Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

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House:  House of Representatives
Portfolio:  Defence
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Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at June 2017.
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Purpose of the Bill

The purpose of the Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 (the Bill) is to enact four separate measures being:

• to expand the conditions under which a prohibited substance positive result must be disregarded
• to put in place greater protections for Reserve members in relation to their employment and education
• to transfer the hydrographic, meteorological and oceanographic functions of the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation and
• to align provisions in the Australian Defence Force Cover Act 2015 (ADFC Act) with those in other military superannuation schemes and to clarify the definition of an eligible child of a member or invalid.

Structure of the Bill

The Bill contains four Schedules which reflect each of those measures:

• Schedule 1 amends the Defence Act 1903 in relation to a prohibited substance positive result—in particular when it arises from appropriate usage of over the counter medication or substances administered or dispensed by authorised persons
• Schedule 2 amends the Defence Reserve Service (Protection) Act 2001 (DRS Protection Act) to ensure that all Reservists are eligible for the full range of protections available under that Act in respect of their employment and education. It also makes a minor contingent amendment to the Regulatory Powers (Standardisation Reform) Act 2017 (if enacted)
• Schedule 3 amends the Intelligence Services Act 2001, the Navigation Act 2012 and the Telecommunications Act 1997 to allow for the transfer of specified functions to the Australian Geospatial-Intelligence Organisation and
• Schedule 4 makes minor amendments to the ADFC Act.

As the matters covered by each of the Schedules are independent of each other, the relevant background, stakeholder comments and analysis of the provisions are set out under each Schedule number.

Committee consideration

Selection of Bills Committee

At its meeting of 10 May 2017 the Senate Selection of Bills Committee determined that the Bill not be referred to Committee for inquiry and report.¹

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills commented on aspects of the amendments to the DRS Protection Act set out in Schedule 2 to the Bill.² A discussion about those comments is under the heading for Schedule 2 below.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.³

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has made comments about the amendments in Schedule 2 to the Bill that impose civil penalties in certain circumstances.⁴ Those comments are canvassed under the heading for Schedule 2 below.

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4. The Statement of Compatibility with Human Rights can be found at pages 4–15 of the Explanatory Memorandum to the Bill.
Financial implications

According to the Explanatory Memorandum, ‘the amendments in the Bill will have no additional impact on Commonwealth expenditure or revenue’. 6

Schedule 1—testing for prohibited substances

Commencement

The provisions of Schedule 1 to the Bill commences on Proclamation or six months after Royal Assent, whichever occurs first.

Background

According to the Explanatory Memorandum to the Bill:

The amendment [in Schedule 1] is needed because Defence members and Defence civilians who test positive for a prohibited substance solely because they took a prescribed or dispensed or over-the-counter medication are currently required by the Act to show cause why they should remain in the Service or why the arrangement in which they were engaged as a Defence civilian should not be terminated. If the same medication was administered, supplied or prescribed by a qualified medical practitioner, the Act allows the member’s result to be appropriately treated as if it was negative. 7

Key issues and provisions

Nature of prohibited substances

Currently, Part VIIIA of the Defence Act sets out the legislative framework within which Defence tests defence members and defence civilians for the use of prohibited substances.

Section 93 of the Defence Act defines a prohibited substance as either a narcotic substance (within the meaning given by the Customs Act 1901) or any substance that is a prohibited substance because of a determination. The relevant determination is the Defence (Prohibited Substances) Determination 2015. The Determination provides that the following are prohibited substances for the purposes of Part VIIIA of the Defence Act:

- a substance in class S0, S1, S2, S3, S5, S6, S7, S8 or S9 of the 2015 Prohibited List (published by the World Anti-Doping Agency, as in force under the World Anti-Doping Code on 1 January 2015) and
- a substance listed in Schedule 4, 8 or 9 to the Poisons Standard as in force on 1 July 2015 (made in accordance with the Therapeutic Goods Act 1989).

Item 1 in Part 1 of Schedule 1 of the Bill repeals the definition of narcotic substance. Item 2 updates the definition of prohibited substance so that it refers only to a substance which is covered by a determination. This means that the relevant determination is the Defence (Prohibited Substances) Determination 2015. If additional substances are identified as requiring prohibition, the current Determination can be repealed and replaced with an updated list of prohibited substances.

Testing requirements

The existing law provides that the Chief of the Defence Force may, by written instrument, determine that a person is an authorised person for the purposes of Part VIIIA of the Defence Act. 8 The authorised person supervising the test must give a written notice to the person who is to provide a sample before the sample is provided, about how the sample will be dealt with. 9

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7. Ibid., pp. 4–5.
8. Section 93A of the Defence Act 1903.
Consequences of a positive test

Where a prohibited substance test in respect of a person returns a positive test result the ‘relevant authority’ (which is the Chief of the Defence Force for all defence civilians and defence members below the rank of Major-General and the Governor-General for members above this rank) must give the person written notice of the positive test result and invite the person to give a written statement of reasons as to:

- if the person is an officer—why the officer’s appointment should not be terminated
- if the person is a defence member other than an officer—why the defence member should not be discharged or
- if the person is a defence civilian—why the arrangement under which the person is a defence civilian should not be terminated.  

Item 6 of Part 2 of Schedule 1 to the Bill repeals the definition of relevant authority in section 93, as under the Bill any functions currently undertaken by the relevant authority will be performed by the Chief of the Defence Force (such as inviting the person who tested positive to provide a statement of reasons and receiving and considering that statement).

Item 7 of Part 2 of Schedule 1 to the Bill inserts the definition of terminate into the Defence Act to put beyond doubt that a reference to terminating the service of a person means to terminate the service of a defence member or to terminate the arrangement under which a person is a defence civilian.

In keeping with the clarification of the command structure of the ADF by the Defence Legislation Amendment (First Principles) Act 2015, the Chief of Defence Force (CDF) is specified as the person responsible for a decision to dismiss a member who has been the subject of a positive test. This power can be delegated.

Item 13 of Part 2 of Schedule 1 to the Bill repeals sections 101–104 of the Defence Act and inserts proposed section 101 which simplifies the process leading to the termination of a member of the ADF. This aligns the provisions of the Defence Act with those contained in the Defence Regulations 2016.

Disregarding test results

Schedule 1 of the Bill amends Part VIII A of the Defence Act so that Defence can use Defence Instructions to broaden and enlarge the circumstances under which a positive test result for a prohibited substance can be set aside.

The Statement of Compatibility with Human Rights notes the positive human rights implications of the Bill. It cites article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which relates to the right to health and notes that access to properly obtained medication is important in relation to this right. In addition, the Statement of Compatibility notes article 6, which is the right to work and the right not to be deprived of work unfairly and states that the new provisions mean that Defence members are less likely to be deprived of work unfairly.

The Statement of Compatibility with Human Rights also states that the right to privacy contained in the International Covenant on Civil and Political Rights (ICCPR) will be promoted by allowing the Defence Instructions to create a framework in which members will not have to show cause why their employment should not be terminated if they have been subject to a positive test result resulting from prescription or over the counter medications.

10. See definition of ‘relevant authority’ in section 93 of the Defence Act.
11. Defence Act, section 100.
12. Defence Act, section 93.
13. Section 11 of the Defence Act provides that for the purposes of the administration of the Defence Force, the Secretary and the Chief of the Defence Force together may issue instructions known as Defence Instructions.
Currently, a positive test result is to be disregarded if an authorised person is satisfied that the presence of any prohibited substance revealed by the testing was wholly attributable to something done in accordance with the directions or recommendations of a legally qualified medical practitioner. 16

Item 9 of Schedule 1 to the Bill repeals and replaces subsection 98(2) of the Defence Act to require a positive test result to be set aside in circumstances which will be specified in a Defence Instruction. The effect of the amendment will address the current inconsistency which was identified in the Explanatory Memorandum as set out under the heading ‘Background’ above.

Schedule 2—reserve service

Commencement

All the provisions in Schedule 2 to the Bill—with the exception of items 73 and 74—commence on the 28th day after Royal Assent. The amendments in items 73 and 74 are contingent on the enactment of the Regulatory Powers (Standardisation Reform) Act 2017. 17 The Regulatory Powers (Standardisation Reform) Bill 2016 was introduced into the Senate on 12 October 2016 and into the House of Representatives on 9 February 2017.

Background

Protection review

In April 2007, the Protection Review (chaired by Major General Neil Wilson) was initiated and, at that time, aimed to assess the ‘appropriate levels of protection in [Reserve members’] civilian occupations without burdening employers with unnecessary compliance’. 18 It is likely that the review outcomes were not publicly announced as it commenced in an election year, which resulted in a change of government. While the three subsequent Defence white papers (2009, 2013 and 2016) noted the importance of Reservists to the Australian Defence Force’s (ADF’s) overall capability, there was no explicit mention of changes to Reserve policy based on findings from the Protection Review. 19 Ten years later, the outcomes of this review now provide the basis for the amendments proposed in the Bill.

According to the Explanatory Memorandum to the Bill, the Protection Review:

... concluded that, overall, the Act was working well and achieving its objectives. However, the Protection Review recommended a number of enhancements to the Act. 20

The amendments in Schedule 2 to the Bill are said to implement many of these recommendations. 21

Unfortunately, the Protection Review does not appear to be in the public domain and the Explanatory Memorandum to the Bill is silent as to the number of recommendations in total and whether the measures in Schedule 2 are a complete or partial response to those recommendations.

Role of the Reserves

In 2001, the number of ADF Reservists was 19,835, which was 22.4 per cent below the budgeted estimate. 22 By 2007, the number had increased to 23,810. 23 The Defence Annual Report 2015–16 reported Reserve force figures in a bit more detail, showing that 19,338 Reserve members received pay for days served. 24 The report showed that while the number of service days increased from the previous year, the number of Reservists undertaking

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21. Ibid.
paid service had decreased. Additionally, 926 Reserve members were on continuous full-time service (Navy 375, Army 440 and Air Force 111). Of these, the number deployed on operational service was not included.

The 2016 Defence White Paper noted that since 1999, approximately 14,000 Reserve members have deployed on operations in Australia and overseas: around 18 per cent of all deployed ADF personnel. The ADF’s increased operational tempo has seen a greater use of Reserves to support large scale national security events such as the Olympics and the Commonwealth Games; humanitarian assistance and disaster relief operations such as the 2009 Victorian bushfires and 2011 Brisbane floods; and regional deployments including Timor Leste and Solomon Islands.

Recent changes to the overall ADF workforce structure and policies, as part of Project Suakin, involve the implementation of a Total Workforce Model, which includes changes to the Service Categories to allow greater flexibility for Permanent and Reserve members. These structural adjustments have been positively acknowledged by Reserve advocates such as Paul Irving (National President, Defence Reserves Association—DRA) who stated it ‘has raised awareness of the Reserve capability’. However, the DRA remains sceptical about the degree of difference it will make to the overall use of Reserve members. The DRA has been critical of the low priority given to Reserves. As Irving pointed out in April 2016:

Despite political advice emanating from the 2015 National DRA [Defence Reserves Association] Conference that the proposed amendments to the Defence Reserve Service (Protection) Act 2001 were moving through the “system” and should be considered by Parliament in the ‘autumn’ session (early 2015), this did not happen. Further, there is still no indication when the amendments will be considered by Parliament. Whilst it took Defence 12 months to endorse the findings of the July 2008 Garde review into the Protection Act, it is an indictment on both major political parties that more than seven years later these relatively non-controversial amendments, which should receive bi-partisan support, have still not been considered by Parliament. This is another indication of the lack of priority given by Government and Opposition to Reserve issues.

In 2011, the Labor Government spoke of proceeding with amendments to the DRS Protection Act, which would ‘ensure that all Reservists performing Defence service receive employment and education protection’. The amendments would also protect Reserve members from workplace harassment or detriment resulting from Reserve service. While the Bill is expected to be broadly welcomed by the Reserve community, it has taken a long time to get to this point.

**Expanding the protections**

The DRS Protection Act was established to support a greater need to use the Reserves by providing ‘for the protection of the reserves in their (primary) employment and education. It facilitates their return to civilian life’.

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25. Ibid.
26. Ibid., p. 89.
31. Ibid., pp. 2 and 8–9.
33. D Feeney (Parliamentary Secretary for Defence), ADF reserves capability: where to now?: address to the Defence Reserves Association national conference, Keswick Barracks, speech, 20 August 2011.
34. Ibid.
Basic protections
Currently the DRS Protection Act sets out the entitlements and prohibitions that apply in relation to people who are rendering or have rendered, defence service as members of the Reserves. In particular:

- Part 5 provides that the member’s employment status and entitlements, such as accrued leave, are protected.
- Part 6 protects members from having their partnership dissolved while they are absent on defence service and
- Part 7 allows a member to re-enrol in, and resume a course of education that was interrupted because they undertook defence service.

Those protections are not currently available to persons undertaking certain kinds of voluntary continuous full time service.

Items 1, 2, 8 and 9 of Part 1 of Schedule 2 to the Bill omit references to a member undertaking ‘certain kinds of voluntary continuous full time service’ so that the protections in Parts 5, 6 and 7 will be available to members undertaking all kinds of defence service. Item 44 of Part 2 of Schedule 2 to the Bill amends the definition of defence service to encompass service (including training) as a member of the Reserves.

Additional protections
Currently the DRS Protection Act provides additional protections for members who are subject of a call out. In particular:

- Part 8 postpones the debts that a member is liable to pay or would otherwise fall due after a member starts to render service as a result of a call out.
- Part 9 protects members from bankruptcy proceedings while the member is rendering service following a call out and
- Part 10 allows a member who has rendered defence service after a call out to get access to loans and guarantees to enable him or her to resume civilian life after returning from that service.

Items 11 and 19 of Part 1 of Schedule 2 to the Bill extend the existing additional protections in Parts 8 and 9 of the DRS Protection Act to a member who is rendering operational service. Item 15 inserts the definition of operational service as:

- defence service in circumstances involving one or more of the following:
  - war, warlike operations or a time of defence emergency (within the meaning of the Defence Act)
  - defence preparation
  - peacekeeping or peace enforcement
  - assistance to Commonwealth, State, Territory or foreign government authorities and agencies in matters involving Australia’s national security or affecting Australian defence interests
  - support to community activities of national or international significance
  - civil aid, humanitarian assistance, medical or civil emergency or disaster relief and
- includes defence service prescribed by the regulations and

36. For the purposes of the DRS Protection Act, member means a person who is, or has been, a member of a part of the Reserves, but does not include a person called upon to serve in the Defence Force under section 60 of the Defence Act 1903. Section 60 of the Defence Act relates to persons who have been listed in a proclamation made by the Governor-General in a time of war as being called to serve in the Defence Force for the duration of the time of war.
37. DRS Protection Act, subsection 24(2).
38. Ibid., subsection 34(2).
39. Ibid., subsection 37(2).
40. Ibid., section 11, table items 2–4.
41. For the purposes of the DRS Protection Act, call out refers to the calling out and directing the utilisation of the Defence Force under Part IIIAAA of the Defence Act 1903.
42. DRS Protection Act, subsection 40(2).
43. Ibid., subsection 62(2).
44. Ibid., section 65.
• defence service by a member involving preparing to render particular operational service or decompressing after rendering operational service as set out above.\(^{45}\)

**Protection against discrimination**

Part 4 of the *DRS Protection Act* (existing sections 14–23) makes it unlawful to refuse to give work to a person on the grounds that the person is rendering, has rendered, or might in the future render, defence service.\(^{46}\) Part 4 currently provides protection against the conduct listed below where it is carried out for a prohibited reason:

- dismissing an employee\(^ {47}\)
- hindering an employee from serving in the Reserves\(^ {48}\)
- refusing to offer a person a partnership\(^ {49}\)
- hindering a fellow partner from serving in the Reserves\(^ {50}\)
- refusing to engage a commission agent\(^ {51}\)
- terminating the contract of, or discriminating against, a commission agent for a prohibited reason\(^ {52}\)
- refusing to engage a contractor\(^ {53}\)
- terminating the contract for services, or discriminating against, a contractor in relation to the terms and conditions of a contract for services.\(^ {54}\)

A prohibited reason is one which relates to a person’s past, present or future rendering of defence service.\(^ {55}\) The Bill expands the prohibition against discrimination to also include harassment.

**Expanding the protection**

Item 76 of Part 3 in Schedule 2 to the Bill inserts *proposed subsection 14(2A)* which provides that it is also unlawful for a person to harass a worker, partner or co-worker of the person on that ground that the person is rendering, has rendered or might render defence service. In support of this new provision, *item 78* in Part 3 of Schedule 2 to the Bill inserts *proposed sections 23A and 23B* into the *DRS Protection Act*.

*Proposed subsection 23A(1)* of the *DRS Protection Act* prohibits a person from *harassing* another person for a *prohibited reason* (or for reasons that include a prohibited reason) if the other person is any of the following:

- a *protected worker* of the person
- a partner in a partnership in which the person is also a partner
- a *protected co-worker* of the person.

For the purposes of the prohibition, *harass* includes abuse or bully.\(^ {56}\) Conduct is a for a *prohibited reason* if it is engaged in because the other person may volunteer to render defence service, is rendering, or may become liable to render defence service or has previously rendered defence service.\(^ {57}\)

A *protected worker* of a person is:

- an employee of the person

45. Ibid., section 7.
46. Ibid., sections 14 and 15.
47. Ibid., section 16.
48. Ibid., section 17.
49. Ibid., section 18.
50. Ibid., section 19.
51. Ibid., section 20.
52. Ibid., section 21.
53. Ibid., section 22.
54. Ibid., section 23.
55. Ibid., section 15.
56. Ibid., *proposed subsection 23A(3)*.
57. Ibid., *proposed subsection 23A(2).*
• a commission agent or contractor of the person
• a person who is seeking to become an employee, partner, commission agent or contractor of the person
• an officer or employee of a commission agent or contractor of the person or an officer or employee of a person who is seeking to become a commission agent or contractor.  

A person is a protected co-worker of another person if the first person is an employee, commission agent or contractor of a third person and the other person is an employee, commission agent or contractor of the third person or a different person, if the first person and the other person work together in performing the duties of their respective employment, commission agencies or contracts. The Explanatory Memorandum states that this definition ‘incorporates relationships where people are working together, even if they are not strictly employed by the same person’.  

Proposed subsection 23B(1) of the DRS Protection Act makes a person vicariously liable for the actions of their employee, commission agent or contract, if they harass a protected co-worker for a prohibited reason.

Penalties

Existing penalties

Currently a breach of the prohibitions against discrimination may be a criminal offence, punishable by a maximum penalty of 30 penalty units. The new prohibition against harassment contains a penalty in equivalent terms.

At the time of writing this Bills Digest, section 4A of the Crimes Act 1914 provides that a penalty unit is equivalent to $180. However, upon the commencement of the Crimes Amendment (Penalty Unit) Act 2017 the value of a penalty unit will increase to $210 with effect from 1 July 2017. This means that the penalty will increase from a maximum of $5,400 to a maximum of $6,300.

Item 70 of Schedule 2 to the Bill inserts proposed section 78A into the DRS Protection Act to make clear that a person who contravenes a conduct provision commits an offence. The physical elements of an offence for the purposes of applying Chapter 2 of the Criminal Code (which sets out general principles of criminal responsibility) are set out in the relevant conduct provision.

Imposing civil penalties

The Bill does two things in relation to civil penalties:

• it inserts civil penalty provisions in respect of each of the prohibitions against discrimination (including the new prohibition against harassment) discussed above—that penalty being 100 penalty units
• it provides that the civil penalty provisions set out in the DRS Protection Act are enforceable under Part 4 of the Regulatory Powers Act. A discussion of this matter is set out below under the heading ‘Enforcement and remedies’.

Human Rights Committee

The Human Rights Committee commented on the liability provisions. The effect of the Bill is that certain prohibited conduct that is a criminal offence under the DRS Protection Act is also made into a civil penalty provision. The Human Rights Committee considered the factors which international jurisprudence has identified should be taken into account in deciding whether the civil penalty provisions introduced by the Bill may be

58. Ibid., proposed subsection 23A(4).
59. Ibid., proposed subsection 23A(5).
61. DRS Protection Act, subsections 15(2), 16(3), 17(2), 18(4), 19(2), 20(2), 21(3), 22(2) and 23(3).
62. Ibid., proposed subsection 23A(6).
63. Crimes Amendment (Penalty Unit) Act 2017.
64. DRS Protection Act, proposed subsections 23A(7) and 23B(1).
65. Ibid., proposed subsections 15(3) (inserted by item 48), 16(4) (inserted by item 50), 17(3) (inserted by item 52), 18(5) (inserted by item 54), 19(3) (inserted by item 56), 20(3) (inserted by item 58), 21(4) (inserted by item 60), 22(3) (inserted by item 62) and 23(4) (inserted by item 64).
considered to be criminal in nature for the purposes of international human rights law. As this was not clear from the explanatory material, including the Statement of Compatibility with Human Rights, the Human Rights Committee sought advice from the Minister for Defence to clarify the position.

The Minister responded to the Human Rights Committee as follows:

The civil penalties introduced in the Bill will only apply in employment and similar contexts, and not to the public at large. For the most part, the proposed civil penalties deal with the conduct of employers. The purpose of the civil penalties is to promote the right to safe and healthy working conditions, and to discourage behaviour in civilian employment-like environments that could dissuade a person from providing Australian Defence Force (ADF) Reserve service. The civil penalties are not intended to be punitive or deterrent in nature but, rather, they are intended to bring employers to the discussion table with the employees and Defence, so that an agreement can be reached through mediation.67

The Minister also responded to the Human Rights Committee’s concerns about the severity of the penalty:

The maximum civil penalty levels proposed are consistent with the range and type of person who are likely to engage in the relevant conduct. The proposed civil penalty provisions are, for the most part, concerned with the conduct of employers and similar, which can range in size from small businesses through to large enterprises, with a corresponding range in turnover and profit. The maximum level of the civil penalty, 100 penalty units, needs to allow for this variation, providing sufficient discouragement even for the largest employers. It is important from a defence capability perspective to discourage conduct by employers and others that could work to dissuade people from joining the ADF Reserves or from providing ADF Reserve service. A person is far less likely to provide ADF Reserve service if they are afraid of adverse consequences in their civilian employment.68

The Human Rights Committee concluded that given the particular regulatory context and the purpose and severity of the penalties, ‘the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply’.69

**Employment protection**

Part 5 of the **DRS Protection Act** (sections 24–33) protects the status and entitlements, such as accrued leave, for members who render defence service while subject to employment obligations.70

**Absent on defence service**

**Item 83** of Part 4 in Schedule 2 to the Bill inserts **proposed section 24A** into the **DRS Protection Act** which sets out the periods during which a member who is employed before starting to render defence service is **absent on defence service**.71 These are:

- any period during which the member is travelling from his, or her, residence to the place at which he, or she, is required to report for defence service
- any period while he, or she, is rendering defence service
- the period (if any) starting immediately after he, or she, ceases to render that service and ending immediately before the earlier of the time that the member resumes work and if the member does not apply to resume work—30 days after the member ceases to render that service.

The current drafting of the **DRS Protection Act** does not specifically state that Reserve members are entitled to be absent from their employment on defence service—although it does provide that an employer must not require the member to take leave concurrently with all or part of his or her absence on defence service.72 To better reflect this entitlement **item 87** of Part 4 in Schedule 2 to the Bill repeals and replaces section 26 of the **DRS Protection Act** to state in positive terms that a member is entitled to be absent on defence service and that

68. Ibid.
69. Ibid.
70. **DRS Protection Act**, subsection 24(2).
71. **Item 80** of Part 4 in Schedule 2 to the Bill repeals the existing definition of the term **absent on defence service** in section 8 of the **DRS Protection Act**.
72. **DRS Protection Act**, subsection 25(2).
the period of absence is not to be counted as a period of employment under the member’s contract of employment unless Part 5 of the DRS Protection Act states otherwise.73

Applying to resume work
Consistent with this position, items 89–91 amend the heading and the text of existing section 27 of the DRS Protection Act so that a member who is absent from his, or her, employment while on defence service may apply to the employer to resume work under the member’s contract of employment. That application must be made by the member no later than 30 days after ceasing to render that defence service.74

Existing section 28 of the DRS Protection Act provides that as soon as reasonably practicable after receiving an application to resume work, the employer must allow the member to resume work in the same capacity in which he, or she, was employed immediately before their absence and ensure that the member’s terms and conditions of employment are at least as favourable as those that would have applied but for the defence service.

Existing subsection 28(2) contains two exceptions to that general rule. Item 94 of Schedule 2 to the Bill inserts proposed subsections 28(3) and (4) to qualify those exceptions.

The amendments operate first, so that if the employer agreed to the resumption or reinstatement, but the member did not make himself, or herself, available for work as agreed between them and did not have a reasonable excuse for not doing so—then the member ceases to be absent on defence service at the time the member was to have been available for work under the agreement.75

The amendments operate second, in circumstances where because of changed circumstances since the member was employed, it was not within the employer’s power to allow the resumption or reinstatement, or the employer offered to employ the member in a capacity, and under terms and conditions, that were the most favourable that it was reasonable or practicable to offer him or her. In that case the member ceases to be absent on defence service:

• when the employer informs the member that it was not within the employer’s power to allow the resumption or reinstatement or
• if the member accepts the offer of alternative employment—when the offered employment starts or
• if the member does not accept the offer—on the earlier of the time the member declines the offer or 30 days after the offer is made.76

Education Protection
Part 7 of the DRS Protection Act (sections 37–39) currently allows a member to re-enrol in and resume, a course that the member had to interrupt in order to undertake defence service. The amendments in the Bill add the additional requirement that a body administering an education institution must make reasonable adjustments for a member who is enrolled in a course at the institution and is rendering defence service.77

Obligations of education institution
Item 104 of Schedule 2 to the Bill repeals and replaces section 38 of the DRS Protection Act to set out the obligations of a body administering an Australian education institution to a member who is enrolled at that institution before starting to render defence service. The Bill lists adjustments such as not failing the member, recognising assessment or practical work undertaken before the member started to render defence service, allowing the member to defer undertaking or completing assessment or practical work and refunding, or crediting, fees already paid.78 For the purposes of Part 7 of the DRS Protection Act, an adjustment is a

73. Item 81 repeals and replaces the definition of contract of employment in subsection 10(1) of the DRS Protection Act so that the term includes a contract of apprenticeship and an arrangement under which a person is employed.
74. DRS Protection Act, item 91 of Schedule 2 to the Bill, proposed amendment to subsection 27(3).
75. Ibid., paragraph 28(2)(a) and proposed subsection 28(3).
76. Ibid., paragraph 28(2)(b) and proposed subsection 28(4).
77. Item 101 of Schedule 2 to the Bill amends the overview of Part 7 of the DRS Protection Act in subsection 3(7). DRS Protection Act, proposed subsection 37(2).
78. DRS Protection Act, proposed subsection 38(3).
reasonable adjustment unless making it would impose unjustifiable hardship on the body administering the education institution. 79

Requirement to re-enrol member
Currently section 39 of the DRS Protection Act requires that a body administering an Australian education institution must not exclude the member from a course on the grounds that the member did not complete a requirement of the course (including any assessment) while rendering defence service or because of having rendered defence service. Item 106 of Schedule 2 to the Bill inserts proposed subsection 39(1A) to put beyond doubt that the protections in section 39 apply to a member who is enrolled at an Australian education institution at a time that he, or she, is also rendering defence service, who does not complete the course before ceasing to render the service and who applies to re-enrol and resume the course within 30 days after ceasing to render the service.

Financial liability protection
Part 8 of the DRS Protection Act (sections 40–61) currently operates to postpone debts that a member is liable to pay and that would otherwise fall due after the member starts rendering defence service as a result of a callout. Importantly, under the changes made by the Bill, this Part also applies to members rendering full time operational service.

Item 24 of Part 1 in Schedule 2 to the Bill repeals and replaces sections 41–44 of the DRS Protection Act and replaces them with proposed sections 40A to 44. Proposed subsection 40A defines the term financial arrangement as being any one of the following:

• a secured or unsecured loan
• a hire purchase agreement
• an agreement to buy something (including land)
• an agreement to lease something (including land)
• a guarantee.

Items 25, 27–28, 30, 33, 36 and 38 make consequential amendments to Part 8 of the DRS Protection Act to amend existing references to an agreement to references to a financial arrangement.

When the protection starts
Part 8 applies to:

• a liability of a member (or their dependent) who renders defence service to make a payment under a financial arrangement if the liability arose before the start day of the defence service 80
• a liability of a member (or their dependent) who renders defence service where the liability arose when the member or their dependent exercised an option under the financial arrangement to buy or lease something where the option was granted before the start day 81
• a liability of a member (or their dependent) to pay rates or other taxes in respect of land which arose before the start day of the service 82

However, there are some exceptions, including that the protection does not apply where there is a pre-existing court order enabling a party to a financial arrangement to enforce any security under the arrangement. 83

79. Ibid., proposed subsections 38(4) and (5).
80. Ibid., proposed subsection 41(1). DRS Protection Act, proposed section 13, at Item 20 of Schedule 2 to the Bill, provides that the start day for continuous full time service that a member renders as a result of a callout is the day on which the member becomes liable to render the service, whilst the start day for continuous full time service that is operational service is the day on which the member starts to render the service.
81. Ibid., proposed section 42.
82. Ibid., proposed section 43.
83. Ibid., proposed section 44.
Bankruptcy protection

Part 9 of the DRS Protection Act (sections 62–64) currently operates to protect members from bankruptcy proceedings while the member is rendering defence service following a callout. The effect of the amendments to Part 9 of the DRS Protection Act is to protect members from bankruptcy proceedings while the member is rendering defence service with effect from the start day of rendering full time operational service. This means that the protection is no longer subject to the member having been called out.

Loans and guarantees to returning members

Part 10 of the DRS Protection Act (sections 65–72) currently allows for a member who has rendered defence service after callout to get access to loans and guarantees to enable him, or her, to resume civilian life after returning from that service.

Item 42 of the Bill amends existing subsection 65(2) of the DRS Protection Act to remove a reference to ‘being called out’. The amendment creates an internal inconsistency in that it appears at first blush to expand the protection in Part 10 to any member who has rendered defence service.

However:
- no corresponding amendment is made to existing subsection 65(1)
- proposed table item 7 in section 11 of the DRS Protection Act (as amended by item 19) provides that the loans and guarantees protections contained in Part 10 apply to continuous full time services as a result of a call out and
- proposed subsection 13(1) (as amended by item 20) provides that Part 10 is to apply in relation to continuous full time service that a member renders as a result of a call out.

That being the case, item 42 is likely to require amendment before the Bill is passed.

Enforcement and remedies

Part 11 of the DRS Protection Act (sections 73–76) provides for civil enforcement and other remedies.

Item 65 of Part 2 in Schedule 2 to the Bill inserts proposed Divisions 1A—Overview of Part—and 1B—Complaints and mediation—into Part 11.

Overview

Proposed section 72A in new Division 1A is self-explanatory in that it provides a clear overview of the intended operation of an amended Part 11.

Complaints and mediation

Currently the Office of Reserve Service Protection, established by the Defence Reserve Service (Protection) Regulations 2001 (the DRS Protection Regulations) is responsible for receiving, mediating and investigating complaints about an alleged contravention of the DRS Protection Act. However, there is no provision within the DRS Protection Act to make, or to investigate, complaints about an alleged contravention. Proposed section 72B is inserted into new Division 1B to explicitly allow for regulations to be made to provide for such processes.

Scrutiny of Bills Committee

The Scrutiny of Bills Committee expressed some concern that proposed section 72B provides for regulations to be made about the processes for making and investigating complaints and for mediating disputes. Of concern to the Committee was:

It appears that the intent of proposed section 72B is to ensure that there is clear legislative authority to make the DRS (Protection) Regulations. This is demonstrated by the application provisions in subitem 72(4) which are designed to ensure that “complaints made or actions taken under the regulations prior to commencement … are taken to be complaints made or actions taken under the regulations made for the purposes of new subparagraph 72B(1)(a)”.

In addition, the Committee noted that item 71:

... seeks to amend subsection 81(2) of the *DRS Protection Act* to allow the regulations to prescribe penalties of up to 50 penalty units and civil penalties of up to 60 penalty units for offences against and contraventions of the regulations. Currently, the maximum penalty is 10 penalty units. 85

The view of the Scrutiny of Bills Committee is that significant matters, such as complaints and mediation processes (compliance with which can be enforced through offence and civil penalty provisions), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The Scrutiny of Bills Committee requested advice from the Minister in relation to those matters. 86

The Minister responded to the Scrutiny of Bills Committee stating:

The complaints and mediation scheme relating to defence reserve service is currently specified in the Defence Reserve Service (Protection) Regulations 2001 (the Regulations), which are made under the *Defence Reserve Service (Protection) Act 2001* (the Act). This has been the case since 2001.

The intent of the proposed measures in the Bill, which would amend the Act if passed, is to implement outstanding recommendations from a 2007 review of the Act, as well as some minor consequential matters.

The review gave no consideration to moving the complaints and mediation scheme into the principal legislation, so this was not considered when the Bill was drafted. Further, there has been no consultation with affected stakeholders, including potentially employer groups, for this type of change. The complaints and mediation scheme has, for the most part, been operating effectively since its inception in 2001.

The review made quite limited recommendations about the complaint and mediation scheme, which is why the proposed amendments relating to that scheme are limited ...

Defence will review the complaints and mediation scheme being moved from the regulations into the principal legislation following implementation of the Bill and prior to the Regulations sunset date of 1 October 2019. 87

**Civil penalty provisions**

As stated above, the *DRS Protection Act* provides that certain conduct is prohibited and currently provides that such conduct may constitute an offence. Under the Bill, such conduct may also render a person liable to a civil penalty.

**Item 69** of the Bill inserts **proposed section 76A** to provide that a civil penalty provision is enforceable under the *Regulatory Powers (Standard Provisions) Act 2014* (*Regulatory Powers Act*).

The *Regulatory Powers Act* contains a standard suite of provisions containing investigative, compliance monitoring and enforcement powers which can be applied to individual pieces of Commonwealth regulatory legislation. The standard provisions in the *Regulatory Powers Act* are based on powers which are commonly available to many Commonwealth regulatory agencies in their various pieces of governing legislation. 88

The *Regulatory Powers Act* does not have a direct legal effect, in the sense of conferring powers on regulatory agencies, or imposing duties or liabilities on regulated entities. Rather, its provisions have effect, as in this case, where an existing Act is amended, to apply the standard provisions of the *Regulatory Powers Act* to a particular regulatory scheme.

Legislation applying the provisions of the *Regulatory Powers Act* to an individual regulatory scheme is commonly referred to as triggering legislation. **Proposed section 76A** is a triggering provision—its purpose is to incorporate the standard terms of the *Regulatory Powers Act* into the *DRS Protection Act* without having to reproduce them in full.

85. Ibid.
86. Ibid.
Victimisation

Proposed section 76B provides that a person must not subject, or threaten to subject, another person to any detriment for reasons that include that the person has made a complaint, has given information or documents or brought proceedings under the DRS Protection Act. Contravention amounts to an offence the maximum penalty for which is 30 penalty units. In the alternative a civil penalty up to a maximum of 100 penalty units will apply.

Schedule 3—Australian Geospatial Intelligence Organisation

Commencement

The provisions in Schedule 3 to the Bill commence on the day after the Defence Legislation Amendment (2017 Measures No. 1) Act 2017 receives Royal Assent.

Background

In the lead up to the 2013 Federal election, the Coalition committed to appointing ‘a high-profile team to undertake a first-principles review of the Department of Defence’s structure and major processes’.89 The focus of that review was to be on minimising bureaucracy and maximising front line resources.90

Consistent with that promise, in August 2014, the Minister for Defence appointed the team to undertake the First Principles Review of Defence.91

The provisions of Schedule 3 to the Bill implement a recommendation of the First Principles Review (the Review) that Defence consolidate its various geospatial intelligence functions.92 The Review found:

Geospatial information management is currently under-resourced, with poorly coordinated investment, limited leadership, obscure accountability, low management prioritisation and disaggregated thinking about strategy and direction. Current, planned and future Australian Defence Force platforms and operations are all critically reliant on integrated geospatial data and services. The remediation of this key enabler is urgent.93

The Review suggested that greater coordination between the various defence geospatial functions would deliver better services through the ‘integration of the associated production and distribution systems and stronger professional linkages between the maritime, land, and aerospace geospatial intelligence domains’.94

Key issues and provisions

Expanding AGO’s functions

Existing section 6B of the Intelligence Services Act sets out the functions of the Defence department known as the Australian Geospatial-Intelligence Organisation (AGO).95 Those functions are currently limited to activities relating to geospatial and imagery intelligence.

The provisions of Schedule 3 to the Bill expand the functions of the AGO in a number of ways. First, items 4 and 5 of Schedule 3 amend paragraphs 6B(a)–(c) and (e) of the Intelligence Services Act to include hydrographic, meteorological and oceanographic activities within the functions of the AGO.

Next, item 5 of Schedule 3 to the Bill inserts proposed paragraph 6B(1)(ea) into the Intelligence Services Act so that it is a function of the AGO to provide to any persons or bodies (including Commonwealth authorities and State authorities)96 assistance in relation to the performance by the persons or bodies of emergency response

90. Ibid.
91. D Johnston (Minister for Defence), Defence minister announces first principles review panel, media release, 5 August 2014.
93. Ibid., p. 49.
94. Ibid.
96. Section 3 of the Intelligence Services Act, defines a State authority as including (a) a Department of State of a State or Territory or a Department of the Public Service of a State or Territory, (b) a body (whether incorporated or not) established, or continued in existence, for a public purpose by or under a law of a State or Territory and (c) a body corporate in which a State, Territory or a body referred to in paragraph (b) has a controlling interest.
functions, safety functions, scientific research functions, economic development functions, cultural functions and environmental protection functions, provided:

• the provision of the assistance is incidental to the performance by AGO of its other functions
• the assistance is capable of being conveniently provided by the use of resources that are not immediately required in performing AGO’s other functions and
• the assistance is capable of being conveniently provided in the course of performing AGO’s other functions.

Finally, item 6 of Schedule 3 to the Bill inserts proposed paragraph 6B(1)(h) to add the functions currently carried out by the Australian Hydrographic Service under the Navigation Act 2012 to the AGO. Those functions are:

• to be responsible for the provision of hydrographic services required by the Safety Convention
• to collect, compile and collate hydrographic data
• to maintain and disseminate hydrographic and other nautical information and nautical publications and
• to maintain and disseminate nautical charts, including authorising charts for use in Australian waters.

Items 12–15 of Schedule 3 to the Bill make minor amendments to the Navigation Act to rename the Australian Hydrographic Service as the Australian Hydrographic Office. The functions of the Australian Hydrographic Office are unchanged.

Providing products and assistance to other bodies
Currently, it is a function of the AGO under paragraph 6B(e) of the Intelligence Services Act to provide certain products and assistance to Commonwealth authorities, State authorities and bodies approved in writing by the Minister.

Item 5 of Schedule 3 to the Bill repeals and replaces paragraph 6B(e) to remove the need for the AGO to seek Ministerial approval each time it wishes to provide information or assistance to other bodies. In addition, item 8 of Schedule 3 to the Bill inserts proposed subsection 6B(2) into the Intelligence Services Act to specify the bodies to whom imagery and other geospatial, hydrographic, meteorological and oceanographic products and assistance in relation to the production of those products may be provided under proposed paragraph 6(1)(e).

The range of bodies to whom these services can be provided is expanded to include a foreign person or entity and any other person or body provided that it is consistent with the Commonwealth’s power under the trade and commerce power in 51(i) of the Constitution or the postal, telegraphic, telephonic and other like services power in section 51(v) of the Constitution.

Charging a fee
Historically, the AGO has not charged fees for the provision of non-intelligence services. However, proposed subsection 6B(4) (inserted by item 8) will permit the AGO to charge a fee in relation to non-intelligence products provided under proposed paragraphs 6B(1)(e), (ea) and (h) of the Intelligence Services Act. This section does not apply to intelligence products.

Item 16 makes a minor amendment to the Telecommunications Act to ensure that the terminology used is consistent with the Intelligence Services Act.

Schedule 4—Australian Defence Force Cover Act 2015

Commencement
The provisions in Schedule 4 to the Bill commence on the day after the Defence Legislation Amendment (2017 Measures No. 1) Act 2017 receives Royal Assent.
However, the application provisions at the end of Parts 1 and 2 of Schedule 4 to the Bill provide that the amendments in those Parts apply or are taken to have applied on and after 1 July 2016. The application provision at the end of Part 3 of Schedule 4 to the Bill provides that the amendment in that Part applies in relation to a decision of the Commonwealth Superannuation Corporation (CSC) made after the commencement of the Defence Legislation Amendment (2017 Measures No. 1) Act 2017.

Key issues and provisions
The provisions in Schedule 4 to the Bill amend the ADFC Act. Speaking in respect of the originating Bill to the ADFC Act, Member for Gilmore, Ann Sudmalis stated that it:

... establishes a statutory death and invalidity benefits scheme that applies to ADF Super members and to people who would have been ADF Super members but for choosing another scheme to which Defence is going to contribute ... The government recognises that, as a result of the unique nature of military service, it is difficult for ADF members to obtain death and invalidity cover at a reasonable cost. ADF cover addresses this issue by ensuring all ADF personnel who are members of ADF Super have full death and invalidity cover. The cover provides the same level of death and invalidity cover as is provided to members of the current [Military Superannuation and Benefits Scheme].

The amendments in Schedule 4 provide for:

• a member who resigned from the ADF and later found that he, or she, could have been medically discharged to apply to the CSC to have their mode of discharge reassessed and

• an updated definition of eligible child.

Medical discharge
Item 16 of Part 1 in Schedule 4 to the Bill inserts proposed section 31A into the ADFC Act so that members who resign from the ADF are deemed to have been medically discharged because of physical or mental impairment if the CSC is later satisfied that such grounds existed at the time that the person resigned.

Currently section 18 of the ADFC Act sets out the rules to be followed by the CSC in making a determination of the percentage of a person’s incapacity for civil employment. Section 19 of the ADFC Act provides that the CSC must classify the person as Class A (at least 60 percent incapacity), Class B (at least 30 percent, but less than 60 percent) or Class C (less than 30 percent) according to the person’s incapacity.

Item 3 of Schedule 4 to the Bill inserts proposed subsections 18(2A) and 18(2B) into the ADFC Act so that where a member is deemed to have been medically discharged, the CSC must, as soon as reasonably practicable, determine the percentage of the person’s incapacity for civil employment at the time of the deemed medical discharge. If the CSC classifies the person as Class A or Class B, then the CSC may at that time, also determine the percentage of the person’s incapacity for civil employment at any time, or times, after the person’s deemed discharge. Importantly, the matters to which the CSC must have regard in determining the percentage of a person’s incapacity for civil employment remain unchanged. Those matters are:

• the person’s vocational, trade and professional skills, qualifications and experience

• the kinds of civil employment that a person with those skills, qualifications and experience might reasonably undertake

• the degree to which the physical or mental impairment that is the basis of the person’s medical discharge has diminished his, or her, capacity to undertake those kinds of civil employment and

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100. Items 19 and 37 of Schedule 4 to the Bill.
101. Item 39 of Schedule 4 to the Bill.
103. ADFC Act, proposed subsection 18(2A).
104. Ibid., proposed subsection 18(2B).
• if the determination is the second or later determination of that percentage—the person’s experience and civil employment history since the last determination of that percentage.  

Definition of eligible child

Where a member of the ADF is medically discharged because the CSC has classified him, or her, as having a significant degree of incapacity for civil employment, an invalidity pension is payable. If the invalid dies while receiving a pension, leaving either a surviving spouse or eligible children, a pension is payable to the surviving spouse or, if there is no spouse, to those children.  

Item 21 in Schedule 4 to the Bill amends the definition of eligible child by removing the requirement that the person was wholly or substantially dependent on the invalid or member when he, or she, died. Instead, being wholly or substantially dependent upon the invalid or member at the time of their death will be only one of the factors which may be taken into account in determining whether a person is a child of the invalid or member.  

Items 22, 25 and 30 amend the ADFC Act to remove references to an eligible child being ‘wholly or substantially dependent on the spouse of an invalid’. This ensures consistency with the updated definition of eligible child.  

Split payments of pension

Section 41 of the ADFC Act recognises that a covered ADF member may have more than one surviving spouse or may have eligible children who are being cared for by someone other than a surviving spouse. In that case, it is for the CSC to determine whether any increase in the pension due to the spouse pension child supplement percentage is to be paid to someone other than the surviving spouse. Item 33 of Schedule 4 to the Bill inserts proposed subsections 41(2A) and (2B) into the ADFC Act to specify that the person to be paid may be one of the eligible children or another surviving spouse of the member. Item 35 inserts proposed subsection 41(4) into the ADFC Act, which operates where one of the surviving spouses dies—‘to ensure that the pension increase goes to the right beneficiary’.  

Death benefit

Currently, under Part 3 of the ADFC Act a benefit is payable for the death of a covered ADF member. Generally, the benefit is paid as a lump sum equivalent to 25 percent of the amount the member would have earned if he, or she, had continued to serve in the ADF at the salary payable at the time of his, or her, death, until turning 60—although this rate is increased when there are one or more eligible children. Where there is no surviving spouse when a covered ADF member dies, a single lump sum payment of death benefit is made to or for the eligible children.  

Where there is neither a surviving spouse nor eligible children immediately after a covered ADF member dies, a single payment of death benefit may be paid to the beneficiaries or estate of the member. In that case, section 39 of the ADFC Act requires the CSC to determine which one or more of those persons is to have an amount of benefit paid to, or for, them.  

Item 32 inserts proposed subsection 39(5) into the ADFC Act so that where

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105. Ibid., subsection 18(5).
106. Ibid., section 3.
107. Ibid., proposed repeal of paragraph 5(1) (b)(iii).
108. Ibid., subsection 5(2).
109. Ibid., subsection 10(1), subsection 26(5) and subsection 34(4) respectively.
110. Ibid., section 10 defines the factor determining the increase in a pension payable to a surviving spouse on account of the eligible children of the invalid or member.
112. ADFC Act, section 33.
113. Ibid., subsection 34(2). Subsection 34(1) provides that if the lump sum would be paid to a surviving spouse of the member, the spouse can choose to convert it to a pension.
114. Ibid., subsection 34(4).
115. Ibid., section 35.
116. Ibid., section 37.
117. Ibid., subsection 39(2).
a determination has been made in relation to two or more persons that determination does not change in the event that one of them dies.

Part 3 of Schedule 4 to the Bill repeals and replaces paragraph 58(2)(a) of the ADFC Act to clarify the circumstances in which a person may request reconsideration of a decision by the CSC. The request must be made in writing and submitted within 30 days after the CSC gives notice of the decision or within such further period as the CSC, in special circumstances, allows.

**Concluding comment**

Each of the Schedules of the Bill amend statutes to put in place four separate and unconnected regulatory measures.

Of note is the internal inconsistency arising from the amendment in item 42 of Schedule 2 to the Bill. It is likely that the amendment will need to be redrafted for the greater clarity during the relevant debate in the Parliament.