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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE LEGISLATION AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Defence,
Senator the Hon. Robert Ray)



Defence Legislation Amendment Bill 1992

OUTLINE

Part IV of the Defence Act 1903 provides for military conscription in time of war (which is limited by definition to a time when Australia is threatened by invasion or attack).

The Bill revises Part IV to:

- . require prior parliamentary approval for conscription;
- . allow conscientious objection to particular wars as well as to war generally;
- . define the expression "conscientious belief";
- . provide for tribunals to consider claims of conscientious belief, and for appeals from those tribunals;
- . remove the current discriminatory provisions; and
- . allow for call up in the order of classes prescribed by the regulations.

The Bill also repeals the National Service Act 1951 and the National Service Termination Act 1973.

Other provisions of the Bill:

- a. amend the Defence Housing Authority Act 1987 to enable the Defence Force Assistant Chief of Personnel to be appointed to the Authority;
- b. make fine tuning amendments to the Defence Force (Home Loans Assistance) Act 1990, the Defence Force Retirement and Death Benefits Act 1973 and the Military Superannuation and Benefits Act 1991; and
- c. repeal obsolete provisions of the Defence Forces Retirement Benefits Act 1948.

FINANCIAL IMPACT

The provisions in this Bill are not expected to have any significant financial impact. (Conscientious Objection Tribunals would only be established in the most unlikely event of conscription to meet a threat to Australia.)

Defence Legislation Amendment Bill 1992

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

1. Formal.

Clause 2 - Commencement

2. This clause provides for the Act to commence on Royal Assent, except clauses 13 and 14 which commence on proclamation (or 6 months after Assent if they have not been proclaimed by that date).

PART 2 - AMENDMENTS OF THE DEFENCE ACT 1903

Clause 3 - Principal Act

3. Formal.

Clause 4 - Interpretation

4. Paragraph (a) amends section 4 of the Principal Act to insert formal definitions for the purposes of the new conscientious objection provisions in Part IV of that Act.

5. Paragraph (b) inserts a new subsection 4(3) to provide that, for the purposes of Part IV of the Principal Act, a person is taken to have a conscientious belief in relation to a matter if the person's belief in respect of that matter:

(a) involves a fundamental conviction of what is morally right and morally wrong, whether or not based on religious considerations; and

(b) is so compelling in character for that person that he or she is duty bound to espouse it; and

(c) is likely to be of a long standing nature.

Clause 5 - Insertion of heading

6. This clause inserts a new heading to cover sections 59 to 61C of Part IV:

"Division 1 - Liability to serve".

Clause 6 - Persons liable to serve in Defence Force in time of war

7. Section 59 of the Principal Act sets out qualifications for the basic liability to conscription in time of war.

8. This clause amends section 59 to omit the requirements to be male and to be a British subject. This would leave the requirements to have resided in Australia for not less than 6 months and to be between the ages of 18 and 60.

Clause 7 - Proclamation calling upon persons to serve in time of war

9. Section 60 of the Principal Act enables persons covered by section 59 to be called upon to serve in time of war. This is effected by a proclamation of the Governor-General. Section 60 also specifies various classes of person, according to age and marital or family status, and the order in which a proclamation may call upon those classes.

10. This clause amends section 60 to require prior approval of a proclamation, by resolution of each House of Parliament, within the period of 90 days before the proclamation is expressed to come into effect. A further amendment replaces the specified classes with provision for a proclamation to call upon persons in the order of classes established by the regulations. The amendment takes the approach of prescribing classes in regulations because personnel requirements could not be assessed until the circumstances of an actual or threatened conflict are known. Parliamentary scrutiny of this aspect is maintained because, in addition to normal procedures for the disallowance of regulations, any call up proclamation based on the regulations requires prior parliamentary approval.

Clause 8 - Registration and allotment for service

11. Section 61 of the Principal Act enables the regulations to make provision for various matters, including exemption from service on the basis of conscientious beliefs.

12. This clause omits the provisions relating to conscientious belief as they have been replaced by the new substantive provisions.

Clause 9 - Persons exempt from service

13. Section 61A of the Principal Act specifies persons who are exempt from service.

14. This clause adds exemptions for persons whose conscientious beliefs (see clause 4 for definition of conscientious belief) do not allow them to participate in war or warlike operations, or in a particular war or warlike operation. There is exemption from combat duties (but not from the liability to serve) where conscientious beliefs preclude such duties, either generally or during a particular war or warlike operation. A further exemption would apply to persons declared, for stated reasons, by the Regulations.

Clause 10 - Part not to apply to certain persons

15. Section 61C of the Principal Act specifies persons to whom Part IV does not apply.

16. This clause substitutes a new section 61C which omits reference to persons now covered by the International Organizations (Privileges and Immunities) Act 1963. The reference to aboriginal Australians is also removed.

Clause 11 - Insertion of new divisions

17. This clause inserts new divisions 2 to 5 in Part IV.

Division 2 - Determination of conscientious belief

New section 61CA - Application for determination of conscientious belief

18. This section requires a person who claims exemption because of conscientious beliefs to apply in writing, within 7 days of being called on for service, to have the claim determined by a Conscientious Objection Tribunal. There is also provision for that person or for the Commonwealth to apply to the Tribunal for a review of its determination on the grounds of a change in circumstances.

New section 61CB - Secretary must refer application

19. This section requires the Secretary to the Department of Defence, who receives applications under section 61CA, to refer them to a Conscientious Objection Tribunal for determination.

New section 61CC - Function of Conscientious Objection Tribunals

20. This section requires a Conscientious Objection Tribunal to determine whether an applicant is exempt from service because of conscientious beliefs. Subject to Part IV (e.g. rights of appeal), a determination is final and binding for all purposes.

New section 61CD - Parties to the hearing of an application

21. This section provides for the parties to be the applicant and the Commonwealth.

New section 61CE - Notice of determination to be given to parties

22. This section requires a Conscientious Objection Tribunal to notify the parties of the result of a determination as soon as possible, and to give the parties written reasons within 28 days.

Division 3 - Establishment and membership of
Conscientious Objection Tribunals

New section 61CF - Establishment of Conscientious Objection Tribunals

23. This section enables the Minister, by notice in the Gazette, to establish such Conscientious Objection Tribunals as he or she thinks necessary. Members are to be appointed by the Minister, either as full-time or part-time members.

24. Each Tribunal is to comprise a presiding member and 2 other members. A presiding member must be a legal practitioner of not less than 7 years standing, and the Minister must be satisfied that other members are capable of ascertaining facts other than by adversarial procedures.

New section 61CG - Period of appointment of members

25. This section provides for members of Conscientious Objection Tribunals to be appointed for specified periods, not exceeding 5 years.

New section 61CH - Remuneration and allowances of members

26. This section provides for remuneration to be determined by the Remuneration Tribunal and for allowances to be prescribed.

New section 61CJ - Other terms and conditions

27. This section allows the Minister to determine terms and conditions for members of Conscientious Objection Tribunals where Part IV makes no provision.

New section 61CK - Leave of absence

28. This section allows the Minister to grant leave to members and to determine terms and conditions for that leave.

New section 61CL - Resignation

29. This section allows members to resign by writing to the Minister.

New section 61CM - Removal from office

30. This section allows the Minister to remove a member from office for proved misbehaviour or physical or mental incapacity.

New section 61CN - Member of a Tribunal unavailable to complete proceeding

31. This section provides for a Conscientious Objection Tribunal to be constituted by the 2 remaining members when a member, other than the presiding member, ceases to be a member or ceases to be available. If the presiding member ceases to be a member or ceases to be available, another Tribunal must be constituted but regard can be had to any record of the previous proceedings.

New section 61CO - Acting appointments

32. This section enables the Minister to make acting appointments where a member (either full-time or part-time) of a Conscientious Objection Tribunal is unable to perform the duties of the office. There is provision for the acting appointment to continue for up to 12 months after the absent member is again able to perform the duties where that can be justified by a pending determination or other special circumstances.

Division 4 - Procedures of Conscientious Objection Tribunals

New section 61CP - Tribunals' way of operating

33. This section stipulates informal, quick, fair, just and economical procedures. Conscientious Objection Tribunals are required to act according to substantial justice and the merits of the case, and are not bound by technicalities, legal forms or rules of evidence.

New section 61CQ - Powers of Tribunals

34. This section enables a Conscientious Objection Tribunal to summon persons to give evidence or produce documents. Persons appearing before a Tribunal may be required to give evidence on oath or affirmation.

New section 61CR - Procedure of Tribunals

35. This section allows the presiding member of a Conscientious Objection Tribunal to convene hearings as necessary for the performance of its functions and requires the presiding member to preside. A Tribunal is required to keep records of its hearings.

New section 61CS - Majority decision

36. This section requires a Conscientious Objection Tribunal to decide matters according to the opinion of a majority of its members.

New section 61CT - Procedure where opinion of members equally divided

37. This section gives the member presiding a casting vote.

New section 61CU - Hearings

38. This section establishes a general rule that a Conscientious Objection Tribunal is to take oral evidence in public. However, where necessary in the interests of determining a matter, a Tribunal may direct that evidence be taken in private. Also, written statements may be accepted where a Tribunal is satisfied that it would be difficult for a person to give oral evidence. An applicant is allowed to be assisted by another person, whether or not that person is a lawyer.

New section 61CV - Onus of proof

39. This section provides that an applicant bears the onus of proving, on the balance of probabilities, exemption from service because of conscientious belief.

New section 61CW - Protection of members and persons giving evidence etc.

40. This section gives a member of a Conscientious Objection Tribunal the same protection and immunity as a Federal Court judge. Applicants, persons assisting them, and persons appearing or summoned to attend before a Tribunal have the same protection and liabilities as a Federal Court witness.

New section 61CX - Fees for persons giving evidence

41. This section enables the Minister to determine, by disallowable instrument, fees and allowances to be paid to persons (other than an applicant) summoned to appear before a Conscientious Objection Tribunal.

New section 61CY - Failure of witness to attend

42. This section creates an offence where persons who have been summoned to appear before a Conscientious Objection Tribunal and tendered reasonable expenses fail to attend, without reasonable excuse.

New section 61CZ - Refusal to be sworn or to answer questions etc.

43. This section creates an offence where persons appearing before a Conscientious Objection Tribunal refuse to take an oath or make an affirmation, refuse to answer a question, refuse to produce a document, or knowingly give false or misleading evidence.

New section 61CZA - Contempt of Tribunal

44. This section creates an offence where persons obstruct or hinder a Conscientious Objection Tribunal, or disrupt the taking of evidence.

Division 5 - Reviews and appeals

New section 61ZB - Review of determinations of Conscientious Objection Tribunals

45. This section enables a party to apply for Administrative Appeals Tribunal ("AAT") review of a Conscientious Objection Tribunal determination.

New section 61ZC - AAT Act to apply subject to modification

46. This section applies the AAT Act where there is a review of a Conscientious Objection Tribunal determination, subject to modifications necessitated by the appeal structure established by the new Division 5 and the fact that the parties will always be the person in relation to whom the determination was made and the Commonwealth.

New section 61ZD - Appeals from AAT

47. This section provides for a party to a decision by the AAT to appeal to the Federal Court on a ground involving a question of law or, with the leave of the court, on any other ground. Appeals must be instituted within 28 days, or such further time as the Court allows, and jurisdiction must be exercised by the Full Court.

New section 61ZE - Operation etc. of decision subject to appeal

48. This section provides that institution of an appeal to the Federal Court from a decision of the AAT does not affect the decision or its implementation, except where the Court considers it appropriate to make specified orders for the purpose of securing the effectiveness of the hearing and determination of the appeal. The orders specified could stay or otherwise affect the operation or implementation of the AAT decision or the decision to which the AAT proceedings related. There is also provision for variation and revocation of such orders.

PART 3 - AMENDMENTS OF THE DEFENCE FORCE (HOME LOANS ASSISTANCE) ACT 1990

Clause 12 - Principal Act

49. Formal.

Clause 13 - Definitions

50. The Principal Act, which establishes a Home Loans Assistance scheme for members of the Defence Force, makes special provision for incapacitated persons. The current definition in section 3 covers incapacitated persons who are discharged because of a compensable disability on or after the commencing day, i.e. 21 January 1991. An unintended consequence of this is that some incapacitated persons who joined the Defence Force after 14 May 1985 (the cut-off point for eligibility under the old Defence Service Homes scheme) and were discharged before 21 January 1991 are not covered by either the old scheme or the new Home Loans Assistance scheme.

51. This clause amends section 3 to ensure that the definition of "incapacitated person" includes persons who are not currently covered by either scheme.

Clause 14 - When do former members stop being eligible members?

52. This clause amends section 4 of the Principal Act so that incapacitated persons who are affected by the amended definition will have 2 years to exercise their entitlement.

Clause 15 - Cancellation, variation or revocation of certificate

53. To have an entitlement under the Home Loans Assistance scheme, members must be issued with entitlement certificates. Section 13 of the Principal Act enables an entitlement certificate to be cancelled where it has been issued as a result of a false or misleading statement, or where an entitlement did not exist. However, there is no provision to vary or re-issue certificates in order to correct errors or omissions which do not go to the substance of an entitlement.

54. This clause amends section 13 of the Principal Act to enable the Secretary to the Department of Defence, who issues the certificates, to vary or re-issue them. The varied or substituted certificates have effect from the time the original certificate was issued. Notice of any variation or substitution must be given to the person concerned and to the bank that has the franchise.

PART 4 - AMENDMENTS OF OTHER DEFENCE LEGISLATIONClause 16 - Amendments of other Acts

55. This clause makes the following amendments to the Acts specified in Schedule 1.

Defence Force Retirement and Death Benefits Act 1973

56. The Defence Force Superannuation Legislation Amendment Act 1991 made various amendments to the Defence Force Retirement and Death Benefits ("DFRDB") Act. This included a change to section 14 to enable the deputy of the Chairman of the DFRDB Authority to preside at meetings in the absence of the Chairman (taking precedence over the Deputy Chairman).

57. Subsection 14(3) of the DFRDB Act, which enables a quorum to be made up of the Chairman or Deputy Chairman and 2 or more members, requires amendment so that a quorum can also be made up of the deputy of the Chairman and 2 or more members. The amendment to subsection 14(3) provides for that and the amendment to subsection 9(8) is consequential.

Defence Forces Retirement Benefits Act 1948

58. The Defence Forces Retirement Benefits ("DFRB") Act provides for the payment of retirement benefits to former members of the Defence Force who ceased service before 1 October 1972 and to widows and dependants of such former members. The scheme under the DFRB Act was closed to new contributors from 1 October 1972 when a new scheme under the Defence Force Retirement and Death Benefits ("DFRDB") Act 1973 came into operation.

59. A number of provisions in the DFRB Act are now obsolete. These relate to matters such as contributions, entitlements which were not on-going, and the DFRB Fund (which was wound up when the DFRDB scheme came into operation). The amendments repeal the obsolete provisions, including most of Part III which deals with the Fund. However, section 15D in Part III, which appropriates revenue for pensions and benefits payable under the DFRB scheme, is retained in an updated form.

Defence Housing Authority Act 1987

60. Section 12 of the Defence Housing Authority ("DHA") Act provides for the Authority's constitution. Paragraph 12(1)(b) includes in the DHA 3 members of the Defence Force holding appointments designated by the Governor-General. The appointments currently designated are those of Assistant Chief of Staff - Personnel for each of the Army, Navy and Air Force. Since the DHA commenced operations, the appointment of Assistant Chief of the Defence Force (Personnel) ("ACPERS") has been created. This amendment enables ACPERS to be included as a fourth Defence Force appointment designated by the Governor-General for membership of the DHA.

Military Superannuation and Benefits Act 1991

61. Section 47 of the Military Superannuation and Benefits ("MSB") Act indemnifies the trustees of the MSB Board of Trustees, the Commissioner for Superannuation, and the staff assisting the Commissioner from any action, liability, claim or demand arising from the bona fide performance of their duties or functions. These amendments extend the indemnity provisions to cover: an acting trustee (including an acting Chairperson); a member of an Incapacity Classification Committee; and a member of a Reconsideration Advisory Committee.

PART 5 - REPEAL OF ACTS

Clause 17 - Repeal of Acts etc.

62. This clause repeals the National Service Act 1951 and the National Service Termination Act 1973. It also preserves legislative provisions where that is necessary to protect entitlements accrued through rendering national service.

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