

THE DEFENCE LEGISLATION AMENDMENT (2017 MEASURES No. 1) ACT 2017

CHANGES TO THE DEFENCE RESERVE SERVICE (PROTECTION) ACT 2001

Introduction

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

The *Defence Legislation Amendment (2017 Measures No. 1) Act 2017* (the Amending Act) came into effect on 27 Nov 2017. The Amending Act amended a number of Defence-related Acts, including the *Defence Reserve Service (Protection) Act 2001*.

The amendments to the *Defence Reserve Service (Protection) Act 2001* 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.

Following the passing of the amendments, the Office of Reserve Service Protection has produced a detailed fact sheet which can be found at <https://www.defencereservessupport.gov.au/media/1194/drs-orsp-chg-protection-act-factsheet.pdf>

Need more information or guidance?

For further information or assistance, you may contact ORSP by:

- visiting the website at defencereservessupport.gov.au;
- emailing your questions to orsp@defence.gov.au; or phoning 1800 671 998.

Part 1 of this article is a reprint of the article by Linda Jelfs and MAJGEN Greg Garde previously published in April 2012, in anticipation of the changes. Part 2 provides a brief summary of the key changes to the Protection Act that are now law.

PART 1

PROPOSED CHANGES TO DEFENCE RESERVE SERVICE (PROTECTION) ACT 2001

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Introduction

In 2001, the Australian Government introduced legislation that provided employment and education protection to members of the Australian Defence Force (ADF) Reserves. The key aim of the *Defence Reserve Service (Protection) Act 2001* (the Act) is to facilitate the availability of Reservists for defence service, thereby enhancing defence capability derived from Reserves. The Act makes it an offence for an employer to discriminate against, disadvantage or dismiss an employee or prospective employee for rendering Defence Reserve Service. The protections apply to contractors and partners and in certain circumstances to students enrolled in a course of instruction at an Australian education institution. The Act makes it mandatory for employers to release employees when required to render Defence Reserve Service. Releasing an employee is also mandatory for the courses and training necessary to undertake service in the Reserve and to attend parades with the Reserve.

Role of the Office of Reserve Service Protection

The *Defence Reserve Service (Protection) Regulations 2001* (the Regulations) establish the Office of Reserve Service Protection (ORSP). The Regulations also provided for the appointment of the Director and Deputy Directors of ORSP who administer the Act. ORSP investigates complaints from Reservists that might involve contraventions of the Act. ORSP also offers advice to Reservists and employers, assists with leave policies, and provides dispute resolution and mediation.

All office holders of ORSP are trained in government investigations and are called on to investigate alleged breaches of the Act. As required, ORSP may also seek the assistance of Federal, State or Territory Police Services to conduct formal investigations of alleged breaches of the Act. Every complaint is treated on a case by case basis. However, ORSP will not investigate complaints that are deemed to be vexatious, frivolous or made in bad faith.

While the Regulations provide the authority to investigate alleged breaches, ORSP will attempt to resolve complaints at the lowest possible level. When issues do arise, ORSP encourages the employee Reservist to attempt resolution at the workplace level. An employer who considers that releasing an employee will cause significant hardship is encouraged to contact the employee's unit commanding officer to discuss other possible service options; for example an alternative date on which a course may be undertaken. Employers may always contact ORSP for further guidance

and information.

Review of the Act

From 2006 to 2008, the Act was subjected to review by a national panel headed by MAJGEN Greg Garde. The review undertook extensive public consultation including with all States and Territories and with Universities Australia. A number of State and Territory Departments made submissions to the Review as did peak employer/industry organisations such as the Australian Industry Group (AIG), Australian Council of Trade Unions (ACTU) and Victorian Farmers Federation (VFF).

Importantly, the review team intentionally included Mr Leigh Purnell, then Executive Director-International of the Australian Industry Group. The employer interest was to the forefront and was actively represented throughout the entire review process.

Following election of the Labor Government in 2007, the review team was reappointed by the then Parliamentary Secretary, Dr Mike Kelly MP. The review thus had bipartisan support from both sides of politics.

What are the key Recommendations of the Review?

Simplification of the Act by removal of the current distinction between ‘protected’ and ‘unprotected’ continuous full time service so that all defence service by Reservists is protected; this has been a major issue not only for Reservists, but also for employers. To date it has been at the discretion of the Service Chief or delegate to decide whether continuous full time defence service should be protected, and conduct consultation with employers. The current arrangement of having a distinction between protected and unprotected service is further complicated by the fact that it is a condition of the Employer Support Payment Scheme that Defence Reserve Service covered by that scheme be treated as protected and by agreed leave policies or memoranda of understanding with many employers which also result in defence service by Reservists being treated as protected for all purposes.

- Extension of the current scope of education protection to apply to all types of Reserve service; this will include - reimbursement or deferment of fees and charges paid by a Reservist to an education institution lost or thrown away as a result of absence on Reserve service. Also education institutions are not to record as a failure in the Reservist’s student record the non-completion of a course or subject in the event that a course of study or subject is not completed by the Reservist as a result of absence on defence service. Continuing recognition of examinations, assessments and practical work, previously completed is also sought when a course of study or subject is resumed by a Reservist following absence on defence service.
- Extension of financial liability protection to apply to Reservists serving on continuous full time service or continuous defence service of an operational nature rather than just call out service as at present.
- Introduction of a new provision directed at objectionable behaviour or conduct adverse to a Reservist such as bullying, abuse or harassment relating to the Reservist’s status or service as a Reservist.
- Introduction of a number of consequential amendments to provide clarification or simplify the language or operation of the Act. Many employers and Reservists have complained that the Act is written in a way that only a lawyer would understand. By simplification of the language, the Act becomes more ‘user friendly’ and assists employers to do the right thing.
- Introduction of civil penalties, this change will add strength to the existing criminal penalty system and allow for government departments and agencies to be held accountable for breaches of the Act.

What is the Objective of the Amendments?

The objective of the amendments as previously stated is to facilitate the availability of Reservists for defence service, thereby enhancing the defence capability derived from Reserves. The protections that apply to Reservists are strengthened, particularly education protection and to a lesser extent financial protection and the current provisions relating to protected and unprotected service are simplified. These changes will create and promote greater efficiency, and streamline administration. The amendments will further enhance defence capability from Reserves.

So why change something that has a proven track record of working?

The Act regulates the legal relationships between Reservists, employers, educational and financial institutions, and we must ensure that they are constantly updated to make sure that we are doing everything we can to support our reservists, and strengthen defence capability. The amendments will streamline processes, and ensure that good communication between employers and Reservists are encouraged. There will be a more transparent set of regulations that are easy enough for everyone to understand.

When introduced, the Act was supported by industry groups, education institutions, the ACTU, State and Territory Departments. During the consultation process for the review of the Act, these same organisations were equally supportive of the proposed changes. There is every reason to believe that the proposed amendments will be equally well regarded and received by everyone. It is expected that the proposed amendments to the Act will be introduced

in the next session of the Parliament. Again it is hoped that there will be bipartisan support for the changes.

How can the Reservist help?

To a large extent releasing employees to undertake Reserve service depends greatly on the goodwill of the employer. Reservists should not just rely on the legislation as a blunt instrument. As a Reservist, you are obliged to make the release from work as easy as possible for your employer. This is best done by:

- considering the impact that your absence will have on your employer's business;
- giving your employer as much notice as possible when required to render Reserve Service;
- providing a 6-12 month plan of your intended Reserve service including any training commitments, noting that exact dates can be provided to your employer when they become known; and
- giving written notification to your employers before and after your Reserve service, and whenever your employer asks for it.
- fostering a good working relationship between Defence, your employer and yourself.

PART 2

SUMMARY OF THE AMENDMENTS TO THE *DEFENCE RESERVE SERVICE (PROTECTION) ACT 2001*

The changes to the Act relate to the following areas:

- Protection against discrimination
- Partnership protection
- Financial liability and bankruptcy protection
- Employment protection.
- Education protection
- Enforcement of the Act and remedies that are available.

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

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. The amendments relate to the following areas:

- introduction of a new provision relating to harassment,
- changes relating to discrimination in partnerships,
- introduction of civil penalty provisions.

Also the amendments to Part 4 insert a new Division dealing with harassment. 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.

Employment protection

Part 5 of the Act deals with employment protection. The amendments 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.

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. 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.

A revised definition of absent on defence service has been included. 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.

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.

The changes to Part 5 of the Act remove reference to the suspension of an employment contract while a member is on Defence service. This is replaced with an entitlement for the member to be absent from their employment while on Defence service. 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.

Partnership Protection

Part 6 of the Act deals with partnership protection. The amendments relate to the following area:

- the application of partnership protection to Defence service by Reserve members

Education Protection

Part 7 of the Act deals with education protection. The amendments 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.

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. Under the amendments 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.

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.

Examples of adjustments that would typically be considered reasonable are 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.

An adjustment is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the educational institution. 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

Financial liability protection and bankruptcy protection

Parts 8 and 9 of the Act deals with financial liability protection and bankruptcy protection. The amendments relate to the following area:

- application of financial liability protection and bankruptcy protection to Defence service by Reserve members.

Enforcement and remedies

Part 11 of the Act deals with enforcement and remedies. The amendments 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.

Changes to other matters

Part 12 of the Act deals with other matters. The amendments relate to the following areas:

- ability to use other protections,
- penalties in regulations.

Importantly the amendment confirms that the Act does not limit protections available to a member or former member under any other law. It should be noted that 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.