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THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE LEGISLATION AMENDMENT BILL 1987

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Defence,
the Hon. Kim Beazley, M.P.)

OUTLINE

This Bill deals with the following matters:

- a. it proposes to amend the Defence Act 1903 and related legislation to enable the call-out of the Reserve Forces in situations short of a declaration of defence emergency to enable those Forces to be available to meet low level contingencies;
- b. it proposes to amend the Defence Act 1903 and related legislation to provide, as an alternative to the present law under which enlisted members are required to enlist or re-engage for a specified period, a scheme under which such members may enlist, or have their periods of enlistment extended, for a period to retiring age;
- c. it proposes to amend the Defence Force Discipline Act 1982 so that before a summary authority may impose one of the more severe summary punishments upon an accused who has pleaded guilty at a summary trial, the summary authority is obliged to give the accused the option of electing to be punished by a court martial or a Defence Force magistrate;
- d. it proposes to amend the Defence Force Retirements and Death Benefits legislation in relation to:
 - (1) non-effective service - to conform to the operation of the Defence Force Discipline Act 1982 and the regulations under section 119 of the Defence Act 1903 relating to forfeiture of salary;
 - (2) purchase of service before 1 October 1972 - to ensure that the provisions of the legislation relating to electing to count such service and the purchase of such service operate in accordance with the original policy intention;
 - (3) deferred benefits - to ensure that the provisions of the legislation relating to the counting of service towards a deferred benefit operate in accordance with the original policy intention;
 - (4) pension increases - to reflect the altered basis for calculation by the Australian Statistician of the consumer price index;
- e. it proposes to amend the Services Trust Fund Act 1947 to wind up the Services Canteens Trust Fund;
- f. it proposes to amend the Defence Act 1903 to ensure that certain Commonwealth laws relating to defence that are intended to override State and Territory laws do in fact have that effect;
- g. it proposes to amend the Supply and Development Act 1939 to:
 - (1) enable persons employed under that Act to be transferred to employment with a company formed by the Government to take over a particular activity under that Act and operate it as a commercial enterprise; and

- (2) vary the provisions relating to employment of persons under that Act so that the regulations under that Act relating to employment may be brought up to date.

FINANCIAL IMPACT

The introduction of the scheme of enlistments and extensions of service of servicemen to retiring age is expected to result in some savings resulting from the reduction of administrative effort but no figure could reasonably be estimated.

In the case of the amendments proposed to the Defence Force Retirement and Death Benefits Act 1973 by clauses 46 and 47 of the Bill there are no additional costs. If the amendments were not made there could be a requirement to refund to members a once only payment totalling \$1.73m and a further \$0.36m foregone to revenue.

The other amendments are not expected to have any significant financial impact.

PART I - PRELIMINARY

Clause 1 - Short Title

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

Clause 2 - Commencement

This clause provides for the coming into operation of the various provisions of the Bill.

Sub-clause (1) provides for many provisions of the Bill to come into operation on the day on which the Bill receives the Royal Assent.

The remaining sub-clauses provide for the other provisions of the Bill to come into operation as follows:

- a. sub-clause (2): the provisions relating to the counting of service under the Defence Force Retirement and Death Benefits Act 1973 before 1 October 1972 are deemed to have come into operation on 16 July 1973;
- b. sub-clause (3): the provisions relating to the amendment of the definition of "widow" in that Act are deemed to have come into operation on 10 November 1977;
- c. sub-clause (4): the provisions relating to non-effective service for the purposes of that Act are deemed to have come into operation on 3 July 1985;
- d. sub-clause (5): the provisions relating to the adjustment of pensions under that Act according to movements in the consumer price index are to come into operation on the day on which the Bill receives the Royal Assent or 30 June 1987 whichever is the earlier;
- e. sub-clause (6): the provisions relating to the call out of the Reserve Forces are to come into operation when proclaimed.

PART II - AMENDMENTS OF THE AIR FORCE ACT 1923

Clause 3 - Principal Act

This clause provides for the citation of the Air Force Act 1923 as the Principal Act in this Part of the Bill.

Clause 4 - Air Force Emergency Force

This clause makes drafting amendments to sections 4B and 4C of the Principal Act related to the introduction of long term enlistments into the Air Force.

Clause 5 - Australian Air Force Reserve

This clause makes drafting amendments to section 4D of the Principal Act related to the introduction of long term enlistments into the Air Force.

Clause 6 - Service of the Permanent Air Force

Sub-section 4G (2) of the Principal Act provides for the continuation of the service of a member of the Permanent Air Force where the member's period of service expires during time of war or defence emergency or while a part of the Air Force Emergency Force is called out. The sub-section requires amendment consequent on the proposed power to call out the Australian Air Force Reserve. Instead, this clause provides for the omission of the sub-section with a view to the inclusion of a corresponding provision in the regulations. This course has been followed because corresponding provisions in relation to other parts of the Air Force are provided by the regulations not by the Act.

Clause 7 - Service of the Air Force Emergency Force

Section 4H provides (inter alia) for the call-out of members of the Air Force Emergency Force. The opportunity has been taken of the requirement to enact new call out provisions for the Reserve Forces to group the call-out provisions for the various parts of the Defence Force in the one Division of the Defence Act (see clause 22). This clause repeals section 4H of the Principal Act and substitutes a new section re-enacting those provisions (sub-sections (1) and (6)) of the existing section which do not relate to call out. There is no change of substance from the existing law.

Clause 8 - Service of the Australian Air Force Reserve

This clause makes drafting amendments related to the new call out provisions for the Reserve Forces (see clause 22).

Clause 9 - Delegation

This clause amends section 8A of the Principal Act to include what is now a standard provision relating to the exercise of delegated powers.

PART III - AMENDMENTS OF THE DEFENCE ACT 1903

Clause 10 - Principal Act

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

Clause 11 - Interpretation

This clause makes a drafting amendment consequent on the proposed replacement of section 42A of the Principal Act by new section 122 (see clause 27).

Clause 12 - Term of Appointment of Officers

Sub-section 10A(4) of the Principal Act provides that if the term of appointment of an officer of the Australian Regular Army or the Regular Army Supplement expires during a time of defence emergency or while the Regular Army Emergency Reserve or a part of that Reserve is called out then the period of the officer's appointment is deemed to be extended until the end of the time of defence emergency.

This clause amends section 10A to provide that the service of such an officer is also extended if a part of the Australian Army Reserve is called out under the proposed new section 50F.

Clause 13 - Resignation of Officers

Sub-section 17(2) of the Principal Act sets out certain circumstances in which the Chief of the General Staff may reject the resignation of an officer of the Army, eg, in time of war or defence emergency.

This clause amends section 17 to provide that the resignation of an officer of the Regular Army Emergency Reserve or the Australian Army Reserve may be rejected if it is tendered during a period when the part of the force to which the officer belongs is called out for continuous full time service.

Clause 14 - Permanent Military Forces

This clause makes drafting amendments to section 32 of the Principal Act related to the introduction of long-term enlistments into the Army.

Clause 15 - Australian Army Reserve

This clause makes drafting amendments to section 32A of the Principal Act related to the introduction of long-term enlistments into the Army.

Clause 16 - Repeal of sections 36 to 42A and Substitution of New Sections

Sections 36 to 42A of the Principal Act are mostly concerned with the enlistment, engagement, re-engagement and discharge of soldiers. In order to make provision for the introduction of long-term enlistments, this clause repeals sections 36 to 42A and replaces them with new sections 36 to 41.

New section 36 - Enlistment of Soldiers

Sub-section (1) introduces the concept of long-term enlistments and provides that a person may volunteer to serve as a soldier for a fixed period or until retiring age. The dual terminology of the existing law ("upon enlistment, shall be engaged") has been eliminated.

Sub-section (2) requires a person enlisting to take an oath or affirmation and provides for the form of oath and other matters relating to the taking of the oath to be prescribed in the regulations.

Sub-section (3) deals with the effect of the taking of the oath.

New section 37 - Extension of Period of Enlistment

This section deals with a soldier who has been enlisted for a fixed period.

Sub-section (1) permits the soldier to volunteer for an extension of service for a fixed period or until attaining retiring age.

Sub-section (2) provides that if the soldier's offer is accepted, his enlistment is extended accordingly.

New section 38 - Discharge of Soldiers who are Enlisted Otherwise than to Retiring Age

This section restates much of the law in sections 39, 40 and 41 of the Principal Act regarding a soldier's entitlement to discharge in the case of soldiers enlisted for fixed periods. The section:

- a. is drafted to accord with the terminology used in new section 36;
- b. has been varied to take account of the consequences of the new call out provisions for the Reserve Forces (see new section 50F); and
- c. clarifies the power to make regulations that deal with the effect of non-effective service on a fixed period of service.

Sub-section (1) is a general rule providing a soldier in the Australian Regular Army or the Regular Army Supplement with an entitlement to discharge at the end of the fixed period for which he enlisted.

Sub-section (2) is a similar general rule for members of the Regular Army Emergency Reserve or the Australian Army Reserve.

Sub-sections (3), (4) and (5) provide exceptions to these rules, and automatically extend a soldier's service:

- a. in time of war or defence emergency;
- b. in the case of a soldier in the Australian Regular Army or the Regular Army Supplement - when the Regular Army Emergency Reserve or a part of that Reserve or part of the Australian Army Reserve is called out;
- c. in the case of a soldier in the Regular Army Emergency Reserve or the Australian Army Reserve - when the part of the force to which he belongs is called out.

Sub-section (6) provides a further exception to the general rules and provides that the regulations may make additional provision for the extension of the periods for which soldiers are enlisted. Such regulations could provide that the period of service is extended by certain non-effective service of the soldier (eg. absence without leave).

Sub-section (7) is a general rule that a soldier in the Regular Army Emergency Reserve or the Australian Army Reserve may claim his discharge on giving 3 months notice.

Sub-section (8) provides an exception to the general rule in sub-section (7) by providing that a discharge may not be claimed in time of war or defence emergency, when the part of the Force to which the soldier belongs is called out or when the soldier is rendering a period of continuous full time service which he volunteered to render.

New section 39 - Discharge of Soldiers who are Enlisted until Attaining Retiring Age

This section sets out the circumstances in which a soldier who enlisted until attaining retiring age may claim his discharge.

Sub-section (1) is a general rule providing a soldier who is enlisted until attaining retiring age with an entitlement to a discharge on claiming his discharge under sub-section (2).

Sub-section (2) provides that a soldier may claim his discharge on giving the appropriate period of notice.

Sub-section (3) provides that the appropriate period is 12 months (or a lesser period determined by the Chief of the General Staff) in the case of a soldier of the Australian Regular Army or the Regular Army Supplement, or 3 months in the case of the Regular Army Emergency Reserve or the Australian Army Reserve.

Sub-section (4) provides exceptions to the general rule by providing that a discharge may not be claimed:

- a. in time of war or defence emergency;
- b. in the case of soldier in the Australian Regular Army or the Regular Army Supplement - when the Regular Army Emergency Reserve or a part of that Reserve or a part of the Australian Army Reserve is called out;
- c. in the case of a soldier in the Regular Army Emergency Reserve or the Australian Army Reserve - when the part of the force to which he belongs is called out or when rendering a period of continuous full time service which he volunteered to render.

Sub-section (5) provides further exceptions to the general rule. These exceptions are based on those applicable under sub-section 17(2) of the Principal Act to officers who submit their resignations. A discharge may not be claimed:

- a. if the Chief of the General Staff certifies that the discharge of the soldier would, in his opinion, seriously prejudice the ability of the Army to carry out military operations in progress or likely to commence; or
- b. if the soldier, in consequence of his having completed a course of special training, employment on special duties, etc, is under a "return of service obligation" which he has not yet completed.

Sub-section (6) is based on sub-section 17 (4) of the Principal Act and is designed to enable a soldier in certain circumstances to buy out his return of service obligation.

New section 40 - Discharge of Soldiers Rendering Service under Part IV

This section merely re-enacts paragraph 39(1)(c) of the Principal Act and provides a person conscripted into the Army in time of war under Part IV of the Principal Act with a right of discharge at the end of the time of war.

New section 41 - Soldier Entitled to Discharge to be Released

This section merely re-enacts sub-sections 39(5), 40(2) and 41(2) of the Principal Act and provides that a soldier entitled to be discharged is to be discharged as soon as reasonably practicable but remains bound to serve until discharged.

Sub-clauses 16 (2) to (5)

These sub-clauses are saving provisions with regard to the repealed sections 36, 37, 40 and 41 of the Principal Act.

Sub-clause (2) provides that the new sections 37 and 38 (which deal, respectively, with extension of enlistment and discharge of soldiers enlisted for fixed periods) apply to soldiers who were engaged or re-engaged under the repealed section 36 of the Principal Act as if the period of the soldier's last enlistment had been extended by the period of any subsequent re-engagement.

Sub-clause (3) ensures that a soldier enlisted under the repealed section 36 of the Principal Act continues to be bound by his original oath while he continues to serve.

Sub-clause (4) treats a notice of claim for discharge, given by a soldier under repealed section 40 or 41 of the Principal Act, as if it had been given under the new section 38.

Sub-clause (5) ensures that a member who became entitled to a discharge under the Principal Act but whose discharge had not occurred when the relevant provisions of the Principal Act were repealed continues to be entitled to release as soon as is reasonably practicable.

Repealed Provisions

Section 40A of the Principal Act is repealed. It is replaced by new section 118B - see clause 25.

Section 42A of the Principal Act is repealed. It is replaced by new section 122 - see clause 27.

Clause 17 - Discharge of Soldiers for Prescribed Reasons

Section 44 of the Principal Act provides that a soldier may be discharged by the Chief of the General Staff at any time for a reason prescribed by the regulations. This clause amends sub-section 44(1) to enable the regulations to limit the power of the Chief of the General Staff. It is intended that the regulations will provide that, in the case of the intended retrenchment of a soldier who is enlisted until retiring age, the soldier is required to be given a specified period of notice of the intended retrenchment. A drafting amendment is also made consequent on the removal of the expression 'engage' from section 26 of the Principal Act.

Clause 18 - Service of the Permanent Military Forces

This clause makes a drafting amendment consequent on the supersession of section 40 of the Principal Act by new section 50D.

Clause 19 - Repeal of sections 46 and 48

This clause repeals sections 46 and 48 of the Principal Act, which are superseded by new section 50D - see clause 22.

Clause 20 - Service of the Australian Army Reserve

This clause makes a drafting amendment consequent on the supersession of section 50A of the Principal Act by new section 50E and the insertion of new section 50F.

Clause 21 - Repeal of sections 50A and 50B

This clause repeals section 50A and 50B of the Principal Act which are superseded by new sections 50E and 50G.

Clause 22 - Insertion of New Division

This clause inserts into Part III of the Principal Act new Division 4 dealing with the calling out of the Defence Force. Power of call out is vested in the Governor-General. By section 16A of the Acts Interpretation Act 1901, this means the Governor-General acting with the advice of the Executive Council.

New Division 4 - The Calling out of the Forces

New section 50D - Calling out of Emergency Forces

This section, which applies to the 3 arms of the Defence Force, supersedes the existing separate sections in separate Acts (sections 46 and 48 of the Principal Act, section 32 (except sub-sections (1) and (6)) of the Naval Defence Act 1910 and section 4H (except sub-sections (1) and (6)) of the Air Force Act 1923). There are minor drafting changes but the legal effect is unchanged.

New section 50E - Calling out of Reserve Forces in time of war or defence emergency

Sub-section (1) re-enacts repealed sub-section 50A(1) with minor drafting changes.

Sub-section (2) re-enacts repealed section 50B with minor drafting changes.

New section 50F - Calling out of Reserve Forces otherwise than in time of war or defence emergency

This section is intended to enable the call-out of the Reserve Forces in situations of low-level threat.

Sub-section (1) empowers the Governor-General to call out, by proclamation, any part of the Reserve Forces for continuous full time service, where he considers it desirable to do so for the defence of Australia.

Sub-section (2) requires a proclamation to specify the period during which the proclamation is to remain in force and limits any such period to 3 months.

Sub-section (3) permits the Governor-General, by proclamation, to make further extensions of the period of call out (each not exceeding 3 months).

Sub-section (4) binds members of parts of the Reserve Forces which are called out to render continuous full time service, during the period for which the proclamation is in force, for such period as the relevant chief of staff directs in writing.

Sub-section (5) entitles a member who has completed 12 months' consecutive service to be released from service.

Sub-section (6) provides that a member released from service under the section is not again bound to render service under the section until a period equal to the period of service immediately before his release has elapsed.

New section 50G - Reasons for Proclamation to be communicated to the Parliament, etc

This section makes provision for the reasons for the proclamation to be stated and communicated to the Parliament and for Parliament to meet if it is not sitting.

Sub-section (1) re-enacts existing sub-section 50A(2), extended to proclamations under new section 50F. It requires a proclamation to state the reason why it was made.

Sub-section(2) re-enacts existing sub-section 50A(3), extended to proclamations under new section 50F. It requires the Governor-General to communicate the reasons for the proclamation to Parliament forthwith. This sub-section and sub-section (3) attempt to make a more precise use of the expression "session" (and "sitting") than do the existing provisions.

Sub-section (3) re-enacts existing sub-section 50A(4), extended to proclamations under new section 50F. It requires a House of the Parliament to meet if a proclamation is made during a session while that House is not sitting.

As is the case with the existing section 50A, the new section makes no provision for the action that might be taken by the Parliament. The reason for this is that a decision to call out the Reserve Forces under the new section is a political decision of a kind that involves the confidence of Parliament in the Government of the day.

Clause 23 - Penalty against raising of Forces without authority

Section 118 of the Principal Act creates an offence of raising armed forces without authority. The section refers to forces the raising of which has not been authorized by the Governor-General. As most provisions authorizing the Governor-General to raise forces have been removed from the Principal Act, this clause removes the reference to the Governor-General from section 118.

Clause 25 - Enlistment of apprentices

This clause replaces section 40A of the Principal Act (which provides that in time of war an apprentice may enlist in the Army notwithstanding his articles of apprenticeship) with new section 118B. The only change of substance is that the new section is not restricted to the Army but extends to the 3 Services (replacing also regulation 98 of the Air Force Regulations).

Clause 26 - Delegation

This clause amends section 120A of the Principal Act (which permits certain powers under the Act to be delegated) to change the references to sections of the Principal Act having regard to amendments made to the Principal Act by the Bill and inserts what is now a standard provision relating to the exercise of delegated powers (new sub-section (6A)).

Clause 27 - Insertion of new sections

This clause inserts new sections 122 and 123 into the Principal Act.

New section 122 - Appointments, etc, not invalid because of defect, etc in connection with appointment

New section 122 replaces section 42A of the Principal Act (repealed by clause 15).

Section 42A was inserted into the Act in 1917 as a result of experience with the operation of the first AIF abroad. Senior officers of the AIF, out of sheer necessity, appointed soldiers to be officers and promoted officers to higher rank, without proper authority, which at that time was vested in the Governor-General; there was no power to delegate. Irregularities also occurred with enlistments.

Section 42A was designed to deal with gross irregularities and was accordingly drafted in sweeping terms. The 1917 legislation validated the past irregularities and inserted a form of delegation into the Act which eliminated the pressure to engage in irregularities. Section 42A may now be restricted to dealing with minor irregularities such as errors in instruments of appointment or attestation papers. New section 122 follows generally the standard form used for such provisions and is limited to things done which have a bearing on whether the person is validly a member of the Defence Force. The new section is not restricted to the Army but extends to the 3 Services (replacing also regulations 69 and 99 of the Air Force Regulations).

New section 123 - Immunity from certain State and Territory laws

New section 123 provides that members of the Defence Force are not bound by laws of the States or Territories that would require members to have permission or licence, etc, to use or have in their possession, or would require members to register, vehicles, vessels, animals, firearms or any other things belonging to the Commonwealth or would require them to have permission to do anything in the performance of their duties as members.

The new section will replace existing regulations (regulation 201 of the Australian Military Regulations, regulations 5 and 6 of the Naval Forces Regulations and regulation 16 of the Air Force Regulations) to similar effect which were made in response to the decision of the High Court in the case of *Pirrie v McFarlane* (1925).

The reason for transferring these provisions to the Act is that there is the possibility that the existing regulations might not override Territory laws where the latter were made at a later date.

Clause 28 - Repeal of section 123BA

Section 123BA of the Principal Act provides that where a person is required to take an oath he may instead make an affirmation.

This clause repeals section 123BA as no longer necessary having regard to the provision made by new section 36 inserted by clause 16 of the Bill.

Clause 29 - Repeal of Part XV

Part XV of the Principal Act makes provision for a Military College and, in particular, for the making of regulations on a variety of subjects related to military colleges and military instructional institutions.

All regulations formerly made under these provisions have been repealed because either:

- a. the subject matter was adequately provided for by the provisions of Part II of the Principal Act relating to administration or conditions of service or by regulations or other instruments made under those provisions; or
- b. the subject matter did not require legislation at all.

This clause repeals Part XV which is no longer required.

Clause 30 - Repeal of Schedule 2

Schedule 2 of the Principal Act sets out forms of oath or affirmation on enlistment.

On the view that the form of oath or affirmation is a matter of administrative detail appropriate for regulations, this clause repeals schedule 2. New sub-section 36(2) requires these forms to be prescribed in regulations.

PART IV - AMENDMENTS OF THE DEFENCE FORCE DISCIPLINE ACT 1982

Clause 31 - Principal Act

This clause provides for the citation of the Defence Force Discipline Act 1982 as the Principal Act in this Part of the Bill.

Clause 32 - Interpretation

This clause amends the definition of "officer" for consistency with the amendment made by clause 11 to the definition of "officer" in the Defence Act 1903.

The clause also omits sub-section 3(14) of the Principal Act which became inoperative with the repeal of the Law Reform (Sexual Behaviour) Ordinance 1976 (ACT) on 28 November 1985.

Clause 33 - Dealing with a charge by subordinate summary authority

Sub-section 111(2) of the Principal Act sets out the courses of action open to a subordinate summary authority when dealing with a charge of a service offence under the Act. One of the courses of action is to refer the charge to "the commanding officer who appointed him". It may be, however, that "the commanding officer who appointed him" is on leave or absent from the unit on duty in circumstances which result in another officer exercising the powers of commanding officer.

This clause accordingly substitutes a reference to "the commanding officer of the authority".

Clause 34 - Election of trial or punishment

Under schedule 3 to the Principal Act, the more severe of the punishments that may be imposed by a superior summary authority or a commanding officer are described as "elective punishments".

Section 131 of the Principal Act describes the only circumstances in which such an authority may impose an elective punishment: generally speaking this is where the authority has given the accused an opportunity to elect to be tried by court martial or Defence Force magistrate but the accused chooses not to exercise this right of election.

A further circumstance is where the accused has previously been convicted and no punishment was imposed but the convicted person gave an undertaking to be of good behaviour for 12 months (sections 75 and 76 of the Principal Act). If such an accused is later convicted by a superior summary authority or commanding officer of a subsequent service offence, the summary authority may impose punishment for the earlier offence.

However, an elective punishment may not be imposed unless the authority has given the accused an opportunity to elect to be punished by court martial or Defence Force magistrate and the accused chooses not to exercise this right of election.

The Principal Act was based on the draft Bill contained in the Report of the 1973 Working Party on the Defence Force Disciplinary Code. Clause 102 of that draft Bill made provision for a right of election to be provided in the circumstances now set out in section 131 of the Principal Act but also set out one further circumstance giving rise to such an election namely where the accused "admits the offence". When the Principal Act was drafted no provision was made for this further circumstance on the ground that a person who pleaded guilty before one tribunal could not properly be referred to another tribunal for trial. This omission has been found to leave a hiatus in the Principal Act.

Sub-clause (1) accordingly amends section 131 of the Principal Act to repair this omission but provides that the accused is to be given the opportunity to elect to be punished (not tried) by court martial or Defence Force magistrate.

Sub-clause (2) is an application provision which restricts the operation of the amendments to convictions occurring after the commencement of the amendments.

Clause 35 - Review of action under Part IV

Part IX of the Principal Act makes provision for the review of convictions by service tribunals, Division 3 of that Part deals with action on review of proceedings that have resulted in a conviction and section 162 describes the action that the reviewing authority may take on reviewing a punishment imposed by a service tribunal.

This clause amends section 162 consequent on the amendments made to section 131 by clause 34: the amendments require the reviewing authority to quash a punishment imposed under the new provisions inserted into section 131 when the reviewing authority is of the view that the decision of the summary authority to himself impose an elective punishment (because the exigencies of service would not have permitted the convening of a court martial or the reference of the conviction to a Defence Force magistrate) was erroneous.

PART V - AMENDMENTS OF THE DEFENCE FORCE RETIREMENT AND DEATH BENEFITS ACT 1973

Clause 36 - Principal Act

This clause provides for the citation of the Defence Force Retirement and Death Benefits Act 1973 as the Principal Act in this part of the Bill.

Clause 37 - Interpretation

This clause inserts a definition of "service offence" into section 3 of the Principal Act in connection with the amendments proposed to section 6 of the Principal Act, and amends the definition of "widow" to accord with amendments made to the definition of "spouse" in the Superannuation Act 1976 in 1986.

Clause 38 - Continuity of Service

This clause makes a drafting amendment to section 5 of the Principal Act consequent on the amendments made to section 6 of the Act by clause 39.

Clause 39 - Non-effective service

The Principal Act provides (section 18) that a member is not required to contribute for periods of non-effective service and the definition of "period of effective service" in sub-section 3(1) provides that such periods do not count for pension purposes. Non-effective service is defined in section 6 as any period that exceeds 21 days where a member has been:

- a. on leave of absence without pay;
- b. absent without leave;

- c. awaiting or undergoing trial on a charge in respect of which he is later convicted;
- d. undergoing field punishment, detention or imprisonment.

The amendments are intended to allow the non-effective service provisions to operate hand in hand with the Defence Force Discipline Act 1982 and regulations (relating to forfeiture of salary) made under section 119 of the Defence Act 1903 (ie, Part XIII of the Defence Force Regulations inserted by Statutory Rules 1985, No. 131), all of which commenced on 3 July 1985.

The clause amends sub-section 6(1) of the Principal Act so that the rules in that sub-section cease to apply in respect of service on or after 3 July 1985 and inserts new provisions to apply in respect of service on or after that date.

New sub-section (3) deals with leave without pay and sub-section (4) deals with periods where salary is forfeited under the Defence Force Regulations.

New sub-section (5) provides for periods in service custody while awaiting or undergoing trial by a service tribunal to be treated as non-effective service if the person is convicted of the offence. These periods are not covered by new sub-section (4) since salary and allowances would not be forfeited in these circumstances under the Defence Force Regulations.

The foregoing all relate to periods of forfeiture, etc, exceeding 21 days. New sub-section (6) deals with individual periods of forfeiture, etc, of 24 hours or more which would not be non-effective service but which, being consecutive, form a continuous period exceeding 21 days and deems such periods to be non-effective service.

New sub-section (7) deals with an individual period of forfeiture, etc, of 24 hours or more which would not be non-effective service but is continuous with a period of non-effective service under new sub-section (3), (4) or (5) and sub-section (8) deals with an individual period of forfeiture, etc, of 24 hours or more which would not be non-effective service but which is continuous with a period of non-effective service under new sub-sections (7) or (8).

Clause 40 - Invalidity or incapacity arising during absence without leave exceeding 60 days

Section 29 of the Principal Act disentitles a person to invalidity benefit where the person's invalidity or incapacity was caused or substantially contributed to by an occurrence that happened at a time when the person was absent without leave and had been so for a period exceeding 60 days.

The clause amends section 29 to require that, after 3 July 1985, only a period of absence in respect of which the member forfeited salary and allowances is regarded as a period of absence for the purpose of the section.

Clause 41 - Death of contributing member after 60 days absence without leave

Section 49 of the Principal Act operates in a similar manner to section 29 of the Principal Act but in relation to a person who dies while absent without leave.

The clause amends section 49 to require (in respect of a member who died or dies on or after 3 July 1985) that only a period of absence in respect of which the member forfeited salary and allowances is regarded as a period of absence for the purpose of the section.

Clause 42 - Interpretation

This clause omits a reference to a repealed provision of another Act.

Clause 43 - Effect of election under section 51

This clause omits a reference to a repealed provision of another Act.

Clause 44 - Re-instated candidates to whom Part does not apply

This clause omits a reference to a repealed provision of another Act.

Clause 45 - Circumstances in which person entitled to deferred benefits

A member who leaves the Defence Force before qualifying for a pension may elect under section 76 of the Principal Act to receive a deferred benefit payable as a pension on the date on which he would have qualified for pension had he remained in the Defence Force - that is on the completion of 20 years service for pension. In determining the date on which payment of the deferred benefit commences, certain periods of eligible service which occurred before or occur after the Defence service may, under section 78 of the Principal Act, be added to the Defence service.

There is a possible obscurity regarding the operation of sub-section 78(3) of the Principal Act and the clause amends the sub-section to clarify its operation.

Clause 46 - Interpretation

The Defence Forces Retirement Benefits (DFRB) Act 1948 ceased operation in relation to members serving in the Defence Force on 30 September 1972. These members, and all entrants since 1 October 1972, are covered by the Defence Force Retirement and Death Benefits (DFRDB) Act 1973.

On the introduction of the DFRDB scheme, provision was made for contributory service under the superseded scheme that was continuous with service under the new scheme to be automatically counted (subject to certain contribution adjustments) as service under the new scheme. Provision was also made for members to be able to purchase certain other periods of prior service for the purposes of the new scheme.

The usual requirements of the DFRDB scheme where a member wishes to purchase a period of prior service are that the member make an election (within 90 days of re-entry to the Defence Force or the date of Royal Assent to the DFRDB Act (19 June 1973) or such other period as the DFRDB Authority in special circumstances allows) to have the period taken into account, have that election accepted by the DFRDB Authority, pay an additional contribution and repay to the Commonwealth any gratuity previously paid on completion of the period of prior service. There are also certain procedures and periods for the contribution payments and gratuity repayments.

A key factor in achieving the division between automatically counted service and service that may be purchased is the definition of "period of previous contributory qualifying service" in subsection 85(1) of the Principal Act.

This clause amends the definition to ensure that it includes as automatically counted service only those periods of service which were intended to be automatically counted. All other periods of service are then periods which the person may elect to purchase.

Clause 47 - Certain periods of previous service deemed to be periods of effective service

Section 91 of the Principal Act deems service that is automatically counted, or that the member has elected to be taken into account, to be effective service for the purposes of the Principal Act.

This clause amends section 91 to ensure that, where a member leaves the Defence Force and later rejoins, section 91 does not cause any of the prior service to be automatically counted as service: it is the intention that all such prior service following re-entry be dealt with by way of elections to have prior service counted (sections 63 and 64 of the Principal Act).

By reason of the operation of clause 2(2) of the Bill (which provides that sections 46 and 47 as amended by the Bill are deemed to have come into operation immediately after the commencement of Part X of the Defence Force Retirement and Death Benefits Act 1973 - ie 19 June 1973) the amendments made to sections 85 and 91 of the Principal Act are intended to ensure that those sections are regarded as having operated in their amended form since 19 June 1973.

Clause 48 - Interpretation

Part XA of the Principal Act provides for pensions payable under that Act to be increased in July each year in accordance with the percentage increase to the previous March quarter in the weighted average of the Consumer Price Index for the 6 State capital cities first published by the Australian Statistician. From and including the December quarter 1986 the Australian Statistician ceased publication of Consumer Price Index numbers for the weighted average of the 6 State capitals but will continue to publish such numbers for the 8 capital cities (the 6 State capital cities and Canberra and Darwin). Accordingly, it will be necessary for annual increases in pensions payable under the Principal Act to be based on the weighted average of the Consumer Price Index for the 8 capital cities with effect from and including the pension increase due in July 1987.

Clause 48 replaces the reference in sub-section 98A(2) of the Principal Act to the 6 State capital cities with a reference to the 8 capital cities.

Clause 49 - Increase in certain pensions

For the reasons set out above in relation to clause 48, clause 49 amends section 98B of the Principal Act to replace references to the 6 State capital cities with references to the 8 capital cities. To enable the proposed amendment to operate effectively, the clause also replaces references in section 98B to the year that commenced on 1 July 1974 with references to the year that commenced on 1 July 1985.

PART VI - AMENDMENTS OF THE DEFENCE FORCE (RETIREMENT AND DEATH BENEFITS AMENDMENTS) ACT (NO 2) 1977

Clause 50 - Principal Act

This clause provides for the citation of the Defence Force (Retirement and Death Benefits Amendments) Act (No 2) 1977 as the Principal Act in this part of the Bill.

Clause 51 - Interpretation

In 1977, section 21 of the Principal Act replaced the definition of "widow" in section 3 of the Defence Force Retirement and Death Benefits Act 1973. Sub-clause 37(1) of the Bill further amends that definition and this clause amends section 21 of the Principal Act to ensure that the savings provisions in that section continue to apply notwithstanding the further amendment to section 3 of the 1973 Act.

PART VII - AMENDMENTS OF THE DEFENCE FORCES RETIREMENT BENEFITS ACT 1948

Clause 52 - Principal Act

This clause provides for the citation of the Defence Forces Retirement Benefits Act 1948 as the Principal Act in this part of the Bill.

Clause 53 - Interpretation

This clause omits a reference to a repealed provision of another Act.

Clause 54 - Provisions applicable to re-instated candidates to whom Part does not apply

This clause omits a reference to a repealed provision of another Act.

Clause 55 - Circumstances in which person entitled to deferred benefits

A member who left the Defence Force before qualifying for a pension could elect under section 82Z of the Principal Act to receive a deferred benefit payable as a pension, on the date he would have qualified for pension had he remained in the Defence Force - that is on reaching retiring age as an officer or on the completion of 20 years service for pension in the case of a member other than an officer. In determining the date on which payment of the deferred benefit commences certain periods of eligible service which occurred before or occur after the Defence service may, under section 82ZB of the Principal Act, be added to the Defence service.

There is a possible obscurity regarding the operation of sub-section 82ZB(3) of the Principal Act and the clause amends the sub-section to clarify its operation.

Clause 56 - Interpretation

Part VID of the Principal Act provides for pensions payable under that Act to be increased in July each year in accordance with the percentage increase to the previous March quarter in the weighted average of the Consumer Price Index for the 6 State capital cities first published by the Australian Statistician. From and including the December quarter 1986 the Australian Statistician ceased publication of Consumer Price Index numbers for the weighted average of the 6 State capitals but will continue to publish such numbers for the 8 capital cities (the 6 State capital cities and Canberra and Darwin). Accordingly, it will be necessary for annual increases in pensions payable under the Principal Act to be based on the weighted average of the Consumer Price Index for the 8 capital cities with effect from and including the pension increase due in July 1987.

Clause 56 replaces the reference in sub-section 83(2) of the Principal Act to the 6 State capital cities with a reference to the 8 capital cities.

Clause 57 - Increase in certain pensions

For the reasons set out above in relation to clause 48, clause 49 amends section 84 of the Principal Act to replace references to the 6 State capital cities with references to the 8 capital cities. To enable the proposed amendment to operate effectively, the clause also replaces references in section 84 to the year that commenced on 1 July 1974 with references to the year that commenced on 1 July 1985.

PART VIII - AMENDMENTS OF THE NAVAL DEFENCE ACT 1910

Clause 58 - Principal Act

This clause provides for the citation of the Naval Defence Act 1910 as the Principal Act in this Part of the Bill.

Clause 59 - Interpretation

This clause amends the definition of "Officer" for consistency with the amendment made by clause 10 to the definition of "Officer" in the Defence Act 1903.

Clause 60 - Term of appointment of Officers

Sub-section 9(4) of the Principal Act provides that if the term of appointment of an officer of the Permanent Naval Forces expires during a time of defence emergency or while the Naval Emergency Reserve Forces or a part of that Reserve is called out then the period of the officer's appointment is deemed to be extended until the end of the time of defence emergency, etc.

This clause amends section 9 to provide that the service of such an officer is also extended if a part of the Australian Naval Reserve is called out under the proposed new section 50F of the Defence Act.

Clause 61 - Resignation of Officers

Sub-section 13(2) of the Principal Act sets out certain circumstances in which the Chief of Naval Staff may reject the resignation of an officer of the Navy, eg, in time of war or defence emergency.

This clause amends section 13 to provide that the resignation of an officer of the Naval Emergency Reserve Forces or the Australian Naval Reserve may be rejected if it is tendered during a period when the part of the force to which the officer belongs is called out for continuous full time service.

Clause 62 - Repeal of Section 18

Section 18 of the Principal Act empowers the Governor-General to establish Naval Colleges and instructional establishments.

Clause 62 repeals section 18 which is unnecessary.

Clause 63 - Repeal of section 21 and 22 and substitution of new sections

This clause repeals sections 21 and 22 and replaces them with new sections.

New Section 21 - Naval Emergency Reserve Forces

This section is a remake of section 21 of the Principal Act with drafting amendments relating to the introduction of long-term enlistments into the Navy.

New Section 22 - Australian Naval Reserve

This section is a remake of section 22 of the Principal Act with drafting amendments relating to the introduction of long-term enlistments into the Navy.

Clause 64 - Repeal of sections 25 to 29 and substitution of new sections

Sections 25 to 29 of the Principal Act are concerned with the enlistment, engagement, re-engagement and discharge of sailors. In order to make provision for the introduction of long term enlistments, this clause repeals sections 25 to 29 and replaces them with new sections 25 to 29A.

New section 25 - Enlistment of Sailors

Sub-section (1) introduces the concept of long term enlistments and provides that a person may volunteer to serve as a sailor for a fixed period or until retiring age. The dual terminology of the existing law ("upon enlistment, shall be engaged") has been eliminated.

Sub-section (2) requires a person enlisting to take an oath or affirmation and provides for the form of oath and other matters relating to the taking of the oath to be prescribed in the regulations.

Sub-section (3) deals with the effect of the taking of the oath.

New section 26 - Extension of period of enlistment

This section deals with a sailor who has been enlisted for a fixed period.

Sub-section (1) permits the sailor to volunteer for an extension of service for a fixed period or until attaining retirement age.

Sub-section (2) provides that if the sailor's offer is accepted, his enlistment is extended accordingly.

New section 27 - Discharge of sailors who are enlisted otherwise than to retiring age

This section restates much of the law in sections 28 and 29 of the Principal Act regarding a sailor's entitlement to discharge in the case of sailors enlisted for fixed periods. The section:

- a. is drafted to accord with the terminology used in new section 25;

- b. has been varied to take account of the consequences of the new call out provisions for the Reserve Forces (see new section 50F of the Defence Act 1903); and
- c. clarifies the power to make regulations that deal with the effect of non-effective service on a fixed period of service.

Sub-section (1) is a general rule providing a sailor in the Permanent Naval Forces with an entitlement to discharge at the end of the fixed period for which he enlisted.

Sub-section (2) is a similar general rule for members of the Naval Emergency Reserve Forces or the Australian Naval Reserve.

Sub-sections (3), (4) and (5) provide exceptions to these rules, and automatically extend a sailor's service:

- a. in time of war or defence emergency;
- b. in the case of a sailor in the Permanent Naval Forces - when the Naval Emergency Reserve Forces or a part of that Reserve or a part of the Australian Naval Reserve is called out;
- c. in the case of a sailor in the Naval Emergency Reserve Forces or the Australian Naval Reserve - when the part of the force to which he belongs is called out.

Sub-section (6) provides a further exception to the general rules and provides that the regulations may make additional provisions for the extension of the periods for which sailors are enlisted. Such regulations could provide that the period of service is extended by certain non-effective service of the sailor (eg absence without leave).

Sub-section (7) is a general rule that a sailor in the Naval Emergency Reserve Forces or the Australian Naval Reserve may claim his discharge on giving 3 months notice.

Sub-section (8) provides an exception to the general rule in sub-section (7) by providing that a discharge may not be claimed in time of war or defence emergency, when the part of the Force to which he belongs is called out or when rendering a period of continuous full time service which he volunteered to render.

New Section 28 - Discharge of sailors who are enlisted until attaining retiring age

This section sets out the circumstances in which a sailor who is enlisted until attaining retiring age may claim his discharge.

Sub-section (1) is a general rule providing a sailor who is enlisted until attaining retiring age with an entitlement to a discharge on claiming his discharge under sub-section (2).

Sub-section (2) provides that a sailor may claim his discharge on giving the appropriate period of notice.

Sub-section (3) provides that the appropriate period is 12 months (or a lesser period determined by the Chief of Naval Staff) in the case of a sailor of the Permanent Naval Forces, or 3 months in the case of the Naval Emergency Reserve Forces or the Australian Naval Reserve.

Sub-section (4) provides exceptions to the general rule by providing that a discharge may not be claimed:

- a. in time of war or defence emergency;
- b. in the case of a sailor in the Permanent Naval Forces - when the Naval Emergency Reserve Forces or a part of that Reserve or a part of the Australian Naval Reserve is called out;
- c. in the case of a sailor in the Naval Emergency Reserve Forces or the Australian Naval Reserve - when the part of the force to which he belongs is called out or when rendering a period of continuous full time service which he volunteered to render.

Sub-section (5) provides further exceptions to the general rule. These exceptions are based on those applicable under sub-section 13(2) of the Principal Act to officers who submit their resignations. A discharge may not be claimed:

- a. if the Chief of Naval Staff certifies that the discharge of the sailor would, in his opinion, seriously prejudice the ability of the Navy to carry out naval operations in progress or likely to commence; or
- b. if the sailor in consequence of his having completed a course of special training, employment on special duties, etc, is under a "return of service obligation" which he has not yet completed.

Sub-section (6) is based on sub-section 13(4) of the Principal Act and is designed to enable a sailor in certain circumstances to buy out his return of service obligation.

New section 29 - Discharge of sailors rendering service under Part IV of Defence Act

This section merely re-enacts paragraph 28(1)(b) of the Principal Act and provides a person conscripted into the Navy in time of war under Part IV of the Defence Act 1903 with a right of discharge at the end of the time of war.

New section 29A - Sailor entitled to discharge to be released

This section merely re-enacts sub-sections 28(5) and 29(2) of the Principal Act and provides that a sailor entitled to be discharged is to be discharged as soon as reasonably practicable but remains bound to serve until discharged.

Sub-clauses 64(2) to (5)

These sub-clauses are saving provisions with regard to repealed sections 25, 26 and 29 of the Principal Act.

Sub-clause (2) provides that the new sections 26 and 27 (which deal, respectively, with extension of enlistment and discharge of sailors enlisted for fixed periods) apply to sailors who were engaged or re-engaged under the repealed section 25 of the Principal Act as if the period of the sailors last enlistment had been extended by the period of any subsequent re-engagement.

Sub-clause (3) ensures that a sailor enlisted under the repealed section 25 of the Principal Act continues to be bound by his original oath while he continues to serve.

Sub-clause (4) treats a notice of claim for discharge, given by a sailor under repealed section 29 of the Principal Act, as if it had been given under the new section 27.

Sub-clause (5) ensures that a member who became entitled to a discharge under the Principal Act but whose discharge had not occurred when the relevant provisions of the Principal Act were repealed continues to be entitled to release as soon as is reasonably practicable.

Clause 65 - Discharge of sailors for prescribed reasons

Section 30 of the Principal Act provides that a sailor may be discharged by the Chief of Naval Staff at any time for a reason prescribed by the regulations. This clause amends sub-section 30(1) to enable the regulations to limit the power of the Chief of Naval Staff. It is intended that the regulations will provide that, in the case of the intended retrenchment of a sailor who is enlisted until retiring age, the sailor is required to be given a specified period of notice of the intended retrenchment. A drafting amendment is also made consequent on the removal of the expression "engage" from section 25 of the Principal Act.

Clause 66 - Service of the Naval Emergency Reserve Forces

This clause remakes sub-sections 32(1) and (6) of the Principal Act, as a consequence of new call out provisions being enacted in section 50D of the Defence Act 1903 by clause 22 of the Bill. There are no changes of substance.

Clause 67 - Service of the Australian Naval Reserve

This clause remakes sub-section 32A(1) of the Principal Act consequent on the supersession of section 50A of the Defence Act 1903 by section 50E and the insertion of new section 50F.

Clause 68 - Repeal of section 43

Section 43 of the Principal Act provides that where a person is required to take an oath he may instead make an affirmation.

This clause repeals section 43 as no longer necessary having regard to the provision made by new section 25 inserted by clause 64 of the Bill.

Clause 69 - Delegation

This clause amends section 44B of the Principal Act (which permits certain powers under the Act to be delegated) to change the references to sections of the Principal Act having regard to amendments made to the Principal Act by the Bill and inserts what is now a standard provision relating to the exercise of delegated powers (new sub-section (6A)).

Clause 70 - Repeal of the Schedule

The schedule of the Principal Act sets out forms of oath or affirmation on enlistment.

On the view that the form of oath or affirmation is a matter of administrative detail appropriate for regulations, this clause repeals the Schedule. New sub-section 25(2) requires these forms to be prescribed in regulations.

PART IX - AMENDMENTS OF THE SERVICES TRUST FUNDS ACT 1947

Clause 71 - Principal Act

This clause provides for the citation of the Services Trust Funds Act 1947 as the Principal Act in this Part of the Bill.

Clause 72 - Interpretation

This clause omits definitions which will not be required on the repeal of Part III of the Principal Act.

Clause 73 - Repeal of Part III

Part III of the Principal Act established the Services Canteens Trust Fund which was mainly derived from profits and assets of the Navy, Army and Air Force Canteens Services accumulated during World War 2 and funds of disbanded wartime units.

The capital of the Fund having been exhausted, clause 73 repeals Part III of the Principal Act thus terminating the legal existence of the Fund.

Clause 74 - Repeal of section 33

This clause repeals section 33 of the Principal Act which provides that benefits are not to be payable from the Royal Australian Navy Relief Trust Fund, the Australian Military Forces Relief Trust Fund or the Royal Australian Air Force Welfare Trust Fund if the recipient is eligible to benefit from the Services Canteens Trust Fund.

PART X - AMENDMENTS OF THE SUPPLY AND DEVELOPMENT ACT 1939

Clause 75 - Principal Act

This clause provides for the citation of the Supply and Development Act 1939 as the Principal Act in this Part of the Bill.

Clause 76 - Interpretation

This clause inserts definitions of expressions used in the Principal Act as proposed to be amended by the Bill.

Clause 77 - Employment of persons in connection with undertakings

Section 10 of the Principal Act makes provision for the employment of persons in undertakings established under the Act. The section vests the power to employ in the Minister and then provides for the devolution of this power on other persons in a series of alternatives that is unnecessarily complicated. The section also requires periods of employment to be prescribed which is a concept generally inappropriate to employment in undertakings under the Principal Act. The section also requires every detail of conditions of employment to be prescribed in regulations which is impracticable.

This clause repeals section 10 and replaces it with new sections 10 and 10A.

New section 10 - Employment of persons in connection with undertakings

Sub-section (1) empowers the Secretary to employ persons in connection with any undertaking established by the Governor-General under section 9 of the Act. (As to delegation of this power - see clause 78.)

Sub-sections (2) and (3) continue provision made by the existing section regarding directions that may be given by the Public Service Board as to kinds of employment that are not to be performed by persons employed under the Principal Act, and the non-application of the Public Service Act 1922 to persons employed under the Principal Act.

Sub-section (4) allows provision for terms and conditions of employment of persons employed under the Act to be made by the regulations or by determinations made under the regulations.

Sub-section (5) provides that a regulation or a determination thereunder may make provision by applying Acts, regulations, Public Service Board determinations, industrial awards, etc, for the time being in force or as in force at a particular time or by applying other instruments as in force at a particular time.

Sub-section (6) preserves the operation of the Conciliation and Arbitration Act 1904.

New section 10A - Transfer of persons where functions are to be performed by Commonwealth authority

This section is intended to enable persons employed under the Principal Act to be transferred from the Government Aircraft Factories to Aerospace Technologies of Australia. The section is based on section 81C of the Public Service Act 1922 but the scope of its operation is much less by comparison because the expression "Commonwealth authority" is defined in much narrower terms than is the definition of the same expression in the Public Service Act.

Sub-section (1) empowers the Minister to certify that a function performed by persons employed under the Act is to be performed by a Commonwealth authority and in that event empowers the Secretary (by writing in the Gazette) to declare that specified persons or classes of persons are in the employment of the authority.

Sub-section (2) provides that on a day specified in the Secretary's declaration the persons become (in effect) transferred to the authority.

Sub-section (3) empowers the authority to determine special terms or conditions of employment for the purpose of facilitating the transfer.

Sub-clauses (2) to (4) are saving provisions.

Sub-clause (2) ensures that the repeal and replacement of section 10 of the Principal Act does not have the effect of terminating the employment of persons employed under that section and sub-clause (3) ensures that any directions made by the Public Service Board under the repealed section do not lapse. Sub-clause (4) ensures that regulations under the repealed section 10 relating to terms and conditions of employment continue in force for the purposes of the new sub-section 10(4).

Clause 78 - Delegation by Secretary

This clause inserts into the Principal Act a new section 26A which is a standard delegation provision empowering the Secretary to delegate his powers under the Act to an officer (which is defined in section 4 of the Principal Act as being an officer of the Public Service).

