

2013-2014-2015

**THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA**

HOUSE OF REPRESENTATIVES

**DEFENCE LEGISLATION AMENDMENT
(SUPERANNUATION AND ADF COVER) BILL 2015**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Assistant Minister for Defence, the Hon
Stuart Robert MP...)

GENERAL OUTLINE

DEFENCE LEGISLATION AMENDMENT (SUPERANNUATION AND ADF COVER) BILL 2015

OUTLINE

The Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015 (Consequential Bill) is part of a package of three Bills to establish the Australian Defence Force Superannuation Scheme (ADF Super) and facilitate the introduction of the Australian Defence Force's new workforce model by providing permanent members of the Australian Defence Force (ADF) access to flexible service arrangements.

The other two Bills in the package are:

- The Australian Defence Force Superannuation Bill 2015 (ADF Super) which gives effect to the Government's announcement to introduce a new modern superannuation arrangement for people joining the ADF on and after 1 July 2016. The new arrangements will allow ADF members to choose which superannuation scheme they belong to and, for the first time, give those members the ability to transfer their accumulated ADF Super benefits to a scheme of their choice when they leave the ADF; and
- the Australian Defence Force Cover Bill 2015 (ADF Cover) which provides for standalone statutory death and invalidity cover for members of ADF Super and those who would have been ADF Super members but for choosing another scheme to which the Department will make employer contributions. ADF Cover is to be deemed to be an exempt public sector superannuation scheme and benefits paid from the ADF Cover arrangements will be treated as payment of superannuation benefits.

Also included in the package are exposure drafts of both the Australian Defence Force Superannuation Trust Deed and the Military Superannuation and Benefits Amendment (Trust Deed – ADF Super Consequential) Instrument 2015 which effects consequential changes to the MSBS Trust Deed and Rules. This is to facilitate the measure and to make some administrative changes to reduce red tape.

Financial Impact Statement

Schedules 1 and 3 of the Bill will have no financial impact. However, the measures in Schedule 2 may have a financial impact depending on the number of ADF members who apply for and are approved for flexible service arrangements.

If the numbers do not increase above current levels of Defence Force Retirement and Death Benefits (DFRDB) and Military Superannuation and Benefits Scheme (MSBS) members taking part-time leave without pay in order to work flexibly, there will be no additional financial impacts flowing from the new measure.

However, if there is an increase in numbers rendering flexible service as a result of the new arrangements, then the financial implications flowing will need to be addressed within the funding provided to the Defence budget. The actuary did

not undertake any financial assessment of the implications because there was insufficient information that could be provided to support any such assessment.

NOTES ON CLAUSES

Clause 1: Short title

3. **Clause 1** provides for the short title of the Act to be the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015* (the Act).

Clause 2: Commencement

4. **Clause 2** is the commencement provision for the Act and includes a table setting out the details of the commencement of sections of the Act. Column 1 of the table sets out the provisions in numbered items, column 2 sets out the commencement and column 3 sets out date/details. Information in column 3 (which is currently blank) does not form part of the Act, so information can subsequently be inserted in the column (or edited) in a published version of the Act.

5. Item 1 in the table provides that sections 1 to 3 of the Act and anything in the Act not covered elsewhere in the table commences when the Act receives Royal Assent.

6. Item 2 in the table provides that the main amendments in Schedule 1 (to the *Defence Act 1903*, the *Defence Force Retirement and Death Benefits Act 1973*, the *Future Fund Act 2006*, the *Governance of Australian Government Superannuation Schemes Act 2011*, the *Income Tax Assessment Act 1997*, the *Military Rehabilitation and Compensation Act 2004*, the *Military Superannuation and Benefits Act 1991*, the *Superannuation Act 2005*, the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation (Resolution of Complaints) Act 1993*) commence at the later of the day after Royal Assent to the Act and the commencement of the *Australian Defence Force Superannuation Act 2015* (ADF Super Act). If the ADF Super Act does not commence, the amendments in Schedule 1 do not commence.

7. Item 3 in the table provides that the flexible service arrangements set out in Schedule 2 commence at the later of Royal Assent and 1 July 2016.

8. Item 4 in the table provides that amendments that are contingent on the *Acts and Instruments (Framework Reform) Act 2015* set out in Schedule 3 commence at the later of the commencement of Schedule 1 of the Act and the commencement of Schedule 1 of the *Acts and Instruments (Framework Reform) Act 2015*.

9. A note to the reader stipulates that the table only relates to the provisions originally enacted and will not be amended to reflect later amendments to the sections of the Act.

Clause 3: Schedules

10. **Clause 3** provides that amendments to legislation contained in the Act are set out in the Schedules to the Act and any other item in a schedule to the Act has effect according to its terms.

SCHEDULE 1 – MAIN AMENDMENTS

PART 1 - AMENDMENTS

Defence Act 1903

11. The amendments to the *Defence Act 1903* in this part are needed to implement ADF Super and ADF Cover and are an important part of the introduction of the new military superannuation arrangements.

12. **Item 1** makes amendments to Part IIIAA of the Act. It repeals the original heading from ‘Part IIIAA – Superannuation Benefit’ to reflect an expanded Part IIIAA that will deal with several matters associated with superannuation for members of the ADF. The superannuation benefit referred to in the original heading is the benefit provided in section 52 under a determination by the Minister (the Defence Force (Superannuation) (Productivity Benefit) Determination 1988). Section 53 provides that the trustee of the scheme established by the Determination for the purposes of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* is the Commonwealth Superannuation Corporation (CSC). Neither section 52 nor 53 are being changed.

13. **Item 2** inserts new **sections 52A and 52B** after section 52 of the *Defence Act 1903*.

14. **Section 52A** sets out the Department’s employer contributions for members of ADF Super and for those ADF members who would have been ADF Super members but for choosing another scheme into which the Department is to make employer contributions. The reason for including the Department’s employer contribution rate in the Defence Act is to set the employer contribution rate for ADF Super members and ensure that rate applies to ADF members who have chosen another scheme to which the Department is to contribute. Without this, the Department would only be required to contribute at the rate set out in the superannuation guarantee laws to avoid incurring a superannuation guarantee liability under the *Superannuation Guarantee (Administration) Act 1992* (SG Act).

15. The Department is the employer and ADF members are deemed to be employees for the purposes of the SG Act.

16. **Subsection 52A(1)** provides that the section applies to persons who are members of ADF Super or would have been members of ADF Super, except that they have nominated an alternative superannuation scheme into which the Department is to make employer contributions.

17. **Subsection 52A(2)** sets out the employer contribution rate will be 16.4% of ordinary time earnings paid by the Department in the pay period.

18. **Subsection 52A(3)** defines several terms which are used in the section including the term *ordinary time earnings* which are basically the member’s fortnightly salary and any additional allowances that may be paid in the fortnight in recognition of the unique nature of military service, excluding any deductions as a result of any salary sacrifice arrangement the member may have entered into with the Department.

19. **Section 52B** provides that the Department may disclose personal information to CSC, the trustee of the DFRDB scheme and the MSBS. The amendment is for the purpose of facilitating the effective working of the DFRDB and MSBS. The information that can be provided is appropriately limited for the purposes of determining an entitlement to invalidity benefits under those schemes, with those receiving the personal information maintaining a legitimate interest in that information.

20. There is no requirement for the Department to pass on such information, but may do so and would generally seek the member's agreement before passing on the information.

21. Note 1 to **section 52B** provides that the section is authority for the Department to pass on information in respect of DFRDB and MSBS members who may be entitled to invalidity benefits under those schemes.

Defence Force Retirement and Death Benefits Act 1973

22. The amendments to the *Defence Force Retirement and Death Benefits Act 1973* (DFRDB Act) are necessary because the current provisions in that Act for those in receipt of DFRDB retirement pay who return for a further period of service cannot continue to apply. However, the current provisions will continue to apply for those DFRDB retirement pay recipients whose further period of service spans 1 July 2016 (until the DFRDB recipient member satisfies the undertaking for that further period of service).

23. The current arrangements are that all DFRDB retirement pay recipients who return (re-enter) for a further period of ADF service must make an election before commencing their further service. If no election is made (or the person elects to become a MSBS member), the re-entered member becomes a MSBS member by operation of the law and they are MSBS members for all subsequent periods of service.

24. Once a DFRDB retirement pay recipient becomes a MSBS member, the DFRDB retirement pay is suspended and continues to grow with increases in the consumer price index until MSBS membership ceases, when the retirement pay is reinstated.

25. If the retirement pay recipient does not elect to become a MSBS member, then that person must make a different election depending on the length of the period of further service to be undertaken.

Re-entry for less than 12 Months

26. DFRDB retirement pay recipients who re-enter for less than 12 months must elect not to become a MSBS member if they want to continue to receive their retirement pay for the period of further service. If a valid election is made, no superannuation contributions are made during the period of further service (although the person accrues a DFRDB productivity benefit which is effectively a superannuation guarantee top-up amount that is paid as a lump sum from consolidated revenue when the service is completed).

Re-entry for more than 12 Months

27. DFRDB retirement pay recipients who re-enter for more than 12 months must elect whether to again become contributing members of DFRDB. If a valid election is made, the DFRDB retirement pay is cancelled and is calculated as a new DFRDB amount of retirement pay after the further service is completed (to take account of that additional service). If the member commuted part of the retirement pay when it first became available, then the member must commute part of the new retirement pay that is calculated taking account of all service (the commutation lump sum that is paid as a result of the new commutation is reduced by the value of the lump sum commutation amount paid originally).

28. The changes that are being made to the DFRDB Act (and to the membership provisions of the *Military Superannuation and Benefits Act 1991* (MSB Act)) will ensure that DFRDB retirement pay recipients who re-enter for a further period of service on or after 1 July 2016 become members of ADF Super. They will continue to receive their DFRDB retirement pay while serving, irrespective of the length of that further period of service and the Department will make contributions to ADF Super on their behalf.

29. There are some other minor changes to facilitate administration of the DFRDB Act by removing some red tape.

30. **Item 3** inserts a definition of *continuous full-time Reservist* in **subsection 3(1)**. The term has the same meaning as that term has in the ADF Super Act.

31. **Item 4** changes the definition of *eligible child* in **subsection 3(1)** to increase the age from which an eligible child must be in full-time education to be able to benefit as the result of the death of a DFRDB member or a beneficiary under the scheme. Benefits will be paid in respect of a child under age 18 (in lieu of age 16). A child age 18 (in lieu of age 16) and below age 25 can only benefit if the child is receiving full-time education at a school, college or university and is not ordinarily in employment or engaged in work on his or her own account.

32. This change removes an administrative burden for the trustee of having to verify that children of deceased members are in full-time education from age 16. It also removes red tape for the parent/guardian of many child beneficiaries, who generally remain in full-time education to at least age 18, by removing the requirement to prove this to the trustees to be able to continue to receive a benefit.

33. **Item 5** makes changes to the first part of the definition of *eligible member of the Defence Force* in **subsection 3(1)** to close off the DFRDB scheme to members of the Defence Force serving on continuous full-time service for 12 months or more (or further service that is continuous with previous service of that nature) under a re-appointment or re-engagement that occurred on or after 1 July 2016.

34. A member of the Defence Force who is re-appointed or re-engaged on continuous full-time service for a period of 12 months or more from 1 July 2016 will continue to receive their retirement pay and will be eligible to become ADF Super members and will do so if they do not choose another scheme to which the Department can make employer contributions.

35. **Item 6** adds a note after the definition of *eligible member of the Defence Force* in **subsection 3(1)** that directs the reader to new **section 5B** which deals with extensions of engagements of members of the Reserves whose service spans 1 July 2016.

36. **Item 7** removes the reference to **section 58** in subparagraph (a)(ii) of the definition of *period of effective service* in **subsection 3(1)**. **Section 58**, which provides that where a contributing member who retired and received only a refund of contributions, a lump sum payment as a Class C invalid or a transfer value, again becomes an eligible member, the period of past effective service is to be disregarded unless the person elects to pay additional contributions in respect of this period, is redundant and is being repealed.

37. The item will now include a reference to new **section 5B** which provides that if the engagement of a member of the Reserves on continuous full-time service is extended, that extended service is not a period of effective service (because the Reservist is eligible to become a member of ADF Super and will do so if he or she does not choose another scheme to which the Department can make employer contributions).

38. **Item 8** removes a reference to **subsection 62(3)** in paragraph (b) of the definition of *period of effective service*, because **subsection 62(3)** is being repealed as it is redundant. **Subsection 62(3)** ensures that a pensioner or recipient member who rejoins the Defence Force will not be placed in a benefit-detriment situation.

39. To this end, the subsection provides that effective service on death or retirement of a person covered by **sub-sections 62(1) or (2)** (which currently provide for the cancellation of pension, retirement and invalidity pay of pensioners and recipient members who become eligible members) will include any period that was a period of service for pension under the previous *Defence Forces Retirement Benefits Act 1948* (DFRB) and any period determined under regulations made for the purpose of **subsection 62(3)**, or notional service under the previous Act.

40. CSC has not made any determination under the *Defence Force Retirement and Death Benefits Regulations 1973* for the purpose of **section 62**.

41. **Item 9** replaces the definition of *recipient member* in **subsection 3(1)** as part of the change to allow recipient members who return for a further period of service to continue to receive their DFRDB retirement while serving. The current definition of *recipient member* includes a member whose invalidity pay is cancelled (**section 61D**) or whose retirement pay is suspended (**section 61C**) on becoming a member of MSBS. **Sections 61C and 61D** are being repealed as part of the new arrangements for DFRDB members who re-enter for a further period of service.

42. **Item 10** removes the reference to **subsections 62(4) and (5)** in the definition of *total period of effective service* in **subsection 3(1)**, as those subsections are being repealed as being redundant. This is because, under the proposals, recipient members who return for a further period of service will continue to receive their retirement pay. This is not intended to affect invalidity pay. Invalidity pay will still be cancelled on the basis that if a person in receipt of invalidity pay were to undertake further service, then that person is obviously fit

to serve. However those persons whose invalidity pay is calculated as if they had retired on grounds other than the ground of invalidity, will continue to keep the invalidity pay when undertaking further service.

43. Currently, **section 62** provides for the cancellation of invalidity pay and retirement pay when a recipient member returns for a further period of service of 12 months or more.

44. **Subsection 62(4)** effectively provides for the recovery of the commuted portion of the invalidity or retirement pay from recipient members whose benefit has been cancelled because of the further service. This is done by adjusting the total period of effective service when calculating the new benefit to be paid after the further service is completed. The reduction period is a period determined by CSC. This subsection is not required if retirement pay and invalidity pay is not cancelled under the new arrangements.

45. **Subsection 62(5)** provides for reduction in the actual period of effective service of those recipient members who rejoin the ADF and by virtue of election or necessity did not contribute for full benefits under the DFRB Act. This period of effective service could be further reduced if those members had commuted part of their benefit entitlement. It is unlikely that DFRB recipient members will be returning for a further period of service since the DFRB scheme was closed in 1973.

46. **Item 11** has the effect of ensuring that new **section 5B** is not limited by **subsection 5(3)**, which operates to treat a member who ceases to be an eligible member of the Defence Force and immediately again becomes such a member as not having ceased to be an eligible member of the Defence Force.

Section 5B operates to mandatorily retire an eligible member of the Defence Force from the day before a period of further service is extended.

47. **Item 12** makes a change to **section 5A** which excludes certain persons from the definition of *eligible member of the Defence Force* in **subsection 3(1)**. A recipient member who returns for a further period of service and makes an election under **section 61B** (to become a DFRDB contributing member, to become a MSBS member or not to become a MSBS member) is excluded from the definition. **Section 61B** is being repealed as recipient members will no longer need to make an election before returning for further service.

48. **Item 13** inserts new **section 5B** that reflects the provisions of subsection 50(3) of the *Defence Act 1903* (and the equivalent subsection 32A(3) of the *Naval Defence Act 1910* and subsection 4J(3) of the *Air Force Act 1923*). Those subsections provide that if a member of the Reserves gives an undertaking to serve for a specified period and that undertaking is accepted, the member is bound to serve for that specified period. If the Service or the member wishes that period to be extended, the member must effectively give another undertaking to serve for the extended period.

49. **Section 5B** is inserted to address the situation of a recipient member who undertakes to serve for a specified period before 1 July 2016 and the specified period ends after that date. If the Service or the member wishes that period of service to be extended, then the member is taken to have retired on the day before the day the service is extended and the member becomes eligible to be an ADF Super member (and will become an ADF Super member if he or she does

not choose another scheme into which the Department can make employer contributions).

50. **Subsection 5B(1)** sets out the class of persons to whom the section applies - an eligible member of the Defence Force who commenced a period of continuous full-time service before 1 July 2016 and whose period of continuous full-time service is extended after that date.

51. **Subsection 5B(2)** effectively mandatorily retires the eligible member of the Defence Force identified in **subsection 5B(1)** for the purposes of the DFRDB Act on the day before the day their service obligation is extended which is the *extension day*. The subsection then specifies that a person is taken to have begun a new period of service on the day of extension. A note sets out the effect of the subsection – the DFRDB Act applies in relation to service before the extension day and the ADF Super Act applies in relation to service after the extension day.

52. **Subsection 5B(3)** provides that, for the purposes of DFRDB, all service after the day of extension is to be disregarded as a period of effective service.

53. The practical effect of **section 5B** is that a DFRDB member who extends their service obligation on or after 1 July 2016 will:

- a. be retired for the purposes of DFRDB;
- b. become a retirement pay recipient of DFRDB; and
- c. become a member of ADF Super if he or she does not choose another scheme into which the Department can make contributions.

54. **Item 14** replaces **subsection 23(1)** because there is no further need to refer to retirement pay having been cancelled under **section 62**. Recipient members who return for a further period of service on or after 1 July 2016, or have their period of service extended on or after that date, will become ADF Super members and will continue to receive their DFRDB retirement pay.

55. **Item 15** repeals **subsection 23(5)** which has the effect of ensuring that retirement pay for a recipient member who returns for a further period of service is not less than the retirement pay that was cancelled on returning for the further period of service. As the retirement pay for a recipient member is not being cancelled when the recipient member returns for a further period of service on or after 1 July 2016 (or has a period of returned service extended after that date), there is no need for the subsection.

56. **Item 16** removes the reference to **subsections 62(1) and (2)** in **subsection 24(1A)** as these subsections are being repealed because retirement pay will not be cancelled when a recipient member returns for a further period of service on or after 1 July 2016. **Section 24** provides the machinery arrangements for commuting a portion of retirement pay. In effect a member may commute five years' retirement pay, at the rate applicable on retirement to a lump sum. The residual annual rate of retirement pay will be obtained by deducting from the amount of retirement pay before commutation, an amount ascertained by dividing the commuted lump sum by the number of years of life expectancy of the member, according to the commutation factor in Schedule 3 of the Act.

57. **Item 17** removes a reference to **subsection 62(1)** in **paragraph 24(1B)(a)** (see explanation at item 16 above).

58. **Item 18** replaces **paragraphs 24(2A)(a) and (b)**. The reason for this is to remove a reference to **paragraph 62(4)(a)** as it is being repealed (see explanation at item 10 above).

59. **Item 19** repeals **subsections 24(5) to (7)**. These machinery provisions are no longer required in circumstances where retirement pay is not being cancelled when a recipient member returns for a further period of service. The fact that retirement pay is no longer being cancelled removes the need to make adjustments to amounts that were previously commuted.

60. **Item 20** removes a reference to **subsection 62(1)** in **subsection 30(3)** as **subsection 62(1)** is being repealed. The reference is being replaced with a reference to **section 62** which will now deal with the cancellation of invalidity pay when a recipient member returns for a further period of service. It is appropriate to cancel invalidity pay when a recipient member returns for a further period of service on the basis that the person is obviously fit to serve. However, those persons whose invalidity pay is calculated as if they had retired on grounds other than the ground of invalidity, will continue to keep the invalidity pay when undertaking further service.

61. **Item 21** removes a reference to **subsection 62(1) and (2)** in **subsection 32A(1A)**, the machinery provisions that deals with the commutation of invalidity pay that is to be paid to a person who is classified as Class C (effectively, Class C invalidity pay is the rate of pay that would have been paid had the person been retired on grounds other than invalidity).

62. **Item 22** replaces **paragraphs 32A(4)(a) and (b)** for the same reasons as the change made by item 18.

63. **Item 23** replaces **subsection 49Q(1)** which was inserted as part of a number of changes to enable amounts to be released from the DFRDB scheme following changes to the taxation arrangements for the concessional contributions of very high income earners. **Subsection 49Q(1)** requires retirement pay and invalidity pay that is recalculated after a further period of service to be adjusted to reflect any release authority lump sum payment made when the member first claimed the retirement pay. As retirement pay is not being cancelled under the new arrangements, there is a need to remove a reference to **subsection 62(1)** which is being repealed. **Subsection 62(1)** is being replaced with **section 62** that will only require the cancellation of invalidity pay when a recipient member returns for a further period of service.

64. **Item 24** removes the reference to retirement pay in **subsection 49Q(2)** which is no longer being cancelled when a recipient member returns for a further period of service.

65. **Item 25** repeals **section 58** which is redundant. **Section 58** provides that where a contributing member who retired, and received only a refund of contributions, a lump sum payment as a Class C invalid or a transfer value, again becomes an eligible member, the person's period of past effective service is to be disregarded unless the person elects to pay additional contributions in respect of this period. There would be no person in this situation.

66. **Item 26** repeals **sections 61B** (which requires recipient members who intend to resume full-time service to make an election before commencing that service), **61C** (which suspends the retirement pay of a recipient members who become members of MSBS, either by election or the operation of the law) and **61D** (which cancels the invalidity pay of recipient members who have not served for 20 years or suspends the invalidity pay of recipient members who have served for 20 years and who become members of MSBS, either by election or operation of the law) as they are no longer required under the new arrangements.

67. **Item 27** effectively repeals **subsection 62(1)**.

68. **Item 28** removes the reference to retirement pay in what is effectively new **section 62**. The reason for this is that, under the new arrangements, retirement pay will no longer be cancelled when a recipient member returns for a further period of service. Invalidity pay will continue to be cancelled when a recipient member returns for a further period of service.

69. **Item 29** ensures that invalidity pay calculated in accordance with **subsection 31(3)** (that is, it is based on years of service other than retirement on the grounds of invalidity) is not cancelled when a recipient member returns for a further period of service.

70. **Item 30** repeals **subsections 62(2) to (8)** as they are redundant. As indicated, **section 62** relates to both recipient members and pensioners under the previous Acts who rejoin the Defence Force. **Subsections 62(1) and (2)** provide for cancellation of retirement and invalidity pay and pensions under the previous legislation for recipient members and pensioners who become eligible members of the Defence Force (**subsection 62(1)** becomes **section 62** and provides for the cancellation of invalidity pay only, other than invalidity pay that is calculated as if the person had been retired other than on the grounds of invalidity).

71. **Subsection 62(3)** stipulates that effective service on death or retirement of a person covered by sub-section (1) or (2) will include any period that was a period of service for a pension under the previous Act and any period determined under regulations made for the purpose of this clause, or notional service under the previous Act. In effect this ensures that a pensioner or recipient member who rejoins the Defence Force will not be placed in a benefit-detriment situation.

72. **Subsection 62(4)** effectively provides for the recovery of the commuted portion of the invalidity or retirement pay from recipient members whose benefit has been cancelled because of the further service. This is done by adjusting the total period of effective service when calculating the new benefit to be paid after the further service is completed. The reduction period is a period determined by CSC. This subsection is not required if retirement pay and invalidity pay is not cancelled under the new arrangements.

73. **Subsection 62(5)** provides for reduction in the actual period of effective service of those recipient members who rejoin the ADF and by virtue of election or necessity did not contribute for full benefits under the DFRB Act. This period of effective service could be further reduced if those members had commuted part of their benefit entitlement. It is unlikely that DFRB recipient

members will be returning for a further period of service since the DFRB scheme was closed in 1973.

74. **Subsection 62(6)** applies to a deceased DFRDB member who had a lower annual rate of pay on second retirement than the member was receiving at first retirement. It makes provision for the retirement pay applicable at death to be based on the higher of the annual rates of pay at first retirement.

75. **Subsection 62(7)** is a machinery provision which applies to members who had previously elected to receive a deferred benefit and **subsection 62(8)** provides for recovery of any retirement or invalidity pay or pension paid beyond the point of a member's rejoining the Defence Force.

76. **Item 31** ensures that **sections 63 and 64** do not apply to a person who is taken by new **section 5B** to have retired.

77. **Section 63** allows a contributing member who retires and receives, or is eligible to receive, a refund of contributions, to rejoin the Defence Force within ninety days and be treated as if the person had not retired; the gap in service is treated as a period of leave of absence without pay. Any refund of contributions is to be repaid to the Commonwealth.

78. **Section 64** applies to a contributing member who retires and receives, or is eligible to receive, a refund of contributions, but who becomes an eligible member again after 90 days. Provided he or she notifies CSC within 90 days after again becoming an eligible member (or within such further period as CSC allows) he or she may elect to purchase all or part of his or her previous effective service by payment of an additional contribution of 5.5% of his or her annual rate of pay applicable to him or her at the time of his or her rejoining the Defence Force.

79. **Item 32** removes the reference to **sections 61C, 61D** and **subsection 135(2)** in **section 98C** which provides for the indexation of suspended pension benefits. **Sections 61C and 61D** are being repealed. **Subsection 135(2)** is also being repealed as it no longer has any work to do.

80. **Item 33** adds a reference in **subsection 102(1)** to Part 5 of the *Australian Defence Force Cover Act 2015* (ADF Cover), subdivision C of which provides for the review of decisions of CSC in relation to benefits under the scheme established under that Act. The functions of the Defence Force Case Assessment Panel established under Part XI of the DFRDB Act are being expanded to facilitate the review of CSC decisions in relation to ADF Cover.

81. **Item 34** changes the note to **section 102**, which sets out the functions of the Defence Force Case Assessment Panel, to refer to **subsection 106(1)** in lieu of **section 106**.

82. **Item 35** adds a second note at the end of **subsection 102(1)** to advise readers that Part 5 of the *Australian Defence Force Cover Act 2015* provides for the Defence Force Case Assessment Panel to review the decisions of CSC under that Act.

83. **Item 36** amends **subsection 106(1)** to ensure that CSC only considers the recommendations of the Defence Force Case Assessment Panel in relation to decisions under the DFRDB Act. Subdivision C of Part 5 of the *Australian Defence Force Cover Act 2015* provides for CSC to consider recommendations

of the Panel in relation to decisions under the *Australian Defence Force Cover Act 2015*.

84. **Item 37** adds a note under **subsection 106(1)** to advise readers that Part 5 of the *Australian Defence Force Cover Act 2015* contains similar provisions for CSC to take into account recommendations of the Defence Force Case Assessment Panel.

85. **Item 38 and Item 39** effectively repeal **section 135** and substitutes the current wording in **subsection 135(1)** as the proposed new **section 135**.

Subsection 135(1) provides that a person who transferred (or was taken to have transferred) to MSBS when the election period was open between 1 October 1991 and 30 September 1992 was not entitled to DFRDB benefits.

Subsection 135(2) was inserted to address the situation of DFRDB recipient members who had returned for a further period of service and had ceased to be an eligible member of the Defence Force. **Subsection 135(2)** is redundant and is repealed.

Future Fund Act 2006

86. The Future Fund was established to meet unfunded superannuation liabilities, by accumulating assets to meet liabilities that will become payable at a time when spending pressures associated with an ageing population are likely to realise. The Fund strengthens the Government's balance sheet and helps ensure the long-term sustainability of its finances

87. **Item 40** inserts the *Australian Defence Force Cover Act 2015* into the definition of superannuation benefit in the *Future Fund Act 2006*. The scheme established under the *Australian Defence Force Cover Act 2015*, to provide death and invalidity benefits payable from Consolidated Revenue Fund, is deemed to be an unfunded public sector superannuation scheme. As such, the scheme will generate an unfunded liability for the Commonwealth, similar to other Commonwealth unfunded superannuation liabilities.

Governance of Australian Government Superannuation Schemes Act 2011

88. The *Governance of Australian Government Superannuation Schemes Act 2011* (GAGSS Act) governs the CSC, which will be the trustee and administrator of ADF Super, including the ADF Super Fund, established by the *Australian Defence Force Superannuation Act 2015* and the administrator of ADF Cover established by the *Australian Defence Force Cover Act 2015*.

89. Amendments need to be made to the *Governance of Australian Government Superannuation Schemes Act 2011* to bring both ADF Super, including the ADF Super Fund, and ADF Cover within the ambit of CSC.

90. **Item 41** adds reference to both the *Australian Defence Force Superannuation Act 2015* and the *Australian Defence Force Cover Act 2015* in the objects section of the GAGSS Act (**subsection 3(b)**). The effect of this is to require CSC to have regard to the unique nature of military service when performing a function under those acts.

91. **Item 42** includes the *Australian Defence Force Superannuation Act 2015* and the *Australian Defence Force Cover Act 2015* within the definition of **Act administered by CSC** in **section 4**.

92. **Item 43** inserts definitions of *ADF Cover*, *ADF Super* and *ADF Super Fund* in **section 4**.
93. **Item 44** inserts reference to the ADF Super Trust Deed within the definition of *governing deed* in **section 4**.
94. **Item 45** replaces the definition of *military schemes* in **section 4** with one that includes reference to ADF Super and ADF Cover.
95. **Item 46** inserts a reference to the ADF Super Fund in the definition of *superannuation fund administered by CSC* in **section 4**.
96. **Item 47** inserts a reference to ADF Super and ADF Cover in the definition of *superannuation scheme administered by CSC* in **section 4**.
97. **Item 48** adds reference to the *Australian Defence Force Superannuation Act 2015* and the *Australian Defence Force Cover Act 2015* in **subsection 8(3)**. The effect of this is to require CSC to have regard to the unique nature of military service when performing a function under those acts.
98. **Item 49** amends **subparagraph 30(1)(c)(i)** to exclude ADF Cover from the annual report to address the performance of CSC's functions in relation to each superannuation scheme and superannuation fund administered by it during the year. The reason for this is that there is no superannuation fund for ADF Cover.
99. **Item 50** inserts a reference to the *Australian Defence Force Cover Act 2015* in **subsection 30(2)** which has the effect of requiring CSC to prepare an annual report to address on its general administration of the Act.
100. **Item 51** amends **section 34** to ensure that when the Chair and Directors of CSC are performing a function in relation to ADF Cover, their remuneration is met from the Consolidated Revenue Fund, because ADF Cover does not have a separate fund from which that remuneration can be met.
101. The item also amends **section 35** to provides that, if money is payable by CSC in respect of an action, liability, claim or demand that relates to ADF Cover, the payment is to be made out of the Consolidated Revenue Fund because ADF Cover does not have a separate fund.
102. **Item 52** adds reference to the *Australian Defence Force Superannuation Act 2015* and the Trust Deed (within the meaning of that Act) to **subsection 35(5)** which enables the regulations to modify or cease the operation of the section as it applies to the ADF Super governing legislation. This provision gives flexibility to allow ADF Super to operate on the same basis as other similar superannuation schemes in relation to indemnities.
103. **Item 53** adds the *Australian Defence Force Cover Act 2015* to a list of acts for which CSC may delegate its power to reconsider its own decisions or decisions made by its delegates in relation to ADF Cover. The effect is that reconsideration of decisions by CSC and its delegates in relation to ADF Cover can only be undertaken by the Defence Force Case Assessment Panel established under the DFRDB Act.

Income Tax Assessment Act 1997

104. **Item 54** amends **section 55-5** of the *Income Tax Assessment Act 1997* to ensure that any amount or pension paid under the *Australian Defence Force*

Superannuation Act 2015 and the *Australian Defence Force Cover Act 2015* are not exempt from income tax. This is to ensure the consistency of tax treatment with benefits paid from other Commonwealth superannuation arrangements.

Military Rehabilitation and Compensation Act 2004

105. Compensation paid under the *Military Rehabilitation and Compensation Act 2004* to members or former members of the ADF is offset against military superannuation invalidity benefits. Changes are required to the *Military Rehabilitation and Compensation Act 2004* to allow compensation paid under that Act to be offset against payments made under ADF Cover.

106. **Item 55** includes ADF Cover within the definition of *Commonwealth superannuation scheme* under **subsection 5(1)**.

107. **Item 56** includes ADF Cover within the definition of *Commonwealth superannuation scheme* under **subsection 5(1)**.

Military Superannuation and Benefits Act 1991

108. As part of the introduction of ADF Super, the current MSBS will be closed to new members from 1 July 2016. The following clauses contain amendments to effect the closing of MSBS.

109. The following clauses also contain amendments to reduce red tape and increase cross-agency communication for the administration of MSBS.

110. **Item 57** inserts a definition of *member* into **subsection 3(1)** to refer to new **sections 6 and 7**.

111. **Item 58** repeals **section 6** which sets out the membership for MSBS and replaces the sections with two new sections. New **section 6** provides that a member of the Permanent Forces and a member of the Reserves who is rendering continuous full-time service under an undertaking that has been accepted is a member of MSBS subject to exclusions set out in new **section 7**.

112. New **section 7** provides that eligible members of the Defence Force for the purposes of the DFRDB Act (effectively, contributing DFRDB members) are not MSBS members. It also provides that persons who become members of the Permanent Forces or members of the Reserves who commence a period of continuous full-time service on or after 1 July 2016 are not members if they do not have a preserved MSBS employer benefit.

113. MSBS members who elect to become ADF Super members are not MSBS members. If a MSBS member chooses to join ADF Super, they will not be able to contribute to MSBS. This choice will affect any future period of ADF service. MSBS members who choose to join ADF Super will not be able to choose to rejoin MSBS as a contributing member at a later time.

114. **Item 59** inserts a provision that enables CSC to presume that information provided to CSC by the Department is correct for the purposes of the MSBS Trust Deed. A tribunal, authority or person empowered to review a decision of CSC is not bound by any such presumption made by CSC.

115. This clause is designed to reduce administrative burden and red tape. It ensures that CSC is not required to verify information provided to it by the

Department. The clause is not intended to prevent CSC from verifying any information provided to it should it so wish.

116. **Item 60** expands the people to whom the Minister may delegate his powers under the Act or regulations to an employee of the administrator, CSC. This is consistent with the Minister being able to delegate all or any of his powers to the CEO of ComSuper or a member of the staff of ComSuper.

Superannuation Act 2005

117. **Item 61** inserts new **subsection 5(1A)** into the *Superannuation Act 2005*. **Section 5** sets out who is a public sector employee for the purposes of determining eligibility for membership of the Public Sector Superannuation Accumulation Plan under **section 13** of the Act. The new **subsection 5(1A)** is inserted to make it clear that a member of the Defence Force is not a public sector employee for the purposes of the Act just because the person is being paid by the Commonwealth as a member of the Defence Force.

Superannuation Industry (Supervision) Act 1993

118. Insurance is a key element of the benefits provided to members of a superannuation fund. These benefits protect members against the risk of not being able to accumulate sufficient retirement savings, for themselves or their dependents, due to having to cease work as a result of injury or illness or as a result of death.

119. For this reason, trustees are required to provide minimum levels of default life insurance and total and permanent disability insurance to members of their fund that hold the MySuper product on an opt-out basis. Trustees that cannot obtain opt-out insurance at a reasonable cost must provide MySuper members with compulsory insurance.

120. A military specific statutory death and invalidity scheme, provided by the Commonwealth, ADF Cover, is being established. From 1 July 2016, ADF Super members will be covered under this statutory scheme as will members who could have been ADF Super members but for choosing another fund into which Defence's employer contributions are to be paid.

121. **Section 68AA** of *Superannuation Industry (Supervision) Act 1993* (SIS Act) sets out the requirement for trustees to provide death and invalidity cover under a policy obtained through an insurer. Failure to do so is a breach of the trustees licence.

122. **Item 62** inserts a provision that exempts ADF Super from the requirement to provide death and invalidity insurance under a policy provided by an insurer. It does this on the basis that all members of ADF Super (within the meaning of the *Australian Defence Force Superannuation Act 2015*) will be provided with death and invalidity insurance under the statutory ADF Cover scheme at no cost to members of the ADF.

123. This clause also exempts trustees of other schemes regulated under the superannuation regulatory regime from the requirement to provide death and invalidity insurance to members of the ADF who would have been members of ADF Super, except that they exercised choice and chose another fund into which the Department's contributions are paid.

Superannuation (Resolution of Complaints) Act 1993

124. The *Superannuation (Resolution of Complaints) Act 1994* establishes the Superannuation Complaints Tribunal (SCT) for the external resolution of complaints made by, among others, members and beneficiaries of superannuation funds and persons affected by insurers' decisions about death and invalidity benefits. It is proposed that the SCT be given the power to provide external review of decisions of CSC in relation to benefits provided under ADF Cover (it will already have the power to review decisions of CSC in relation to ADF Super).

125. **Item 63** inserts a new **section 4C** to provide for the external review of decisions in relation to benefits payable to those covered under the *Australian Defence Force Cover Act 2015*.

PART 2 – APPLICATION PROVISIONS

126. **Item 64** makes new **section 52A**, which sets the employer contribution rate at 16.4% for ADF Super members and those who would have been ADF Super members but for choosing another fund to which the Department is to contribute (see item 2 above), applicable from 1 July 2016.

127. **Item 65** makes new **section 52B** which allows the Department to pass on information to facilitate invalidity classification for DFRDB and MSBS members (see item 2 above), applicable immediately.

128. **Item 66** has the effect of preserving the present arrangements for DFRDB recipient members who return for a further period of service prior to 1 July 2016 where that service ends on or after 1 July 2016 (that is, the requirement to make an election before commencing service, the suspension or cancellation of retirement pay as the case may be, the requirement to commute recalculated retirement pay after the completion of further service, etc.).

SCHEDULE 2 – FLEXIBLE SERVICE ARRANGEMENTS IN THE PERMANENT FORCES

129. At present, Defence legislation provides for two types of service for members of the ADF - permanent and reserve service. All members of the permanent force serve on a continuous full-time basis. Reserve members are not bound to render continuous full-time service, other than when they voluntarily undertake to render continuous full-time service for a specified period of time and that undertaking is accepted.

130. These conditions of service are set out in the *Defence Act 1903*, the *Naval Defence Act 1910* and the *Air Force Act 1923*.

131. Under current arrangements, which are limited by the provisions of the current DFRDB and MSBS superannuation arrangements, members of the permanent force who wish to work other than full-time are required to take part-time leave without pay. The period of part-time leave without pay cannot exceed 21 days for any particular period without having adverse superannuation consequences by creating a break in service. This constrains the flexibility available to permanent ADF members and the Chiefs of Service who are responsible for providing capability.

132. The following amendments to the *Defence Act 1903*, the *Naval Defence Act 1910* and the *Air Force Act 1923* introduce a new contemporary concept of Defence service, effectively, formalising the present arrangements, removing the need for any member of the permanent force to take part-time leave without pay if they wish to render flexible service. It is not necessary to provide similar arrangements for members of the Reserves who already have access to flexible service through the use of Reserve service days (in lieu of undertaking continuous full-time service).

133. This category of service will provide greater flexibility for permanent ADF members in line with contemporary community standards of employment. It will also give the Chiefs of Service greater flexibility in dealing with capability.

134. The new flexible service arrangements, will work in conjunction with the introduction of ADF Super to provide flexible, modern and equitable conditions of service for ADF members to assist in the delivery of Defence capability.

Air Force Act 1923

135. **Item 1** inserts new **section 4H** after **section 4G** to provide for flexible service arrangements for members of the Permanent Air Force.

136. **Subsection 4H(1)** provides that the Chief of Air Force may determine a class of persons who may render flexible service instead of continuous full-time service. The determination does not mean that everyone in that class is required to participate in flexible service arrangements. In that determination, the Chief may determine a period or pattern of service that constitutes the flexible service.

137. A note to the subsection advises the reader that a person who is in a class of persons determined by the Chief does not have to participate in flexible service arrangements (that is, the person does not have to apply).

138. **Subsection 4H(2)** provides that any person who is a member of the Permanent Air Force may apply to the Chief of Air Force in writing to render

flexible service, even if the person is not in the class of person's identified in the Chief's determination. A person who is in a class of persons approved for flexible service, must also apply to render flexible service.

139. **Subsection 4H(3)** sets out that the Chief may determine that a member who has applied may render flexible service and may determine the period or pattern of service that constitutes that flexible service and the period during which the determination is in force. A note to the subsection reminds the reader that a determination may be varied or revoked.

140. **Subsection 4H(4)** provides that even if a person is in a class of persons identified as able to undertake flexible service, the Chief may still:

- a. refuse an individual's application for flexible service; or
- b. determine a different period or pattern of flexible service to that set out in the determination made under **subsection 4H(1)**.

141. A determination under **subsections 4H(3) and 4H(4)** is a decision under an enactment and would be subject to external merits review under the provisions of the *Administrative Decisions (Judicial Review) Act 1977*.

142. **Subsection 4H(5)** provides that a person rendering flexible service in accordance with a determination made under **subsection 4H(3)** is taken to be rendering continuous full time air-force service for the garnishee provisions of the *Defence Act 1903 (section 120B)*, for all the purposes of the *Defence Force Discipline Act 1982*, the DFRDB Act, the MSB Act, for Ministerial determinations of non-salary related allowances for members of the ADF (**section 58B** of the *Defence Act 1903*), for determinations of the Defence Force Remuneration Tribunal of salary related allowances for members of the ADF (**section 58H** of the *Defence Act 1903*) for any instruments made for the purpose of the *Defence Act 1903*, the *Defence Force Discipline Act 1982*, the DFRDB Act and the MSB Act or any other Act, instrument or provision prescribed by regulation.

143. **Subsection 4H(6)** provides that, without limiting **subsections 4H(1) and 4H(3)**, a flexible service determination may deal with:

- a. the treatment of flexible service, including how remuneration and allowances are to be treated, for a person or persons in a class; and
- b. whether the person or persons rendering flexible service under a determination are fulfilling their obligation to render continuous full time air-force service under **section 4G**.

144. **Subsection 4H(7)** provides that, at any time, the Chief may revoke or vary a flexible service determination made under **subsections 4H(1) and 4H(3)**. Permanent members undertaking flexible service have the same service obligation as members of the permanent force not undertaking flexible service. This provision ensures that the Chief is able to require persons undertaking flexible service to meet their service obligation so that, at any time, the member can be required to render continuous full time service.

145. **Subsection 4H(8)** sets out conditions on which a flexible service determination made under **subsection 4H(3)** is automatically revoked.

146. **Subsection 4H(9)** provides that the Chief of the Defence Force may, at any time, direct the Chief to revoke a determination under **subsection 4H(3)**. The Chief of the Defence Force may use this power if he or she is satisfied that it is appropriate to do so for operational or other requirements of the Defence Force.

147. The purpose of **subsection 4H(9)** is to provide the Chief of the Defence Force the power to manage overall Defence capability through directing the Service Chiefs.

148. **Subsection 4H(10)** provides that, to avoid doubt, the Chief must comply with the direction of the Chief of the Defence Force under **subsection 4H(9)**.

149. **Subsection 4H(11)** provides that a determination or direction made under **section 4H** is not a legislative instrument within the meaning of **section 5** of the *Legislative Instruments Act 2003*. The purpose of the determination making power is to create a class of persons who can access flexible service arrangements at a particular time in their career in the permanent force. It is an instrument that relates to the terms and conditions of those members' engagement with the ADF. As such, a determination for these purposes is an internal employment related matter for the ADF and is consistent with the exemption provided in the Legislative Instruments Regulations 2004.

150. **Item 2** inserts **subsection 8A(1AA)** which ensures that the power to make flexible service determinations under **section 4H** may not be delegated to an officer of the Permanent Air Force below the rank of Air Commodore.

Defence Act 1903

151. **Item 3** inserts new **section 46** to provide for flexible service arrangements for members of the Regular Army.

152. **Subsection 46(1)** provides that the Chief of Army may determine a class of persons who may render flexible service instead of continuous full-time service. The determination does not mean that everyone in that class is required to participate in flexible service arrangements. In that determination, the Chief may determine a period or pattern of service that constitutes the flexible service.

153. A note to the subsection advises the reader that a person who is in a class of persons determined by the Chief does not have to participate in flexible service arrangements (that is, the person does not have to apply).

154. **Subsection 46(2)** provides that any person who is a member of the Regular Army may apply to the Chief in writing to render flexible service, even if the person is not in a class of persons identified in the Chief's determination. A person who is in a class of persons approved for flexible service, must also apply to render flexible service.

155. **Subsection 46(3)** sets out that the Chief may determine that a member who has applied may render flexible service and may determine the period or pattern of service that constitutes that flexible service and the period during which the determination is in force. A note to the subsection reminds the reader that a determination may be varied or revoked.

156. **Subsection 46(4)** provides that even if a person is in a class of persons identified as able to undertake flexible service, the Chief may still:

- a. refuse an individual person's application for flexible service; or
- b. determine a different period or pattern of flexible service to that set out in the determination made under **subsection 46(1)**.

157. A determination under **subsections 46(3) and 46(4)** is a decision under an enactment and would be subject to external merits review under the provisions of the *Administrative Decisions (Judicial Review) Act 1977*.

158. **Subsection 46(5)** provides that a person rendering flexible service in accordance with a determination made under **subsection 46(3)** is taken to be rendering continuous full time Army service for the garnishee provisions of the *Defence Act 1903 (section 120B)*, for all the purposes of the *Defence Force Discipline Act 1982*, the DFRDB Act, the MSB Act, for Ministerial determinations of non-salary related allowances for members of the ADF (**section 58B** of the *Defence Act 1903*), for determinations of the Defence Force Remuneration Tribunal of salary related allowances for members of the ADF (**section 58H** of the *Defence Act 1903*) for any instruments made for the purpose of the *Defence Act 1903*, the *Defence Force Discipline Act 1982*, the DFRDB Act and the MSB Act or any other Act, instrument or provision prescribed by regulation.

159. **Subsection 46(6)** provides that, without limiting **subsections 46(1) and 46(3)**, a flexible service determination may deal with:

- a. the treatment of flexible service, including how remuneration and allowances are to be treated, for a person or persons in a class; and
- b. whether the person or persons rendering flexible service under a determination are fulfilling their obligation to render continuous full time Army service under **section 45**.

160. **Subsection 46(7)** provides that, at any time, the Chief may revoke or vary a flexible service determination made under **subsections 46(1) and 46(3)**. Permanent members undertaking flexible service have the same service obligation as members of the permanent force not undertaking flexible service. This provision ensures that the Chief is able to require persons undertaking flexible service to meet their service obligation so that, at any time, the member can be required to render continuous full time service.

161. **Subsection 46(8)** sets out conditions on which a flexible service determination made under **subsection 46(3)** is automatically revoked.

162. **Subsection 46(9)** provides that the Chief of the Defence Force may, at any time, direct the Chief of Army to revoke a determination under **subsection 46(3)**. The Chief of the Defence Force may use this power if he or she is satisfied that it is appropriate to do so for operational or other requirements of the Defence Force.

163. The purpose of **subsection 46(9)** is to provide the Chief of the Defence Force the power to manage overall Defence capability through directing the Service Chiefs.

164. **Subsection 46(10)** provides that, to avoid doubt, the Chief of Army must comply with the direction of the Chief of the Defence Force under **subsection 46(9)**.

165. **Subsection 46(11)** provides that a determination or direction made under **section 46** is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. The purpose of the determination making power is to create a class of persons who can access flexible service arrangements at a particular time in their career in the permanent force. It is an instrument that relates to the terms and conditions of those members' engagement with the ADF. As such a determination for these purposes is an internal employment related matter for the ADF and is consistent with the exemption provided in the Legislative Instruments Regulations 2004.

166. **Item 4** amends **subsection 120A(4AA)** of the *Defence Act 1903* to ensure that the power to make flexible service determinations under section 46 may not be delegated to an officer of the Regular Army below the rank of Brigadier.

Defence Force Retirement and Death Benefits Act 1973

167. **Item 5** inserts **subsection 19(3)** to make it clear that the contributions of a DFRDB contributing member who is rendering flexible service are to be based on the rate of pay applicable to the member as if the member was not rendering flexible service (that is, the contributions will be 5.5% of the annual rate of salary at the highest increment for rank held within a pay grade applicable to the member and any service allowance being paid).

Naval Defence Act 1910

168. **Item 6** inserts new **section 32** to provide for flexible service arrangements for members of the Permanent Navy.

169. **Subsection 32(1)** provides that the Chief of Navy may determine a class of persons who may render flexible service instead of continuous full-time service. The determination does not mean that everyone in that class is required to participate in flexible service arrangements. In that determination, the Chief may determine a period or pattern of service that constitutes the flexible service.

170. A note to the subsection advises the reader that a person who is in a class of persons determined by the Chief does not have to participate in flexible service arrangements (that is, the person does not have to apply).

171. **Subsection 32(2)** provides that any person who is a member of the Permanent Navy may apply to the Chief in writing to render flexible service, even if the person is not in a class of persons identified in the Chief's determination. A person who is in a class of persons approved for flexible service, must also apply to render flexible service.

172. **Subsection 32(3)** sets out that the Chief may determine that a member who has applied may render flexible service and may determine the period or pattern of service that constitutes that flexible service and the period during which the determination is in force. A note to the subsection reminds the reader that a determination may be varied or revoked.

173. **Subsection 32(4)** provides that even if a person is in a class of persons identified as able to undertake flexible service, the Chief of Navy may still:

- a. refuse an individual person's application for flexible service; or

- b. determine a different period or pattern of flexible service to that set out in the determination made under **subsection 32(1)**.

174. A determination under **subsections 32(3) and 32(4)** is a decision under an enactment and would be subject to external merits review under the provisions of the *Administrative Decisions (Judicial Review) Act 1977*.

175. **Subsection 32(5)** provides that a person rendering flexible service in accordance with a determination made under **subsection 32(3)** is taken to be rendering continuous full time Naval service for the garnishee provisions of the *Defence Act 1903 (section 120B)*, for all the purposes of the *Defence Force Discipline Act 1982*, the DFRDB Act, the MSB Act, for Ministerial determinations of non-salary related allowances for members of the ADF (**section 58B** of the *Defence Act 1903*), for determinations of the Defence Force Remuneration Tribunal of salary related allowances for members of the ADF (**section 58H** of the *Defence Act 1903*) for any instruments made for the purpose of the *Defence Act 1903*, the *Defence Force Discipline Act 1982*, the DFRDB Act and the MSB Act or any other Act, instrument or provision prescribed by regulation.

176. **Subsection 32(6)** provides that, without limiting **subsections 32(1) and 32(3)**, a flexible service determination may deal with:

- a. the treatment of flexible service, including how remuneration and allowances are to be treated, for a person or persons in a class; and
- b. whether the person or persons rendering flexible service under a determination are fulfilling their obligation to render continuous full time Naval service under **section 31**.

177. **Subsection 32(7)** provides that, at any time, the Chief may revoke a flexible service determination made under **subsections 32(1) and 32(3)**. Persons undertaking flexible service still have the same service obligation as members of the permanent force not undertaking flexible service. This provision ensures that the Chief is able to require persons undertaking flexible service to meet their service obligation so that, at any time, the member can be required to render continuous full time service.

178. **Subsection 32(8)** sets out conditions on which a flexible service determination made under **subsection 32(3)** is automatically revoked.

179. **Subsection 32(9)** provides that the Chief of the Defence Force may, at any time, direct the Chief of Navy to revoke a determination under **subsection 32(3)**. The Chief of the Defence Force may use this power if he or she is satisfied that it is appropriate to do so for operational or other requirements of the Defence Force.

180. The purpose of **subsection 32(9)** is to provide the Chief of the Defence Force the power to manage overall Defence capability through directing the Service Chiefs.

181. **Subsection 32(10)** provides that, to avoid doubt, the Chief of Navy must comply with the direction of the Chief of the Defence Force under **subsection 32(9)**.

182. **Subsection 32(11)** provides that a determination or direction made under **section 32** is not a legislative instrument within the meaning of **section 5** of the *Legislative Instruments Act 2003*. The purpose of the determination making power is to create a class of persons who can access the flexible service arrangement at a particular time in their career in the permanent force. It is an instrument that relates to the terms and conditions of those members' engagement with the ADF. As such a determination for these purposes is an internal employment related matter for the ADF and is consistent with the exemption provided in the Legislative Instruments Regulations 2004.

183. **Item 7** inserts **subsection 44B(3AA)** to ensure that the power to make flexible service determinations under **section 32** may not be delegated to an officer of the Permanent Navy below the rank of Commodore.

SCHEDULE 3 – AMENDMENTS CONTINGENT ON THE ACTS AND INSTRUMENTS (FRAMEWORK REFORM) ACT 2015

184. The following items make amendments to the *Australian Defence Force Superannuation Act 2015* to reflect changes that will come into operations when the *Acts and Instruments (Framework Reform) Act 2015* comes into operation. All of the amendments are administrative in nature and do not change the substantive purpose of the primary provision.

185. **Items 1 through 4** change references to the *Legislative Instruments Act 2003* wherever occurring in the *Australian Defence Force Superannuation Act 2015* to references to the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

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

Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015

This Bill 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 Bill

The Australian Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015 (Consequential Bill) is part of a package of three Bills to establish the Australian Defence Force Superannuation Scheme (ADF Super) and facilitate the introduction of the Australian Defence Force's future workforce model by providing flexible service conditions for permanent members of the Australian Defence Force (ADF)

Human Rights Implications

The Bill promotes the following rights:

- Article 7, International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to just and favourable conditions of work;
- Article 9, ICESCR, the right to social security;
- Article 11, ICESCR, the right to an adequate standard of living;
- Article 2(2), ICESCR, the right to equality and non-discrimination.
- Article 26, International Covenant on Civil and Political Rights; and (ICCPR), the right to equality and non-discrimination.

This Bill proposes to introduce new and modern superannuation arrangements which provide just and favourable conditions of work for ADF members. The employer contributions will exceed the minimum requirement under the *Superannuation Guarantee (Administration) Act 1992* and there is no compulsion for the ADF member to make additional contributions. However, they can elect to do so to improve their circumstances. This will provide an enhanced standard of living and social security environment.

The Bill also proposes to provide a military specific statutory death and invalidity scheme and all ADF Superannuation members will have access to this insurance without any employee contributions. These premiums will be contributed from a specific Government consolidated appropriation. These measures promote the right to social security and an enhanced living standard.

The Bill further proposes to introduce flexible service arrangements which provide just and favourable conditions of work for ADF members. The flexible service arrangements will allow ADF members to better balance their military careers and their personal lives. Members on flexible service arrangements will have consistent comparative benefits to other ADF members, including access to death and invalidity and superannuation benefits. This promotes the right to

equality and non-discrimination. The introduction of flexible service arrangements in legislation is consistent with the *Review into the Treatment of Women in the Australian Defence Force* conducted by Elizabeth Broderick, in her role as the Sex Discrimination Commissioner. This measure promotes the right to equality and non-discrimination.

The Bill may infringe the following human right:

- Articles 17, ICCPR, the right to privacy.

Article 17 of the ICCPR prohibits State Parties from arbitrary or unlawful interference with privacy.

The Bill provides that the Department give the Commonwealth Superannuation Corporation (CSC) information on individual ADF members where that information is relevant to the determining of a benefit for that member. Although this may appear to impact the right to privacy, the transfer of an ADF member's information between Commonwealth entities is not arbitrary or unlawful.

The information is transferred only to ensure expediency in the calculation of a benefit and is limited to only information that is relevant to that calculation. This limitation is reinforced by the requirement in the Bill that CSC only use personal information for the purposes of administering the military superannuation schemes. CSC is responsible for the privacy, confidentiality and security of personal information it holds in accordance with the *Privacy Act 1988* and the Australian Privacy Principles under that Act. Accordingly, the Bill does not impact the right to privacy.

Conclusion:

The Australian Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015 is compatible with human rights. It advances the protection of human rights.