

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DEFENCE LEGISLATION AMENDMENT  
BILL 1995**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Defence Science and Personnel,  
the Hon. Gary Punch)



**Defence Legislation Amendment Bill 1995**

**OUTLINE**

This Bill proposes to:

- a. amend the Defence Act 1903 to enable senior statutory appointments to be for fixed terms and, in the case of acting appointments, to be made at ministerial level rather than by the Governor-General;
- b. replace existing provisions in the Defence Act 1903 and Naval Defence Act 1910, under which officers hold their appointments at the Governor-General's pleasure, with specific procedures for the retirement of officers or termination of their appointments, and with procedures for the management initiated early retirement and limited-tenure promotion of officers;
- c. amend the Defence Force Discipline Act 1982 by implementing recommendations of the Defence Force Discipline Legislation Board of Review;
- d. extend, from 1 September 1994 to 1 December 1994, the deadline in the Defence Force (Home Loans Assistance) Act 1990 within which certain incapacitated former members can apply for home loan assistance; and
- e. amend the Military Superannuation and Benefits Act 1991 to ensure that the Military Superannuation and Benefits Scheme complies with the Superannuation Industry (Supervision) Act 1993.

Defence Legislation Amendment Bill 1995

**FINANCIAL IMPACT**

The amendment to the Defence Force (Home Loans Assistance) Act will cost approximately \$40,000.

The other provisions of this Bill are not expected to have any significant financial impact.

Defence Legislation Amendment Bill 1995

**NOTES ON CLAUSES**

Clause 1 - Short title

1. Formal.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. The amendments to the Defence Act and Naval Defence Act dealing with the replacement of the concept of officers holding their appointments at the pleasure of the Governor-General and the amendments to the Defence Force Discipline Act dealing with discipline officers will commence on a day to be fixed by Proclamation, or six months after the Bill receives Royal Assent if the amendments have not been proclaimed by that date. (This will enable consequential regulation amendments to be made in association with the commencement of the Bill.) The amendments to the Defence Force (Home Loans Assistance) Act will be taken to have commenced on 1 September 1994. The remaining provisions will commence on the day the Bill receives Royal Assent.

Clause 3 - Schedules of amendments

3. This clause provides for various Acts to be amended as specified in the Schedules.

**SCHEDULE 1 - AMENDMENTS OF THE DEFENCE ACT 1903**

4. This Schedule makes amendments to the Defence Act which will provide for senior appointments in the Defence Force to be for specified periods, enable certain senior acting appointments to be made at ministerial level rather than by the Governor-General, and replace a provision under which officers in the Army hold their appointments at the pleasure of the Governor-General.

New section 9BA

5. Sections 9 and 9AA of the Defence Act provide that the Governor-General may appoint officers of the Defence Force to be the Chief of the Defence Force, the Vice Chief of the Defence Force or the chief of staff of an arm of the Defence Force.

6. The new section will provide that these senior appointments will be for specified periods. (The end of such a period will be a reason for retirement under the new provisions outlined below.) The saving provisions at the end of the Schedule will ensure that the current provisions will continue to apply to any existing appointments.

#### Amendment of sections 9C

7. Section 9C of the Defence Act provides that the Governor-General may appoint an eligible officer to act as the Chief of the Defence Force, the Vice Chief of the Defence Force or as the chief of staff of an arm of the Defence Force. Such an acting appointment can be made during a vacancy in one of these offices, or where the holder of the office is absent from duty or from Australia or for any other reason is unable to perform the functions of the office.

8. The amendment to section 9C will provide that this power will now be vested with the Minister rather than the Governor-General. The associated savings provision at the end of the Schedule will preserve any existing appointments.

#### Limited-tenure promotions

9. New section 10B provides for the promotion of selected senior Army officers for a specific period. This is intended to allow for a limited number of senior officer promotions in situations where an individual is identified as having skills relevant to a particular appointment rather than skills that will enable wider employability at the higher rank level. (Schedule 5 of the Bill contains the corresponding amendments to the Naval Defence Act. Corresponding amendments for the Air Force will be made to the Air Force Regulations.)

10. The new section provides for limited-tenure promotions to be applied where an officer is promoted to Colonel rank or above for a set period (which would normally be for a minimum of 3 years).

11. The new section ensures that an officer has the right to refuse a limited-tenure promotion and to continue service at the lower rank. However, where a limited-tenure promotion is accepted, an officer will be retired on completion of its period, unless offered an extension of service at the higher rank or a continuation at the original rank level.

12. Officers promoted under the limited-tenure Promotion provisions are not entitled to the financial benefits of the management initiated early retirement provisions outlined below.

Replacement of appointments "at pleasure"

13. Subsection 16(1) of the Defence Act (and subsections 12(1) and (2) of the Naval Defence Act) provide that officers in the Army and the Navy hold their appointments at the pleasure of the Governor-General.

14. The amendments made by the remaining items of this Schedule will replace subsection 16(1) of the Defence Act with procedures for the Army which set out the specific grounds for the retirement of officers and termination of their appointments, and with procedures for the management initiated early retirement of Army officers. (Schedule 5 of the Bill contains the corresponding amendments to the Naval Defence Act. Corresponding amendments for the Air Force will be made to the Air Force Regulations.)

Retirement and Termination of Officers

15. New sections 20, 21 and 22 provide that an officer in the Army may be **retired** for one of the following reasons:

- a. that the period of the officer's statutory appointment has expired in the case of an officer appointed to a statutory office under section 9 or 9AA of the Defence Act;
- b. that the period of service, expressed in accordance with section 10A, for which the officer was appointed (including any extension of the period) has expired;
- c. that the officer is, as a result of some physical or mental incapacity, not within his or her control, incapable of rendering effective service; or
- d. that the officer is inefficient or incompetent for causes not within his or her control.

16. New sections 24 and 25 provide that the appointment of an officer in the Army may be **terminated** for one of the following reasons:

- a. that the officer has been absent without leave for a continuous period of at least 3 months;

b. that the officer has been convicted by a court or service tribunal of a criminal or service offence, or that a court or service tribunal has found (without recording such a conviction) that the officer has committed an offence, and the Chief of the General Staff is of the opinion that, having regard to the nature and seriousness of the offence, the retention of the officer is not in the interests of the Defence Force;

c. that the officer is inefficient or incompetent for reasons or causes within his or her own control; or

d. that the officer's behaviour or performance, due to circumstances within his or her control, is such that the retention of the officer is not in the interests of the Defence Force.

17. New sections 22 and 25 require (subject to the exceptions specified in the next sentence) that an officer, who is to be retired or have an appointment terminated, should be given adequate particulars of the reasons for the proposed retirement or termination of appointment and an opportunity to show cause why he or she should not be retired or have the appointment terminated. The exceptions are where the officer has been retired because his or her period of statutory appointment or service (including extensions) has expired or where the officer's appointment has been terminated because he or she has been absent without leave for a continuous period of at least 3 months.

18. New sections 19, 20, 21, 22, 24 and 25 specify the persons who may retire an officer or terminate the appointment of an officer. With the exception of officers who are absent without leave these are: at Major-General rank and above, the Governor-General; at Brigadier rank, the Minister; and at Colonel rank and below, the Chief of the General Staff. In the case of officers who are absent without leave these are: at Brigadier rank and above, the Minister; and at Colonel rank and below, the Chief of the General Staff.

19. New sections 23 and 25A provide that a retirement or termination of appointment is to be effected by instrument. That instrument must specify the day on which the retirement or termination takes effect. With the exception of officers who are absent without leave, this must be a date not earlier than the day the instrument is given to the officer and not later than 3 months after that date. In the case of officers who are absent without leave, this must be a date not earlier than the date of the instrument.

20. The following amendments are associated with the above changes.

a. The omission of subsection 10A(2) is a consequential change tied to the specified grounds of retirement.

b. New subsection 27(2) makes it clear that an officer who attains the prescribed retiring age retires automatically at that point without the need for any formal action.

c. New section 27A enables regulations to be made dealing with the ranks that chaplains are to be deemed to hold for the purposes of the retirement and termination provisions. (There is a single rank of chaplain, and chaplains are classified in Divisions for the purposes of precedence.)

#### Management Initiated Early Retirement

21. New sections 25B, 25C, 23D and 25E provide separate procedures for the management initiated early retirement of Army officers.

22. New section 25B empowers the Chief of the General Staff to initiate an early retirement by giving an officer written notice that the officer is entitled to a special financial benefit if he or she retires within a specified period (one month commencing not earlier than the day the notice is given.)

23. New section 25D enables the Chief of the General Staff to compulsorily retire without a special financial benefit an officer who does not retire within the period specified in the notice under section 25B, if the Chief of the General Staff considers that the officer needs to be removed for organisational effectiveness. The section also provides that the retirement of an officer who does not accept an offer of a financial benefit will take effect no earlier than 13 months after the officer is given a retirement notice.

24. New section 25C provides that, before the Chief of the General Staff can initiate an early retirement, the officer must be given, in writing, reasons for his or her retirement and an opportunity to show cause why that action should not proceed. In addition, new section 25E provides that the periods described in paragraphs 22 and 23 above will be suspended while any associated redress of grievance complaint made by an affected officer under the Defence Force Regulations or complaint under the Ombudsman Act is being finalised.

#### **SCHEDULE 2 - AMENDMENTS OF THE DEFENCE FORCE DISCIPLINE ACT 1982**

25. The Defence Force Discipline Act ("the DFDA") provides a discipline scheme for all members of the Defence Force.



26. Section 196B of the DFDA established a Defence Force Discipline Legislation Board of Review ("the Board") which was required to prepare a report on the operation of the disciplinary legislation and the operation of any other Commonwealth law in so far as it related to the discipline of the Defence Force. The Board presented its report in May 1989.

27. This Schedule implements a number of the Board's recommendations and makes several associated amendments.

Definition of "police member"

28. This is a gender neutral drafting change which replaces the current definition of "service policeman". Other gender neutral drafting changes are contained in Schedule 6 of the Bill.

Amendment of section 23 and Schedule 6 - Absence From Duty

29. Section 23 of the DFDA makes it an offence for a member to be absent from duty. Section 24 makes it an offence for a member to be absent without leave.

30. It is often the case that a member's actions can come within either of these provisions. However, the maximum penalty for being absent from duty is 3 months imprisonment while the maximum penalty for being absent without leave is 12 months imprisonment. Given the close relationship between the two offences, the amendment to subsection 23(1) provides a maximum penalty of 12 months imprisonment for being absent from duty.

31. Schedule 6 of the DFDA specifies alternative offences. The associated amendment to Schedule 6 ensures that the offences of absent without leave and absent from duty are alternative offences.

Amendment of section 34 - Assault on an Inferior

32. Section 25 of the DFDA provides that a defence to a charge of assaulting a superior officer is that the person charged neither knew nor could reasonably be expected to have known that the person against whom the offence is alleged to have been committed was a superior officer. (Corresponding defences apply to the offences of insubordination and disobedience under sections 26 and 27 of the DFDA.)

33. Section 34 of the DFDA makes it an offence to assault or ill-treat an inferior. However, at present there is no defence if the person charged neither knew nor could reasonably be expected to have known that the person against whom the offence is alleged to have been committed was an inferior. The amendment to section 34 provides this defence.

New section 36A - Unauthorised or negligent discharge of weapon

34. While section 36 of the DFDA is a general provision covering dangerous behaviour associated with weapons and other material, the DFDA contains no offence which specifically deals with the intentional or negligent unauthorised discharge of a weapon. New section 36A therefore makes the intentional or negligent unauthorised discharge of a weapon a specific offence with a maximum penalty of 6 months imprisonment.

Amendment of section 59 - Drug Offences

35. The Defence Force has in place a firm 'no drugs' policy. Paragraphs 59(2)(b), 59(4)(a) and 59(5)(a) of the DFDA provide a maximum penalty of a fine of up to 7 days pay for certain charges relating to the use or possession of cannabis. As this penalty is inadequate, the amendments to these provisions increase the maximum penalty to a fine equivalent to 14 days pay for a first offence and to dismissal from the Defence Force for a subsequent offence.

Amendment of sections 63 and 104 - References to the Crimes Act 1900 (NSW)

36. Subparagraphs 63(1)(a)(ia) and 104(a)(ii) of the DFDA contain references to provisions about sexual offences in the Crimes Act 1900 of the State of New South Wales in its application to the Australian Capital Territory.

37. As a consequence of the self-government of the Australian Capital Territory, Schedule 2 of the Crimes Legislation Amendment Act 1991 (Act No. 28 of 1991) replaced various references, in the DFDA and other Commonwealth legislation, to laws in force in the "Australian Capital Territory" with references to laws in force in the "Jervis Bay Territory". However, subparagraphs 63(1)(a)(ia) and 104(a)(ii) were overlooked in this exercise.

38. The amendments to subparagraphs 63(1)(a)(ia) and 104(a)(ii) replace the references to the Crimes Act 1900 of the State of New South Wales in its application to the Australian Capital Territory with references to the Crimes Act 1900 of the State of New South Wales in its application to the Jervis Bay Territory.

### Amendment of paragraph 68(1)(n) and Schedule 3 - Extra Duties

39. Section 68 of the DFDA sets out the scale of punishments that may be imposed on a convicted person. Paragraph 68(1)(n) provides that the punishment of extra duties may be imposed for a maximum duration not exceeding 3 days. The amendment to this paragraph increases the maximum duration of extra duties to 7 days.

40. Schedule 3 of the DFDA contains details of the punishments that may be imposed by summary authorities. Tables B and C of that Schedule provide that the maximum duration of the punishment of extra duties is 3 days. The amendments to Tables B and C reflect the increased maximum duration of extra duties.

### New paragraphs 68(1)(na) and (2)(g) and Schedule 3 - Extra Drill

41. Amendments are also made to section 68 and Schedule 3 of the DFDA to provide a new punishment of extra drill. This new punishment is limited to two half hour sessions each day for a maximum duration of 3 days.

### Amendment of section 71 - Non-Commissioned Officers Sentenced to Detention

42. At present, a service tribunal can reduce non-commissioned officers in rank and sentence them to detention at the same time or simply award a period of detention. Section 71 of the DFDA sets out restrictions on the powers of service tribunals to impose punishments.

43. The amendment to section 71 will ensure that a non-commissioned officer sentenced to detention is reduced below non-commissioned rank.

### Amendment of section 79 - Suspension of Fines

44. At present, subsection 79(1) of the DFDA provides that service tribunals have power to suspend payment of a fine (either in whole or in part) only where that fine exceeds 7 days pay. The amendment to subsection 79(1) will increase sentencing flexibility by ensuring that tribunals can suspend the payment of any fines (either in whole or in part).

### Amendment of section 100 - Suspension from Duty

45. Section 98 of the DFDA provides that a member can be suspended from duty pending the investigation of an offence (either service or civil) or prior to the trial of a service or civil offence. Section 99 of the DFDA provides that a member can be suspended pending the approval of a punishment by a reviewing authority.

46. Section 100 provides that a member continues to be entitled to the payment of salary and allowances during the period he or she is suspended from duty. This is contrary to the rule for members of the Public Service who have been suspended from duty.

47. The amendment to section 100 will ensure that, except in cases of proven hardship, a member suspended from duty will not be entitled to the payment of salary and allowances after the member has been charged with an offence. However, the provision ensures that members are entitled, during the period of suspension, to engage in employment outside the Defence Force.

### Investigation of Service Offences

48. Part 1C of the Crimes Act 1914 includes provisions dealing with:

- a. administration of a caution;
- b. access to lawyers, relatives or friends; and
- c. the tape recording of confessions.

The following changes to the DFDA are made in light of these Crimes Act provisions. An associated amendment to subsection 101(1) defines the term "tape recording" to include both sound and video recordings.

#### a. Administration of a Caution

49. Section 101D of the DFDA provides that a person may be cautioned by giving that person a document in the prescribed form setting out the caution, and then reading the caution or having it read to that person.

50. Sections 23F and 23U of the Crimes Act require that a person under arrest must be cautioned by the arresting official before questioning and that the caution must be tape recorded, if practicable.

51. The amendment replaces section 101D of the DFDA with a new provision that requires that the caution must be tape recorded, if practicable.

**b. Access to Lawyers, Relatives or Friends**

52. Sections 101E and 101G of the DFDA deal with access to lawyers and friends.

53. Section 23G of the Crimes Act provides that a person under arrest must be informed by the investigating official, before questioning commences, that the person under arrest may:

- a. communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and
- b. communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for the legal practitioner to be present during questioning.

54. Section 23L of the Crimes Act provides that compliance with these requirements is not required if it likely to result in an accomplice taking steps to avoid apprehension, the loss of evidence or intimidation of a witness, or if the questions of the investigating official relate to the immediate safety of others.

55. The amendments replace sections 101E and 101G of the DFDA with new provisions corresponding to sections 23G and 23L of the Crimes Act.

**c. Tape Recording of Confessions**

56. Section 101K of the DFDA deals with the admission of confessions.

57. Section 23V of the Crimes Act provides that a confession or admission is inadmissible if it was not tape recorded in circumstances where this was reasonably practicable.

58. New section 101JA corresponds with section 23V of the Crimes Act, and applies where alleged offences under the DFDA are being investigated by service police (which is the normal way of proceeding). However, the amendment to section 101K will ensure that the existing provisions will continue to apply to investigations that are not conducted by service police (eg where there is a military operation and service police are not available).

Amendment of section 101Q and new section 101QA - Offence of refusing to submit to medical examination etc

59. Section 101Q of the DFDA permits an investigating officer to arrange for a medical practitioner to examine or take a specimen from a person in lawful custody in respect of a service offence. However, it is not an offence for a member to refuse to be examined or to decline to supply a specimen.

60. The amendment of section 101Q and new section 101QA makes it an offence for a person in lawful custody in respect of a service offence to refuse to submit to a medical examination or to supply a specimen without reasonable excuse. This is subject to a maximum penalty of 6 months imprisonment.

61. The provisions can only be used for drug testing and requires that the member must first be warned that refusal to submit to the medical examination or supply a specimen will constitute an offence.

Amendment of sections 119 and 120 - Convening Orders

62. Section 119 provides that a convening authority shall, in an order convening a court martial, appoint the persons involved in the trial and fix the date and venue of the trial.

63. There is some doubt whether a convening authority has the power to either amend or revoke a convening order. The amendment to section 119 makes it clear that a convening authority has the power to amend or revoke a convening order. The amendment to section 120 ensures that the accused will be notified of the amendment or revocation of the convening order.

Amendment of section 130 - Procedure at a Trial before a Summary Authority

64. Sections 110, 111A, 112, 130, 131 and 131A of the DFDA deal with the power of a summary authority, at certain stages of proceedings, to break off the hearing of a trial and refer the case to a convening authority.

65. The amendment to section 130 provides that a summary authority has the power to refer a case at any stage of a trial to a convening authority if he or she considers that, in the interests of justice, the matter should be referred.

Amendment of section 141 - Bias

66. A judge or a magistrate in a civil court will not hear a case if he or she is biased or likely to be biased against an accused person or likely to be thought, on reasonable grounds, to be biased. Subsection 141(3) of the DFDA applies

this rule to courts martial and subsection 141(4) applies it to service tribunals (including summary authorities).

67. It would not be workable for this rule to apply to a summary authority simply because the summary authority is the commanding officer of the accused. That is, simple knowledge of the accused should not, in itself, disqualify the summary authority as it is important for discipline to be seen to be administered in the accused member's unit.

68. The amendment to section 141 therefore makes it clear that the normal command relationship between a summary authority and the accused will not, of itself, be sufficient to constitute a disqualification on the ground of bias.

#### Amendment of section 141A - Amendment of Charges

69. Section 141A of the DFDA limits the power of various specified bodies to amend a charge to situations where a charge is defective. Some charges, although not necessarily defective, may nevertheless be more appropriately worded or amended in various ways.

70. The amendment to section 141A allows the bodies covered by that section to amend charges whenever this is appropriate, provided such amendments can be made without prejudice to the accused.

#### Discipline officer

71. Section 107 of the DFDA provides that a commanding officer has power to try any charge against a member of his or her unit except where it relates to a prescribed offence (as defined in section 104) or where the accused is above the rank of flight lieutenant (or equivalent) or is less than two ranks junior to the commanding officer. Subsection 105(2) enables the commanding officer to appoint an officer to be a subordinate summary authority. Under section 108 a subordinate summary authority can only try a charge against a member of or below the rank of corporal or equivalent. It is administratively burdensome for the commanding officer or a subordinate summary authority to try all minor charges. New Part IXA will therefore enable certain minor infringements to be dealt with by a "discipline officer". The aim of the discipline officer provisions is to provide a simplified procedure that will enable minor infringements to be dealt with simply, speedily and justly.

72. New sections 169A, 169C and 169F make it clear that discipline officers are not service tribunals and that the infringements with which they can deal are not service offences. This ensures that the more complex procedures and more severe penalties applied by service tribunals do not apply to hearings by discipline officers. In addition, the amendment to section 144 ensures that if a matter has been disposed of under the discipline officer provisions, that matter cannot then be tried as a service offence by a service tribunal. However, new sections 169C and 169J ensure that a matter is not prevented from being dealt with as a service offence merely because the offence arises out of an act or omission that could constitute a disciplinary infringement under new Part IXA.

73. New section 169B authorises the commanding officer of a unit to appoint a member not below the rank of warrant officer to be a discipline officer.

74. New sections 169A and 169C provide that the discipline officer can only deal with the following disciplinary infringements.

- a. section 23 - absence from duty;
- b. section 24 - absence without leave (but only for absences of up to 3 hours);
- c. section 27 - disobedience of command;
- d. section 29 - failure to comply with a general order;
- e. subsection 32(1) - irregularities relating to guard duty;
- f. section 35 - negligent performance of duty; and
- g. section 60 - prejudicial behaviour.

75. New sections 169C, 169D and 169E apply the discipline officer provisions to members below the rank of a non-commissioned officer and ensure that the provisions will not apply unless the member concerned has acknowledged that he or she has committed a breach of one of the above offences and elected to be dealt with by a discipline officer. In addition, new section 169D deals with infringement notices and who can give such a notice to an accused member.



76. New subsection 169F(1) provides that a discipline officer has the power to impose any one, but not more than one, of the following limited punishments:

- a. loss of pay for a period not exceeding 1 day;
- b. up to 2 days restriction of privileges;
- c. up to 3 days stoppage of leave;
- d. up to 3 days extra duties;
- e. up to 3 days extra drill; and
- f. reprimand.

77. New subsections 169F(2) and (3) provide that a discipline officer may decline to impose a penalty where he or she considers the matter to be trivial or decline to deal with a matter that he or she thinks is too serious to be dealt with under this new Part.

78. New section 169G provides that a member appearing before a discipline officer is not entitled to be represented. This is because discipline officers will only be dealing with minor matters that do not involve determination of contested questions of fact. However, this provision ensures that the member can give evidence and call witnesses in mitigation of punishment.

79. New section 169H ensures that any records of infringements or punishments are to be destroyed after a period of twelve months.

#### Amendment of section 171 - Postponement of Punishment

80. Section 171 of the DFDA states that a punishment imposed by a service tribunal takes effect forthwith and that the punishment for a specific period commences on the day it is imposed.

81. When units are on exercise in the field, or when a ship is at sea, the deterrent effect of punishments is reduced as there is no leave or other privileges that can generally be restricted.

82. The amendment to section 171 therefore gives summary authorities (which by subsection 3(1) of the DFDA include superior summary authorities, commanding officers and subordinate summary authorities) the power to postpone the commencement date of a punishment for up to 14 days.

### Amendment of Schedule 3 - Reduction in Rank of Corporals

83. Table B of Schedule 3 of the DFDA enables commanding officers to reduce non-commissioned officers by not more than one rank. An effect of this in the Army is that commanding officers can only reduce Corporals to Lance Corporal rank, although some offences committed by Corporals are serious enough to require reduction in rank to Private. (There is no corresponding problem for the other Services as they do not have a rank equivalent to that of Lance Corporal.)

84. This amendment to Table B therefore ensures that commanding officers in the Army may, if the circumstances of the case dictate, reduce a Corporal to either Lance Corporal or Private rank.

### **SCHEDULE 3 - AMENDMENT OF THE DEFENCE FORCE (HOME LOANS ASSISTANCE) ACT 1990**

85. The Defence Force (Home Loans Assistance) Act ("the Assistance Act") establishes a scheme to provide for the payment of home loan subsidies to eligible persons who are serving or have served in the Defence Force. Eligible persons include certain "incapacitated persons" as defined in section 3 of that Act. Ordinarily, a person ceases to be an eligible person 2 years after ceasing Defence Force service.

86. In 1992, the definition of "incapacitated person" was amended to enable incapacitated former members 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 15 May 1991 (the day the Assistance Act commenced full operation) to apply for home loan subsidies. Section 4 of the Assistance Act, which sets out the time within which former members stop being eligible, was also amended to set a deadline for this particular class of incapacitated former members to apply for home loan subsidies. The effective deadline was 1 September 1994.

87. The Service Offices in the Defence Force notified incapacitated former members affected by the 1992 amendments of their eligibility. However, the notification to certain members was inadequate. While notification was not a legislative requirement it was the only realistic means by which incapacitated former members could become aware of their entitlement.

88. This Schedule therefore replaces the present deadline of 1 September 1994 in paragraph 4(1)(b) of the Assistance Act with a deadline of 1 December 1994. Fresh notifications were sent before this date to all potentially eligible persons.

89. As the proposed amendment was not in place before the new deadline expired, this amendment is deemed by clause 2 of the Bill to have commenced on 1 September 1994. This will ensure that any applications made before 1 December 1994 by persons affected by the amendment to paragraph 4(1)(b) are treated as having been validly made.

#### **SCHEDULE 4 - AMENDMENTS OF THE MILITARY SUPERANNUATION AND BENEFITS ACT 1991**

90. The Military Superannuation and Benefits Act ("the MSB Act") establishes a superannuation scheme for members of the Defence Force. The scheme is administered by a Board of Trustees.

91. The Superannuation Industry (Supervision) Act 1993 ("the SIS Act") establishes a framework for the supervision of superannuation funds. The Government has decided that the main Commonwealth superannuation schemes will be required to comply in full with the SIS Act.

92. In accordance with the Government's policy, the Board of Trustees will be electing to become a regulated superannuation fund under section 19 of the SIS Act.

93. Sections 58 and 60 of the SIS Act provide that the trustees of superannuation entities must not be subject to direction by any person, and that the approval of the trustees must be obtained for changes to the governing rules of a superannuation scheme.

94. The following changes, which correspond with recent changes to the Superannuation Act 1990, are required to ensure that the MSB Act complies in full with the SIS Act, particularly sections 58 and 60.

#### **Provisions required to ensure the Board consents prior to amendments to the Trust Deed and Regulations**

95. Section 5 of the MSB Act provides for the amendment of the Trust Deed. (Under the definition of "Rules" in subsection 3(1), the Trust Deed

includes the Military Superannuation and Benefits Rules which are set out as a schedule to the Trust Deed.) Section 52 of the MSB Act provides that the Governor-General may make regulations for the purposes of the Act.

96. The amendment to section 5 ensures that the Board must consent to any amendment of the Trust Deed except in circumstances permitted by the SIS Act and its Regulations.

97. The amendment to section 52 ensures that the Board must consent to the making of any regulations dealing with the MSB scheme except in circumstances permitted by the SIS Act and its Regulations. (This amendment to section 52 does not apply to any regulations made for the purposes of Part 8 of the MSB Act. Part 8 deals with retention benefit payments which have no relevance to superannuation and the functions of the Board.)

Amendment of subsections 26(1) and (5)

98. Section 26 provides that financial statements in respect of the management of the fund are to be in a form approved by the Minister. The amendments to subsections 26(1) and (5) of the MSB Act ensure that the financial statements will be in a form agreed to by both the Minister and the Board of Trustees. This will ensure that section 26 is not seen as a provision directing the Board in its management of the scheme.

Repeal of section 50 and omission of subsection 26(7)

99. The Schedule repeals section 50 of the MSB Act which provides that the Minister may give the Chairperson of the Board of Trustees a statement of Government policy and request that the Board consider that policy in exercising its functions. (This is not consistent with the spirit of the SIS requirement that trustees should not be subject to direction.)

100. A consequential amendment omits subsection 26(7). That subsection provides that the annual report of the Board should include details of these policy statements.

**SCHEDULE 5 - AMENDMENTS OF THE NAVAL DEFENCE ACT 1910**

101. The amendments made by this Schedule correspond to the retirement and termination of appointment amendments to the Defence Act contained in Schedule 1 of this Bill. That is, this Schedule will replace subsections 12(1)

and (2) of the Naval Defence Act, which provide that officers in the Navy hold their appointments at the pleasure of the Governor-General, with procedures setting out the specific grounds for retirement and termination, as well as procedures for the management initiated early retirement and limited-tenure promotion of Navy officers.

#### Limited-tenure promotions

102. New section 13A provides for the promotion of selected senior Navy officers for a specific period. (As with the corresponding Defence Act provision, this is intended to allow for a limited number of senior officer promotions in situations where an individual is identified as having skills relevant to a particular appointment rather than skills that will enable wider employability at the higher rank level.)

103. The new section provides for limited-tenure promotions to be applied where an officer is promoted to Captain rank or above for a set period (which would normally be for a minimum of 3 years).

104. The new section ensures that an officer has the right to refuse a limited-tenure promotion and to continue service at the lower rank. However, where a limited-tenure promotion is accepted, an officer will be retired on completion of its period, unless offered an extension of service at the higher rank or a continuation at the original rank level.

105. Officers promoted under the limited-tenure promotion provisions are not entitled to the financial benefits of the management initiated early retirement provisions outlined below.

#### Retirement and Termination of Officers

106. New sections 13C, 13D and 13E provide that an officer in the Navy may be **retired** on various specified grounds. These grounds are identical to the retirement grounds specified for Army officers by Schedule 1 of the Bill.

107. New sections 13G and 13H provide that the appointment of an officer in the Navy may be **terminated** on various specified grounds. These grounds are identical to the termination grounds specified for Army officers by Schedule 1 of the Bill.

108. New sections 13E and 13H require (subject to the exceptions specified in the next sentence) that an officer, who is to be retired or have an appointment terminated, should be given adequate particulars of the reasons for

the proposed retirement or termination of appointment and an opportunity to show cause why he or she should not be retired or have the appointment terminated. The exceptions are where the officer has been retired because his or her period of statutory appointment or service (including extensions) has expired or where the officer's appointment has been terminated because he or she has been absent without leave for a continuous period of at least 3 months.

109. New sections 13B, 13C, 13D, 13E, 13G and 13H specify the persons who may retire an officer or terminate the appointment of an officer. With the exception of officers who are absent without leave these are: at Rear Admiral rank and above, the Governor-General; at Commodore rank, the Minister; and at Captain rank and below, the Chief of Naval Staff. In the case of officers who are absent without leave these are: at Commodore rank and above, the Minister; and at Captain rank and below, the Chief of Naval Staff.

110. New sections 13F and 13J provide that a retirement or termination of appointment is to be effected by instrument. That instrument must specify the day on which the retirement or termination takes effect. With the exception of officers who are absent without leave, this must be a date not earlier than the day the instrument is given to the officer and not later than 3 months after that date. In the case of officers who are absent without leave, this must be a date not earlier than the date of the instrument.

111. The following amendments are associated with the above changes.

a. The omission of subsection 9(2) is a consequential change tied to the specified grounds of retirement.

b. New subsection 17(2) makes it clear that an officer who attains the prescribed retiring age retires automatically at that point without the need for any formal action.

c. New section 18 enables regulations to be made dealing with the ranks that chaplains are to be deemed to hold for the purposes of the retirement and termination provisions. (There is a single rank of chaplain, and chaplains are classified in Divisions for the purposes of precedence.)

#### Management Initiated Early Retirement

112. New sections 13K, 13L, 13M and 13N provide separate procedures for the management initiated early retirement of Navy officers.

113. New section 13K empowers the Chief of Naval Staff to initiate an early retirement by giving an officer written notice that the officer is entitled to a special financial benefit if he or she retires within a specified period (one month commencing not earlier than the day the notice is given.)

114. New section 13M enables the Chief of Naval Staff to compulsorily retire without a special financial benefit an officer who does not retire within the period specified in the notice under section 13K, if the Chief of Naval Staff considers that the officer needs to be removed for organisational effectiveness. The section also provides that the retirement of an officer who does not accept an offer of a financial benefit will take effect no earlier than 13 months after the officer is given a retirement notice.

115. New section 13L provides that, before the Chief of Naval Staff can initiate an early retirement, the officer must be given, in writing, reasons for his or her retirement and an opportunity to show cause why that action should not proceed. In addition, new section 13N provides that the periods described in paragraphs 113 and 114 above will be suspended while any associated redress of grievance complaint made by an affected officer under the Defence Force Regulations or complaint under the Ombudsman Act is being finalised.

#### **SCHEDULE 6 - AMENDMENTS OF THE DEFENCE FORCE DISCIPLINE ACT 1982 TO REMOVE GENDER-SPECIFIC LANGUAGE**

116. This Schedule makes various drafting changes to the Defence Force Discipline Act to remove gender-specific language.

