

1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DEFENCE LEGISLATION AMENDMENT
BILL (No.1) 1999**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Defence,
the Hon. John Moore MP)

Defence Legislation Amendment Bill (No.1) 1999

OUTLINE

This Bill will:

- a. introduce a urinalysis drug testing scheme that will apply to members of the Australian Defence Force;
- b. enable the Chief of the Defence Force, the Vice Chief of the Defence Force, the Chief of Army and the Chief of Navy to be transferred to the Reserves on the expiration of fixed term appointments;
- c. enable officers to be transferred to the Reserves on the expiration of a limited-tenure promotion or relevant management initiated early retirement period;
- d. enable the Chief of Army and the Chief of Navy to delegate their powers to retire officers and terminate officer appointments to an officer not below the rank Brigadier/Commodore;
- e. amend the Defence Force Discipline Act 1982, to extend, from 3 to 5 years, the time limitation that applies to most charges under the Act, and to remove an obsolete provision;
- f. repeal the Supply and Development Act 1939 which formerly provided the legislative framework for defence production activity (including employment of staff); and
- g. make minor technical amendments.

FINANCIAL IMPACT

The urinalysis drug testing scheme will cost approximately \$300,000 a year with funding being met within the current Defence program. The other amendments will not have any significant financial impact.

Defence Legislation Amendment Bill (No.1) 1999

NOTES ON CLAUSES

Clause 1 - Short title

1. Formal.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. The amendments dealing with the delegation of the Chief of Navy's and the Chief of Army's powers to retire officers and terminate officer appointments, and the amendments dealing with the Defence Force Discipline Act 1982 will commence on assent. The amendments dealing with the introduction of the urinalysis drug testing scheme and transfer of certain officers to the Reserves on the expiration of their service will commence on a day to be fixed by proclamation, or six months after the Bill receives Royal Assent if the amendments have not been proclaimed by that date. (This will enable consequential regulation amendments to be made in association with the commencement of the Bill.) The provisions dealing with the repeal of the Supply and Development Act 1939 will commence on 1 January 2001. (This will ensure that a thorough search can be made for personnel that might still be covered by the Supply and Development Act.) In addition, one technical drafting correction to a misdescribed provision will be taken to have commenced on the same day as the provision it is amending, while a further drafting correction will commence on assent.

Clause 3 - Schedule(s)

3. This clause provides for Acts to be amended as specified in the Schedules.

Schedule 1 - Urinalysis testing of members of the Defence Force who undertake combat or combat-related duties

4. Item 1 of this Schedule inserts a new Part VIIIA into the Defence Act 1903 which provides for the introduction of a urinalysis drug testing scheme.
5. New sections 91 and 92 set out the Application and Object of this new

Part of the Defence Act, and provide that all members of the Australian Defence Force undertaking combat or combat-related duties will be liable to be selected for testing to detect narcotic substances. (This would include Reserve personnel of the Defence Force who are performing such duties.)

6. New section 93 defines various terms including the expressions 'combat duties' and 'combat-related duties'. The definition of those terms covers any duties which require, or are likely to require, a person to:

- commit, or participate directly in the commission of, an act of violence in the event of armed conflict;
- undertake training or preparation for, or in connection with, combat duties; or
- work in support of a person undertaking combat duties.

7. New section 93 also defines the term 'narcotic substance' by reference to the meaning of that term in the Customs Act 1901. This will enable testing for illegal drugs such as Cocaine, Opiates, Cannabinoids and Amphetamines.

8. New sections 94 to 97 deal with the provision and testing of urine samples from members. New section 94 provides that a person authorised under the regulations may, in circumstances specified in the regulations, require a member to provide a sample. New section 95 provides that a member who has been required to provide a sample is entitled to pass the sample without being observed, and requires that the process of collecting a sample is to be supervised by a qualified medical practitioner (if service exigencies permit) or by a person whose duties include the provision of medical assistance (in all other cases). New section 96 provides that a member who is required to provide a sample must, before the sample is provided, be given a written notice explaining such matters relating to dealing with the sample as are prescribed by the regulations. New section 97 provides that the regulations may prescribe the procedures for dealing with samples but expressly requires that the regulations must include a provision for informing members of the testing results. New section 97 also provides that the regulations may provide that particular prescribed procedures need not be strictly complied with and that substantial compliance is sufficient. However, new section 97 ensures that any substantial compliance rule provided for by the regulations cannot apply to procedures for ensuring that a sample is not interfered with.

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9. New sections 98 to 105 provide for administrative action to be taken against members found to test positive to narcotic substances. New section 98 makes it clear that administrative action is not to be taken against a member where a positive test

result is wholly attributable to something done by the member in accordance with directions or recommendations of a qualified medical practitioner. (In addition, new section 108 excludes the application of the Defence Force Discipline Act 1982 where a positive result has been detected under the provisions. That is, it is not intended that members should be charged under the Defence Force Discipline Act, given the range of administrative action that can be taken against them.)

10. New section 99 provides that, where a member returns a positive test result, a qualified medical practitioner is to provide an assessment of whether the member is fit or suitable for further service in the Defence Force.

11. New section 100 provides that, if a member is assessed to be unfit or unsuitable for further service, the member must be given a written notice of this assessment and an opportunity to show cause why he or she should not be discharged (in the case of an enlisted member) or have his or her appointment terminated (in the case of an officer). The notice to the member must specify a period, of not less than 28 days, within which the member must give a written statement of reasons why he or she should not be discharged or have his or her appointment terminated. New section 101 provides for the discharge of the member or the termination of his or her appointment where the member has not given a statement of reasons within the period specified in the notice or where the member's statement is insufficient. New section 102 provides that a discharge or termination of appointment must be in writing, and must specify the day on which the discharge or termination is to take effect. This date must not be earlier than the day the member is given this notification and not later than 3 months after that date.

12. New section 103 provides that, where a member returns a positive test result, the member's rank may be reduced. (This provision will apply where a member was assessed under section 99 as still being fit or suitable for further service, or where the member was assessed under that provision as being unfit or unsuitable for further service but where the member was able to show that he or she should be retained.) Under this provision, the member must be given a written notice informing of the proposed reduction and a reasonable opportunity to show cause why he or she should not be reduced in rank. In addition, the reduction must be in writing and specify the day on which the reduction is to take effect.

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13. New section 104 provides that a member who returns a positive test result may be given a warning that any subsequent positive test result may lead to the member being discharged or having his or her appointment terminated. (It is intended that any member who returns a positive test result, but whose service is retained by the Defence Force, will be placed on a regular follow-up testing regime, normally over a period of twelve months. This will be set out in the Regulations.) In addition, new section 105 provides that nothing in this new Part of the Defence Act precludes the

taking of other forms of administrative action. This could, for example, include posting action.

14. New sections 106 and 107 provide that it is an offence to intentionally refuse or fail to provide a sample, and to intentionally interfere with, or otherwise deal with, a sample. A maximum penalty of 6 months imprisonment applies to both of these offences.

15. Items 2, 3 and 4 of this Schedule enable the delegation of the reduction in rank and discharge/termination powers in line with general Defence reduction and discharge/termination of appointment provisions.

Schedule 2 - Transfer of certain officers to the Reserve

16. This Schedule amends the Defence Act 1903 and the Naval Defence Act 1910 to enable:

- the Chief of the Defence Force, the Vice Chief of the Defence Force, the Chief of Army and the Chief of Navy to be transferred to the Reserves on the expiration of fixed term appointments;
- officers who are subject to limited-tenure promotion or management initiated early retirement to be transferred to the Reserves on the expiration of the limited-tenure promotion or relevant management initiated early retirement period.

Provisions dealing with the Chief of the Defence Force, the Vice Chief of the Defence Force, the Chief of Army and the Chief of Navy

17. Section 9 of the Defence Act provides that the Governor-General may appoint an officer of an arm of the Defence Force to be the Chief of the

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Defence Force and appoint an officer from an arm of the Defence Force to be the service chief of that arm. Section 9AA of the Defence Act provides that the Governor-General may appoint an officer of an arm of the Defence Force to be the Vice Chief of the Defence Force.

18. The Defence Legislation Amendment Act 1995 (Act No. 43 of 1995) inserted a new section 9BA into the Defence Act which enables the appointments of the Chief of the Defence Force, the Vice Chief of the Defence Force and the service chiefs to be for fixed terms. It also inserted new provisions into the Defence Act and Naval

Defence Act dealing with the retirement and termination of officers. These included section 20 of the Defence Act and section 13C of the Naval Defence Act. These provide that, when the term of appointment of the Chief of the Defence Force, the Vice Chief of the Defence Force, the Chief of Army and the Chief of Navy end, the Governor-General must retire the officer as soon as is reasonably practicable unless the officer has been re-appointed or appointed to another office under section 9 or 9AA of the Defence Act before the appointment ended. (The corresponding Air Force provision is contained in the Air Force Regulations.)

19. As an alternative to the Governor-General's power to retire these officers, items 3 and 15 of this Schedule amend subsection 20(1) the Defence Act and subsection 13C(1) of the Naval Defence Act to enable the Chief of the Defence Force, the Vice Chief of the Defence Force, the Chief of Army and the Chief of Navy to be transferred to the Reserve on the expiration of their appointments where they are on fixed term appointments. The amendments ensure that these officers will only be transferred to the Reserves where they request this action. This will streamline the administrative processes for dealing with these officers at the end of their statutory appointments, and avoid the more cumbersome requirement of an officer being first retired from the Defence Force and then appointed to the Reserves under separate processes. (A corresponding amendment will be made to the Air Force Regulations which contain similar provisions in relation to the Chief of Air Force.)

20. Items 4, 5, 6, 7, 16, 17, 18 and 19 of this Schedule make consequential amendments as a result of the above amendments.

Provisions dealing with officers who are subject to limited-tenure promotion or management initiated early retirement

21. Section 10B of the Defence Act and section 13A of the Naval Defence Act provide for the limited-tenure promotion of officers of the Army and Navy.

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At the end of their limited-tenure promotion these officers are presently retired under the provisions unless they are given permission to revert to the rank they held immediately before their promotion. Sections 25B and 25D of the Defence Act and sections 13K and 13M of the Naval Defence Act provide for the management initiated early retirement of officers of the Army and Navy with or without a special benefit. (The corresponding provisions dealing with the limited-tenure promotion and management initiated early retirement of officers in the Air Force are contained in the Air Force Regulations.)

22. Items 1, 2, 13 and 14 of this Schedule amend the Defence Act and Naval Defence Act to enable officers to be transferred to the Reserve on the expiration of their limited-tenure promotion, where they request this action. Items 8, 9, 10, 11, 20,

21, 22 and 23 of this Schedule amend the Defence Act and Naval Defence Act to enable officers to be transferred to the Reserve on the expiration of their relevant management initiated early retirement period, where they request this action. Items 12 and 24 of this Schedule are savings provisions dealing with action that has occurred prior to the commencement of these provisions.

23. The amendments will maintain access to these officers' expertise, and avoid the more cumbersome requirement of an officer being first retired from the Defence Force and then appointed to the Reserves under separate processes.

Schedule 3 - Delegation of powers to retire, and terminate the appointments of, officers

24. Sections 21, 22, 24 and 25 of the Defence Act 1903 and sections 13D, 13E, 13G and 13H of the Naval Defence Act 1910 provide the Chief of Army and Chief of Navy with powers in relation to the retirement of officers and termination of officer appointments. The Chiefs' powers of retirement and termination can only be exercised in relation officers of the rank of Colonel (equivalent) or below. In addition, sections 25B and 25D of the Defence Act and sections 13K and 13M of the Naval Defence Act provide the Chief of Army and Chief of Navy with powers in relation to the management initiated early retirement of officers. At present, the Chiefs cannot delegate any of these powers.

25. The two items of this Schedule amend subsection 120A(4AA) of the Defence Act and subsection 44B(3A) of the Naval Defence Act to enable the

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Chief of Army and Chief of Navy to delegate these powers to an officer not below the rank of Brigadier (in the case of Army) and Commodore (in the case of Navy).

Schedule 4 - Amendment of the Defence Force Discipline Act 1982

26. This Schedule amends one provision of the Defence Force Discipline Act and repeals an obsolete provision from that Act.

27. Subsection 96(1) set a time limitation of 3 years on charging persons with most offences under the Act. Item 1 of this Schedule amends subsection 96(1) by extending from 3 to 5 years the present time limitation on charging persons with most offences under the Act. This measure results from the Government's response to the Report of the Senate Foreign Affairs, Defence and Trade References Committee on the 'Crash

of RAAF Nomad Aircraft A18-401 on 12 March 1990’.

28. Item 2 of this Schedule repeals section 196B of the Defence Force Discipline Act. That provision required the review of discipline law as soon as practicable after 3 years of the Act’s operation. This review occurred in 1988-89 and its recommendations have been implemented so the provision no longer serves any purpose.

Schedule 5 - Repeal of the Supply and Development Act 1939

29. Part 1 of this Schedule repeals the obsolete Supply and Development Act 1939. That Act provided the legislative framework for defence production activities which in the past formed an integral part of the Defence organisation, and dealt with the conditions of employment of persons employed at Defence factories and other establishments. With the removal of defence production from the Department’s functions and the creation of Government-owned companies such as Australian Defence Industries in the late 1980s, the Act became largely obsolete. However, it still played a residual role in providing the statutory basis of employment for a limited number of persons at factories that were in the process of being closed down. Those factories have now been closed. The repeal of this Act will formally remove legislation that no longer serves a useful purpose.

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30. Part 2 of this Schedule makes consequential amendments to various references to the Supply and Development Act that are contained in other Commonwealth Acts.

Schedule 6 - Technical amendments

31. This Schedule makes minor technical drafting corrections to a provision in the Defence Force (Home Loans Assistance) Act 1990 and a provision in the Defence Legislation Amendment Act (No.1) 1997.