

EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence Personnel

Subject – *Defence Act 1903*

Defence Amendment (2020 Measures No. 2) Regulations 2020

1. The *Defence Act 1903* (the Act) prescribed 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. 2) Regulations 2020* (the Amending Regulations) amend the Regulation.

Purpose of the *Defence Amendment (2020 Measures No. 2) Regulations 2020*

3. The Amending Regulations make a further amendment consequential to recent amendments made to the Regulation under the *Defence Amendment (2020 Measures No.1) Regulations 2020* (the Initial Amending Regulations).
4. Recently, the Initial Amending Regulations modified Section 24 of the Regulation which provides for early termination of service of ADF members on several grounds. In the vast majority of circumstances, subsection 24(4) 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. However, written notice is not required if the ADF member has failed to meet a condition of their appointment or enlistment, or 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.
5. The Initial Amending Regulations addressed concerns that 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. These concerns particularly derived from instances where a delay in taking action following a criminal conviction can lead to a perception that the ADF is not serious about addressing misconduct of ADF members. In seeking to alleviate these concerns, the Initial Amending Regulations provided for two additional circumstances when written notice is **not** required before a decision is made to terminate an ADF member's service. This included where the ADF member has been sentenced to imprisonment for an offence and where the ADF member has plead guilty to, or been convicted of an offence, and the Chief of the Defence Force is satisfied that it is not in the best interest of the Defence Force for notice to be given to a member.

6. In making these changes, the Initial Amending Regulations likewise re-structured section 24 and the grounds for termination, to ensure that the Regulation was completely clear as to when written notice is and is not required before making a decision to terminate a member's service. Notably however, no substantive change was made to the available grounds for termination, nor did the re-structure limit or exclude the operation of the common law relating to procedural fairness.
7. In response to the Initial Amending Regulations, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) raised a question as to whether the re-structuring of section 24 meant that the Initial Amending Regulations had the effect of excluding common law procedural fairness requirements in relation to decision-making in these instances. The Department of Defence provided advice that while the requirement for 14 days written notice does not apply in these circumstances, the general requirements of common law procedural fairness were not excluded or limited in any way. This was identical to the situation before the Initial Amending Regulations were made. The obligation to afford procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case. Decision makers would still be required to adopt processes that were fair and reasonable in all circumstances.
8. Although accepting Defence's response, the Committee requested that Defence, in an effort to provide maximum clarity, amend the Regulation to explicitly state that the requirements of common law procedural fairness continue to apply termination decisions made under section 24.
9. Accordingly, the purpose of the Amending Regulations is make it absolutely clear that the common law requirements of procedural fairness continue to apply to decisions made under subsection 24(2) of the Regulation.

Authority for the *Defence Amendment (2020 Measures No. 2) Regulations 2020*

10. 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 and 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.
11. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers 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. 2) Regulations 2020*

12. Details of the Amending Regulation are set out in Attachment A.

Regulatory Impact Statement

13. The Office of Best Practice Regulation advised that no regulatory impact statement was required (OBPR ID 42707).

Legislative Instrument

14. The Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

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

Consultation

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

Attachment

A: Provisions in the Defence Amendment (2020 Measures No. 2) Regulations 2020.

**ATTACHMENT A – PROVISIONS IN DEFENCE AMENDMENT (2020
MEASURES NO. 2) REGULATIONS 2020**

Section 1 - Name of Regulation

This section provides that the title of the instrument is the *Error! Use the Home tab to apply ShortT to the text that you want to appear here.*

Section 2 – Commencement

This section provides for the whole of the instrument to commence the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Defence Act 1903*.

Section 4 – Schedules

This section 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 this Schedule concerned, and any other item in a Schedule to this instrument has effect accordingly to its terms.

SCHEDULE 1 – AMENDMENTS

Item 1

This item adds a note at the end of subsection 24(3) to explicitly confirm that the subsection does not exclude or limit the operation of the common law relating to procedural fairness.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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1. The *Error! Use the Home tab to apply ShortT to the text that you want to appear here.* (the Amending 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 Regulation

2. The Regulations make an amendment consequential to amendments recently made to the *Defence Regulation 2016* (the Regulation), by making it absolutely clear that the common law requirements of procedural fairness are not limited nor excluded by subsection 24(2) of the Regulation regarding grounds for termination of ADF members in specified circumstances.

Human Rights Implications

3. The Amending Regulations do not have any human rights implications.

Conclusion

4. The Amending Regulations are compatible with human rights.

Darren Chester

Minister for Defence Personnel