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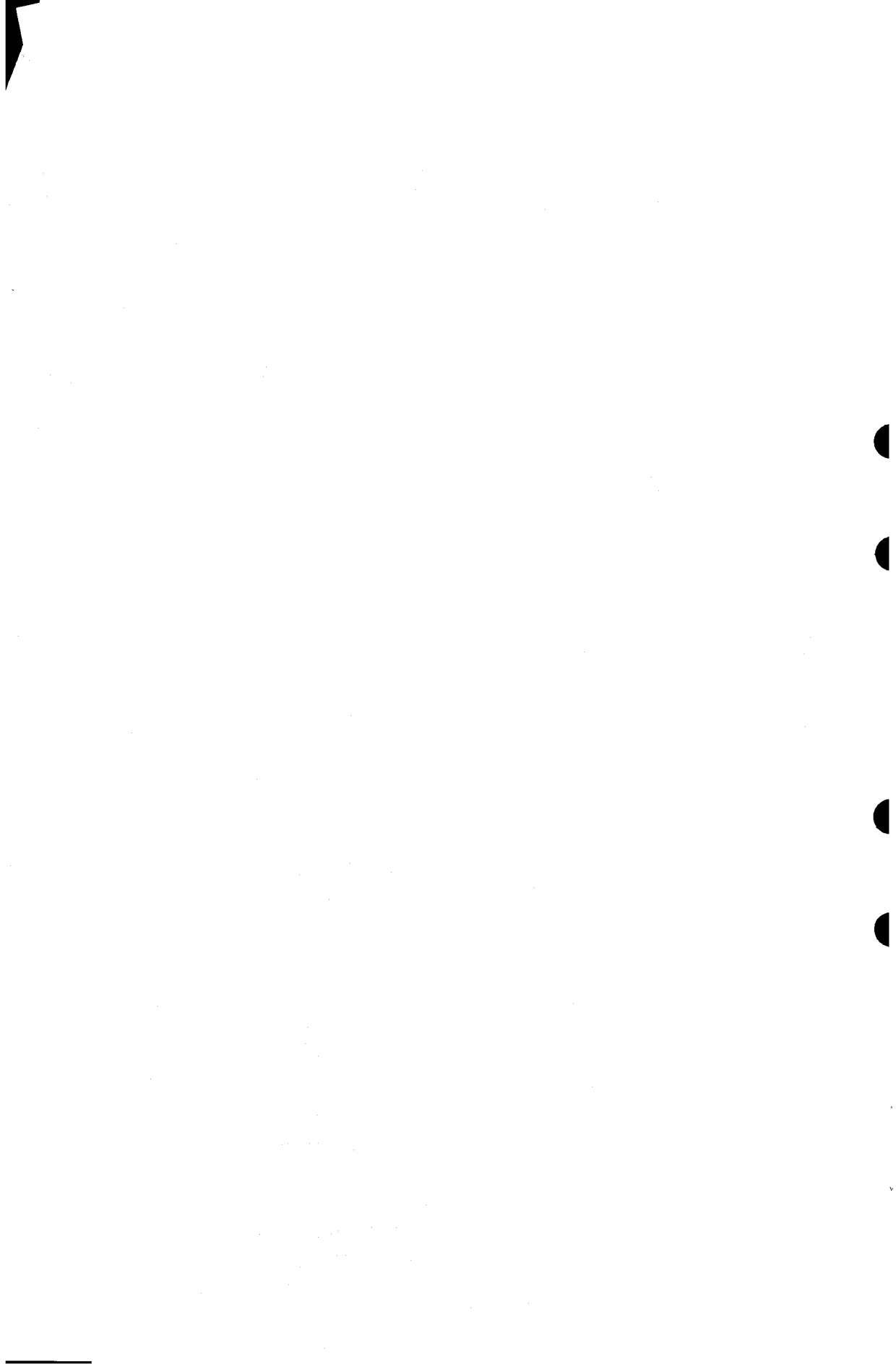
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE ACTS AMENDMENT BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Defence,
the Hon D.J. Killen, MP)



DEFENCE ACTS AMENDMENT BILL 1981

Outline

The Bill deals with a number of unrelated matters, by way of amendments to the Defence Act 1903 and by the removal of certain matter from the Defence (Visiting Forces) Act 1963. The amendments to the Defence Act:

- a. make provision to enable payment of additional compensation to a reservist who is totally incapacitated as a result of personal injury arising out of or in the course of his employment on part time service with the Defence Force so that he does not suffer a reduction in the compensation payable to him after the expiration of 26 weeks;
- b. generally revise, and transfer from the Defence (Visiting Forces) Act, provisions that are not restricted to visiting forces, namely, provisions relating to attachments between the Australian Defence Force and the armed forces of other countries, mutual powers of command between such forces and the arrest and disposal of illegal absentees from the armed forces of other countries;
- c. enact provisions enabling adequate controls to be exercised over members of the public where general access is permitted to certain defence lands for recreational purposes;
- d. amend the power to make regulations for the forfeiture of salary and allowances of members of the Defence Force to permit the making of regulations for the suspension of the payment of salary, etc, in certain cases where forfeiture

is likely to occur;

- e. amend the power to make regulations providing for the payment of compensation to persons suffering loss or damage so that regulations on this topic may be made in relation to anything done under the Act or the Regulations;
- f. amend the power to make regulations for the establishment, operation, etc, of Defence Force canteens, etc, to permit the making of regulations subjecting such canteens, etc, to Commonwealth, State or Territory taxes (other than income tax); and
- g. amend the power to make regulations for Defence Force courts of inquiry and boards of inquiry to permit regulations making persons compellable witnesses with regard to self-incriminating answers, and to provide a protection to such persons against the use of evidence given in these circumstances in subsequent criminal, civil or court-martial, etc, proceedings.

PART I - PRELIMINARY

Clause 1 - Short title

This clause sets out the short title of the proposed Act.

Clause 2 - Commencement

Sub-clause (1) provides for the Bill to come into force on the day on which it receives the Royal Assent, with the exception of the provisions mentioned in sub-clauses (2), (3) and (4).

The Statute Law Revision Act 1981 amended the Defence Act 1903 to substitute new titles for the Reserve and Citizen Forces. The relevant provisions have not yet come into force because it is necessary to make consequential amendments to the regulations.

Sub-clause (2) provides that sub-clause 5(2) (which further amends the amendments made by sub-clause 5(1) by substituting the new titles for the Reserve and Citizen Forces) is to come into force:

- a. when the relevant provisions of the Statute Law Revision Act 1981 come into force; or
- b. if those provisions come into force before the Bill, on the day after sub-clause 5(1) comes into operation.

Sub-clause (3) provides that clause 18 (which re-enacts provisions of the Defence (Visiting Forces) Act 1963) and Part III (which makes related amendments to the latter Act) come into force on a date to be proclaimed. The reason for this is that it will be necessary to make regulations for the purposes of these provisions.

Section 53 of the Defence Force Re-organization Act 1975 replaced section 119 of the Defence Act 1903 with a new provision that provides for the making of regulations relating to forfeiture of salary and allowances of members of the Defence Force. Section 53 has not yet come into force because it is necessary to make new regulations.

Sub-clause (4) provides that clause 7 (which amends the new section 119) is to come into force when the new section 119 comes into force.

PART II - AMENDMENTS OF THE DEFENCE ACT 1903

Clause 3 - Principal Act

This clause provides for the citation of the Defence Act 1903 as the Principal Act in this Part of the Bill.

Clause 4 - Delegation of power to make appointments and promotions

This clause makes a drafting amendment to the power of delegation in section 10 of the Principal Act and validates any delegations that may previously have been expressed to be delegations of all powers.

Clause 5 - Repeal of section 57

This clause repeals section 57 of the Principal Act, which provides for the payment of compensation in respect of members of the Army killed or incapacitated on war service or on duty. Section 57 has been superseded by Repatriation and Compensation legislation.

Clause 6 - Determination of conditions of service

Sub-clause (1) amends section 58B of the Principal Act to empower the Minister for Defence to make determinations relating to the payment of additional compensation to a reservist to whom compensation is payable under the Compensation (Commonwealth Government Employees) Act 1971.

The purpose of the amendment is to enable additional compensation payments to be made to a reservist who becomes totally incapacitated as a result of personal injury arising out or in the course of his employment on part time service with the Defence Force so that he does not suffer a reduction in the compensation payable to him after the expiration of 26 weeks.

Sub-clause (2) further amends section 58B (as amended by sub-clause (1)) to substitute the new titles for the Citizen Forces that were introduced by the Statute Law Revision Act 1981, when the latter provisions come into force.

Clause 7 - Powers may be delegated

This clause makes a drafting amendment to the power of delegation in section 87 of the Principal Act and validates any delegations that may previously have been expressed to be delegations of all powers.

Clause 8 - New Part IXA - provisions relating to the forces of other countries

This clause inserts a new Part IXA into the Principal Act. The effect of this and of consequential amendments made to the Defence (Visiting Forces) Act 1963 by Part III of the Bill is to transfer to the Principal Act provisions hitherto contained in Parts III and IV of the Defence (Visiting Forces) Act.

The Defence (Visiting Forces) Act 1963 deals principally with the armed forces of other countries visiting Australia and such matters as the exercise of jurisdiction by courts martial, etc, of those forces in Australia and the exercise of jurisdiction by Australian civil courts and coroners over, or in relation to, members of such forces, and related matters.

Parts III and IV of that Act (which relate to deserters and absentees from the armed forces of other countries, and attachment of personnel and mutual powers of command) are not specifically related to visiting forces and the then Attorney-General informed Parliament when the Defence (Visiting Forces) Bill was introduced in 1963 that these Parts had been included in the Bill as a matter of convenience and that they could be transferred later to general Defence legislation.

A requirement having arisen to make minor improvements to Parts III and IV, the opportunity has been taken to transfer them to the Defence Act 1903.

New Part IXA consists of new sections 116A to 116N inclusive. In what follows, references to the "existing Act" are references to the Defence (Visiting Forces) Act 1963.

New Division 1 - Interpretation

New section 116A - Interpretation

This section defines certain expressions used in the new Part IXA.

New sub-section (2) is based on para 6(1)(b) of the existing Act and provides for the regulations to specify the various countries in relation to which various provisions of new Part IXA are to apply.

New sub-clause (3) is based on sub-sec 5(6) of the existing Act and provides that a member of reserve or auxiliary forces must be called into actual service before he is deemed to be a member of the forces of another country for the purposes of the new Part IXA.

New Division 2 - Attachment of Personnel and Mutual Powers of Command

New Division 2 provides for mutual powers of command and, in limited cases, powers of discipline where Australian forces are serving with the forces of another country to which the regulations apply the relevant provisions.

There are 3 situations:

- a. Where we attach individual members of our forces to the forces of another country, or they attach their members to a part of our Defence Force. In such a case, the persons so attached become subject to the service law of the force to which they are attached and any breaches of discipline are dealt with in accordance with that service law.

There are adequate safeguards to protect our personnel. In the first place, the country concerned would have to be declared to be a country to which the provision applies. This would not be done until after an examination of its service law. In the second place, such attachments are preceded by entering into a memorandum of understanding with the country concerned. Where necessary, the memorandum requires the other country to modify its service law in its application to our personnel.

- b. Where our forces are serving together with the forces of a country to which the relevant provisions are applied by regulation then, as between officers and NCOs of the forces concerned, there would be power to give orders to subordinates in the other force. Any disobedience of such orders by Australians would, however, have to be dealt with by the Australian service authorities in accordance with Australian service law.

- c. Australian forces may not only be serving with, but may be acting in combination with, the forces of another country to which the relevant provisions are applied by regulation. This action may be taken where there is a traditional close association with the country concerned and a substantial degree of similarity of the respective systems of service law. An officer appointed to command the combined forces has not only powers of command but also powers of discipline. He must, however, exercise his powers of discipline over Australians in accordance with Australian service law.

New section 116B - Attachment to the Defence Force of members of the forces of another country and vice versa

This section provides for temporary attachments to and from forces of other countries to which the section applies. Attachments may take place for a variety of reasons, but the most common in peacetime are where members are exchanged for the purpose of gaining experience by serving for a time in the other country's force or where members undergo training with the other force.

Sub-section (1) is based on sub-sec 24(1) of the existing Act and empowers a chief of staff to attach members of the forces of other countries to the relevant arm of the Defence Force and to place a member of the relevant arm of the Defence Force at the disposal of the service authorities of another country.

The attachment of members of Australian forces to the forces of another country is expressed to be "subject to anything to the contrary in the conditions applicable to his service". This would, for example, prevent a reservist being so attached for a period in excess of the prescribed period of service that he is liable to render.

A reference to a specified class of members has been included to clarify that members do not have to be individually attached.

Sub-section (2) is based on sub-sec 24(2) of the existing Act and deals with the status of a member of the forces of another country who is attached to a part of the Australian Defence Force. In effect, the person becomes subject to the relevant Australian disciplinary law, etc. For practical reasons, he must be able to exercise the powers of command and arrest appropriate to his rank and appointment and, where he holds an appointment, the power (if any) conferred on such an appointee to impose punishments, and provision is made accordingly. The reference to arrest is new.

Sub-section (3) is based on sub-sec 24(3) of the existing Act and empowers the Minister to modify the application of the relevant Australian disciplinary law, etc. For example, it may be necessary to impose certain limits on the powers that such a member is to be permitted to exercise, or to impose certain restrictions on the disciplinary action that the Australian Defence Force may exercise in relation to that member. This sub-clause has been redrafted to clarify its operation.

Sub-sections (4) and (5) are based on sub-secs 24(4) and (5) of the existing Act and merely ensure that a member of the Defence Force attached to the forces of another country remains subject to the law applicable to his part of the Defence Force, and that new section 116B has extra-territorial operation. There are no changes of substance from existing law.

New section 116C - Forces serving together

This section deals with the circumstances where a part of the Defence Force is serving together with, or acting in combination with a part of the forces of another country.

Sub-section (1) is based on sub-sec 25(1) of the existing Act and deals with the position where Australian forces and the forces of another country are serving together. The forces are not serving together unless an order to that effect has been made under sub-sec (5).

The operation of the sub-section is very limited and merely allows the members of the force of the other country to exercise powers of command to the extent that these derive from rank and not from appointment. Powers of discipline cannot be exercised. There is no change of substance from existing law.

Sub-section (2) is based on sub-sec 25(2) of the existing Act and deals with the position where Australian forces and the forces of another country are acting in combination. The forces are not acting in combination unless an order to that effect has been made under sub-sec (5).

The sub-section relates to the command of the forces acting in combination and authorizes the appointment in command of the combined forces of an officer of the forces of the other country. It provides that an officer so appointed has:

- a. powers of command and discipline over members of the Defence Force in the combined force; and
- b. may be invested with the same power to convene and confirm the findings and sentences of courts martial,

as if he were an officer of the Defence Force holding the appointment, etc.

The following changes have been made:

- a. the sub-section applies to countries declared under sub-sec (5) to be acting in combination whereas the existing provision is limited to the United Kingdom Canada and New Zealand;

- b. the sub-section specifically states that it is the Governor-General who may appoint the officer and may invest him with power to convene courts martial, etc; and
- c. provision is made for the Chief of Defence Force Staff to limit the powers of command and discipline that the officer may exercise.

With regard to command, there may be a requirement for the commander of the combined force to have command for the purpose of carrying out a particular mission or operation but not responsibility for (say) logistic support or administration.

With regard to the appointment of an officer in command, such an appointment would be made by arrangement between the 2 Governments. The officer will need to be appointed in command under Australian law (having regard to the fact that there is an Australian component) and will presumably also be appointed under the law of the other country (having regard to the component of the other country).

With regard to exercise of powers of summary punishment, it is desirable that the Australian component deal with minor offences internally. However, the requirement for the exercise of these powers by the commander of the combined force in relation to members of the Army can still arise.

Sub-section (3) is based on sub-sec 25(3) of the existing Act and relates to forces serving together, in accordance with sub-section (1), outside Australia.

Where forces are serving together, there may be a requirement for an arrangement with the authorities of the other country, when Australian service police are not available, for the service police of the other country to be empowered to arrest Australian servicemen who commit offences against Australian service law and hand them over into Australian service custody.

Sub-section (3) meets this need. There is no change of substance from existing law.

Sub-sections (4), (5) and (6) are ancillary to sub-sections (1) to (3) and are based on sub-secs 25(4) and (5) and the definition of "Australian service law" in sub-section 5(1) of the existing Act. There are no changes of substance from existing law.

New section 116D - Corresponding ranks

This section, which is based on sec 26 of the existing Act, deals with the establishment of corresponding ranks between the Australian Defence Force and the forces of other countries to which the respective provisions of section 116C have been applied. The only change from existing law is that this necessary, but routine, function is vested in the Chief of Defence Force Staff instead of in the Governor-General.

New Division 3 - Absentees without leave

New Division 3 makes provision for the arrest in Australia by Australian authorities of a member of the forces of another country who is absent without leave and his disposal to the authorities of his own country.

The existing law relates to deserters and absentees without leave. A deserter is an absentee without leave who, in addition, has behaved with a particular intent set out in the governing disciplinary legislation (usually an intent to remain permanently absent or to avoid service before the enemy). It is not strictly necessary to refer to a deserter and references have been omitted accordingly.

New section 116E - Interpretation

Sub-sections (1) to (3) are based on sub-secs 19(2), 5(7) and 22, respectively, of the existing Act without any changes of substance.

Sub-section (4) is new and ensures power to act under Division 3 although the forces or warship to which the illegal absentee belongs may have left Australia.

New section 116F - Apprehension of illegal absentees

This section, which is based on sub-sec 19(1) of the existing Act, provides for the issue of a warrant for the arrest of an alleged illegal absentee. The warrant may be executed by Federal, State or Territory police or by a member of the Defence Force.

The absentee must be from the force of a country to which section 116F is applied by the regulations under sub-section 116A(2). It is an Australian officer who has the discretion to issue the warrant and he has no power to do so without a written request from the authority of the other country designated in accordance with sub-section 116E(2).

The words "not being an Australian citizen" have been inserted in order to prevent the procedures under Division 3 being applied to a member of the forces of another country who has retained his Australian citizenship.

New section 116G - Detention of illegal absentee

Sub-section (1), which is based on section 20 of the existing Act, provides for the lawful custody of an arrested person until his disposal is dealt with in accordance with section 116H. He will remain in the meantime in Australian custody. There are no changes of substance from existing law.

Sub-section (2) is new and provides additional safeguards, namely, that the person holding an arrested person in custody is to cause an authorized officer to be informed and is to ensure that the person in custody understands his right under sub-section (3) to request his release.

Sub-sections (3) and (4), which are based on sub-sec 21(2) of the existing Act, provide the arrested person with a right to request his release, and impose a duty on the person in whose custody he is to cause the request to be referred to an authorized officer. There are no changes of substance from existing law.

New section 116H - Disposal of person in custody

Sub-section (1), which is based on sub-sec 21(3) of the existing Act, requires the authorized officer, after due investigation, to direct the person's release or refer the matter to the Minister. This differs from existing law under which the authorized officer may hand the arrested person over to the authorities of the other country without reference to the Minister.

Sub-section (2) is new and requires the authorized officer to pay due regard to any request for release made by the arrested person.

Sub-section (3), which is based on sub-sec 21(4) of the existing Act, requires the Minister to deal with a matter referred to him by directing that the person be released from custody or to issue a warrant for the delivery of the person to a specified service authority of the country concerned at a place in Australia. The sub-section is more detailed than the existing provision.

Sub-section (4), which is a new provision, makes clear that the service authority of the country to which a person belongs, and into whose custody the person is delivered in pursuance of the Minister's warrant, may remove the person from Australia.

Sub-section (5), which is based on sub-sec 21(5) of the existing Act, requires the person to be released when the Minister or authorized officer so directs. There is no change of substance from existing law.

New section 116J - Evidence for the purposes of this Division

This section, which is based on section 23 of the existing Act, is an evidentiary provision regarding the identity of an alleged illegal absentee. There is no change of substance from existing law.

New section 116K - Proof of facts by certificate

This section, which is based on sub-secs 27(3) to (5) of the existing Act, contains further evidentiary provisions regarding various instruments made under Division 3. There is no change of substance from existing law.

New Division 4 - Miscellaneous

New section 116M - Delegation by chief of staff

This section, which is based on sub-secs 28(3) to (8) of the existing Act (to the extent that those provisions relate to chiefs of staff and to Parts III and IV of the existing Act), empowers chiefs of staff to delegate their powers under the new Part IXA. There is no change of substance from existing law.

New section 116N - Orders

This section, which is based on sec 29 of the existing Act, provides that orders made under Part IXA are not statutory rules within the meaning of the Statutory Rules Publication Act 1903. There is no change of substance from existing law.

Clause 9 - New Part IXB - Public areas of defence land

This clause inserts a new Part IXB into the Principal Act to enact provisions enabling adequate controls to be exercised over members of the public where general access is permitted to certain defence lands for recreational purposes.

Some substantial areas of defence lands - for example, at Garden Island WA and Beecroft Peninsula, NSW - have been opened to public access where this is compatible with defence requirements. It is appropriate that controls be maintained in these areas analagous to those exercised in national parks, etc.

New section 116P - Interpretation

This section provides definitions, etc, of expressions used in the new Part IXB. The effect of the definition of "ranger" is that the powers conferred on a ranger may also be exercised by a member of a police force.

New section 116Q - Public areas of defence land

This section empowers the Minister to declare areas of defence land to be public areas and to assign names to such areas.

New section 116R - Delegation

This section empowers the Minister to delegate his powers under Part IXB, except the power of delegation itself or his power to make by-laws.

New section 116S - Appointment of rangers

This section empowers the Minister to appoint persons as rangers.

New section 116T - Rangers ex officio

This section provides that any member of the Australian Federal Police or of the police force of a Territory is a ranger.

New section 116U - Identity cards

This section provides for the issue of identity cards to rangers and that it is an offence for a card not to be returned on the person ceasing to be a ranger.

New section 116V - Powers of arrest

This section provides rangers with powers of arrest in respect of offences against Part IXB or the by-laws. Sub-section (1) provides that the power of arrest may be exercised only if there are reasonable grounds for believing that proceedings by summons would not be effective.

Sub-section (2) requires the person effecting an arrest (other than a policeman in uniform) to show the person arrested his identity card or police identification.

Sub-section (3) requires a person arrested by a ranger to be brought before a Justice of the Peace or other proper authority.

Sub-section (4) preserves any other powers of arrest that may exist.

New section 116W - General powers of rangers

This section provides rangers with powers of search, and with power to require a person to leave a public area, etc, in relation to offences against Part IXB or the by-laws.

Sub-section (1) empowers a ranger to stop and search a vehicle, aircraft or vessel. The power does not extend to the search of a person.

Sub-section (2) empowers a ranger to require a person to state his name and address or to leave the public area.

Sub-sections (3) and (4) provide that it is a condition of the exercise of a power under sub-section (1) or (2), that the person (other than a policeman in uniform) show the person affected his identity card or police identification.

Sub-section (5) creates an offence of failing to comply with a requirement under sub-section (1) or (2).

New section 116X - Seizure and forfeiture

This section provides for the forfeiture, restitution or disposal of vehicles, etc, used in the commission of an offence.

Sub-section (1) empowers a court, on conviction of a person, to order forfeiture to the Commonwealth of any vehicle, etc, used in the commission of the offence.

Sub-section (2) empowers a ranger to seize any vehicle, etc, used in the commission of an offence and retain it for 60 days or, if proceedings are commenced within that period, until the proceedings are terminated.

Sub-section (3) empowers the Minister to authorize the release (conditionally or otherwise) of a vehicle, etc, to the owner or the person from whom it was seized.

Sub-section (4) empowers the Minister to dispose of any vehicle, etc, that is forfeited.

New section 116Y - Assaulting, etc, rangers

This section creates an offence of assaulting or threatening a ranger in the performance of his duties.

New section 116Z - Personation of rangers

This section creates an offence of falsely representing oneself to be a ranger.

New section 116ZA - Officers and employees of governments and authorities

This section empowers the Governor-General to make arrangements with a State or Territory for State or Territory officers, etc, to exercise powers under Part IXB.

New section 116ZB - Prosecution of offences

This section empowers a court of summary jurisdiction to hear and determine indictable offences under Part IXB if the court is satisfied that it is proper to do and the defendant and prosecutor consent, and provides a lesser maximum punishment that applies in such a case.

New section 116ZC - Concurrent operation of State and Territory laws

This section provides that the provisions of Part IXB do not displace State or Territory laws in relation to public areas.

New section 116ZD - By-laws

This section empowers the Minister to make by-laws in relation to public areas. It is based on the corresponding power to make regulations in the National Parks and Wildlife Conservation Act 1975, varied to meet the possible requirements in relation to defence lands.

Sub-section (3) has the effect that by-laws have to be dealt with in the same way as regulations (including notification in the Gazette, tabling in Parliament and liability to disallowance by either House of the Parliament).

Clause 10 - Forfeiture or suspension of salary in certain circumstances

As previously mentioned, section 53 of the Defence Force Re-organization Act 1975 replaced section 119 of the Defence Act 1903 with a new provision that provides for the making of regulations relating to forfeiture of salary and allowances of members of the Defence Force.

In the course of preparing the relevant regulations, it became apparent that there is a requirement to make regulations providing for the suspension of the payment of salary and allowances (eg, where a member goes absent without leave, because a forfeiture cannot be applied until the member is convicted of absence without leave).

The purpose of the amendment is to clarify the power to make such a regulation.

Clause 11 - Regulations

This clause amends section 124 of the Principal Act (which empowers the Governor-General to make regulations) for the following purposes:

- a. amendment of paragraph (1)(o) to permit the making of regulations subjecting canteens, messes, etc, to Commonwealth, State or Territory taxes (other than income tax);
- b. replacement of paragraphs (1)(r) and (t) with a new paragraph (r) to permit the making of regulations authorizing the payment of compensation for loss, injury or damage suffered by reason of anything done under the Act or regulations. This power is required, in particular, in connection with the making of new regulations for the control, prohibition, etc, of the construction or use of buildings, etc, in areas adjacent to certain defence facilities such as aerodromes and communication stations and new regulations governing defence firing and practice areas;

- c. insertion of new sub-regulations (2A) and (2B) to permit the making of regulations making persons compellable witnesses with regard to self-incriminating answers, and to provide protection to those persons against the admissibility of such answers against them in criminal, civil or court martial, etc, proceedings.

PART III - AMENDMENTS OF THE DEFENCE (VISITING FORCES)
ACT 1963

Clause 12 - Principal Act

This clause provides for the citation of the Defence (Visiting Forces) Act 1963 as the Principal Act in this Part of the Bill.

Clause 13 - Interpretation

This clause omits the definition of "Australian service law" from sub-section 5 of the Principal Act by clause 15.

Clause 14 - Countries in relation to which provisions of this Act apply or may be applied

This clause omits from sub-section 6(2) of the Principal Act a reference to sub-section 25(2) consequent on the repeal of the latter by clause 15.

Clause 15 - Repeal of Parts III and IV

This clause repeals Parts III and IV of the Principal Act consequent on the insertion, by clause 8, of corresponding provisions (Part IXA) into the Defence Act.

Clause 16 - Delegation of powers and functions

This clause:

- a. makes a drafting amendment to the power of delegation in section 28 of the Principal Act;

- b. validates any delegations that may previously have been expressed to be delegations of all powers; and
- c. omits from sub-section (4) references to Part III and sub-section 25(3) consequent on their repeal by clause 15.

Clause 17 - Transitional

Sub-clause (1) saves the operation of appointments regulations and various instruments made under the repealed Part III or IV as if they had been made under the Defence Act.

Sub-clause (2) preserves the custody of a person who is in custody under the repealed provisions and provides that the repealed provisions continue to apply to him.