THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE LEGISLATION AMENDMENT (2017 MEASURES NO. 1) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Defence Personnel, the Honourable Dan Tehan MP)
DEFENCE LEGISLATION AMENDMENT (2017 MEASURES NO. 1) BILL 2017

GENERAL OUTLINE

The proposed Bill will address four separate measures by amending:

1. The *Defence Act 1903* to enable a policy framework (Defence Instructions) to broaden and expand the conditions under which a positive test result for prohibited substances must be disregarded, including in circumstances relating to appropriate usage of over the counter medication or substances administered or dispensed by authorised persons.

2. The *Defence Reserve Service (Protection) Act 2001* to ensure all Reservists would be eligible for the full range of protections under the Act in respect of their employment and education. The Bill will also extend the financial liability and bankruptcy protections for Reservists on continuous full time service that is operational service. The Bill will also introduce a new provision protecting Reservists in the workplace from harassment or detriment including victimisation relating to their status or service as a Reservist.

3. The *Intelligence Services Act 2001*, the *Navigation Act 2012* and the *Telecommunications Act 1997* to include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation in accordance with one of the recommendations from the First Principles Review.

4. The *Australian Defence Force Cover Act 2015* to align a small number of provisions in the Act with other military superannuation schemes and to provide clarity on the definition of an eligible child of a member or invalid.
Financial Impact statement

The amendments in the Bill will have no additional impact on Commonwealth expenditure or revenue.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

DEFENCE LEGISLATION AMENDMENT (2017 MEASURES NO. 1) BILL 2017

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.

Details of the measures included in the various Schedules of the Bill and their human rights implications are set out below.

Schedule 1- Prohibited Substances Testing Measure

The amendments made by Schedule 1 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the measure

Schedule 1 of the Bill makes a number of minor amendments with the main purpose to enable a policy framework (Defence Instructions) to broaden and expand the conditions under which a positive test result for prohibited substances must be disregarded. This framework would support the disregarding of positive test results due to circumstances relating to appropriate usage of over the counter medication or substances administered by authorised persons.

Background

The amendment 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.

This amendment allows Defence to establish policy by which a member’s test result will be appropriately treated as if it were a negative result when a medication has been:

a. administered, supplied or prescribed by medical officers, nurse practitioners, dentists, pharmacists or other health professionals who hold such authorisations approved by their Australian national registration boards;

b. administered, supplied or prescribed by Defence internally authorised health and allied health professionals or Defence-trained health staff; or

c. obtained as an over-the-counter medication as a pharmacy medicine, pharmacist-only medicine or a general sales medicine.

**Human rights implications**

This Schedule engages/promotes the following rights:

- Article 7, International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to safe and healthy working conditions. Though the specific amendments themselves may not appear to directly engage this right, one of the purposes of the testing scheme as a whole would be to ensure there are no Defence personnel operating in the workplace under the influence of prohibited substances and therefore endangering the lives of others. To the extent that the amendments bolster the scheme as a whole, this right may be engaged and promoted.

- Article 12, ICESCR, the right to health. To the extent that the amendment facilitates Defence members’ access to necessary medicine by removing the possibility that they would have to show cause if such medicine causes a positive result to a prohibited substance test, it will likely promote the right to health.

- Article 6, ICESCR, the right to work and the right not to be deprived of work unfairly. The amendment deals with a policy framework which would engage
with procedures for the termination of service of Defence members or arrangement of service for Defence civilians, and the right to work may be relevant. At common law, Defence members traditionally served at the pleasure of the Crown. This meant that they could be dismissed at any time, for any reason. In most cases, the member must be given a notice of the proposed decision and an opportunity to respond before a decision is made. Under the Defence Regulation 2016, a member can make a complaint about a decision to terminate their service or arrangement of service, which will include review of the decision by the statutorily independent Inspector-General Australian Defence Force. These provisions mean that Defence members will not be deprived of work unfairly.

- Article 17, International Covenant on Civil and Political Rights (ICCPR), the right to privacy. This article provides that everyone has a right not to be subjected to arbitrary or unlawful interference with privacy. Overall the amendment will likely promote the right to privacy to the extent that it, in combination with the relevant Defence Instructions, will remove the obligation on Defence members to show cause on termination of service or for Defence civilians to show cause to change of arrangement in response to a positive result from a prohibited substance test arising from a prescribed, dispensed or over-the-counter medication.

The amendment may also limit the right to privacy to the extent that it, in combination with the relevant Defence Instructions, will require the individual to disclose information regarding the nature of substances taken (i.e. that the substance was a prescribed, administered or over-the-counter drug) in order for the positive result to be disregarded. However, this appears to be a reasonable, necessary and proportionate limitation on the right to privacy in light of the legitimate purpose of the amendment to mitigate the unnecessary disclosure of Defence members’ private information overall.

Conclusion
This Schedule is compatible with the human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.
Schedule 2- All Reservists Eligible for Protection Measure

The amendments made by Schedule 2 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the measure

Schedule 2 of the Bill makes a number of amendments to enhance the employment, education and other protections available to Reserve members who render defence service. The Defence Reserve Service (Protection) Act 2001 mitigates some of the disadvantages Reserve members may face when rendering defence service, because of their absence from the workplace, from their education provider and, in some cases, from Australia. The amendments will:

- expand the scope of the employment, partnership and education protections to apply to all defence service by Reserve members;
- expand the scope of the financial liability and bankruptcy protections to apply to all operational service by Reserve members;
- clarify the employment protections to give greater certainty about Reserve members’ rights when they are absent from their employment to render defence service;
- enhance the education protections to create an obligation on education providers to make reasonable adjustments to accommodate Reserve members’ defence service;
- introduce anti-victimisation and anti-harassment provisions to improve the experience of Reserve members in their civilian workplaces; and
- introduce a civil penalty regime as a complement to the existing criminal offences throughout the Act.
Background

The amendments are needed to mitigate some of disadvantages Reserve members may face when rendering defence service. This facilitates their availability to undertake defence service, therefore enhancing Defence capability. A review of the Defence Reserve Service (Protection) Act 2001 in 2008 concluded that, overall, the Act was working well and achieving its objectives, but recommended enhancements to improve the Act’s clarity, consistency, and to address some gaps in the available protections.

Human rights implications

This Schedule engages/promotes the following rights:

- Article 6, International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to work and the right not to be deprived of work unfairly. The amendments deal with the rights of Reserve members in their civilian employment. They clarify the right of Reserve members to be absent from their civilian workplace without consequence while rendering defence service. They also expand the scope of the employment protections to apply to all defence service by Reserve members. These provisions mean that Reserve members will not be deprived of their civilian work unfairly.

- Article 7, ICESCR, the right to safe and healthy working conditions. The amendments enhance the anti-discrimination protections in the Act, and introduce new anti-victimisation and anti-harassment provisions. These provisions prohibit behaviour in Reserve members’ civilian workplaces that would be detrimental to health and safety. The new civil penalty regime also provides greater enforcement options if these prohibitions are breached. These provisions promote Reserve members’ right to safe and healthy working conditions.

- Article 13, ICESCR, the right to education. The amendments improve the ability of Reserve members to access education, by requiring education providers to make reasonable adjustments to accommodate Reserve members’ defence service. They also expand the scope of the education protections to
apply to all defence service by Reserve members. These provisions improve the ability of Reserve members to access the same education courses that are available to civilians, enhancing their right to education.

Conclusion

This Schedule is compatible with human rights because it promotes and advances human rights.
Schedule 3- Incorporation of Hydrographic, Meteorological and Oceanographic Functions into the Australian Geospatial-Intelligence Organisation (AGO) Measure.

The amendments made by Schedule 3 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Background

The primary purpose of this Schedule is to amend three Acts; Intelligence Services Act 2001 (ISA); the Navigation Act 2012; and the Telecommunications Act 1997.

The amendments to the ISA are intended to affect the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to AGO. They are needed to implement a recommendation of the First Principles Review of Defence that Defence geospatial related information functions be consolidated within the AGO. The transfer is expected to realise synergies in the exploitation of imagery and other data to produce intelligence and non-intelligence geospatial related information in support of Australia’s defence interests and other national objectives.

The amendments to the ISA will: incorporate hydrographic, meteorological and oceanographic functions within AGO’s intelligence collection and non-intelligence functions in addition to its traditional geospatial and imagery functions; and permit AGO to provide its non-intelligence products and related assistance to an expanded range of entities in accordance with Australia’s legal obligations and national interests.

Minor consequential amendments to the Navigation Act 2012 and the Telecommunications Act 1997 will ensure that the terminology used in those Acts aligns with new Defence organisational arrangements following transfer of those functions.
Human rights implications

The Bill engages/promotes the following rights:

- Article 17 of the International Covenant on Civil and Political Rights (ICCPR), right to protection from arbitrary and unlawful interferences with privacy. Article 17 of the ICCPR provides that no-one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. Any limitation on this right must be consistent with the provisions, aims and objectives of the ICCPR, which include State sovereignty and protection of the nation state, including national security, and proportionate and necessary in the circumstances.

The Schedule includes a provision which incorporates hydrographic, meteorological and oceanographic functions within AGO’s intelligence collection functions in addition to geospatial and imagery functions. To the extent that obtaining hydrographic, meteorological and oceanographic intelligence of Australian territory while performing an AGO function may include producing intelligence on a person who is in Australia’s territory and subject to its jurisdiction, a person’s right to protection against arbitrary and unlawful interferences with privacy may be engaged.

The new functions are for a legitimate objective – to assist AGO in performing its existing functions of conducting geospatial-intelligence related activities under the ISA. There are appropriate existing safeguards and oversight mechanisms in place to ensure the proportionality of these amended intelligence functions.

AGO must not undertake any activity unless the activity is either necessary for the proper performance of its functions, or authorised or required by or under another Act. Ministerial authorisations are required for certain activities including undertaking an activity for the purpose of producing intelligence on an Australian person and the Minister has an ability to include conditions in such authorisation as appropriate. Any intelligence produced will only be retained and communicated in accordance with the rules to protect the privacy of Australians made by the Minister under the ISA. The Director AGO must give the responsible
Minister a written report in respect of each activity, or series of activities carried out by AGO in reliance on a Ministerial authorisation. AGO is subject to oversight by the Inspector-General of Intelligence and Security (IGIS), who provides independent review, advice and assurance on the legality and propriety of AGO’s activities, including consideration of all applicable laws, guidelines, Ministerial directions and policies and procedures. AGO is also subject to scrutiny by the Parliamentary Joint Committee on Intelligence and Security in relation to their administration and expenditure. All these mechanisms ensure that the exercise of AGO’s functions are reasonable and necessary in the circumstances.

- Article 12 of the International Covenant on Civil and Political Rights, (ICCPR), right to liberty of Movement. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement.

The Schedule includes provisions which: permit AGO to perform the safety functions mentioned in subsection 223(2) of the Navigation Act 2012: and to provide, within prescribed limitations, its non-intelligence products or related assistance to any person or body. These provisions should promote safe navigation and safety of life at sea and in turn, promote the right to liberty of movement of persons within Australia’s territory and subject to its jurisdiction.

**Conclusion**

This Schedule is compatible with the human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.
Schedule 4- ADF Superannuation Measure

The amendments made by Schedule 4 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Background

The amendments to the Australian Defence Force Cover Act 2015 are to align a small number of provisions in this new superannuation Act with other military superannuation schemes and provide clarity in definitions.

The amendments will ensure that members that resign from the ADF and later find that they could have been medically discharged will be able to apply to the Commonwealth Superannuation Corporation (CSC) to have their mode of discharge circumstances reassessed. This is consistent with other military superannuation schemes.

The amendments will also creates a more contemporary definition to allow a child to become eligible at a later date, where the child is found ineligible at the time of the member’s death. An example of how this could occur would be where a child of the member is over 18 and ceases full-time study to care for the member or to undertake a gap year prior to the member’s death, subsequently resuming full-time study after the member’s death while still under the age of 25.

Human rights implications

This Schedule engages/ promotes the following rights:

- Article 9, International Covenant on Economic, Social and Cultural Rights (ICESCR), the right of everyone to social security. The amendments provide opportunity for Defence members to have their discharge circumstances reassessed. This will promote the right to social security.
• Article 26, Convention on the Rights of the Child (CRC), the right of every child to benefit from social security. The amendments will allow a child to become eligible for a benefit in additional circumstances and will promote the right to social security.

**Conclusion**

This Schedule is compatible with human rights because it promotes and advances human rights.
DEFENCE LEGISLATION AMENDMENT (2017 MEASURES NO. 1) BILL 2017

Short title


Commencement

2. Clause 2 provides for the commencement provisions for the Act.

Schedules

3. Clause 3 provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
SCHEDULE 1 – Defence Act 1903- Testing for prohibited substances

Defence Act 1903

Overview
Amend the Defence Act 1903 to enable a policy framework (Defence Instructions) to broaden and expand the conditions under which a prohibited substance positive test result must be disregarded due to circumstances relating to appropriate usage of over the counter medication or substances administered by authorised persons.

Schedule 1

Item 1- repeals the definition of narcotic substance as the prohibited substance testing program as determined under section 93B (1) of the Defence Act includes narcotic substances.

Item 2 - amends the definition of prohibited substance as determined under section 93B (1) of the Defence Act.

Item 3 and item 4- expands on the conduct of testing to include the option of a chaperone if the person being tested requests such an accompanying person. This may provide comfort and support in certain situations for the person being tested. However where the request is unreasonable or impractical the testing may proceed without such an accompanying person or chaperone.

Item 5- makes application of the amendments to the testing for prohibited substances to commence on or after Royal Assent.

Item 6- repeals the definition of relevant authority as the Chief of Defence Force will be the authority.
Item 7 simplifies the definition for termination of services to include the termination of service of a Defence member or if the person is a Defence civilian then the termination of the arrangement under which they are engaged.

Item 8 and item 9- this enables the policy framework, the Defence Instruction as provided in sections 11 and 109 of the Defence Act, to be used to provide for the specific circumstances where a positive test is disregarded. Using this framework a positive test could be disregarded under additional legitimate circumstances including where Defence members and Defence civilians test positive for a prohibited substance solely because they appropriately took a prescribed or dispensed or over-the-counter medication, in accordance with the directions.

This amendment facilitates a member’s test result being appropriately treated as if it were a negative result when a medication has been:

a. administered, supplied or prescribed by medical officers, nurse practitioners, dentists, pharmacists or other health professionals who holds such authorisations approved by their Australian national registration boards;

b. administered, supplied or prescribed by Defence internally authorised health and allied health professionals or Defence-trained health staff; or

c. obtained as an over-the-counter medication as a pharmacy medicine, pharmacist-only medicine or a general sales medicine.

Item 10- amends the relevant authority to be the Chief of the Defence Force.

Item 11- amends the ‘Notice’ provisions by the relevant authority to be replaced by the Chief of Defence Force and streamlining the provision to be applicable to all Defence members and Defence civilians.

Item 12- amends the relevant authority to be the Chief of the Defence Force.
Item 13- provides amendment to the 'Termination' provisions after a positive test has been confirmed in accordance with section 98(1) of the Defence Act and the person has been given a notice of the positive test and invited to provide a written statement of reasons why they had returned a positive prohibited substance test result. This item provides for procedural fairness during the termination decision making process. There are redress of grievance provisions available including possible investigation by the Inspector-General of the Australian Defence Force and the Defence Force Ombudsman. The Defence Regulation 2016 provides access to redress of grievance (Part 7).

Item 14- provides the legislative basis to enable the detailed policy framework for Defence Instructions, a non legislative instrument, as outlined in section 11 of the Defence Act. These instructions will outline the circumstances where a positive test must be disregarded. Such circumstances will include Defence members and Defence civilians who test positive for a prohibited substance solely because they appropriately took a prescribed or dispensed or over-the-counter medication, in accordance with directions.

Medical officers, nurse practitioners, dentists, pharmacists and other health professionals with authorisations established by their Australian national boards which are legislatively regulated under the National Registration and Accreditation Scheme can administer, supply or prescribe medicines.

Defence internal authorisations allow for health and allied health professionals and Defence-trained health staff to prescribe, dispense and administer medications that may contain products or by-products that can result in a screening or laboratory-confirmed positive prohibited substance test outcome.

Item 15- Repeals the delegations by the Governor-General and substitutes where applicable with the Chief of the Defence Force.

Item 16- Amends the delegations by the Chief of the Defence Force to reflect current sections of the Act.
**Item 17**- makes of application of the amendments to the testing for prohibited substances to commence on or after Royal Assent.

**Item 18 to Item 22**- Changes the definition of 'accredited authority' to 'accredited laboratory' to reflect the definition used by the National Association of Testing Authorities.
SCHEDULE 2 – Defence Reserve Service (Protection) Act 2001- All reservists eligible for protections

*Defence Reserve Service (Protection) Act 2001*

**Overview**

Amends the *Defence Reserve Service (Protection) Act 2001*. The Defence Reserve Service (Protection) Act provides for the protection of Reserve members in their employment and education, to facilitate their return to civilian life after rendering defence service, and for related purposes. It sets out entitlements and prohibitions that apply in relation to people who intend to render, are rendering, have rendered or may required to render defence service as members of the Reserves. The Act mitigates some of the employment and financial disadvantages Reserve members may face when rendering defence service and facilitates their availability to undertake defence service, so enhancing Defence capability.

A review of the Act in 2008 (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. The amendments in Schedule 2 implement many of these recommendations. In particular:

- The application of the employment, partnership and education protections in Parts 5, 6 and 7 of the Act is extended to all types of Reserve service. Previously, voluntary continuous full time service (which is the type of Reserve service that is typically used when a Reserve member deploys on operations) was only protected if the CDF (or delegate) had requested the member to undertake the service on that basis. This requirement resulted in confusion for Reserve members and their employers as to whether the protections applied in any given case. This will no longer be an issue, as all defence service will henceforth be protected.

- The application of the financial liability and bankruptcy protections in Parts 8 and 9 of the Act is extended to continuous full time service that is operational service. Previously, the service was only protected if it was continuous full time service following a call-out under the Defence Act 1903.
• A civil penalty regime is established to supplement the criminal offence provisions throughout the Act, including provisions dealing with discrimination in employment and education.

• The provisions in Part 4 of the Act dealing with discrimination are enhanced to improve the clarity and consistency of these provisions, and to deal with harassment of Reserve members because of their defence service. The Bill also introduces provisions to protect Reserve members against victimisation or threatened victimisation.

• The employment protections in Part 5 of the Act are clarified, including by stating when the protected period begins and ends, and by replacing the concept of suspending an employment contract with an entitlement to be absent from employment while absent on defence service.

• The education protections in Part 7 of the Act are enhanced to provide a general obligation on education institutions to make reasonable adjustments to accommodate a Reserve member's defence service.

Schedule 2


Division 1 expands the application of Parts 5, 6 and 7 of the Defence Reserve Service (Protection) Act 2001, so that the employment, partnership and education protections in those parts are available in relation to all defence service undertaken by Reserve members.

Item 1 and Item 2- amends the overview of the Act, as it applies to Parts 5, 6 and 7, to describe these Parts as applying to all kinds of defence service.
Item 3- amends the rows in the table in section 11 relevant to Parts 5, 6 and 7 of the Act to describe these Parts as applying to all kinds of defence service.

Item 4- repeals section 12, which provided that Parts 5, 6 and 7 of the Act did not apply to certain kinds of defence service.

Item 5- amends the overview of Part 5 to describe the Part as applying to all kinds of defence service.

Item 6 and Item 7- amends section 30 of the Act so that it applies to all continuous full-time defence service.

Item 8- amends the overview of Part 6 to describe the Part as applying to all kinds of defence service.

Item 9- amends the overview of Part 7 to describe the Part as applying to all kinds of defence service.

Item 10- applies the amendments to the scope of Parts 5, 6 and 7 to defence service that begins on or after the commencement of the item.

Division 2 expands the application of Parts 8 and 9 of the Defence Reserve Service (Protection) Act 2001, so that the financial liability and bankruptcy protections apply not only to continuous full-time defence service following a call out under the Defence Act, but also to all continuous full-time defence service that is operational service. It also clarifies the application of Part 10, which provides for loans and guarantees to members who render continuous full-time service following a call-out. The Division also makes some minor amendments to improve the readability of Parts 8, 9 and 10.

Item 11- amends the overview of the Act, as it relates to Parts 8 and 9, to describe these Parts as applying to defence service as a result of a call out, or operational service.
**Item 12**- amends the overview of the Act, as it relates to Part 10, to provide clearer language describing the application of that Part. Part 10 applies in relation to Reserve members who render defence service as a result of a call out.

**Item 13 and Item 14**- replaces the definition of ‘call out day’ with a definition of ‘call out’, meaning an order under sections 28, 51A, 51AA, 51AB, 51B, 51C or 51CA of the *Defence Act 1903*. This improves the readability of the Act, but does not amount to a substantive change.

**Item 15**- amends section 7 by referencing definitions of ‘financial arrangement’ and ‘start day’. These definitions have been added to improve the readability of the Act, but do not make a substantive change to the operation of the Act. A definition of ‘operational service’ is added, which is essential to understand the expanded application of Parts 8 and 9 of the Act.

- The application of Parts 8 and 9 have been expanded to apply in relation to continuous full-time service that is ‘operational service’. ‘Operational service’ has its ordinary meaning – defence service on operations. This could be operations either inside or outside Australia. It would not ordinarily include defence service rendered for training or involvement in exercises (except for training for a specific operation) or to backfill for a member who has deployed on an operation.

- Paragraph (a) of the definition provides non-exhaustive examples of defence service that would be operational service. The examples are identical to the list of circumstances in which the Governor-General can issue a call-out order under section 28 of the *Defence Act 1903*. In particular, operational service includes defence service in circumstances involving:
  - war or warlike operations. War is defined in the *Defence Act 1903* as any invasion or apprehended invasion of, or attack or apprehended attack on, Australia by an enemy or armed force. Recent operations in Iraq and Afghanistan are warlike operations.
a time of defence emergency. This is defined in the *Defence Act 1903* as the period between the publication of a proclamation declaring that a state of defence emergency exists in relation to Australia and the publication of a proclamation that that state of defence emergency no longer exists.

- defence preparation. This refers to activities undertaken by the ADF in preparation to defend Australia. For example, moving troops or other capability to a specific location in preparation for defending against an identified threat. Defence service for the purposes of general defence preparedness, such as training or exercises, would not be included in this category.

- 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. Border protection operations and ADF involvement in security operations for the Commonwealth Heads of Government Meeting are recent examples in this category.

- support to community activities of national or international significance. Recent examples of this include ADF support to the Olympic Games and Commonwealth Games security.

- civil aid, humanitarian assistance, medical or civil emergency or disaster relief.

- Paragraph (c) provides that time spent preparing to render particular operational service, such as pre-deployment training, is included in operational service. Similarly, time spent decompressing after rendering operational service is included. Decompression is an important period after a member returns from operational service, helping to improve mental health outcomes for ADF members. Permanent members are typically granted leave from their ordinary duties for a period, in order to assist with their re-integration into ordinary life following operational service. Similarly, it is important to extend the protections available for operational service to the period immediately
following a member’s return, to avoid a premature return to civilian employment.

- Paragraphs (b) and (d) enable the making of regulations to prescribe defence service that is, or is not, operational service. This provides a mechanism to resolve any uncertainty that arises around what defence service receives the protections in Parts 8 and 9.

**Item 16 to Item 18**- amend the definition of ‘dependant’ consistently with the changed scope of Parts 8 and 9.

**Item 19**- amends the rows in the table in section 11 relevant to Parts 8, 9 and 10 of the Act to describe these Parts as applying to continuous full time service as a result of a call out, and continuous full time service that is operational service.

**Item 20**- amends section 13 to provide that Parts 8 and 9 apply in relation to continuous full time service that is operational service. New section 13 also defines the ‘start day’ of defence service as being:

- In the case of continuous full time service as a result of a call out, the day on which the member becomes liable to render service.
- In the case of continuous full time service that is operational service, the day on which the member starts to render the service.

**Item 21**- amends the heading for Division 1 of part 8 to make the Division heading consistent with the headings for the other overview Divisions in the Act.

**Item 22**- amends the overview of Part 8 to describe the Part as applying to continuous full time service as a result of a call out, and to continuous full time service that is operational service, reflecting the expanded application of the Part.

**Item 24**- replaces sections 41 to 44 with new sections 40A to 44. This amendment does not change the substantive effect of the Act, and has been made to improve clarity. Part 8 operates to postpone the time for making payments under financial
arrangements. It applies to members rendering the relevant defence service to which Part 8 applies, and their dependants. New section 40A provides a definition of financial arrangement. New sections 41 to 44 describe some of the circumstances in which the protections in Part 8 will apply. It includes where a liability to make a payment under a financial arrangement arose before the start day of the member’s defence service (section 41), where a liability arose when the member or dependant exercised an option that was granted before the start day of the member’s defence service (section 42), and where there is a liability to pay rates or other land taxes (section 43). However, it 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 (section 44).

**Items 25 to 28, Item 30, Item 32, Item 33, Item 36, Item 38** - replaces references to ‘an agreement’ with ‘a financial arrangement’, reflecting the new definition of financial arrangement.

**Item 23, Item 29, Item 31, Item 34, Item 35, Item 37, Item 41** - amends references to ‘member’s call out day’ with ‘start day of the member’s defence service’ or ‘start day of the service’, and ‘call out day’ with ‘start day of the defence service’, reflecting the expanded application of Part 8.

**Item 39 and Item 40** - amends the overview of Part 9 to describe the Part as applying to continuous full time service as a result of a call out, and to continuous full time service that is operational service, reflecting the expanded application of the Part.

**Item 42** - omits reference to call out, reflecting expanded application of Part 9.

**Item 43** - applies the amendments to the scope of Parts 8 and 9 to defence service that begins on or after the commencement of the item.

**Division 3** amends the definition of defence service for the purposes of the Act. The amendment does not change the substantive effect of the Act, but clarifies the meaning of defence service consistently with how Reserve service is described in the *Defence Act 1903*. 
Item 44-amends the definition of defence service, which is service (including training) as a member of the Reserves. This description of defence service is similar to the description of Reserve service in section 26 to 28 of the Defence Act 1903. The amended definition makes it absolutely clear that any service as a member of the Reserves is defence service, including service undertaken inside or outside Australia, in or with any part of the Australian Defence Force (including in a unit otherwise made up of members of the Permanent Forces), and service undertaken with coalition forces.

Part 2–Enforcement and remedies amends the Defence Reserve Service (Protection) Act 2001 so that the various criminal offences throughout the Act are also civil penalty provisions. The civil penalty provisions will be enforced under the standard provisions in the Regulatory Powers (Standard Provision) Act 2014. The Act includes offences to, for example, prohibit conduct that discriminates against Reserve members because they have rendered, are rendering, or may render defence service in the future. Other offences prohibit hindering a person from rendering defence service. The new civil penalty regime will supplement the criminal penalties. Civil penalty provisions provide a less cumbersome and technical enforcement process than criminal prosecutions. Contraventions of the Act can be insidious and indirect, making it difficult to prove an offence beyond reasonable doubt. For example, establishing that an employee was dismissed or disadvantaged for a prohibited reasons will often be very difficult to prove to the criminal standard, whereas the standard of proof for a civil penalty could be met. Including a civil penalty regime will provide an important deterrent to indirect discrimination against Reserve members. Civil penalties are also more appropriate when dealing with government employers, who are not liable to criminal remedies. Part 2 also clarifies the regulation-making power in relation to complaints and mediation, and introduces a new victimisation offence prohibiting a person from causing detriment to another person for reasons including that a person has made a complaint or given information under the Act.

Division 1–Main amendments amends existing offences in the Act so that, in addition to being criminal offences, they are also civil penalty provisions. It also inserts a new victimisation offence in the Act.
**Item 45**- inserts definitions of ‘civil penalty provision’ and ‘Regulatory Powers Act’.

**Item 46**- amends the overview of Part 4 to include reference to the new civil penalty regime.

**Item 47 to Item 64**- amends the offences in Part 4 of the Act to add a civil penalty provision for each offence. Each criminal offence has a maximum penalty of 30 penalty units. The maximum civil penalty is 100 penalty units. The civil penalty is higher than the criminal penalty, reflecting that the fact of a criminal conviction is itself a penalty. The most closely analogous legislation to the Act is the *Fair Work Act 2009*, which is also concerned with the protection of the rights of employees – including relevantly securing their right to be absent for volunteer emergency management activities (for example with the Rural Fire Service). The relevant civil remedy in the *Fair Work Act 2009* is 60 penalty units. However, a contravention of Part 4 of the *Defence Reserve Service (Protection) Act 2001* involves an act inimical to the requirements of national security, warranting a civil penalty that exceeds that available under the *Fair Work Act 2009*.

**Item 65**- inserts new Division 1A – Overview of Part, which provides a description of Part 11 of the Act. A new Division 1B – Complaints and mediation, is inserted. The new Division provides that the regulations may provide in relation to processes for making and investigating complaints about contraventions of the Act and mediating disputes between people affected by the Act. The Act can be enforced using penalties, compensation and other court orders, but most matters are resolved without recourse to these provisions. The Office of Reserve Service Protection, established under the *Defence Reserve Service (Protection) Regulations 2001*, receives, investigates and mediates complaints under the regulations. The regulations provide, for example, for obtaining documents and information from employers and others (subject to the privilege against self-incrimination). The new provision confirms that regulations may be made about these matters. New subsection 72B(2) also makes it clear that, even though there is a complaints process in the regulations, other civil remedies can still be pursued.
**Item 66**- adds a reference to the civil penalty regime.

**Item 67**- amends the limitation period for commencing an action for loss or damage for contravention of the Act from 3 years to 4 years. This removes the inconsistency between the old limitation period (3 years) for bringing an action for compensation and the limitation period (4 years) for applying for a civil penalty under the *Regulatory Powers (Standard Provisions) Act 2014*.

**Item 68**- adds a reference to the civil penalty regime.

**Item 69**- inserts new Division 3 – Civil penalties in Part 11 of the Act. The new Division provides that the civil penalty provisions in the Act are enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*. It provides that, for the purposes of the *Regulatory Powers Act*, the authorised applicant is a person prescribed by the regulations. Given the nature of the civil penalty provisions, the most appropriate authorised applicant will be the Director of the Office of Reserve Service Protection. This position is established in the regulations, rather than the Act, so it is appropriate that identification of the authorised applicant is similarly left to the regulations. The new Division also identifies all State and Territory Courts, the Federal Court of Australia and the Federal Circuit Court of Australia as relevant courts for the purposes of the *Regulatory Powers Act*. A new Division 4 – Victimisation in Part 11 of the Act, is inserted. The new Division provides that a person must not subject, or threaten to subject, another person to detriment for reasons that include that the person has made a complaint, given information or documents, or brought proceedings under the Act. Contravention amounts to an offence with 30 penalty units, and a civil penalty provision with 100 penalty units. These penalties are the same as other offences and civil penalty provisions in the Act.

**Item 70**- inserts new sections 78A and 78B relating to physical elements of offences, and contraventions of offence and civil penalty provisions. The new sections are in line with current drafting practice for offences.

**Item 71**- amends the regulation-making power to enable the regulations to prescribe penalties and civil penalties of up to 60 penalty units for offences and contraventions
against the regulations. Previously, there was a maximum penalty of 10 penalty units. Offences in the regulations include failure to provide information to the Director of the Office of Reserve Service Protection, which can significantly hamper the enforcement of the Act. Enabling a higher penalty in the regulations for this conduct will greatly enhance the ability to enforce the Act.

**Item 72**- applies the amendments in relation to enforcement and remedies to conduct that occur after the commencement of the item. It also specifies that the change of limitation period for commencing actions for compensation applies in relation to contraventions of the Act that occur on or after the commencement of the item. The new victimisation offence applies for conduct after the commencement of the item, including where the conduct is in response to complaints or the giving of information that occurred before commencement of the item. Complaints made or actions taken under the regulations prior to commencement of the item are taken to be complaints made or actions taken under regulations made for the purposes of new subparagraph 72B(1)(a) (which clarifies the regulation-making power).

**Division 2 – Amendments contingent on the Regulatory Powers (Standardisation Reform) Act 2017.**

**Item 73 and Item 74**- makes two minor technical amendments that will only apply if the *Regulatory Powers (Standardisation Reform) Act 2017* commences before the amendments in this Bill, reflecting the effect of amendments to the *Regulatory Powers (Standardisation) Act 2014* made in that Act.

**Part 3 – Discrimination and harassment** enhances the protections available to Reserve members from discrimination and harassment in their civilian activities. In particular, it inserts a new provision prohibiting the dissolution of partnerships for a prohibited reason, and inserts a new provision prohibiting harassment of workers, partners and co-workers for prohibited reasons.

**Item 75**- inserts new definitions of ‘harass’, ‘protected co-worker’ and ‘protected worker’ in section 7 of the Act. The definitions refer to new section 23A, where these terms are used.
Item 76- amends the overview of Part 4 to include a description of the new provision against harassment.

Item 77- inserts new section 18A, which, in certain circumstances, prohibits a partner in a partnership from dissolving the partnership, expelling another partner from the partnership, requiring another partner to forfeit their share in the partnership, or subjecting another partner to other detriment concerning the partnership. The prohibition applies to actions taken for a reason, or reasons that include, that the other partner may volunteer to render defence service, is rendering defence service, is or may become liable to render defence service, or has previously rendered defence service. The new provision is analogous to existing section 16, which prohibits dismissing an employee, changing the terms and conditions of their employment, or discriminating against the employee in the terms and conditions of their employment. The protections available to Reserve members should be the same, regardless of their civilian employment model. Like the other offences in Part 4 of the Act, the new offence in section 18A has a maximum penalty of 30 penalty units, and is also a civil penalty provision with maximum civil penalty of 100 penalty units.

Item 78- inserts new Division 6 – Harassment.

- New section 23A prohibits the harassment of a protected worker, partner or protected co-worker for a prohibited reason. It operates to prohibit harassment in a broad spectrum of workplaces. Conduct is for a prohibited reason if it is engaged in because the subject of the harassment may volunteer to render defence service, is rendering defence service, is or may become liable to render defence service, or has previously rendered defence service. Harassment includes abuse or bullying, but is not limited to conduct that amounts to abuse or bullying. Protected worker is defined as being an employee, commission agent or contractor, a person seeking to become an employee, commission agent or contractor, or an officer or employee of a commission agent or contractor. The definition of protected co-worker incorporates relationships where people are working together, even if they are not strictly employed by the same person. Like the other offences in Part 4 of the Act, the new offence in section 23A has a maximum penalty of 30 penalty
units, and is also a civil penalty provision with maximum civil penalty of 100 penalty units.

- New section 23B makes a person vicariously liable for the actions of their employee, commission agent or contractor, if they harass a protected co-worker for a prohibited reason. This provision is a civil penalty provision only – there is no criminal offence. The employer (or equivalent) is not liable if they have taken all reasonable steps to ensure that their employees, commission agents and contractors do no harass protected co-workers.

**Part 4 – Employment protection** amends the protections available in the context of employment. The amendments are intended to clarify, rather than make substantive changes to the protections. In particular, references to suspension of an employment contract have been removed, and replaced with an entitlement to be absent from employment while absent on defence service.

**Item 79 and Item 80**- moves the definition of ‘absent on defence service’ from the beginning of the Act to Part 5, where the phrase is used.

**Item 81 and Item 85**- amends the definition of ‘contract of employment’. Contract of employment includes the ordinary meaning (that is, a contract under which a person is employed). The definition confirms that it covers apprenticeships and arrangements where people are employed. Previously, the concept of other arrangements of employment was included in the operative provision, rather than the definition. Employment is defined in section 7 of the Act.

**Item 82**- amends the heading of Division 1 of Part 5.

**Item 83**- inserts a definition of ‘absent on defence service’. This definition is used throughout Part 5 of the Act to determine the period during which the Part 5 protections apply. When a member is ‘absent on defence service’, they are entitled to be absent from their employment (notwithstanding any assertions to the contrary by their employer). This period also determines the time by which a member must have applied to resume work in order to be entitled to resume work under Part 5. Under new subsection 24A, a member is ‘absent on defence service’ during three periods:
when the member is travelling to the place they are required to report for defence service; while they are rendering defence service; and the period immediately following their defence service. The period ends when they resume work or, if they do not apply to resume work within 30 days of ceasing to render defence service, at the end of that 30 day period. This definition of ‘absent on defence service’ enables a member a reasonable period to apply to resume work after ending their defence service, while giving the employer certainty as to when the protected period ends.

**Item 84 and 86** - amends references to suspending an employment contract to an entitlement to be absent during defence service.

**Item 87** - replaces the provision that provided for the suspension of a contract of employment with a provision stating that a member who is employed before being absent on defence service is entitled to be absent from that employment while absent on defence service (new subsection 26(1)). This means that an employee who is absent on defence service is not in breach of their employment contract, even if their employer has not given them leave to be absent from the workplace. The provision makes it clear that a period of absence on defence service is taken not to be a period of employment under the contract (new subsection 26(2)), subject to the rest of Part 5. This might be relevant as to whether a person accrues annual leave, for example, while absent on defence service. This does not apply if the Reserve member is taking any type of leave to which they are entitled under their employment contract (including paid and unpaid leave) (new subsection 26(3)). It is noted that new subsection 26(2) is subject to sections 30 and 31 of the Act, which provide that the member's work entitlements must be no less beneficial than if the member had been absent on leave without pay (in the case of continuous full-time service) or absent on paid leave (in the case of other defence service). New subsection 26(4) also makes it clear that the provision does not limit the availability of paid and unpaid leave under a contract of employment, or prevent termination of the contract of employment in accordance with law for a reason other than that the person is absent on defence service.

**Item 88 to Item 91** - clarifies the right to apply to resume work after defence service, including the timeframe during which the application must be made for the protection
in Part 5 to continue to apply. Previously, a member was required to apply to resume work ‘within 30 days after’ ceasing to render defence service. This has been amended to ‘no later than 30 days after’, to avoid any suggestion that the member could not apply to resume work before they finish rendering defence service.

**Item 92 to Item 94** - clarifies the provision that provides that an employer must allow a member to resume work, in particular by clarifying when the member ceases to be absent on defence service.

**Item 95** - inserts a provision clarifying that the Division does not limit the right of a member to resume work or be reinstated in employment under a contract of employment or any other law.

**Item 96** - clarifies subsection 30(2) as applying in respect of the period of the absence on defence service.

**Item 97** - amends a reference to ‘suspended contract of employment’ to ‘contract of employment with the old employer’.

**Item 98** - amends subsection 61(5) to accommodate the new definition of ‘absent on defence service’.

**Item 99** - inserts a new section to confirm that the Act does not limit protections available to a member or former member under any other law. For example, nothing in the *Defence Reserve Service (Protection) Act 2001* would prevent a person from taking advantage of other protections available under the *Fair Work Act 2009* or under anti-discrimination legislation.

**Item 100** - applies the amendments in relation to employment protections in relation to absence on defence service if the absence starts on or after the commencement of the item.

**Part 5 – Education protection** enhances the protections in Part 7 of the Act available to Reserve members who render defence service while they are enrolled at an
Australian educational institution. It inserts a new general protection, requiring educational institutions to make reasonable adjustments to accommodate a member’s defence service. This is in addition to the specific obligations already in the Act, which include obligations to allow a member to re-enrol or resume a course of study.

**Item 101** - amends the overview of the Act, as it applies to Part 7 of the Act, to describe this Part as requiring an education institution to make reasonable adjustments for a member who undertakes defence service.

**Item 102** - inserts a definition of ‘reasonable adjustment’, referring to the meaning given in new section 38.

**Item 103** - amends the overview of Part 7 to describe the new requirement to make reasonable adjustments for members undertaking defence service.

**Item 104** - replaces section 38. The new provision applies in relation to Reserve members who are enrolled at Australian education institutions before they commence defence service. The body administering the institution is required to make reasonable adjustments to accommodate the member’s defence service. An adjustment is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the body administering the education institution (new subsection 38(4)). To determine whether something would amount to an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the nature of any benefit or detriment likely to arise and the education institution’s financial circumstances (new subsection 38(5)). Other relevant factors could include the nature of the course being undertaken and the effect of the adjustment on other students. The education institution would be best placed to present evidence as to any unjustifiable hardship, so the burden of establishing unjustifiable hardship would lie on them (new subsection 38(6)). New subsection 38(3) provides examples of adjustments that would typically be considered reasonable, including: not failing a member; recognising assessment or practical work undertaken by the member before starting to render defence service; allowing the member to defer undertaking or completing assessment or practical work; and refunding or crediting fees paid by or for the member. The provision is not intended to require education institutions to
award degrees or qualifications to people who have not completed all course requirements.

**Item 105**- replaces the heading for section 39.

**Item 106**- clarifies the application of the protections in section 39 of the Act. It inserts a new subsection stating that the section applies to a member who is enrolled at an Australian education institution during all or part of the period they are rendering defence service, who does not complete the course before the end of their defence service, and who applies to re-enrol and/or resume the course within 30 days of the end of their defence service.

**Item 107**- confirms that the particular obligations in section 39 do not limit the general obligation in new section 38.

**Part 6 – Jurisdiction of courts**

**Item 108 and Item 109**- inserts references to the Federal Circuit Court of Australia as an additional court that may hear and determine matters arising under the Act.

**Part 7 – Other provisions**

**Item 110**- provides for the unlikely scenario that any of the amendments to the *Defence Reserve Service (Protection) Act 2001* amount to an acquisition of property. If that is the case, it provides that the amendments do not apply to the extent that their operation would result in the acquisition of property from a person otherwise than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution). This preserves the operation of the amendments as far as possible.
SCHEDULE 3 - Intelligence Services Act 2001- Australian Geospatial-Intelligence Organisation

Intelligence Services Act 2001
Navigation Act 2012
Telecommunications Act 1997

Overview

The primary purpose of this Schedule is to amend three Acts; the Intelligence Services Act 2001 (ISA); the Navigation Act 2012; and the Telecommunications Act 1997.

The amendments to the ISA are intended to affect the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy (RAN) to the Australian Geospatial-Intelligence Organisation (AGO). They are needed to implement a recommendation of the First Principles Review of Defence that Defence geospatial related information functions be consolidated within the AGO. The transfer is expected to realise synergies in the exploitation of imagery and other data to produce intelligence and non-intelligence geospatial related information in support of Australia’s defence interests and other national objectives.

The amendments to the ISA will: incorporate hydrographic, meteorological and oceanographic functions within AGO’s intelligence collection and non-intelligence functions in addition to its traditional geospatial and imagery functions; and permit AGO to provide its non-intelligence products and related assistance to an expanded range of entities in accordance with Australia’s legal obligations and national interests.

The minor consequential amendments to the Navigation Act 2012 and the Telecommunications Act 1997 are needed to ensure that the terminology used in those Acts aligns with new Defence organisational arrangements following transfer of those functions.
Schedule 3

Item 1 - makes a technical amendment to paragraph 3(a) of the definition of incidentally obtained intelligence in section 3 of the ISA by substituting the reference to “6B (a)” for “6B (1) (a)”.

Item 2 – makes a technical amendment to paragraph 3(b) of the definition of intelligence information in section 3A of the ISA by substituting the reference to "6B (a)’ for "6B (1) (a)".

Item 3 – makes a technical amendment to section 6B of the ISA by inserting “(1)” before “The functions of AGO” in section 6B making the entire contents of the current section 6B a subsection.

Item 4 –amends the paragraphs 6B (a), (b) and (c) of the ISA by adding the new hydrographic, meteorological and oceanographic intelligence functions to those paragraphs. This will add an environmental intelligence dimension to AGO’s existing intelligence functions.

Item 5 –repeals paragraph 6B (e) of the ISA and replaces it with two new paragraphs which will become 6B (1) (e) and (ea).

Until now AGO has only provided non-intelligence imagery and other geospatial products and assistance to Commonwealth and State government agencies and those bodies approved by the Minister. New paragraph (e) will now provide AGO with a function to also provide hydrographic, meteorological and oceanographic non-intelligence products and related assistance as these are distinct from imagery and other geospatial products and related assistance.

Subject to limitations in the new paragraph 6B(2) the new paragraph 6(B)(1) (e) will also significantly expand the range of customers to whom AGO non-intelligence products and related assistance may be provided by including persons as well as bodies. Further, the provision by AGO of non-intelligence products and related assistance to a body who is not a Commonwealth or State authority currently requires
Ministerial approval. The new paragraph 6B (1) (e) will not require Ministerial approval to be obtained before providing non-intelligence products and assistance to any person or body.

The provision of non-intelligence hydrographic, meteorological and oceanographic products and related assistance are functions which have historically been performed by the Australian Hydrographic Service and in particular, the Australian Hydrographic Office. In conjunction with the transfer of the hydrographic, meteorological and oceanographic functions from the RAN to AGO, the Australian Hydrographic Office has also been transferred from the RAN to AGO so that it can continue to perform these vital non-intelligence functions as a part of AGO. These amendments are necessary because it is expected that AGO will need to promptly respond to a significantly increased volume of requests for non-intelligence products and related assistance from a wide range of customers such as foreign regional countries, international maritime bodies, cargo and cruise line operators, port authorities and Australian civil mariners. The requirement to obtain a Ministerial approval before providing such services would create a substantial and unnecessary administrative burden on both AGO and the Minister and could delay the provision of navigation safety services.

Until now AGO has only been able to assist another Commonwealth agency, State government agency or an approved body perform their non-intelligence functions if it was related to an emergency response function. Subject to limitations in the new paragraph 6B(2) the new paragraph 6B(1) (ea) will permit AGO to provide non-intelligence assistance to any person or body in relation to the performance by a person or body of emergency response functions, safety functions, scientific research functions, economic development functions, cultural functions and environmental protection functions. This will ensure that in the future, AGO can, where such assistance is incidental to the performance of its other functions and within spare capacity, also disaster recovery activities and developmental programs in accordance with Australian Government policy.

**Item 6** – amends paragraph 6B of the ISA by including a new subparagraph (h) which incorporates the functions mentioned in subsection 223(2) of the *Navigation Act 2012*
into AGO’s non-intelligence functions (to the extent they are not already provided for). These are maritime safety functions which have historically been performed by the Australian Hydrographic Office. Following the transfer of the Australian Hydrographic Office to AGO, AGO will, through the Australian Hydrographic Office, continue to effectively and efficiently deliver high quality hydrographic, meteorological and oceanographic services to the maritime community.

**Item 7** – makes a technical amendment to the current note at the end of paragraph 6B of the ISA by making this Note 1.

**Item 8** – amends paragraph 6B of the ISA by including a Note 2 and new subparagraphs (2) to (5).

Note 2 to paragraph 6B states that subsection 223(2) of the *Navigation Act 2012* deal with functions performed by the Australian Hydrographic Office, which is now part of AGO. This is necessary to explain why the amendments gives AGO responsibility for performing these functions.

A new subparagraph 6B (2) has been included to place some limitations on the provision by AGO of non-intelligence products and related assistance to persons and bodies. Where the person or body is not a Commonwealth authority; a State authority of a Territory; or a foreign person or entity, the provision of non-intelligence products and related assistance is limited to: use in, or incidental to, overseas and interstate trade and commerce; for use outside Australia; or by means of postal, telegraphic, telephonic or other like services. Subparagraph 6B (2) ensures that AGO’s non-intelligence functions are within Commonwealth legislative power.
A new subparagraph 6B (3) has been included to clarify that the Australian Hydrographic Office, mentioned in section 223 of the Navigation Act 2012 is part of the AGO and not a separate entity in its own right. This is consistent with the amendments which gives AGO responsibility for performing these functions. Although the functions mentioned in 223(2) of the Navigation Act 2012 will continue to be performed by the Australian Hydrographic Office, this will now be as a sub-organisation of the AGO.

A new subparagraph 6B (4) has been included to specifically permit AGO to charge a fee in relation to providing non-intelligence products and related assistance under the new subparagraphs 6B (1) (e), (ea) or (h). AGO has not historically charged any fees for the provision of non-intelligence geospatial and imagery products and related assistance principally because until now it constituted a minor service and it had no explicit power under the ISA to do so in any event. New subparagraph 6B(4) provides AGO with the ability to charge a fee to ensure that, following the incorporation of the Australian Hydrographic Office into AGO, the Commonwealth can continue to partially offset the significant cost of providing non-intelligence products and related assistance to the broad range of bodies and persons it will now need to support.

A new subparagraph 6B(5) has been included to clarify that any fee charged for the provision of non-intelligence products and related assistance must not be such as to amount to taxation.

**Item 9** –makes a technical amendment to the paragraph 11(2) (c) of the ISA by substituting the reference to “6B (a)” for “6B (1) (a)” as a consequential amendment to the amendment made by item 2 of this Schedule.

**Item 10** –makes a technical amendment to paragraph 11(2) (e) of the ISA by substituting the reference to “6B (e) and (f)” for “6B (1) (e), (ea), (f) and (h)”.

**Item 11** –makes a technical amendment to the current subsection 11(3) by substituting the reference to “6B (b), (c), (d), (e), (f) and (g)” for “6B (1) (b) to (h)”.

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**Item 12** – makes a technical amendment to paragraph 161(6) (d) of the *Navigation Act 2012* by substituting the reference to “Service” for “Office”.

**Item 13** – makes a technical amendment to the heading of Division 5 of Part 6 of Chapter 6 of the *Navigation Act 2012* by substituting the heading “Division 5—The Australian Hydrographic Service and offences and civil penalties relating to taking a vessel to sea without charts, etc.” for “Division 5 – The Australian Hydrographic Office and offences and civil penalties relating to taking a vessel to sea without charts, etc.”.

**Item 14** – makes a technical amendment to the heading of section 223 of the *Navigation Act 2012* by substituting the heading “223 Functions of the Australian Hydrographic Service” for “223 Functions of the Australian Hydrographic Office”.

**Item 15** – makes a technical amendment to subsections 223(1) and (2) of the *Navigation Act 2012* by substituting the reference to “Service” wherever it occurs for “Office”.

**Item 16** – makes a technical amendment to paragraph 47(2) (b) of Schedule 3A of the *Telecommunication Act 1997* by replacing the paragraph with a new paragraph which refers to “that part of the Defence Department known as the Australian Hydrographic Office”.
Overview

The proposed amendments to the ADF Cover Act are to align a small number of provisions in this new superannuation Act with other military superannuation schemes and provide clarity in definitions.

The amendments will ensure that members who resign from the ADF and later find that they could have been medically discharged will be able to apply to the Commonwealth Superannuation Corporation (CSC) to have their mode of discharge circumstances reassessed.

The amendments will also create a more contemporary definition to allow a child to become eligible at a later date, where the child is found ineligible at the time of the member’s death. An example of how this could occur would be where a child of the member is over 18 and ceases full-time study to care for the member or to undertake a gap year prior to the member’s death, subsequently resuming full-time study after the member’s death while still under the age of 25.

Schedule 4

Part 1 - Medical Discharge - inserts a new provision and definition to:

- Allow persons who for certain reasons were not discharged medically unfit at the time of discharge to apply to the Commonwealth Superannuation Corporation (CSC) at a later date to consider if grounds existed on which the person could have been medically discharged because of the physical or mental impairment they had at the time of discharge.

- If CSC is satisfied that grounds existed on which the person could have been medically discharged, CSC must as soon as reasonably practicable determine the percentage of incapacity for civil employment at the time of medical discharge.
- If CSC classifies the person either as class A or B, CSC may at the time it makes that determination also determine the percentage of the person’s incapacity for civil employment at any time or times that occurred after the persons medical discharge.

- A person affected by a decision of CSC may request CSC to reconsider the decision. The insertion of this provision is consistent with other Military superannuation schemes.

**Item 1**- inserts a note to assist the reader in relation to the new section 31A where a person is taken in certain circumstances to have been medically discharged even though he or she ceased to be a covered ADF member for a different reason.

**Item 2**- inserts an exception to section 18(1) in relation to determining a person’s incapacity for civil employment. The exception only relates to the new subsection 18 (2A) which only applies to a person where a new section 31A determination has been made. A section 31A determination only applies to a person who is taken in certain circumstances to have been medically discharged even though he or she ceased to be a covered ADF member for a different reason.

**Item 3**- inserts a new subsection 18(2A) and 18(2B) to make provision for members who have determinations made under section 31A where a person is taken in certain circumstances to have been medically discharged even though he or she ceased to be a covered ADF member for a different reason.

Subsection 2A provides that CSC must as soon a reasonably practicable, after CSC determines that grounds existed for the member to be discharged medically unfit, determine the percentage of the person’s incapacity for civil employment at the time of discharge.

Subsection 2B provides that if the person is classified either class A or B, CSC can also determine the percentage of the person’s incapacity for civil employment at any time or times that occurred after the person’s medical discharge.

**Item 4 and Item 5**- expands subsection 18(3) to include the new subsections (2A) and (2B). This ensures that despite subsections (1) to (2B), CSC is not required to make a determination if the pension is not payable because of certain circumstances outlined in Subdivision C.
Item 6- makes a minor amendment to assist with the readability of subsection 18(4). The insertion of “at that time” is to clarify that the determination of a member’s level of incapacity will be made at the same time as CSC makes the discretionary determination.

Item 7- amends subsection 19(2) to take account of the new subsection (2B) to ensure CSC must not make any substantive classifications after a member turns 60.

Item 8- amends subsection 21(1) to make clear that a classification made under section 19 also includes a determination under subsection 18(2A).

Item 9- inserts a note at the end of subsection 21(1) to assist the reader that subsection 18(2A) applies if a person is taken, under section 31A, to have been medically discharged even though he or she ceased to be a covered ADF member for a different reason.

Item 10- fixes a grammatical error in subsection 21(2) (b).

Item 11- inserts a new subsection 21(2A) to make it clear that a classification made under section 19 because of a determination under subsection 18(2B) of what was a person’s incapacity for civil employment at a particular time takes effect at that particular time. The new subsection also inserts a note to assist the reader that subsection 18 (2B) applies if a person is taken, under section 31A, to have been medically discharged even though he or she ceased to be a covered ADF member for a different reason.

Item 12-updates subsection 21(3) to take account of the new subsection 21(2A).

Item 13- fixes a grammatical error in subsection 21(3) (b).

Item 14-amends subsection 21(4) provides that a classification of the person (except a classification described in new subsection 21(5)) (see clause 15 below) ceases to have effect when a classification of the person that is made later takes place.

Item 15- adds a new subsection 21(5) to allow a classification of a person made under section 19 because of a determination made under subsection 18(2A) or 18(2B) cease to have effect when another classification of the person under this Subdivision takes effect. A note is also provided to assist the reader.
**Item 16** — adds a new provision at the end of Part 2 - 'Division 6- Other provisions - section 31A- Persons who could have been medically discharged'. This new Division 6 will:

- Allow persons who for certain reasons were not discharged medically unfit at the time of discharge to apply to the Commonwealth Superannuation Corporation (CSC) at a later date to consider if grounds existed on which the person could have been medically discharged because of the physical or mental impairment they had at the time of discharge.

- If CSC is satisfied that grounds existed on which the person could have been medically discharged, in accordance with 18 (2A) must as soon as reasonably practicable determine the percentage of incapacity for civil employment at the time of medical discharge.

- If CSC classifies the person either as class A or B in accordance with 18(2B), CSC may at the time it makes that determination also determine the percentage of the person’s incapacity for civil employment at any time or times that occurred after the person’s medical discharge.

- A person affected by a decision of CSC may request CSC to reconsider the decision. The insertion of this provision is consistent with other military superannuation schemes.

**Item 17 and Item 18** — adds new subsection 51(2). Section 51 provides that the Department is to provide CSC information around the time of medical discharge. These items have renumbered Section 51 to add a new provision to ensure that the section 51(1) does not apply if a section 31A applies to the member.

The reason is that section 31A allow persons who for certain reasons were not discharged medically unfit at the time of discharge to apply to the Commonwealth Superannuation Corporation (CSC) at a later date to consider if grounds existed on which the person could have been medically discharged because of the physical or mental impairment they had at the time of discharge. It is up to the applicant and CSC to determine the evidence. However, in determining the person’s application under Section 31A, CSC could approach the Department for further information if required at that time. A note is also added to assist the reader.
**Item 19**- provides that the amendments in this Part only apply to a person who ceased or ceases to be a covered ADF member (*Australian Defence Force Cover Act 2015*) on or after 1 July 2016.

**Part 2- Eligible Children**

- Amends the definition of eligible child to remove the requirement to apply a work test to an eligible child over the age of 18 who is undertaking full-time education.

- Allows the continuation of the child subsidy payment providing the child is in full-time education and has not reached the age of 25.

- Creates a more contemporary definition to allow a child to become eligible at a later date, where the child is found ineligible at the time of the member’s death. An example of how this could occur would be where a child of the member is over 18 and ceases full-time study to care for the member or to undertake a gap year prior to the member’s death, subsequently resuming full-time study after the member’s death while still under the age of 25. The amendment is beneficial to the children of deceased ADF members and is consistent with civilian defined benefit superannuation schemes.

**Benefit payments in relation to all eligible children of a deceased member:**

- Removes the requirement for a child of a deceased member to be “wholly or substantially dependent” on the deceased invalid or member, or an eligible spouse. The amendment ensures that all eligible children of a deceased member are recognised, regardless of where they reside and does not unintentionally exclude children who would otherwise be found eligible if there was no eligible spouse.

- Assures that pensions payable under these circumstances are determined by who is eligible (i.e. spouse, three children [being the total pension payable]). The total pension is calculated as though there had been only one spouse. CSC will determine who to pay a proportion of that total pension.
- Ensures that CSC has discretion to determine who to pay the child pension.

- This amendment may result in more children being eligible under the new provisions and might also increase the amount payable for dependent children (i.e. children who are already eligible, where there are multiple eligible spouses). However the total pension cannot exceed 100% of the deceased member pension. The following amendments are consistent with the other military superannuation schemes.

**Item 20 and Item 21**- amend the definition of an eligible child in subparagraph 5(1)(b)(ii) to remove the requirement for a child of a deceased member to be “wholly or substantially dependent” on an eligible spouse. The amendment ensures that all eligible children of a deceased member are recognised, regardless of where they reside and does not unintentionally exclude children who would otherwise be found eligible if there was no eligible spouse.

**Item 22**- removes the reference to wholly or substantially dependent on an eligible spouse. The amendment of subsection 10(1) ensures that all eligible children of a deceased invalid or member are recognised, regardless of where they reside and does not unintentionally exclude children who would otherwise be found eligible if there was no eligible spouse.

**Item 23**- amends the heading in the table in relation to eligible children.

**Item 24**- amends the simplified outline of Part 2 to ensure that a pension is payable to any eligible children of the invalid.

**Item 25**- amends the heading of subsection 26(5) to remove the reference that eligible children do not have to be dependent on a spouse of the invalid.

**Item 26**- removes the reference to wholly or substantially dependent on an eligible spouse. The amendment ensures that all eligible children of a deceased invalid are recognised, regardless of where they reside and does not unintentionally exclude children who would otherwise be found eligible if there was no eligible spouse. CSC will use section 41 to ensure that the increase goes to the appropriate recipient.
**Item 27 and Item 28** - amend the simplified outline of this part to ensure consistency with the policy that an eligible child does not have to be dependent on the spouse.

**Item 29** - amends the heading to remove the requirement for eligible children to be dependent on the spouse.

**Item 30** - removes the reference to wholly or substantially dependent on the spouse. This amendment removes the requirement for eligible children to be dependent on the spouse.

**Item 31** - amends subsection 39(3) to make clear that if CSC makes a determination under subsection 39(2) in relation to more than one surviving spouse of an invalid or member it must equal the maximum benefit that would have been payable to a single surviving spouse.

**Item 32** - adds a new subsection 39(5) (effect of death of surviving spouse) to assist CSC in the allocation of benefits payable to more than one surviving spouse or nominated beneficiary and one spouse or beneficiary dies. The provision ensures that a determination made under subsection 39(1) (a) or (b) in relation to the allocation of benefits continues if a spouse or beneficiary dies.

**Item 33** - inserts new subsections 41(2A) and 41(2B) to enable CSC to also pay that part of the pension attributed to the child to one of the eligible children or another surviving spouse of the invalid or member. Without limiting when CSC may make a determination under subsection (2) CSC must consider whether to make such a determination in relation to a pension payable to a surviving spouse if CSC becomes aware that one or more of the eligible children of the invalid or member are not wholly and substantially dependent on the surviving spouse. For example: CSC are only obliged to “divert” the payment once they are aware of the child no longer living with the eligible spouse – CSC are not obliged to backdate any diversion and therefore create an overpayment debt to the eligible spouse. The new sections provide CSC with greater flexibility in their ability to distribute benefits appropriately.

**Item 34** - fixes a spelling error.

**Item 35** - adds a new subsection 41(4) to provide for the effect of death of a surviving spouse where there is more than one eligible spouse and CSC has determined that the pension is split between the eligible spouses, and later one of the eligible spouses dies the portion of that pension attributed to the deceased spouse ceases to be paid. The
new provision makes it clear that if any eligible child was wholly and substantially dependent on the spouse before the spouse died that determination is to cease and a new determination is to be made.

The new subsection also provides that a determination in relation to eligible children not dependent on a surviving spouse will continue.

For example: In the event of the death of an eligible spouse, where a determination under Section 41(2) is in existence, CSC will:

- cancel the pension payable to the eligible spouse, including any amount that were payable in respect of any eligible children who were wholly and substantially dependent on that spouse;
- continue to pay anyone else to whom the determination applies; and
- re-calculate the amount payable to any eligible children who were wholly and substantially dependent on the spouse and create a ‘dependents pension’. This would be calculated by reference to section 29 but if necessary, because of a determination remaining in existence under section 41(4) (b) to another eligible child, reduce the amount of the dependents pension to ensure that the maximum amount payable for all beneficiaries would be no more than the maximum rate of pension that could be payable because of the death of the surviving spouse.

The new subsection has been added to reinforce that section 41 will be used to ensure that the pension increase goes to the right beneficiary.

**Item 36** - fixes a spelling error.

**Item 37** - provides that the amendments in this Part apply, and are taken to have applied, on and after 1 July 2016.

**Part 3 – Other amendments**

**Item 38** - repeals and substitutes subparagraph 58(2) (a) in relation to a request for reconsideration of a decision by CSC. The request must be in writing and must be given within 30 days after CSC gives notice of the decision to a person or such further period as CSC, in special circumstances allows.
Item 39- the amendment made by this part applies in relation to a decision of CSC made on or after the commencement of this item.