



## DEFENCE RESERVES SUPPORT

Supporting Australia's Reservists and their Employers

# CHANGES TO *DEFENCE RESERVE SERVICE (PROTECTION) ACT 2001*

## Background

1. The *Defence Reserve Service (Protection) Act 2001* prohibits conduct that discriminates against Reserve members in their employment or other work.
2. The Act also includes employment, partnership, education, bankruptcy and financial liability protection and applies to current serving ADF Reserve members, former ADF Reserve members and persons who intend to undertake ADF Reserve service as Reserve members.
3. The Act minimises some of the employment, educational, financial and other disadvantages that ADF Reserve members may experience when undertaking ADF Reserve service. The Act also enhances Defence capability by improving the availability of ADF Reserve members.

## ***Defence Legislation Amendment (2017 Measures No. 1) Act 2017***

4. The *Defence Legislation Amendment (2017 Measures No. 1) Act 2017* (the Amending Act) received Royal Assent on 30 Oct 17.
5. The Amending Act amended a number of Defence-related Acts, including the *Defence Reserve Service (Protection) Act 2001*.

## Changes to *Defence Reserve Service (Protection) Act 2001*

6. The amendments to the *Defence Reserve Service (Protection) Act 2001* come into effect on 27 Nov 17, 28 days after the Amending Act received Royal Assent.
7. The changes will only apply in relation to Defence service that starts on or after 27 Nov 17. For periods of Defence service that commenced before 27 Nov 17, the protections in the previous version of the Act will still apply.
8. The changes to the Act relate to the following areas:
  - Protection against discrimination
  - Employment protection
  - Partnership protection
  - Education protection
  - Financial liability and bankruptcy protection
  - Enforcement of the Act and remedies that are available.

## Key changes

9. Key changes are:
  - a new anti-harassment provision
  - extended protections against discrimination in partnerships
  - a new civil penalty regime (complementing existing criminal offences in the Act)
  - expanding the scope of the employment, partnership and education protections to apply to all Defence service by Reserve members

- enhancing the education protections by creating an obligation on education providers to make reasonable adjustments to accommodate Reserve members' Defence service
- expanding the scope of the financial liability and bankruptcy protections to apply to operational service by Reserve members
- a new anti-victimisation provision.

## Protection against discrimination

10. Part 4 of the Act provides protection against discrimination because of Defence service. This Part makes it unlawful for an employer to hinder or prevent an employee from volunteering to render or rendering Defence service as a Reserve member.
11. Part 4 of the Act applies to all Defence service by Reserve members, including continuous full-time Defence service.
12. The amendments to Part 4 relate to the following areas:
  - introduction of a new provision relating to harassment
  - changes relating to discrimination in partnerships
  - introduction of civil penalty provisions.

### Introduction of harassment provision

13. The amendments to Part 4 insert a new Division 6, dealing with harassment.
14. This Division makes it unlawful to harass a worker, partner or co-worker on the grounds that the person is rendering, has rendered or might, in the future, render Defence service as a Reserve member.
15. Harassment includes abuse or bullying (but is not limited to conduct that amounts to abuse or bullying).
16. For the purposes of this Division, a worker includes:
  - an employee, commission agent or contractor
  - a person seeking to become an employee, commission agent or contractor
  - an officer or employee of a commission agent or contractor
17. Co-worker includes relationships where people are working together, even if they are not employed by the same person.
18. Contravention of the harassment provision amounts to a criminal offence with a maximum penalty of 30 penalty units. A civil penalty provision of 100 penalty units also applies.

19. **Vicarious liability.** A separate provision (new section 23B) makes a person (or employer) vicariously liable for the actions of their employees, commission agents or contractors if they harass a co-worker for a prohibited reason. This section only provides a civil penalty provision of 100 penalty units (there is no criminal offence).
20. The person (or employer) is not liable under section 23B if they have taken all reasonable steps to ensure that their employees, commission agents and contractors do not harass co-workers.

### Discrimination in partnerships

21. The changes to Part 4 of the Act amend the existing Division 3 (Discrimination in partnerships) by inserting a provision (new section 18A) which prohibits a partner in a partnership from undertaking, or threatening to undertake, certain actions because the other partner:
  - Is rendering Defence service as a Reserve member
  - has rendered Defence service as a Reserve member, or
  - might, in the future, render Defence service as a Reserve member.
22. The actions which are prohibited by the new section are:
  - dissolving the partnership
  - expelling the other partner from the partnership
  - requiring the other partner to forfeit his or her share in the partnership, or
  - subjecting the other partner to any other detriment concerning the partnership.
23. Contravention of the new provision amounts to a criminal offence with a maximum penalty of 30 penalty units. A civil penalty provision of 100 penalty units also applies.

### Introduction of civil penalty provisions

24. Under the existing provisions of the Act, a breach of a section in Part 4 may be a criminal offence. The maximum penalty for each criminal offence is 30 penalty units. A breach may also be redressed by bringing a civil action in a court. A court may:
  - order compensation be paid
  - grant an injunction restraining or requiring particular conduct
  - make other orders, as it thinks fit.

25. While these provisions are unchanged, the amendments have added a civil penalty provision to each section in Part 4. Civil penalty provisions provide a less cumbersome and technical enforcement process than criminal prosecutions. The maximum civil penalty for each offence is 100 penalty units.

26. As a result of these changes, a breach of Part 4 may, in addition to being a criminal offence, result in a civil penalty arising from a civil action in a court.

**Note:** The current value of a single penalty unit is \$210, as set out in the *Crimes Act 1914*.

## Employment protection

27. Part 5 of the Act deals with employment protection.

28. The amendments to Part 5 relate to the following areas:

- the application of employment protection to Defence service by Reserve members
- the definition of absent on Defence service
- a member's entitlement to be absent during Defence service
- resuming work after Defence service.

29. Other than the amendment relating to the application of Part 5 to Defence service, the changes to Part 5 clarify, rather than make substantive changes to, the protections in the Act.

### Application of Employment Protection

30. **Previous situation.** Previously, service by Reserve members on Reserve Service Days was protected service under Part 5 of the Act. However, voluntary continuous full-time service (CFTS) by Reserve members was either protected or unprotected service under Part 5.

31. Voluntary CFTS was only protected service under Part 5 if the Chief of the Defence Force (or delegate) had requested the Reserve member to undertake the service on a protected basis.

32. If the member had not been requested to undertake the voluntary CFTS on a protected basis, this service was unprotected service (to which the employment protections in Part 5 did not apply).

33. **New situation.** The application of the employment protections in Part 5 of the Act has been extended. All Defence service by Reserve members, including all periods of voluntary CFTS, is now protected service to which the protections in Part 5 apply.

34. **Date of effect.** These changes to the application of the employment protection provisions only apply in relation to an absence on Defence service if the absence starts on or after 27 Nov 17, the date that the changes to the Act will come into effect.

**Note:** For periods of absence on Defence service that commenced before 27 Nov 17, when the service was protected service under the previous version of Part 5, the protections as detailed in Part 5 of the previous version of the Act still apply.

### Definition of *absent on defence service*

35. A revised definition of absent on defence service has been included (at new section 24A). Under this definition, a member is absent on defence service during three periods:

- when travelling to the place they are required to report for Defence service
- while rendering Defence service
- during the period immediately following the member's Defence service.

36. The period immediately following the member's Defence service 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 the 30 day period.

### Entitlement to be absent during Defence service

37. The changes to Part 5 of the Act remove reference to the suspension of an employment contract while a member is absent on Defence service. This is replaced with an entitlement for the member to be absent from employment while absent on Defence service (at amended section 26).

38. 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.

39. The section 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 a contract of employment in accordance with the law for a reason other than that the person was absent on Defence service.

## Resuming work after Defence service

40. The changes to Part 5 of the Act amend those sections dealing with resuming work after being absent on Defence service. The main change (in amended section 27) is to remove reference to the suspension of an employment contract.
41. The changes do not make any substantive changes to a member's ability to resume work. The amended provisions continue to specify that:
  - a member may apply to their employer to resume work under their contract of employment, after being absent on Defence service (at section 27).
  - the employer must allow the member to resume work. (at section 28)
  - there are some exceptions, when an employer does not need to allow the member to resume work (detailed in subsection 28(2)).

## Partnership Protection

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42. Part 6 of the Act deals with partnership protection.
43. The amendments to Part 6 relate to the following area:
  - the application of partnership protection to Defence service by Reserve members

### Application of Partnership Protection

44. **Previous situation.** Previously, service by Reserve members on Reserve Service Days was protected service under Part 6 of the Act. However, voluntary CFTS by Reserve members was either protected or unprotected service under Part 6.
45. Voluntary CFTS was only protected service under Part 6 if the Chief of the Defence Force (or delegate) had requested the Reserve member to undertake the service on a protected basis.
46. If the member had not been requested to undertake the voluntary CFTS on a protected basis, this service was unprotected service (to which the partnership protections in Part 6 did not apply).
47. **New situation.** The application of the partnership protections in Part 6 of the Act has been extended. All Defence service by Reserve members, including all periods of voluntary CFTS, is now protected service to which the protections in Part 6 apply.

48. **Date of effect.** These changes to the application of the partnership protection provisions only apply in relation to an absence on Defence service if the absence starts on or after 27 Nov 17, the date that the changes to the Act will come into effect.

**Note:** For periods of absence on Defence service that commenced before 27 Nov 17, when the service was protected service under the previous version of Part 6, the protections as detailed in Part 6 of the previous version of the Act still apply.

## Education Protection

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49. Part 7 of the Act deals with education protection.
50. The amendments to Part 7 enhance the protections available to Reserve members who render Defence service while enrolled at an Australian educational institution. The changes relate to the following areas:
  - the application of education protection to Defence service by Reserve members
  - obligation on educational institutions to make reasonable adjustments.

### Application of Education Protection

51. **Previous situation.** Previously, the education protections in Part 7 only applied to protected voluntary CFTS by Reserve members, where the Chief of the Defence Force (or delegate) had requested the Reserve member to undertake the service on a protected basis.
52. **New situation.** The application of the education protections in Part 7 of the Act has been extended. All Defence service by Reserve members, including service on Reserve Service Days and all periods of voluntary CFTS, is now protected service to which the protections in Part 7 apply.
53. **Date of effect.** These changes to the application of the education protection provisions only apply in relation to an absence on Defence service if the absence starts on or after 27 Nov 17, the date that the changes to the Act will come into effect.

**Note:** For periods of absence on Defence service that commenced before 27 Nov 17, when the service was protected service under the previous version of Part 7, the protections as detailed in Part 7 of the previous version of the Act still apply.

## Obligation to make reasonable adjustments

54. The changes to Part 7 insert a new requirement for educational institutions to make reasonable adjustments that are required because a Reserve member, who is enrolled in a course at the institution, is rendering Defence service (at amended section 38).
55. Examples of adjustments that would typically be considered reasonable are detailed in the amended section 38. These include:
  - 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
  - refunding or crediting fees paid by or for the member.
56. An adjustment is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the educational institution.
57. To determine whether something would amount to an unreasonable hardship, all the relevant circumstances of the case must be taken into account. The burden of establishing unreasonable hardship is placed on the educational institution.

## Obligation to allow re-enrolment/resumption

58. The previous requirement (in section 39) that an educational institution allow a member to re-enrol in, and resume, a course that was interrupted because the member rendered Defence service remains unchanged.
59. The member must apply to re-enrol (if necessary) and to resume the course within 30 days of the end of their Defence service.

## Financial liability protection and bankruptcy protection

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60. Parts 8 and 9 of the Act deals with financial liability protection and bankruptcy protection.
61. The amendments to Parts 8 and 9 relate to the following area:
  - application of financial liability protection and bankruptcy protection to Defence service by Reserve members.

## Application of Financial Liability Protection and Bankruptcy Protection

62. **Previous situation.** Previously, the financial liability and bankruptcy protections in Parts 8 and 9 only applied to continuous full-time Defence service by Reserve members as a result of a call out.
63. **New situation.** As a result of the changes to the Act, the financial liability and bankruptcy protections in Parts 8 and 9 now also apply to continuous full-time Defence service by Reserve members that is operational service.
64. Operational service may be either inside or outside Australia.
65. A definition of *operational service* has been added into section 7 of the Act. This definition includes Defence service involving:
  - preparing to render operational service, or
  - decompressing after rendering operational service.
66. **Date of effect.** These changes to the application of the financial liability and bankruptcy protections only apply in relation to an absence on Defence service if the absence starts on or after 27 Nov 17, the date that the changes to the Act will come into effect.

## Enforcement and remedies

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67. Part 11 of the Act deals with enforcement and remedies.
68. The amendments to Part 11 relate to the following areas:
  - introduction of a new victimisation offence
  - changes to limitation period
  - enforcement of new civil penalty provisions
  - complaints and mediation
  - orders for compensation.

## Introduction of victimisation offence

69. The amendments to Part 11 insert a victimisation offence, in a new Division 4 to that Part.
70. The new Division provides that a person must not subject, or threaten to subject, another person to detriment for reasons that include:
  - the other person having made, or proposing to make, a complaint under the regulations relating to the Act
  - the other person having given, or proposing to give, information or documents to a person exercising a power or performing a function under the regulations relating to the Act, or
  - the other person having brought, or proposing to bring, proceedings under the Act.

71. The new victimisation offence applies to subjecting a person to detriment, or threatening to subject a person to detriment, on or after 27 Nov 17, the date that the changes to the Act will come into effect, regardless of whether:

- the relevant complaint was made, information or documents provided, or proceeding brought before, on or after 27 Nov 17, or
- the proposal to do any of those things was made before, on or after 27 Nov 17.

72. Contravention amounts to a criminal offence with a maximum penalty of 30 penalty units. A civil penalty provision of 100 penalty units also applies.

### Limitation period

73. The changes to the Act amend the limitation period for commencing an action for loss or damage for contravention of the Act from 3 years to 4 years.

74. This change to the limitation period only applies to contraventions that occurred on or after 27 Nov 17, the date that the changes to the Act will come into effect.

**Note:** This will make the limitation period consistent with the limitation period for applying for a civil penalty in other legislation.

### Enforcement of new civil penalty provisions

75. A new Division 3 to Part 11 specifies that:

- the new civil penalty provisions in the Act are enforceable under the *Regulatory Powers (Standard Provisions) Act 2014*
- an authorised applicant in relation to the civil penalty provisions is a person prescribed by the regulations
- all State and Territory Courts, the Federal Court and the Federal Circuit Court are relevant courts in relation to the civil penalty provisions.

**Note:** The Director of the Office of Reserve Service Protection will be the most appropriate authorised applicant.

### Complaints and mediation

76. A new Division 1B to Part 11 provides that regulations may provide processes for making and investigating complaints about alleged contraventions of the Act and for mediating disputes between people affected by the Act.

**Note:** The Office of Reserve Service Protection, established under the *Defence Reserve Service (Protection) Regulations 2001* receives, investigates and mediates complaints under the regulations.

77. The new provision makes clear that, while there is a complaints process in the regulations, other civil remedies can still be pursued.

### Order for compensation

78. Previously, a court could order a person, who had been found guilty of an offence against the Act, to pay such compensation as the Court thought reasonable.

79. This provision (at section 74) has been amended to add a reference to the civil penalty regime. A Court may now order a person to pay compensation if it makes a civil penalty order against the person for contravening a civil penalty provision of the Act, as well as if the person has been found guilty of an offence against the Act.

### Changes to other matters

80. Part 12 of the Act deals with other matters.

81. The amendments to Part 12 relate to the following areas:

- ability to use other protections
- penalties in regulations.

### Ability to use other protections

82. New section 76C confirms that the Act does not limit protections available to a member or former member under any other law.

**Note:** This is to ensure that nothing in the *Defence Reserve Service (Protection) Act 2001* would prevent a person taking advantage of other protections, such as those available under the *Fair Work Act 2009* or under anti-discrimination legislation.

### Penalties in regulations

83. Changes to section 81 enable regulations to prescribe penalties of up to 60 penalty units for offences and contraventions of the regulations.

**Note:** Offences in the *Defence Reserve Service (Protection) Regulations 2001* include a failure to provide information to the Director of the Office of Reserve Service Protection.

84. As offences and contraventions can significantly hamper the enforcement of the Act, the change will enable the regulations to provide a higher penalty for this conduct.

Dated

1 November 2017