2004 – 2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

DEFENCE LEGISLATION AMENDMENT BILL (No. 1) 2005

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Defence, Senator Robert Hill)

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OUTLINE

This Bill will amend various Defence administered legislation. These are –

- the *Defence Force Discipline Act 1982*
- the *Defence Act 1903*
- the *Naval Defence Act 1910*
- the *Military Superannuation and Benefits Act 1991*

The Bill will make minor amendments to the *Defence Force Discipline Act 1982* consequential to changes in the criminal law of the Australian Capital Territory relating to the renumbering of the ACT *Crimes Act 1900* and the introduction of the ACT *Criminal Code 2002*.

The Bill will also –

- amend the *Naval Defence Act 1910* so as to align the legislation governing eligible ages of Navy Cadets with the legislation governing their Army and Air Force counterparts;

- amend the *Defence Act 1903* to change reference from "investigating officers" to "inquiry officers"; and

- amend the *Military Superannuation and Benefits Act 1991* to repeal Part 8 which provides for a retention benefit for certain members of the Scheme but to preserve the benefit for currently eligible serving Australian Defence Force members.

The Bill also contains provisions amending various Defence administered legislation required as a consequence of the *Legislative Instruments Act 2003* and the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003.*

FINANCIAL IMPACT

Most measures in this Bill have no financial impact. Changes to the *Military Superannuation and Benefits Act 1991* will eventually involve some savings once all members currently eligible for a retention benefit have been paid, estimated to occur in 15 years time.

Defence Legislation Amendment Bill (No. 1) 2005

NOTES ON CLAUSES

Clause 1: Short Title

1. This clause is a formal provision specifying the short title of the Bill as the *Defence Legislation Amendment Act (No. 1) 2005*.

Clause 2: Commencement

2. Except for Schedule 5, which will be taken to have commenced on 1 January 2005, the Bill will commence on Royal Assent.

Clause 3: Schedules

3. Clause 3 provides that the Acts specified in each of the Schedules to the Bill are amended as provided for in the identified items in each of those Schedules.

Schedule 1 – Criminal laws of the Australian Capital Territory
Defence Force Discipline Act 1982

Items 1 and 6 – subsection 3(1), "ancillary offence"

Item 1 moves the existing definition of "ancillary offence" from subsection 3(13) to the Interpretation section in section 3, to make the definition more intuitive to locate. As a consequence, Item 6 repeals subsection 3(13).

Items 2 and 5 – subsection 3(1), "ancillary Territory offence"

Items 2 and 5 insert a new definition of "ancillary Territory offence" to ensure that offences against section 61 involving attempt, incitement, conspiracy or accessory after the fact (which are some of the extensions of criminal liability) are subject to the requirements of the Act relating to obtaining the consent of the Director of Public Prosecutions before proceeding, and limiting the jurisdiction of summary authorities.

The application of the concept of an ancillary offence to section 61 offences has been problematic. The definition of "ancillary offence" was linked to offences under the Act, thereby creating doubt as to whether the concept applied to section 61 itself or the relevant Territory offence that was being charged under section 61. The new definition of "ancillary Territory offence" has been inserted to address this issue by making it clear that the extension of criminal liability applies to the relevant Territory offence (ie, the offence under the law applying in the Jervis Bay territory as provided for in the definition of Territory offence). Both Commonwealth and Australian Capital Territory law relating to extension of criminal liability are referred to in the section. This is because the Commonwealth law on extension of criminal liability applies to relevant Territory offences based on Commonwealth law (via paragraph 3(1)(a) of the definition of Territory offence), and the Australian Capital Territory law on extension

of criminal liability apply to relevant Territory offences based on Australian Capital Territory law (via paragraph 3(1) (b) of the definition of Territory offence).

A new category of offences has been included in paragraph 3(1)(e) of the definition of Territory offence that provides for offences prescribed for the purposes of that paragraph. This paragraph is inserted in anticipation of the offence in section 181 of the *Crimes Act 1900* (ACT) (accessory after the fact) migrating to the *Criminal Code 2002* (ACT). When this occurs, the provision in the Criminal Code (ACT) will be prescribed. To ensure that the paragraph is used in this way and not to otherwise broaden the scope of offences falling under the definition of "ancillary territory offence", subsection 3(3A) has been inserted which provides that the Minister must be satisfied that the provision is equivalent to, or has the same effect as, a provision referred to in paragraph (c) or (d) of the definition.

Items 3, 7, 12 and 18 – Correction of references to section 61

Items 3, 7, 12 and 18 remove an incorrect reference to subsection 61(1). Item 3 also improves how the concept of "relevant Territory offence" is expressed without altering the definition (except with respect to the incorrect reference to subsection 61(1)).

Item 4 – "Territory offence"

Item 4 repeals paragraphs 3(1)(b) and (c) and substitutes new paragraph 3(1)(b) to reflect that the Australian Capital Territory is in the process of migrating criminal offences contained in the *Crimes Act 1900* (ACT) into the *Criminal Code 2002*. In addition, the current definition is obsolete as the *Police Offences Act 1930* (ACT) has been repealed. The amendment is intended to ensure that the military justice system adopts the criminal law in force in the Jervis Bay Territory as was originally intended in the drafting of the Act.

Three notes are also inserted. The first and second notes explain that paragraphs 3(1) (a) and (b) of the definition of "Territory offence" include the offences of attempt, incitement, conspiracy or accessory after the fact in relation to another Territory offence (ancillary territory offences). That is, the extension of criminal responsibility (such as attempt) do not attach to section 61 itself, but rather become the relevant Territory offence.

Items 8 and 13 – renumbering of *Crimes Act 1900*

Items 8 and 13 amend subparagraph 63(1)(a)(ia) and subparagraph 104(a)(ii) respectively to reflect a re-numbering of that Act of various sections in the *Crimes Act 1900* (ACT). The new sections cited are textually identical to the old sections and no change to the operation of the Act will occur.

Item 9 – paragraph 63(1)(b)

Item 9 gives effect to the new definition of "ancillary territory offence" to ensure that the consent of the Commonwealth Director of Public Prosecutions is sought where it is

proposed to institute proceedings for an offence of attempt, incitement, conspiracy or accessory after the fact with respect to one of the offences listed in paragraph 63(1)(a).

Item 10 – paragraph 64(a)

Item 10 will ensure that offences against section 61 are excluded from the limitation of punishments as set out in section 64 of the Act. This exclusion arises because an "ancillary Territory offence" operates wholly within section 61 and is governed by the limitations as to punishments as set out in subsection 61(4) rather than section 64.

Item 11 – subsection 96(4)

Item 11 amends subsection 96(4) as one aspect of it is now redundant and will be omitted. An offence based on an extension of criminal liability with respect to a relevant Territory offence is not an ancillary offence against section 61 itself. Time limitations with respect to charges based on extensions of criminal liability with respect to a relevant Territory offences (ancillary territory offences) will continue to be in accordance with subsection 96(4), as any such offences will be charged as offences against section 61.

Items 14 and 15 – paragraphs 104(a) and (c)

Item 14 adds a further class of offences, being those prescribed for the purposes of the subsection. This class of offence is introduced in anticipation of certain offences in the *Crimes Act 1900* (ACT) migrating to the *Criminal Code 2002* (ACT). Once the offences migrate, the new Criminal Code provisions will be prescribed to ensure that the class of offences remains applicable for the purposes of the section.

This item also gives effect to the new definition of "ancillary Territory offence" to ensure that the restrictions on the jurisdiction of summary tribunals applies to offences of attempt, incitement, conspiracy or accessory after the fact with respect to offences that are themselves prescribed offences.

Item 15 amends paragraph 104(c) necessitated by the amendments to paragraph 104(a). Paragraph 104(c) is amended to avoid a redundant reference to paragraph 104(a), as the previous intent of referring to paragraph 104(a) in paragraph 104(c) is now covered by subparagraph 104(a)(iv).

Items 16 and 17 – paragraph 142(1)(b)

Items 16 and 17 give effect to the new definition of "ancillary Territory offence" and to ensure that certain offences remain as statutory alternatives. Paragraph 142(1)(b) is amended to reflect that the concept of ancillary offences does not relate to offences against section 61 for the purposes of paragraph 142(1)(b). Without intending to limit which offences may be alternative offences under the law as applied in the Jervis Bay Territory, paragraph 142(1)(ba) is inserted to ensure that certain offences against section 61 are alternative offences to other offences against section 61.

Schedule 2 – Inquiry officers
Defence Act 1903

The term "investigating officer" appears in both the *Defence Act 1903* and the *Defence Force Discipline Act 1982*, but has different meanings in each Act. The role of an investigating officer as referred to in the *Defence Act 1903* is to conduct an administrative inquiry into matters affecting the Australian Defence Force (ADF). However, some ADF members believe that officers are conducting criminal investigations because of the use of the words "investigating officers". To remove this confusion, it is considered appropriate to change references in the *Defence Act* from "investigating officers" to "inquiry officers" to make it clear that these officers are conducting purely administrative rather than criminal investigations. To this end, item 1 will amend paragraph 124(1)(gc), item 2 will amend subsection 124(2A) and item 3 will amend subsection 124(2C) by omitting the references to "investigating" and substituting "inquiry".

Schedule 3 – Naval defence
Naval Defence Act 1910

To align the position of Navy Cadets with that of their Army and Air Force counterparts, item 1 amends paragraph 38(5)(b) of the *Naval Defence Act 1910* to ensure that a person cannot become an Australian Naval Cadet unless the person is less than 20 years old. Item 2 amends subsection 38(6) to provide for a person to cease being a cadet at age 21 years or such lower age as is set out in the Regulations.

Schedule 4 – *Military Superannuation and Benefits Act 1991* (the MSB Act)

The *Review of Australian Defence Force Remuneration 2001* (the Nunn review) reviewed ADF remuneration arrangements. The purpose of this review was to ensure that ADF pay arrangements provide an effective, efficient and flexible remuneration framework consistent with reforms in the wider public and private sectors. The focus of the review was to provide options that improve the attractiveness, flexibility, simplicity, efficiency and transparency of employment conditions and total remuneration package within overall Defence budget constraints, while taking into account the specific circumstances faced by ADF personnel.

In particular, Recommendation 10.2 stated that –

"The *Military Superannuation and Benefits Act 1991* be amended to cease access to the MSBS Retention Benefit for future ADF members while "grandfathering" the entitlement for current serving members".

The Retention Benefit is a bonus of one year's salary paid to eligible members of the Military Superannuation and Benefits scheme who, on reaching 15 years of continuous effective service, agree to complete a further 5 years' service. However, the Nunn Review considered that issues of attraction to and retention in the Services was better

suited for determination by the Navy, Army and Air Force Service Chiefs based on priority needs and linked to capability. An automatic retention bonus rigidly tied up to a number of years of service, at a fixed rate, is no longer regarded as appropriate.

Therefore, Schedule 4 will effect the repeal of Part 8 of the MSB Act.

Item 1: Section 20

This item amends section 20 by omitting the reference to Part 8 of MSB Act.

Item 2: Part 8

Item 2 repeals Part 8.

Item 3: Subsection 52(4)

This item repeals subsection 52(4), which refers to Part 8. Section 52 is the Regulation making provision under the MSB Act. Subsection 52(4) is now unnecessary because of the repeal of Part 8.

Item 4: Saving provision

The proposed amendments will also incorporate provisions to preserve the benefit for currently (eligible) serving ADF members. It is proposed that access to the benefit would continue for current members for as long as they remain eligible but would not be available to new members joining the ADF after the date of the commencement of the proposed amendments.

Therefore, Item 4 provides that, notwithstanding the repeal of Part 8, the MSB Act continues to apply to a member of the Military Superannuation and Benefits Scheme who was a member of that Scheme immediately before the commencement of the Bill. Furthermore, for the purposes of those members, the definition of *salary* will either be that prescribed by regulations or if no regulations are in force, the definition that is contained in existing Part 8 (in relation to a member of the Permanent Forces, includes any service allowance payable to the member but does not include any other allowance payable to the member).

Schedule 5 - Technical amendments relating to legislative instruments

The *Legislative Instruments Act 2003* (the LI Act) establishes a comprehensive regime for the registration, tabling, scrutiny and sunsetting of Commonwealth legislative instruments. The Act originated from a 1992 report of the Administrative Review Council, *Rule Making by Commonwealth Agencies*.

As an adjunct to the LI Act, the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* (the "TPC Act") deals with certain transitional and consequential matters arising from the enactment of the LI Act. In particular, it

repeals sections 46 and 46A of the *Acts Interpretation Act 1901* and replaces them with provisions dealing with the construction and disallowance of non-legislative instruments. It also repeals sections 48 to 50 of the *Acts Interpretation Act 1901* and repeals the *Statutory Rules Publication Act 1903*.

While the repeal of sections 48 to 50 of the *Acts Interpretation Act 1901* means that existing references to those provisions in Commonwealth legislation will be redundant, the TPC Act does not purport to amend all Commonwealth legislation to remove those references. The operation and subject matter of the repealed provisions are covered by the LI Act where they relate to legislative instruments and by the *Acts Interpretation Act 1901* as amended by the TPC Act where they relate to non-legislative instruments, thereby preserving the status quo. However, the TPC Act has still necessitated the amendment of some Commonwealth legislation to remove any redundant references. In a Defence context, these references occur in the following legislation –

Defence Act 1903

Item 1, subsections 52(1)
Item 2, subsection 52(4)
Item 3, subsection 61CX(2)
Item 4, subsection 61CX(3)
Item 5, section 116N
Item 6, subsection 116ZD(1)
Item 7, subsection 116ZD(3)
Item 8, subsection 123G(1)
Item 9, subsections 123G(3) and (4)

Defence Force Discipline Act 1982

Item 10, subsection 68(2)
Item 11, subsection 68A(2)
Item 12, section 68B
Item 13, subsection 149(1)
Item 14, subsection 149(1)
Item 15, subsections 149(2) and (3)

Defence (Home Loans Assistance) Act 1990

Item 16, subsection 3C(1)
Item 17, subsection 3C(3)
Item 18, subsection 3C(5)

Defence Forces Retirement and Death Benefits Act 1973

Item 19, subsection 49F(1)
Item 20, subsection 49F(2) and (3)

Defence Forces Retirement Benefits Act 1948

Item 21, subsection 80E(1)
Item 22, subsections 80E(2) and (3)

Defence (Special Undertakings) Act 1952

Item 23, subsections 15(1), (2) and (3)

Explosives Act 1961

Item 24, subsections 16(1), (2) and (3)

Military Rehabilitation and Compensation Act 2004

Item 25, subsection 286(4)
Item 26, subsection 286(5)
Item 27 subsection 293(3)
Item 28, subsection 293(4)

Military Superannuation and Benefits Act 1991

Item 29, subsection 2(1)
Item 30, subsection 5(1)
Item 31, subsection 5A(3)
Item 32, subsection 30(1)
Item 33, section 49

Naval Defence Act 1910

Item 34, subsection 42A(6)

Schedule 5 amends the identified provisions contained in the above legislation essentially to replace references to "instrument in writing" with "legislative instrument" or add this term where appropriate. Furthermore, certain provisions are repealed, and where appropriate, substituted, as they contain references to the now repealed *Statutory Rules Publication Act 1903.*

The combined effect of these amendments is that certain instruments referred to in the identified provisions are now referred to as 'legislative instruments", subject to the requirements of the *Legislative Instruments Act 2003,* rather than the *Acts Interpretation Act 1900* and the *Statutory Rules Publication Act 1903.*

The amendments do not in any way affect the operation of the Acts referred to in the Schedule.