

1979

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE AMENDMENT BILL 1979

NAVAL DEFENCE AMENDMENT BILL 1979

AIR FORCE AMENDMENT BILL 1979

EXPLANATORY MEMORANDUM

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

DEFENCE AMENDMENT BILL 1979

General Outline

The Bill deals with two matters:

- a. it clarifies the power to make standing appointments of Acting Chief of Defence Force Staff, and Acting Chiefs of Staff of the Navy, the Army and the Air Force; and
- b. it confers on the Minister for Defence power to determine remuneration, allowances and other benefits for members of the Defence Force, etc.

At present, remuneration, etc, for members of the Defence Force is required to be prescribed in regulations made under the Defence Act 1903, the Naval Defence Act 1910 and the Air Force Act 1923. This results in substantial delays, to the dissatisfaction of members of the Defence Force. The degree of retrospectivity necessarily provided for in some Statutory Rules has also generated criticism by the Senate Standing Committee on Regulations and Ordinances.

The purpose of the amendments regarding remuneration etc, is to ensure the prompt payment to members of the Defence Force of increases in rates of salary and allowances and the prompt application of other improvements in financial conditions of service.

Because of the size of the task of replacing some 480 regulations by determinations, the Bill provides for an interim period during which the transition from regulations to determinations will take place.

The scheme proposed by the Bill is, briefly, as follows:

- a. The Minister for Defence to be empowered to determine remuneration, etc. These determinations will have their own system of numbering, be tabled in Parliament and be subject to disallowance;

- b. The Minister for Defence to be also empowered to make, during the interim period, interim determinations amending or repealing the existing regulations dealing with remuneration etc. These will be issued as Statutory Rules tabled in Parliament and subject to disallowance. The power to make interim determinations will normally be exercised to repeal regulations as they are superseded by determinations referred to in paragraph a.

The purpose of this is to reduce the delays that would otherwise take place in repealing regulations when a determination is made that is to replace a regulation.

On the expiration of the interim period, the power to make interim determinations and the power to make regulations regarding remuneration etc, will lapse.

The Naval Defence Amendment Bill 1979 and the Air Force Amendment Bill 1979 make complementary amendments to the Naval Defence Act 1910 and the Air Force Act 1923, respectively.

NOTES ON CLAUSES

DEFENCE AMENDMENT BILL 1979

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) and (3).

Sub-clause (2) provides for sub-clause 6(1) and clause 9 (which amend the regulation-making powers in the Defence Act 1903 (the Principal Act)) and Part IV (which terminates the provisions of the Bill relating to interim determinations) to come into force on 1 January 1982 or on a later date proclaimed by the Governor-General.

Sub-clause (3) provides for clause 7 to come into operation on date of Royal Assent if section 53 of the Defence Force Re-organization Act 1975 has not come into force. This is explained in more detail under clause 7.

PART II - AMENDMENTS OF THE PRINCIPAL ACT (THE DEFENCE ACT 1903)

This Part contains the changes being effected by the Bill, namely:

- a. clarification of the power to make standing appointments of acting chiefs of staff; and
- b. conferring on the Minister for Defence power to determine remuneration, allowances and other benefits for members of the Defence Force, etc.

Clause 3 - Remuneration of Chiefs of Staff

This clause amends section 9B of the Principal Act consequent on the conferring on the Minister for Defence of power to determine remuneration, etc (see clause 5).

Sub-clause (1):

- a. omits from sub-section 9B(1)(which deals with the remuneration of a chief of staff) words, now obsolete, that refer to the situation where the Remuneration Tribunal has not determined remuneration; and
- b. replaces a reference in sub-section 9B(2) to allowances being prescribed with a reference to allowances being determined under the new section 58B

Sub-section 9B(3) of the Principal Act continues to provide that section 9B has effect subject to the Remuneration Tribunals Act 1973.

Sub-clause (2) is a transitional provision that continues in force the relevant regulations and provides that they may be amended or repealed by interim determinations made under clause 12, subject to clause 15 (which terminates the interim period) and to the overriding operation of the Remuneration Tribunals Act 1973.

Clause 4 - Acting Chiefs of Staff

This clause inserts a new section 9C into the Principal Act clarifying the power to make standing appointments of acting chiefs of staff.

Section 9 of the Principal Act empowers the Governor-General to appoint the Chief of Defence Force Staff, the Chief of Naval Staff, the Chief of the General Staff and the Chief of the Air Staff. The effect of

sub-section 33(4) of the Acts Interpretation Act 1901 is that the Governor-General may also make appointments under section 9 of the Principal Act of persons to act during a particular absence of the holder of one of the offices mentioned above.

There is a further requirement to be able to appoint two senior officers as first and second standing reliefs to cover any unexpected absence of a Chief of Staff (eg, for illness). The reason for this is that the function of commanding the Defence Force and the 3 arms of the Defence Force, which is conferred by sub-section 9(2) of the Defence Act on the Chief of Defence Force Staff and the 3 Service Chiefs of Staff, respectively, is not capable of delegation, and it is unacceptable to have a situation where, by reason of an unexpected absence, such an appointment is not effectively filled.

The Attorney-General's Department has advised that sub-section 33(4) of the Acts Interpretation Act does not support the making of standing acting appointments. The new section 9C, which is drafted in the form usually used for provisions of this nature, fills this gap.

NEW SECTION 9C - ACTING CHIEFS OF STAFF

Sub-section (1) authorises the Governor-General to appoint an eligible officer to act as a chief of staff during a vacancy in the office or during any periods when the chief of staff is absent from duty or from Australia or otherwise unable to perform the functions of his office. Where the office is vacant, an officer is not to act for longer than 12 months.

Sub-section (2) provides that an acting appointment may be expressed to have effect only in certain circumstances. This will permit the Governor-General to appoint first and second standing reliefs, by expressing the appointment of

one of the acting officers as not being exercisable except in the absence of the other acting officer.

Sub-section (3) authorises the Governor-General to determine the terms and conditions of appointment (including remuneration and allowances) of an acting chief of staff. This is necessary because determinations under the Remuneration Tribunals Act 1973 do not apply to an acting chief of staff.

Sub-section (3) also authorises the Governor-General to terminate an acting appointment at any time.

Sub-section (4) provides that where an officer is acting otherwise than during a vacancy in the office and the office becomes vacant he may continue to act until the Governor-General otherwise directs, subject to sub-section (2) (ie, if he is the second relief, he would cease to act on the return of the first relief), and to a maximum period of 12 months from the date on which the vacancy occurred.

Sub-section (5) provides that the acting chief of staff may exercise all the powers and functions of that office, including any powers that may have been delegated to the holder of the office.

Sub-section (6) protects the acts of an acting chief of staff from being invalidated on the ground that the occasion for his appointment had not arisen, that there is a defect or irregularity in his appointment, that the appointment had ceased to have effect or that the occasion for him to act had not arisen or had ceased.

Clause 5 - Insertion of new Part IIIA in the Defence Act

This clause inserts in the Principal Act a new Part IIIA dealing with the determination of remuneration, allowances and other benefits for members of the Defence Force, and their families.

New section 58A - Interpretation

This section provides definitions of expressions used in the new Part IIIA.

New Section 58B - Determination of certain conditions of service

Sub-section (1) empowers the Minister for Defence to make determinations, not inconsistent with the Defence Act 1903, the Naval Defence Act 1910, or the Air Force Act 1923, providing for the following matters:

- a. remuneration of members or cadets;
- b. the payment of allowances or other pecuniary benefits, otherwise than remuneration, in respect of members or cadets and members' families;
- c. leave of absence and long service leave;
- d. the provision of other benefits in respect of members and their families;
- e. the payment of allowances and expenses, and the provision of travelling facilities, in respect of applicants for appointment or enlistment.

"Member" here includes former members - see the definition of "member" in new section 58A.

Sub-sections (2) and (3) provide that determinations shall not be made in respect of the following:

- a. pensions;
- b. forfeiture or assignment of, or deductions from, remuneration, etc;
- c. suspension, etc, of allotments; and
- d. imposition of a liability on a member, etc, to pay an amount to the Commonwealth.

These matters will continue to be dealt with in the regulations or, in the case of pensions, by the Defence Force Retirement and Death Benefits Act 1973.

Sub-section (4) provides that a determination takes effect when made unless an earlier or later date is specified in the determination.

Sub-section (5) provides that a determination which prejudices a person's rights or imposes a liability on him, retrospectively, is of no effect.

Sub-section (6) provides for the numbering of determinations on an annual series.

Sub-section (7) provides that a determination may be cited by reference to the relevant number and year.

Sub-section (8) requires the Minister to cause to be published in the Gazette a notice of the making of each determination and of the place or places where copies of the determination can be obtained.

Sub-section (9) defines the expression "this Act" as not including the regulations. This prevents the application of a contrary definition in section 4 of the Principal Act.

New Section 58C - Tabling, disallowance, etc, of determinations

Sub-section (1) applies, to determinations, the provisions of sections 48, 49 and 50 of the Acts Interpretation Act 1901, which deal with the tabling in Parliament and disallowance of regulations and the effect of the repeal of regulations.

Paragraphs 48(1)(a) and (b) and sub-section 48(2) of the Acts Interpretation Act are not applied because provision on the matters dealt with therein is made by proposed sub-sections 58B(4), (5) and (8).

Sub-section (2) deals with the effect of a disallowance where the disallowed provision itself amended or revoked another determination. The sub-section provides that the amended or revoked determination revives as from the date of disallowance as if the disallowed determination had not been made.

Sub-section (3) provides that determinations shall not be deemed to be statutory rules within the meaning of the Statutory Rules Publication Act 1903. The effect of this is that determinations are not required to be printed and numbered as statutory rules. Provision for numbering is made by proposed sub-section 58B(6).

New Section 58D - Evidence

This section provides that, for the purposes of section 5 of the Evidence Act 1905, a determination is deemed to be an order made by the Minister. The effect is that evidence of a determination may be given in any court by the production of a document purporting to be certified by the Minister as a true copy.

New Section 58E - Delegation

This section authorises the making of regulations empowering the Minister to delegate his power to make determinations under proposed section 58B.

Clause 6 - Australian Cadet Corps

This clause makes consequential amendments with regard to the Australian Cadet Corps.

Sub-clause (1) removes from sub-section 62(7) of the Principal Act the power to make regulations with regard to cadets on matters that may be determined under proposed section 58B. This amendment will not come into force until the end of the interim period defined in clause 11.

Sub-clause (2) makes a drafting amendment to sub-section 62(9) of the Principal Act (which deals with the power of the Chief of the General Staff to administer the Australian Cadet Corps) by including a reference to determinations made under proposed section 58B.

Clause 7 - Stoppage of pay in certain cases

This clause makes a consequential amendment to section 119 of the Principal Act (which has the effect of forfeiting the pay of members who are absent without leave, in custody awaiting trial, etc except in such circumstances as are prescribed) by including a reference to determinations made under proposed section 58B.

Under sub-clause 2(3) of the Bill, clause 7 will not come into operation if the amendment of the Defence Act 1903 effected by section 53 of the Defence Force Re-organisation Act 1975 comes into operation on or before the date of Royal Assent to the Defence Amendment Bill. The latter amendment replaces section 119 with a new section authorizing the making of regulations providing for the forfeiture of pay in specified circumstances, thus rendering the amendment proposed by clause 7 unnecessary.

Extensive amendments of regulations are necessary before section 53 of the Defence Force Re-organization Act 1975 can be brought into force and these are currently being drafted by the Attorney-General's Department.

Clause 8 - Repeal of Section 123 E

This clause repeals section 123E of the Principal Act, which provides that uniforms shall be supplied free of charge to all members of the Citizen Forces. There are circumstances in which it is preferable to pay Citizen Force members an allowance for the purchase or upkeep of uniforms eg, where a member renders a substantial period of continuous full time service with the Permanent Forces. Repeal of section 123E will allow more flexibility to be adopted under proposed Part IIIA.

Clause 9 - Regulations

This clause is complementary to proposed Part III A.

The clause:

- a. omits provisions of the regulation-making power (section 124 of the Principal Act) that are superseded by the determination-making power in proposed sub-section 58B (1) and substitutes provisions regarding certain matters that are not to be determined but are to continue to be provided for by regulations; and
- b. adds to section 124 a sub-section defining remuneration in terms similar to those used in proposed section 58A.

This clause will not come into force until the end of the interim period defined in clause 11.

Clause 10 - Formal Amendments

This clause makes formal drafting amendments to the Principal Act to accord with current drafting practices. The amendments are set out in the Schedule.

PART III - INTERIM PROVISIONS

This Part provides for an interim period during which the existing regulations will be progressively replaced by determinations made under proposed section 58B. Provision is made for the relevant regulations to be amended or repealed by interim determinations during the interim period.

Clause 11 - Interpretation

This clause provides definitions of expressions used in Part III of the Bill. The definition of 'interim period', read in conjunction with sub-clause 2(2), has the effect of setting an interim period of approximately 2 years for the replacement of regulations by determinations. As there are some 480 regulations to be replaced, this period may be insufficient and provision is accordingly made in sub-clause 2(2) for the interim period to be extended, if necessary, by Proclamation by the Governor-General. Only 1 extension may be made.

Clause 12 - Interim Determinations

Sub-clause (1) empowers the Minister for Defence to make interim determinations amending or repealing relevant regulations. This power will normally be exercised to repeal regulations as they are superseded by determinations made under proposed section 58B.

A requirement to amend the regulations by interim determinations may arise where it is necessary to replace a reference to a superseded regulation or where, particularly during the early part of the interim period, it is necessary

to vary an existing conditions of service and it is not yet convenient to replace the existing regulation by a determination made under proposed section 58B.

Sub-clause (2) provides that an interim determination may not amend a regulation in a way that would render the regulation inconsistent with the Defence Act, the Naval Defence Act or the Air Force Act.

Sub-clause (3) provides that the power to make interim determinations does not derogate from the Governor-General's power to make regulations under the Defence Act 1903 the Naval Defence Act 1910 and the Air Force Act 1923.

Clause 13 - Tabling, Disallowance, Etc, of Determinations

Sub-clause (1) applies sections 48, 49 and 50 of the Acts Interpretation Act 1901 (which deal with the notification tabling and disallowance of regulations) to interim determinations.

Sub-clause (2) applies the Statutory Rules Publication Act 1903 to interim determinations: the effect is that these determinations are required to be numbered in the Statutory Rules series and printed by the Government Printer in the same way as regulations.

Clause 14 - Determinations Prevail Over Inconsistent Regulations

Sub-clause (1) deals with the relationship between determinations made under proposed section 58B and relevant regulations during the interim period and provides for the determinations to prevail.

Sub-clause (2) deals with the effect of the disallowance of a determination which has prevailed over a regulation in accordance with sub-clause (1). In such a case, the regulation revives as from the date of the disallowance.

PART IV - MISCELLANEOUS

Clause 15 - Interpretation

This clause defines 'relevant date' for the purposes of Part IV of the Bill.

Clause 16 - Termination of Part III

This clause provides that, on the end of the interim period, the interim provisions (Part III of the Bill) cease to have effect. This clause will not come into force until the end of the interim period defined in clause 11.

Clause 17 - Saving

This clause provides for the continuation in force after the end of the interim period, of the regulations in force under the Defence Act 1903 immediately before that date (as amended by any interim determinations) and any determinations, directions or approvals in force under those regulations, to the extent that they are not inconsistent with the Defence Act.

Schedule - Formal Amendments

See explanation under clause 10.

NAVAL DEFENCE AMENDMENT BILL 1979

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 exceptions of the provisions mentioned in sub-clause (2).

Sub-clause (2) provides for clauses 4 (which amends the regulation-making power in the Naval Defence Act 1910 (the Principal Act) in relation to cadets) and 7 (which is a related saving provision) to come into force on the date of commencement of sub-section 6(1) of the Defence Amendment Act 1979 (ie, the end of the interim period defined in clause 11 of the Defence Amendment Bill 1979).

Clause 3 - Application of Defence Act

Section 5 of the Principal Act applies certain provisions of the Defence Act 1903 to members of the Navy.

Clause 3 amends section 5 by including a reference to the new Part IIIA proposed to be included in the Defence Act by the Defence Amendment Bill 1979.

Clause 4 - Establishment and Constitution of Naval Reserve Cadets

This clause removes from sub-section 38(7) of the Principal Act the power to make regulations with regard to cadets on matters that may be determined under proposed section 58B of the Defence Act. This amendment will not come into force until the end of the interim period defined in clause 11 of the Defence Amendment Bill 1979.

Clause 5 - Administration of Naval Reserve Cadets

This clause makes a drafting amendment to section 39 of the Principal Act (which deals with the power of the Chief of Naval Staff to administer the Naval Reserve Cadets) by including a reference to determinations made under proposed section 58B of the Defence Act.

Clause 6 - Formal Amendments

This clause makes formal drafting amendments to the Principal Act to accord with current drafting practices. The amendments are set out in the Schedule.

Clause 7 - Saving

This clause provides for the continuation in force, after the end of the interim period, of the regulations in force under the Naval Defence Act 1910 immediately before that date (as amended by any interim determinations made under Part III of the Defence Amendment Bill 1979) and any determinations, directions or approvals in force under those regulations, to the extent that they are not inconsistent with the Naval Defence Act.

Schedule - Formal Amendments

See explanation under clause 6.

AIR FORCE AMENDMENT BILL 1979

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-clause (2).

Sub-clause (2) provides for sub-clause 4(1) (which amends the regulation-making power in the Air Force Act 1923 (the Principal Act) in relation to cadets) and 6 (which is a related saving provision) to come into force on the date of commencement of sub-section 6(1) of the Defence Amendment Bill 1979 (ie, the end of the interim period defined in clause 11 of the Defence Amendment Bill 1979).

Clause 3 - Application of Defence Act

Section 3 of the Principal Act applies certain provisions of the Defence Act 1903 to members of the Air Force.

Clause 3 amends section 3 by including a reference to the new Part III A proposed to be included in the Defence Act by the Defence Amendment Bill 1979.

Clause 4 - Air Training Corps

Sub-clause (1) removes from sub-section 8(7) of the Principal Act the power to make regulations with regard to cadets on matters that may be determined under proposed 58B of the Defence Act. This amendment will not come into force until the end of the interim period defined in clause 11 of the Defence Amendment Bill 1979.

Sub-clause (2) makes a drafting amendment to sub-section 8(9) of the Principal Act (which deals with the power of the Chief of the Air Staff to administer the Air Training Corps) by including a reference to determinations made under proposed section 58B of the Defence Act.

Clause 5 - Formal Amendments

This clause makes formal drafting amendments to the Principal Act to accord with current drafting practices. The amendments are set out in the Schedule.

Clause 6 - Saving

This clause provides for the continuation in force after the end of the interim period, of the regulation in force under the Air Force Act 1923 immediately before that date (as amended by any interim determinations made under Part III of the Defence Amendment Bill 1979), and any determinations, directions or approvals in force under those regulations, to the extent that they are not inconsistent with the Air Force Act.

Schedule - Formal Amendments

See explanation under clause 5.