides a person who has been evacuated from a location with the ability to store personal possessions that they have not been able to secure or bring back to Australia. It is expected this provision would only be used if all members of a family group were evacuated from a location. In addition to personal property, if the member is on a long-term posting overseas and has a car, the benefit provides for the storage of one car in the location if it cannot otherwise be secured.
- Section 14A.1.15 makes provision for the accommodation and care of the pets of a member on a long-term posting overseas that remain in the overseas location if the member is evacuated. The benefit is an emergency measure that only applies if the pet cannot be reasonably cared for by another person and does not include any fees charged for veterinary treatment or care.
- Section 14A.1.16 enables Defence to cease a member's overseas living allowances if they have been evacuated to Australia. Overseas living allowances are intended to compensate a member for additional costs of living in an overseas location, including the higher costs of living. A member who is evacuated to Australia continues to be eligible for these allowances until a decision is made to cease the payment. A member who has returned to Australia will not incur the additional costs that the allowances are intended to cover. Payments of the allowances will recommence on the member's return to the overseas posting location.
- Section 14A.1.17 enables Defence to cease hardship or location allowances if they have been evacuated to Australia. Hardship and location allowances are intended to compensate a member for the hardship of some overseas posting locations. A member who is evacuated to Australia continues to be eligible for these allowances until a decision is made to cease the payment. Payment of the allowances will recommence on the member's return to the overseas posting location.
- Section 14A.1.18 enables members with children who have been evacuated from an overseas location to be reimbursed the costs of tuition fees for up to 10 hours per week per child up to a maximum of \$106 an hour. This is to ensure that a child can continue their education and be provided with additional support while they are away from their usual school during the evacuation period. The section also confirms that benefits under Chapter 15 Part 6 of the Principal Determination remain available to members who satisfy the eligibility criteria. The benefits provided under this section cease when the evacuation period ends or the dependant is enrolled in a school in Australia.
- Section 14A.1.19 confirms that specific benefits that may be affected by the member's return to Australia remain available to members who satisfy the eligibility criteria.

Part 1 Division 5

- Section 14A.1.20 specifies that Division 2 only applies to members who remain in a posting location that is affected by COVID-19.
- Section 14A.1.21 enables members with children who remain in the posting location overseas to be reimbursed the reasonable costs of tuition fees for up to 10 hours per week per child. This is only available if the child usually attends a school but the school is closed to

prevent the spread of COVID-19. It ensures that the child can continue their education and be provided with additional support while their school is closed.

- Section 14A.1.22 enables Defence to reduce the rate of a member's overseas allowances, including overseas living allowances, hardship allowance and location allowance, from the accompanied rate to the unaccompanied rate while the member's dependants are in Australia. This section only applies to a member who was accompanied by a dependant at their posting location and all the dependants have returned to Australia. The accompanied rate is set based on members having dependants living with them in the posting location. As the dependants are not living with the member during the evacuation period, it may no longer be appropriate for a member to be paid the accompanied rate.
- Section 14A.1.23 provides a member with the ability to travel to Australia to reunite with their dependants. This section only applies to a member who was accompanied by a dependant at their posting location and all the dependants have returned to Australia. A member can only use this travel benefit if they are separated for a minimum of three months and they are granted leave for the duration of the proposed reunion. A reunion travel benefit provided under this section reduces the number of reunion travel benefits a member may receive (if any) under section 15.3.12 of the Principal Determination.

Part 2

- Section 14A.2.1 specifies the purpose of Chapter 14A Part 2, which is to provide benefits to a member and their dependants who are working overseas but are unable to attend to their place of duty as a result of restrictions imposed relating to COVID-19.
- Section 14A.2.2 provides definitions that apply to the Part, particularly in relation to when a person is required to isolate themselves. For a person overseas, they may be required to isolate themselves if an isolation period and travel restrictions apply imposed by a law or direction of the local health authorities in their location or their place of duty. This benefit may not be available to members immediately due to travel restrictions.
- Section 14A.2.3 specifies who the Part applies to. It includes members on short-term duty overseas or on long-term posting overseas, and any dependants who have accompanied them.
- Section 14A.2.4 provides reasonable temporary accommodation for a member on a long-term posting overseas and their dependants in a location where they are required to complete a period of isolation or are unable to leave to return to the posting location due to travel restrictions or limitations.
- Section 14A.2.5 provides reasonable temporary accommodation for a member on short-term duty overseas and their dependants in a location where they are required to complete a period of isolation or are unable to leave to return to the place of duty or move to a new place of duty due to travel restrictions or limitations.
- Section 14A.2.6 provides a member and their dependants who receive temporary accommodation under this Part with meal supplement allowance for the period which they are unable to return to the posting location or place of duty. The rate of the allowance is the rate that would be payable for meals in the location where the member is and for the member's rank under Annex 13.3.A of the Principal Determination.

Part 3

- Section 14A.3.1 specifies the purpose of Chapter 14A Part 3, which is to provide additional benefits to a member and their dependants who were evacuated from China between 29 January 2020 and 10 February 2020.
- Section 14A.3.2 specifies who the Part applies to. It includes members and their dependants who were evacuated from China between 29 January 2020 and 10 February 2020 in response to COVID-19.
- Section 14A.3.3 provides that a person who was evacuated from China between 29 January 2020 and 10 February 2020 is taken to have been authorised to do so under section 14.6.4 of the

Principal Determination. This has the effect of making benefits under Chapter 14 Part 6 Division 1 available to those persons.

- Section 14A.3.4 enables a person who was evacuated to be paid a meal supplement allowance from the day they arrived in Australia until the commencement of Chapter 14A Part 1, which is also made under this Determination. This provision provides an equivalent benefit to section 14A.1.11, as made by this Determination.
- Section 14A.3.5 enables a person who was evacuated to be paid an incidentals payment. This provision provides an equivalent benefit to section 14A.1.13, as made by this Determination.
- Section 14A.3.6 provides additional domestic flights between Brisbane and Canberra to a person who is a child and was evacuated from China to Australia on 29 January 2020. The additional flights enable the child to be reunited with the person, being their parent, in their parent's location. Additional flights between Brisbane airport and Canberra airport are also provided for a person to accompany the child on the flight to Canberra.
- Section 14A.3.7 has the effect of making specified benefits provided under Chapter 14A Part 1, as made by this Determination, available to a member and their dependants who were evacuated from China. This ensures continuity and equivalency of benefits to all people who are evacuated from an overseas location in response to COVID-19. In doing so, this Determination ceases the application of specified benefits under Chapter 14 Part 6 Division 1 that would have been available to a member and their dependants on an ongoing basis where there is an equivalent benefit provided in Chapter 14A Part 1. It does not cease a benefit that would be detrimental to a member or their dependant if it were ceased.

Schedule 3—Overseas allowances amendment

Section 1 inserts a new section after section 15.1.1 of the Principal Determination. The new section provides definitions that apply to Chapter 15 in relation to when a person is required to isolate themselves. For a person overseas, they may be required to isolate themselves if an isolation period is imposed by law or local health authorities in their location or their posting location.

Section 2 amends section 15.2.31 of the Principal Determination which limits the payment of overseas living allowances for a member who was posted on a long-term overseas posting before 1 July 2017. The amendment inserts two new subsections that have the following effect for members who left the posting location on or after 20 March 2020.

- To prevent a member's overseas living allowances from ending if they are away from their posting location for more than 28 days as a result of quarantine or travel restrictions put in place for the purpose of controlling an infectious disease.
- To recommence the payment of a member's overseas living allowances that had ceased because they had been away from their posting location for more than 28 days, on the day they would have returned to the posting location had quarantine or travel restrictions not been in place for the purpose of controlling an infectious disease.

Sections 3 and 4 amend section 15.2A.23 of the Principal Determination which limits the payment of overseas living allowances for an accompanied member who was on a long-term overseas posting on or after 1 July 2017. The amendment inserts a new subsection and new paragraphs into subsection 15.2A.23.3 that have the same effect as section 2 of this Schedule for members who left the posting location on or after 20 March 2020.

Sections 5 and 6 amend section 15.2A.24 of the Principal Determination which limits the payment of overseas living allowances for an unaccompanied member who was on a long-term overseas posting on or after 1 July 2017. The amendment inserts a new subsection and new paragraphs into subsection 15.2A.24.2 that have the same effect as section 2 of this Schedule for members who left the posting location on or after 20 March 2020.

Section 7 inserts a new definition into section 16.1.2 of the Principal Determination which provides the definitions that apply to Chapter 16. The section provides a new definition in relation to when a person is required to isolate themselves. For a person overseas, they may be required to isolate themselves if an isolation period is imposed by law or local health authorities in their location or their posting location.

Section 8 amends section 16.2.4 of the Principal Determination which sets out when a member's hardship allowance stops being paid. The amendment inserts a new subsection that has the same effect as section 2 of this Schedule for members who left the posting location on or after 20 March 2020.

Section 9 amends section 16.2A.4 of the Principal Determination which sets out when a member's location allowance stops being paid. The amendment inserts a new subsection that has the same effect as section 2 of this Schedule for members who left the posting location on or after 20 March 2020.

Schedule 4—Overseas reunion visits amendment

Section 1 omits and substitutes section 15.3.13 of the Principal Determination which provides the time periods for when a reunion visit is to be taken. The revised section provides that a member is not permitted to take a reunion visit during the COVID-19 pandemic.

Section 2 inserts a new section after section 15.3.17 of the Principal Determination. The new section provides that if a member is not eligible for a reunion visit under subsection 15.3.13.3 they are eligible for door-to-door travel costs for a dependant who is in boarding school in Australia to the location of a person approved by the member. It also provides door-to-door travel costs for the approved person to accompany the dependant.

Criteria are provided for the exercise of discretion under the Principal Determination, as amended by this Determination. Adverse decisions may be subject to inquiry under the ADF redress of grievance system provided under Part 7 of the *Defence Regulation 2016*. Also, a person may make a complaint to the Defence Force Ombudsman.

Consultation

Before this Determination was made, consultation was undertaken with the Department of Foreign Affairs and Trade and the Directorate of Attaché and Overseas Management in the Strategic Policy and Intelligence Group in the Department of Defence.

The rule maker was satisfied that further external consultation was not required.

Authority: Section 58B of the
Defence Act 1903

Statement of Compatibility with Human Rights

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

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This Determination 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.

The purpose of this Determination is to enable the ADF to respond to the Coronavirus (COVID-19), particularly in relation to a member and their families posted overseas, by providing a bespoke set of conditions for ADF members in, or who have been evacuated from high risk locations. The conditions set out in this Determination generally reflect those provided by the Department of Foreign Affairs, who has led the Whole of Australian Government response in relation to Australian Government officials posted overseas.

The Determination also makes provisions for members of the ADF to be absent from their place of duty if they are required to isolate themselves from the workplace without the requirement to use recreation leave credits. This is consistent with the Whole of Australian Government response to managing APS employees who are required to isolate themselves and encourages self-isolation of people at risk in support of the advice provided by the Department of Health.

Human rights implications

Right to the enjoyment of just and favourable conditions of work

The protection of a person's right to just and favourable conditions of work engages Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 recognises the right of everyone to just and favourable conditions of work including remuneration, safe and healthy working conditions, equal opportunity for promotion, and rest, leisure and reasonable limitation of working hours.

This Determination promotes the right to just and favourable work conditions by providing assistance to members required to work in overseas locations that, in relation to the spread of the coronavirus, are considered high risk countries. The Determination provides a range of measures to enable members and their dependants to evacuate from those countries as required and to receive reasonable accommodation and allowances during the period of evacuation. The Determination also provides members who are required to isolate themselves as a consequence of the coronavirus with the ability to take a type of leave that does not reduce their accruable leave types.

Right of the child to education

The protection of child's right to education engages Article 28 of the Convention of the Rights of the Child.

This Determination recognises the right of the child to education by providing financial assistance with the costs of tuition of an evacuated child to ensure the child can continue their education and be provided with additional support while they are away from their usual school during the evacuation period.

Conclusion

This Determination is compatible with human rights because it advances the protection of human rights.

Fiona Louise McSpeerin, Assistant Secretary People Policy and Employment Conditions