

EXPLANATORY STATEMENT

Issued by the authority of the Chief of the Defence Force

Defence Force Discipline Act 1982

Defence Force Discipline (Disciplinary Infringement Records) Rules 2022

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 Australian Defence Force.

Part IA of the Act was inserted by Schedule 1 to the *Defence Legislation Amendment (Discipline Reform) Act 2021* (the Amendment Act) and will commence operation either on proclamation or, if no proclamation is made within 12 months of the Amendment Act receiving the Royal Assent, the day after the expiration of that period.

Part IA of the Act provides the disciplinary infringement scheme for prescribed defence members and includes provisions about disciplinary infringement records (referred to as Part IA records).

Subsection 9JB(1) within Part 1A of the Act will, on commencement, provide that the Chief of the Defence Force may, by legislative instrument, make rules for, or in relation to, the keeping of Part IA records and the retention, use or destruction of Part IA records.

Subsection 9JB(2) will define a Part IA record as any part of a record that relates to a person's service as a defence member, is kept by any means under a law of the Commonwealth and relates to Part IA of the Act.

Section 9JB(3) of the Amendment Act provides that a person must comply with any Rules made under subsection 9JB(1).

The *Defence Force Discipline (Disciplinary Infringement Records) Rules 2022* (the Rules) have been made before the enabling provision in subsection 9J(1) of the Act has commenced in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*.

Section 169H within Part IXA of the Act provides for the destruction of records under the discipline officer scheme. Part IXA of the Act will be repealed on commencement of the Amendment Act (Schedule 1 Part 2 section 14).

The Chief of the Defence Force has prescribed by the instrument, the Rules requiring appropriate records of Part IA records to be kept; and prescribes those records that can be used including accessed by specified persons and their use limited for specified purposes only.

The purpose of the Rules is to facilitate the fair and efficient administration of the infringement scheme and improve the discipline and personnel management of prescribed defence members; and improve service discipline by retaining records of disciplinary infringements at the service headquarter level.

Section 9JB(3) of the Amendment Act provides that a person must comply with any Rules made under subsection 9JB(1).

The Rules will enable the continuation of the maintenance and enforcement of good order and discipline in the Defence Force following the repeal of Part IXA of the Act and the commencement of Part IA of the Amendment Act.

The 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 details of the Rules are set out in Attachment A.

Commencement

The Rules commence at the same time as Schedule 1 to the Amendment Act.

Consultation

Extensive consultation was conducted in formulating the Amendment Act within Defence, Australian Government Solicitor, ex-Service Organisations, academia and interest groups. The Attorney-General's Department (Information Law branch) was consulted by the Office of Parliamentary Counsel concerning the Rules together with the Office of the Australian Information Commissioner. The Privacy Impact Assessment concerning Part IA records will be registered and promulgated on the Defence internal Privacy Register as required by the Privacy Code and consistent with the Defence Privacy Policy.

The Chief of Defence Force is satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the *Legislation Act 2003*.

Regulatory Impact Statement

The Office of Best Practice Regulation was consulted and advised that no Regulation Impact Statement is required (ID: OBPR22-02340).

Human Rights Statement

A Statement of Compatibility with Human Rights is at Attachment B.

ATTACHMENT A**Section 1 – Name**

1. This section states that the name of this instrument is the *Defence Force Discipline (Disciplinary Infringement Records) Rules 2022* (the Rules).

Section 2 – Commencement

2. This section states that the whole of the instrument commences at the same time as Schedule 1 to the *Defence Legislation Amendment (Discipline Reform) Act 2021* (the Amendment Act) commences.

Section 3 – Authority

3. This section states that the instrument is made under subsection 9JB(1) of the *Defence Force Discipline Act 1982* (the Act).

Section 4 – Objects of this instrument

4. This section describes the objects of the Rules, which are to:
 - facilitate the fair and efficient administration of the infringement scheme and improve the personnel management of prescribed defence members by requiring appropriate records of disciplinary infringements to be kept; and only allowing those records to be used for specified purposes; and
 - improve service discipline by retaining records of disciplinary infringements at the service level to assist the management of service discipline, including the provision of reports on, and to inform inquiries into, service discipline.

Section 4 – Simplified outline of this instrument

5. This section provides a simplified outline and broadly describes the operation of the Rules including about what disciplinary infringement records must be kept, used and archived. The outline covers disciplinary infringement records about a prescribed defence member that may be used by the member's commanding officer and other specified persons for personnel or discipline management of the member or unit discipline management.

Section 6 - Definitions

6. The note to the section lists a number of expressions used in the Rules that are defined in the Act including disciplinary infringement, Part IA record and prescribed defence member.
7. The section defines:

- the “Act” as meaning the *Defence Force Discipline Act 1982*
- “archive” a record as meaning storing the record with the relevant service headquarters in a manner that restricts access to the record by a person prevented from doing so under subsection 9(5)
- “unit” includes a sub-unit.

Section 7 – Disciplinary infringement records that must be kept

8. Subsections 7(1) and 7(2) state what records must be kept if a prescribed defence member is given an infringement notice in relation to a disciplinary infringement. The member’s commanding officer must ensure that the record is retained until it is archived.
9. Subsection 7(3) states that the prescribed defence member’s commanding officer must ensure that the record is archived as soon as practicable after certain events occur, including where the member does not elect to be dealt with under the infringement scheme, the member is substantively promoted to a higher rank or the service of the member ends.
10. Subsection 7(4) provides that if before a record is archived, the member is posted to another unit, the member’s former commanding officer must ensure the member’s new commanding officer is given access to the record as soon as practicable.

Section 8 – Monthly report by discipline officer or senior discipline officer must be kept

11. The section provides that a monthly report made by a discipline officer or a senior discipline officer under section 9JA of the Act to a commanding officer must be kept, and archived after the commanding officer has considered the report.

Section 9 – Use of Part IA records

12. Subsection 9(1) states that a person may only access, make a record of information in, disclose information in or otherwise use a Part IA record, or part of a Part IA record in accordance with section 9. The note states that records kept under sections 7 or 8 of the Rules are Part IA records and refers the reader to subsection 9JB(2) of the Act.
13. Subsection 9(2) deals with personal use and states that a prescribed defence member may access, make a record of information in, disclose information in or otherwise use a Part IA record, or part of a Part IA record, that is about the member.
14. Subsection 9(3) deals with the use of Part IA records for functions, powers and duties under the Act. It states that a person performing a function or duty or exercising a power under the Act may access, make a record of information in, disclose information in or otherwise use a Part IA record, or part of a Part IA record, only to the extent necessary to perform that function or duty or exercise that power.

15. Subsection 9(4) deals with other uses of a Part IA record. It states that a person referred to in an item of the Table in that subsection may access, make a record of information in, disclose information in or other use a Part IA record, or part of a Part IA record, that is about a prescribed defence member:
 - for a purpose referred to in that item; or
 - as required or permitted by law.
16. Note 1 to the subsection provides examples of when something may be required or permitted by law for the purposes of paragraph 9(4)(b), including disclosure may be required by Court order, or the *Privacy Act 1988* may require that a person be given access to personal information in a Part IA record that is about the person.
17. Note 2 to the subsection states that a person may have a number of capacities referred to in the table and provides that the table applies to the person in respect of the capacity in which the person is accessing, making a record of information in, disclosing information in or otherwise using a Part IA record or part of a Part IA record.
18. Subsection 9(5) states that despite subsection 9(4), a person referred to in item 2 or 3 of the table in subsection 9(4), must not access, make a record of information in, disclose information in or otherwise use, a Part IA record, or part of a Part IA record, about a disciplinary infringement of a prescribed defence member if:
 - the Part IA record is required to be archived under subsection 7(3) or 8(2); or
 - any of the listed events have occurred after the infringement notice for that infringement was given.
19. The note to subsection 9(5) states that a Part IA record may be about more than one disciplinary infringement and more than one prescribed defence member (such as a discipline officer monthly report). Access etc. to only part of the record may be prohibited under subsection 9(5)(b).
20. Subsection 9(6) enables an officer performing the functions of a Chief of Staff of a service headquarters to authorise a person posted to the service headquarters for the purposes of item 5 of the table in subsection 9(4).
21. Subsection 9(7) enables the Inspector-General of the Australian Defence Force to authorise a person for the purposes of item 6 of the table in subsection 9(4).

ATTACHMENT B

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence Force Discipline (Disciplinary Infringement Records) Rules 2022

The *Defence Force Discipline (Disciplinary Infringement Records) Rules 2022* (the Rules) 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 Legislative Instrument

The Rules are consequential on the commencement of the *Defence Legislation Amendment (Discipline Reform) Act 2021* (the Amendment Act), which relevantly:

- repealed Part IXA (Special procedures relating to certain minor disciplinary infringements) of the *Defence Force Discipline Act 1982* (the Act), including section 169H of the Act which provided a 12 month, limited discipline infringement record-retention regime after which time the record was destroyed (Schedule 1, Part 2, clause 14); and
- inserted a disciplinary infringement scheme for the Australian Defence Force (ADF) in Part IA (Schedule 1, Part 1).

The Discipline Officer Scheme (DO Scheme) in Part IXA of the Act was established in 1995 following recommendations of the *Report of the Defence Force Discipline Legislation Board of Review 1989* to provide for a simplified process of dealing with minor discipline infringements committed by the most junior members of the Australian Defence Force (ADF).

In response to the *Report of an Inquiry into Military Justice in the Australian Defence Force July 2001* (The Burchett Inquiry into 'Rough Justice'), the context of the DO Scheme was fundamentally changed to expand it to include all ADF personnel between the ranks of private to Army captain and equivalent ranks across the services. The DO Scheme includes commanders and leaders at the senior non-commissioned officer and junior officer level. These Rules implement the Burchett recommendation, to balance the increased scope of the DO Scheme, to retain DO records until the member's next promotion.¹

The disciplinary infringement scheme within Part IA of the Act will comprise a discipline officer and a senior discipline officer (the latter replacing the subordinate summary authority under the summary discipline system). The senior discipline officer will have a broader infringement jurisdiction than the discipline officer and higher punishment options available, consistent with the subordinate summary authority it replaces.

The failures of Defence's record-keeping practices were laid bare in the *Report of the*

¹ *Burchett Inquiry Report* – Recommendation 9

Review of allegations of sexual and other abuse in Defence - Facing the problems of the past.

Volume 1:

Poor record keeping not only makes it difficult to track offenders /call them to account, it can also present a misleading picture as to levels of abuse within an organization...

and in the subsequent DLA Piper Review:

Defence does not have in place systems to track and notify management of persons who can be described as serial low level perpetrators of unacceptable behaviour and/or who are frequently the subject of complaints or reports...

A commanding officer or other manager will have no knowledge of the fact that a member may have been constantly under consideration and/or managed at a number of previous postings²

The *Re-thinking Systems of Inquiry Review Investigation and Audit in Defence Report*, the *Report of the Review of allegations of sexual and other abuse in Defence* and the *Birrer Report*³ identified the systemic issue of the ADF's inability to effectively monitor serial minor offending:

Under current arrangements, Discipline Officer Scheme records cannot be retained as part of a member's discipline or other military records and are only retained on unit registers for 12 months. This creates a practical incentive for members to elect the Discipline Officer jurisdiction. However, it also poses a risk that serial minor offending (including unacceptable behaviour) cannot be readily identified as part of a broader pattern of behaviour by particular individuals. Conversely, if an ADF member makes a complaint that he has been bullied or harassed by his or her commander and cites excessive disciplinary action (including through the Discipline Officer scheme) as an example, Defence is not currently in a position to confirm or refute such assertions because relevant records are not kept beyond 12 months...

The Review is concerned that insufficient attention is being paid in Defence to the management of members who repeat unacceptable behaviour and of people who are accused of unacceptable behaviour whether or not a formal finding has been made about that behaviour.⁴

The absence of an adequate record-keeping regime exposes Defence to an unacceptable level of risk to the reputation of the Defence Force and the safety of its personnel. The impact of an organisation's inability to monitor people's behaviour over time, exposed by the *Royal Commission into Institutional Responses to Child Sexual Abuse* (2017) and related issues within Defence identified in the DLA Piper report, have been addressed by Parliament by repealing section 169H of the Act (see: the Amendment Act Schedule 1 Part 2 item 14).

² Report of the *Review of allegations of sexual and other abuse in Defence - Facing the problems of the past*-Volume 1 pg 129

³ *Study into the Management of Unacceptable Behaviour in the Australian Defence Force* (1 Nov 1999)

⁴ DLA Piper Report – Volume 1 – Chapter 4 (see: Finding 5 (page 51))

The Defence Force as a national institution is accountable and transparent, while reflecting contemporary community standards and attitudes. This includes the requirement for the Defence Force to maintain appropriate records relating to the service history and management of its personnel. Consistent with these principles, the retention of discipline officer records was a recommendation of the Review of the summary discipline system (2017).

Following the repeal of section 169H of the Act, and pursuant to subsection 9JB(1) of the Act, the Rules require appropriate disciplinary infringement records (Part IA records) to be kept, and describe the circumstances in which they are to be archived and prescribe the limited circumstances in which they can be accessed and used by specified persons for specified purposes.

Human rights implications

The right to privacy

Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy. The right to privacy includes respect for informational privacy, including the storing, using and sharing of personal information and the right to control the dissemination of this information. The Rules, made under section 9JB(1) of the Act, engage the right to privacy, as they impose requirements in relation to keeping, retaining, using and disclosing, within the Defence Force, Part IA records that will necessarily include personal information concerning infringed defence members.

Key provisions of the Rules that engage the right to privacy and the controls to protect personal privacy are addressed below.

Section 7– Requirement to keep and archive infringement notices and related evidence

If a prescribed defence member is given an infringement notice in relation to a disciplinary infringement under section 9E of the Act, section 7 of the Rules requires a record to be kept of the completed infringement notice form as well as any evidence presented by the infringed member, or by a witness called by the member, to the discipline officer or senior discipline officer dealing with the infringement (subsection 7(1)). Section 9E of the Act governs the detail that is to be recorded within a disciplinary infringement notice, which will necessarily include personal information about the prescribed defence member.

Commanding officers must retain any Part IA record for an infringed member until the record is archived.⁵ In accordance with subsection 7(3) these records are to be archived by the infringed defence member's commanding officer to the relevant service headquarters after any of the following events occur:

- the member does not elect to be dealt with under the infringement scheme;
- the disciplinary infringement is dismissed;
- the member graduates from initial recruit or officer training;
- the member is substantively promoted to a higher rank;

⁵ 'archive' a record means storing the record with the relevant service headquarters in a manner that restricts access to the record by a person prevented from doing so under subsection 9(5).

- the service of the member ends.

If, before the record is archived, the prescribed defence member is posted to another unit, the member's former commanding officer must ensure that the member's new commanding officer is given access to the record as soon as practicable. The record will continue to be subject to the Rules.

Section 8 – Requirement to keep and archive monthly reports under section 9JA of the Act

Section 9JA of the Act requires each discipline officer and senior discipline officer to give a report in writing to the officer's commanding officer after the end of each month covering each disciplinary infringement dealt with by the officer in that period. The report must detail the name of the respective infringed defence member, the nature of the disciplinary infringement and the decision made by the discipline officer or senior officer in respect of the infringement.

Section 8 requires a record of a monthly report given under section 9JA of the Act to a commanding officer to be kept, provided that that record must be archived by the commanding officer as soon as practicable after the commanding officer has considered the report.

Section 9 – Permitted use of Part IA records

Section 9 of the Rules prescribes the limited circumstances in which a Part IA record can be used, and by whom, in a way that reflects the nature of the personal information that will necessarily be recorded therein.

Relevantly, a Part IA record, or part of a Part IA record, can only be accessed or used:

- by the member to which it relates (subsection 9(2));
- by a person performing a function or duty or exercising a power under the Act, but only to the extent necessary to perform that function or exercise that power (subsection 9(3)); and
- by a limited class of persons listed in the table in subsection 9(4), but only for a purpose listed in the relevant table item or as required or permitted by law (subsection 9(4)).

However, subsection 9(5) prohibits the use of Part IA records by a prescribed defence member's chain of command or service career management agency if the Part IA record is required to be archived under subsection 7(3) or 8(2), or if any of the following events have occurred after the infringement notice for that infringement was given:

- the member does not elect to be dealt with under the infringement scheme in relation to the disciplinary infringement
- the disciplinary infringement is dismissed
- the member graduates from initial recruit or officer training

- the member is substantively promoted to a higher rank
- the service of the member ends.

The retention and use of disciplinary infringement records and monthly reports of discipline infringement matters to commanding officers as required by section 9JA of the Act, for defined purposes and periods, is necessary for the efficient and effective operation of the infringement scheme contained in Part IA of the Act and for the maintenance and enforcement of service discipline within the ADF. In particular, it will:

- enable commanders to take appropriate personnel or discipline management action in relation to infringed defence members within their command, initiate early intervention strategies in appropriate cases and better support infringed defence members to continue as positive contributors to the Defence Force; and
- give commanding officers oversight of the use of the infringement scheme by infringement officers, discipline officers, senior discipline officers and infringed defence members.

Having regard to the important safeguards governing access to and use of Part IA records contained in section 9, including the narrow personnel management and discipline related purposes for which such records can be accessed or used, to the extent that the right to privacy is engaged by the Rules, any interference with the informational privacy of prescribed defence members goes no further than is reasonably necessary to achieve the legitimate objectives of:

- facilitating the fair and efficient administration of the new infringement scheme in Part IA of the Act; and
- improving the personnel management and discipline management of prescribed defence members.

Conclusion

The Rules are compatible with human rights because to the extent that it may limit a right to privacy, those limitations are reasonable, necessary and proportionate to a legitimate aim concerning the maintenance and enforcement of discipline within the Defence Force.