



21 May 2020

Senator the Hon Linda Reynolds CSC
Minister for Defence
Parliament House
CANBERRA ACT 2600

Via email: Senator.Reynolds@aph.gov.au

CC: parliamentary.business@defence.gov.au

Dear Minister,

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice about this matter.

Procedural fairness

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties.

The instrument amends section 24 of the Defence Regulation 2016 (the regulation), which relates to early termination of service. The effect of the restructure of section 24 is to explicitly exclude decisions to terminate a member who has failed to meet a condition of the member's appointment or enlistment (paragraph 24(3)(b)(i)), or has been absent without leave for a continuous period of 3 months or more (paragraph 24(3)(b)(iii)), from the requirement in subsection 24(2) to give 14 days' notice of the termination decision.

The committee notes that the previous iteration of section 24 was silent in relation to the giving of notice in these circumstances. In the absence of an express legislative exclusion of procedural fairness, courts will require that notice, and an opportunity to be heard, be afforded to individuals whose interests may be affected by a decision. The committee considers that having notice of decisions is an important feature of the common law right to procedural fairness.

It is not clear to the committee why the 14 day notice requirement cannot be applied to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii). In this regard, the committee does not consider the fact that the 14 day notice requirement did not apply to such terminations in the previous iteration of section 24 to

be a sufficient justification for not including the notice requirement for terminations made in these circumstances in the latest iteration of section 24.

The committee understands that the restructure of section 24 is not intended to exclude the general common law requirements of procedural fairness, including the requirement that a member be given notice and an opportunity to respond if that is appropriate in the particular circumstances of the case. However, the committee considers that section 24, as amended by the instrument, does not make this intention clear on its face. In any event, the committee does not consider the fact that the common law requirements of procedural fairness will apply to be, on its own, a sufficient justification for the exclusion of the statutory 14 day notice requirement.

The committee therefore requests your advice as to whether the regulation could be amended to provide that the 14 day notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii) and if not, why not.

If such an amendment is not considered appropriate, the committee also requests your advice as to whether the regulation could at least be amended to expressly state that subsection 24(3) is not intended to exclude the common law requirements of procedural fairness in order to put the matter beyond doubt for defence officials, defence members and the courts.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

A large black rectangular redaction box covers the signature area of the letter.

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA

MB20-000699

Senator the Hon Concetta Fierravanti-Wells
Chair Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

3 JUN 2020

By email: sdlc.sen@aph.gov.au

Dear Senator *Concetta*

I refer to your correspondence to me on 21 May 2020 concerning the Defence Amendment (2020 Measures No. 1) Regulations 2020 (the Amending Regulations), which amended the Defence Regulation 2016 (the Regulation). The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) has identified scrutiny concerns in relation to the Amending Regulations, and has sought my advice about this matter.

In particular, the committee has requested advice as to whether the Regulation could be amended to provide that the 14 day notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24 (3)(b)(i) and (iii) and if not, why not. If such an amendment is not considered appropriate, the committee has requested my advice as to whether the regulation could be amended to expressly state that subsection 24(3) is not intended to exclude the common law requirements of procedural fairness in order to put the matter beyond doubt for defence officials, defence members and the courts.

Termination decisions without 14 days written notice

As the committee has outlined in its correspondence, the effect of the Amending Regulations was to restructure section 24 of the Regulation to explicitly exclude decisions to terminate a member who has failed to meet a condition of their appointment or enlistment (paragraph 24(3)(b)(i)), or has been absent without leave for a continuous period of 3 months or more (paragraph 24(3)(b)(iii)), from the requirement in subsection 24(2) to give 14 days' written notice of a termination decision. However, notwithstanding this exclusion, decision-makers must follow a fair and reasonable process when making these decisions, having regard to all the circumstances.

That means that, generally, members would need to be provided with notice in some form and a fair opportunity to be heard, before a decision is made.

The first circumstance of concern to the committee is where a member has failed to meet a condition of appointment or enlistment. A common example of a condition on appointment or enlistment is to complete certain training within a specified period. ADF members are made aware of this condition at the time of appointment or enlistment, and, generally, if an ADF member is at risk of not completing required training, they will be made aware of this (including the possible consequences of failing to complete the required training), and given ample opportunities to satisfy the condition.

If the ADF member fails to complete the required training in time, and termination is contemplated, the procedures adopted in relation to that decision must be reasonable, taking account of previous opportunities the ADF member has had to address the issue. Applying the 14 day written notice requirement in s 24(2) to these sorts of decisions would result in duplication of process, without making any substantive difference to the fairness of the process followed or the decision to terminate the member's service. Other examples of conditions that might apply to appointment or enlistment are obtaining citizenship or obtaining a particular professional qualification. These sorts of condition have a similar intent as a period of probation, but with a more specific focus on a particular quality of the member.

The other circumstance of concern to the committee is where a member has been absent without leave for a continuous period of 3 months or more. Defence policy sets out a range of actions that are to be taken when a member has failed to report for duty, and is absent without leave. This includes attempting to contact the member at their place of residence, contacting their next of kin and emergency contact, checking whether they have been hospitalised, and checking that they are not in custody. After a period of 24 hours, an arrest warrant may be raised, noting that absence without leave is a disciplinary offence. By the time a member has been absent without leave for 3 months, the member would have either been located and encouraged to return to duty (and potentially charged), or efforts to locate the member have not been successful. A mandatory requirement to provide 14 days written notice before proceeding to a termination decision in these circumstances would be redundant.

Accordingly, the Regulation should not be amended to provide that the 14 day written notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii).

Amending regulation to state effect of common law procedural fairness

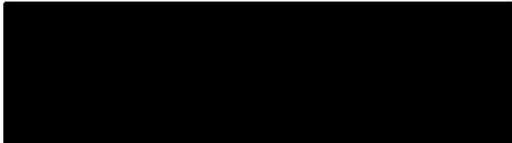
The committee is concerned that defence officials, members and the courts may not be aware that the intent of subsection 24(3) is not to exclude the common law requirements of procedural fairness. I have asked the Department to consider inserting a note in regulation 24, with this in mind, next time the Regulation is amended.

Decision-makers and members in Defence are guided by the *Military Personnel Manual*, which provides comprehensive guidance for how termination decisions should be made under section 24. For example, the manual requires that decision-makers obtain legal advice before making a termination decision without providing 14 days written notice. Another internal guide, *Good Decision-Making in Defence: A guide for decision-makers and those who brief them*, includes guidance for decision-makers about how to comply with procedural fairness obligations, including adopting fair and reasonable processes to suit the specific circumstances.

The Department has advised me that the *Military Personnel Manual* will be amended to state clearly that, notwithstanding the operation of subsection 24(3), common law requirements of procedural fairness still apply, and decision-makers must adopt a fair and reasonable process in all the circumstances. This will help ensure that defence officials and members and the courts are aware that common law procedural fairness applies to these decisions.

Thank you for bringing this matter to my attention.

Yours sincerely



Linda Reynolds

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SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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18 June 2020

Senator the Hon Linda Reynolds CSC
Minister for Defence
Parliament House
CANBERRA ACT 2600

Via email: Senator.Reynolds@aph.gov.au

CC: parliamentary.business@defence.gov.au

Dear Minister,

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]

Thank you for your response of 4 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument. The committee considered your response at its private meeting on 17 June 2020.

Your response has further assisted the committee in its consideration of the instrument. Nevertheless, the committee retains some scrutiny concerns about the matter outlined below, and has resolved to seek your further advice.

Procedural fairness

The committee sought your advice as to whether the instrument could be amended to provide that the 14-day notice requirement in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii), and if not, why not. The committee also requested your advice as to whether—as an alternative—the instrument could be amended to expressly state that subsection 24(3) is not intended to exclude the common law requirements of procedural fairness, to put the matter beyond doubt for defence officials, defence members and the courts.

In response, you advised that the regulations should not be amended to provide that the 14-day notice period in subsection 24(2) applies to termination decisions made in the circumstances set out in paragraphs 24(3)(b)(i) and (iii). However, you also advised that you have asked the Department of Defence (the department) to consider inserting a note into section 24 of the Defence Regulations 2016 (primary regulations) next time they are amended. You indicated that this note would clarify that the intent of the provision is not to exclude the common law requirements of procedural fairness.

You further advised that decision-makers are guided by the *Military Personnel Manual* (Manual) and the guidance document, *Good Decision-Making in Defence: A guide for decision makers and those who brief them*. You advised that these materials include guidance on how to comply with procedural fairness obligations. In particular, you noted

that the Manual includes a requirement for decision-makers to obtain legal advice before making a termination decision without providing 14 days' written notice.

Finally, you noted that the department has advised that the Manual will be amended to state clearly that, notwithstanding the operation of subsection 24(3), common law requirements of procedural fairness still apply, and decision-makers must adopt a fair and reasonable process in all circumstances.

The committee welcomes the advice that you have asked the department to consider amending the primary regulations to insert a note, clarifying that procedural fairness obligations apply to termination decisions under section 24. The committee also welcomes the foreshadowed amendments to the Manual in this regard.

However, in order to provide maximum clarity for defence officials, defence members and the courts, the committee considers that it would be appropriate to amend the primary regulations to include the relevant note as soon as practicable, rather than waiting until those regulations are next amended. In this regard, the committee notes that the regulations have been amended only three times (including by the present instrument) since they were enacted in 2016.

Noting this, the committee requests your clear advice as to whether and, if so, when, the Defence Regulations 2016 will be amended to insert a note clarifying that the common law requirements of procedural fairness apply to termination decisions made under section 24.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that today is the 15th sitting day after the instrument was tabled in the Senate, the committee has resolved to give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

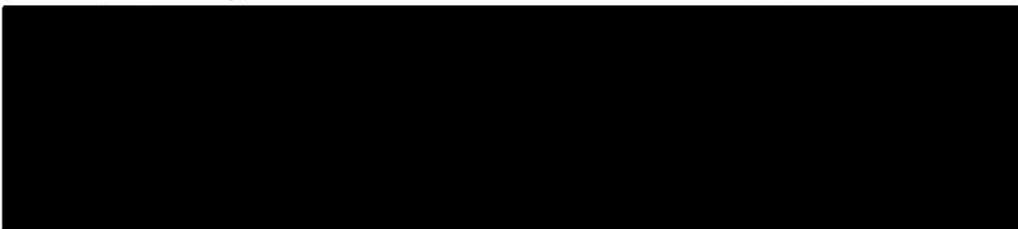
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **2 July 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



**SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA**

MS20-001406

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear *Connie*
Chair

I refer to your letter dated 18 June 2020 concerning the Defence Amendment (2020 Measures No. 1) Regulations 2020. As the Chair of the Senate Standing Committee for the Scrutiny of Delegated Legislation, you requested advice as to whether and, if so, when, the Defence Regulation 2016 will be amended to insert a note clarifying that the common law requirements of procedural fairness apply to termination decisions made under section 24 of the Defence Regulation 2016.

Given the Committee's concerns about procedural fairness requirements, the Department will proceed to amend the Defence Regulation 2016 as soon as practicable, by inserting a note to make it absolutely clear that the common law requirements of procedural fairness will continue to apply to termination decisions made under section 24 of the Defence Regulation 2016.

The Department has engaged the Office of Parliamentary Counsel to commence the drafting of the proposed amendment.

Thank you for bringing the matter to my attention.

Yours sincerely


~~Linda Reynolds~~ *R*



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Senate Standing Committee for the

Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600

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27 August 2020

Senator the Hon Linda Reynolds CSC
Minister for Defence
Parliament House
CANBERRA ACT 2600

Via email: Senator.Reynolds@aph.gov.au

CC: parliamentary.business@defence.gov.au

Dear Minister,

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]

Thank you for your response of 6 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

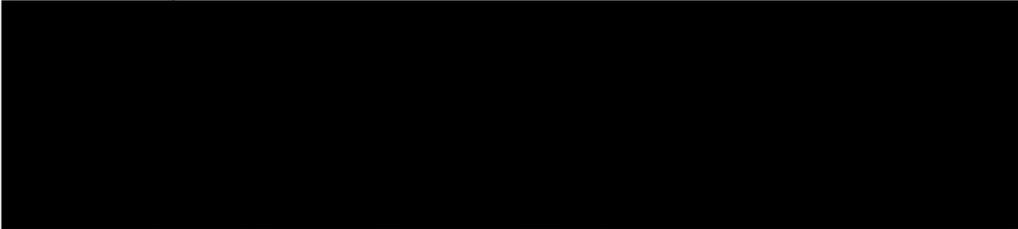
The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument, and has resolved to withdraw the protective notice of motion to disallow the instrument.

The committee welcomes your undertaking to amend the Defence Regulation 2016 to insert a note to clarify that the common law requirements of procedural fairness continue to apply to termination decisions made under section 24 of the Defence Regulation 2016.

In the interests of transparency, I note that your undertaking will be recorded in the *Delegated Legislation Monitor*, and that this correspondence will be published on the committee's website.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation