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Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000

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Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000

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Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000

Date Introduced: 9 November 2000

House: House of Representatives

Portfolio: Defence

Commencement: 28 days after Royal Assent apart from

- certain items in schedule 2 (repealing provisions that are to be incorporated into the Regulations) which commence on a day or days to be fixed by Proclamation
- schedule 3 (repealing the *Defence Re-establishment Act 1965*) and whose commencement depends on when the proposed Defence Reserve Service (Protection) Act 2000 commences, and
- schedule 4 (dealing with employer allowances) which commences on Royal Assent.

Purpose

- extend the circumstances and the times in which the Reserves may be called out
- repeal the *Defence Re-establishment Act 1965* which contains the current legislative framework for protection of the civilian employment conditions for reservists
- facilitate the payment of financial incentives and compensatory payments to employers of Reservists and self-employed Reservists, and
- facilitate changes to the personnel structure of the Australian Defence Force.

Background

The Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000 is closely related to the Defence Reserve Service (Protection) Bill 2000 ('the Protection Bill'). Further background can be found in the Digest for the Protection Bill.

The Reserve descends directly from the militia concept created after Federation. The militia, which originally was a conscripted force, was intended for the defence of Australian territory and could not be used outside of Australia[1].

However the modern history of the Reserve dates back to the comprehensive review of the Army conducted in 1974 by Dr T.B. Millar[2]. This review recommended the concept of a 'total force' and proposed measures to integrate Reserves and regulars. Up to this time the Reserves had been seen as rather a vague building-block against the possibility of future mobilisation. The intent behind the total force concept was to make full use of the total personnel assets available.

Since the Millar review the Reserves have struggled to find an appropriate role alongside the highly professional forces of the regular Army, Navy and Air Force. The theory of a 'total force' has proved difficult to turn into reality. Reservists were inevitably disadvantaged compared with their regular counterparts in terms of the time they could devote to military training, the courses they could attend and the experience they could gain by filling a variety of posts. Limited budgets also meant that capital works, equipment, facilities, training funds and so on tended to go first to the regulars. As a result doubts were frequently expressed as to the true capabilities of reserve forces.[3]

The issue of the reserve forces has been the subject of intractable debate in the last 30 years and the number of reorganisations and inquiries that have impacted on the Reserves is large. These include:

- Committee of Inquiry into the Citizen Military Forces 1972–74 – The Millar Report
- The Reformation of the 2 nd Division 1981
- The Reformation of the 3 rd Division
- The Sanderson-Nunn Inquiry 1987
- The Force Structure Review 90/91
- The JSCFADT Report – The Reserves, 1991
- Disbandment of 3 rd Division 1991
- Project Wellesley – Rationalisation of Army Training
- Establishment of the Ready Reserve Program, May 1991

- Restructuring of the 2 nd Division 1991 and 1994
- Review of the Ready Reserve Scheme by John Coates and Hugh Smith, 1995
- An Army for the Twenty First Century/Restructuring the Army, 1996–1999
- The Defence Efficiency Review, 1997
- The JSCFADT Report - From Phantom to Force August 2000.

However as the Parliamentary Joint Standing Committee on Foreign, Affairs, Defence and Trade in its recent inquiry ('JSCFADT inquiry')[4] commented, 'despite all these reviews and inquiries, fundamental and sustainable reform to produce a useful reserve has not eventuated'[5].

Two major areas of concern that have often been identified in these reviews are:

- civilian employment pressures on reservists, and
- the call out arrangements for the Reserves.

The Defence Reserve Service (Protection) Bill 2000 and the Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000 currently before the Parliament deal with these two issues.

Civilian employment pressures on reservists

For a fuller discussion of these issues, the reader is also referred to the Digest for the Protection Bill.

The size of the Reserves is currently 21 346 compared to the permanent force of 50 755.[6] Of serious concern is the fall in recruitment and retention of the Reserves. In 1998–1999, the Army assigned a recruitment target for the Reserves of 4465 however only 51 per cent of this target was achieved. This reflected a 3 year downward trend in recruiting.[7] In December 1999, reservists left the Army at a rate of 23.45 per cent per year[8] and as many as 30 per cent may leave shortly after completion of their initial training. According to the JSCFADT Inquiry there appear to be a variety of reasons that contribute to this separation rate, the most significant being civilian employment pressures and the current nature of Reserve Service.

The situation of joining and staying in the Reserves is very much complicated by employment issues. Many potential reservists find the demands of their employer too great, particularly in small enterprises where it is difficult to absorb staff absences. Evidence to the JSCFAD Inquiry suggested that some reservists do not reveal their service to their employer, sometimes because of an expectation of discrimination.[9] This may explain why a large number of reservists come from large organisations with some 40 per cent of the Reserves currently residing in government jobs.[10] The Defence Reserves

Association also pointed out that the Reserves personnel returning from East Timor, unlike their Regular Army counterparts, could be faced with the reality of having to find a new job.

The problems of reserve retention rates may also point to fundamental changes that have occurred in employment conditions in recent years. Under the *Workplace Relations and Other Legislation Amendment Act 1996*, leave for service in the Reserves was removed as an allowable matter for industrial awards in July 1999. A fuller analysis of this issue is found in the Digest for the Protection Bill.

Training requirements for reservists have further aggravated these problems. In the past, reserve training was structured around modified Regular Army courses and was stripped down to permit their conduct within two weeks or a series of two-week modules. However as part of 'one army' policy, training for reservists and regulars has been standardised and increased from two weeks to seven weeks. The expansion of the time now taken to complete training courses has exacerbated the difficulty for reservists to take leave. There is a feeling that the drop in the number of people joining the Reserve Forces may be due in a large part to the seven weeks' training requirement.

Concerns of employers

While protection of reservists' civilian employment conditions is an important issue, it is also apparent that call out and employment protection legislation must also address the concerns of employers. This was emphasised by the Australian Chamber of Commerce and Industry in its evidence to the recent JSCFADT inquiry.

> We are concerned particularly about the issue of reserves and the impact on their change in use on both their employment and their employer's business. Australian employers have been long time supporters of the Australian Defence Reserves. We have been public and vigorous supporters of employers providing support to reservists being as flexible as they can, in terms of providing leave to reservists to undertake their training and to meet their existing commitments. The challenge we are confronted by at the present time is that it is unclear to employers what the future intentions might be in terms of the use of reservists for a new or enhanced call-out service, what the duration of that service might be and what the implications might be for the individual businesses.[…]
>
> It is not clear to us now, nor has it been for any time in the recent past, what will be the nature of the demand on reservists in taking up more full-time engagement, the nature of the demand on employers, the nature of the protection to be afforded employers and the nature of the protection to be afforded employees when called up. […]The employer consequences will depend, as I said, on the size of the business and the nature of the capacity within that business to share skills around.[11]

Call out

Interrelated with the issues of employer and employee protection is the matter of call out of the Reserves.

Call out provisions of some kind have always existed in Australia. Initially the Reserve forces were only liable for call out in time of war, and then only for service within Australia. In 1964 this was extended to call out in time of defence emergency and for service outside Australia.

The 1976 White Paper on Defence guardedly proposed:

> that Parliament may well wish to consider whether the purpose of better training and better sense of participation would justify provisions authorising compulsory call up of Citizen Reserves for limited periods in international situations proclaimed as requiring augmentation of the forces, but not proclaimed as a state of war or time of defence emergency or for short-term assistance to the civil authorities during a national disaster.[12]

In his Review of Australia's Defence Capabilities, in 1986 Dibb pointed out that the focus of defence policy - that is, the defence of Australia - largely obviated the need 'for overseas service to be voluntary for Reserve'[13]. He argued that it was necessary that the Government legislate for a limited call out, that is, a call out prior to the declaration of a defence emergency.[14]

The then Labor Government's response was the *Defence Legislation Amendment Act 1987* which enabled the limited call out of Reserves for the defence of Australia in situations short of a defence emergency, for periods of three months at a time with the maximum continuous period for an individual reservist being 12 months. The rationale was that this would allow the Reserves to be utilised in credible contingencies and particularly in integrated units.

However despite the existence of this legislation the Reserves have never been called out since 1945. They were not called out for service in Korea, Vietnam or any other occasion.[15] While individual reservists voluntarily filled slots the limitation on their use has meant they have not been a real, useable and substantial backup for the Regular Army.

The most recent impetus for change to the call out arrangements came with Australia's peace keeping operations in East Timor. The manpower crisis exposed by the East Timor peacekeeping deployments and tight defence budgets have meant that reserve troops have played a key role. Minister Scott in his Second Reading Speech for the current Bills pointed out that out that 13 officers and 200 other ranks served with the 6RAR group in East Timor, supported by 200 reservists on full-time service within Australia.[16]

However, significantly the Reserves in East Timor were there on a purely voluntary basis and could not be deployed in their reserve units but had to be slotted into regular units.

This method of deployment is arguably disruptive and requires unnecessary time and training.

A further matter that arose in relation to East Timor was a concern that reservists serving in a voluntary capacity were possibly not covered by the *Defence (Re-establishment) Act 1965*. It was on the basis of this uncertainty that the Leader of the Opposition, the Honourable Kim Beazley, introduced a private members Bill in 1999[17] the purpose of which was to enhance the civilian employment protection to ADF reserves engaged in overseas peace enforcement, peacekeeping and humanitarian relief operations. The Bill was aimed at plugging potential gaps in the current Re-establishment Act on the basis that it may not cover the employment rights of reservists in East Timor. The Government at that time criticised this Bill and suggested the current arrangements in the Re-establishment Act were adequate to prevent employers penalising employees because of their service in East Timor.[18]

Since then the Government has introduced a legislative package which will make three major changes to the conditions of the Reserves. The package will:

- repeal the *Defence (Re-establishment) Act 1965* and replace it with the new Protection Act which will provide a range of protections for reservists;
- authorise the Minister for Defence to make determinations for the payment of compensation, incentives or benefits to employers, business and professional partners arising from a member's absence on defence service. The Government plan is to pay employers or self employed reservists the current average weekly full-time earnings to offset the financial losses incurred when reservists are released for more than two weeks of military service, and
- change the call out arrangements for Reserves to extend the circumstances and the times in which the Reserves may be called out, to include war, defence emergency, peace enforcement, civil and humanitarian aid and disaster relief operations in peacetime.

This Bill and the Protection Bill implement this package.

Main Provisions

Schedule 1 -Calling out the Reserves

Schedule 1 amends the *Defence Act 1903* and proposes new arrangements for the calling out of the Reserves.

Item 1 repeals sections 50D, 50E, 50F and 50G and substitutes new sections 50D and 50E. Under current sections 50D and 50E the Governor-General may call out by

Proclamation the Reserves in times of war or defence emergency. Section 50F enables the Governor-General to call out by Proclamation the Reserves for the defence of Australia for a period of up to 3 months. A number of callouts may be proclaimed, but each must be justified every three months. Further the reasons for the call out must be reported to Parliament.

The Bill considerably extends the situations of call out. Under **proposed section 50D** the Governor-General may by written order in the Gazette call out the Reserves or any member or part of the Reserves for continuous full time service. Examples of circumstances where the Reserves may be called out include war, defence emergency, defence preparation, peacekeeping, peace enforcement, civil aid, humanitarian assistance or disaster relief. Significantly **proposed subsection 50D(2)** specifies that callout is not limited to the examples provided.

In calling out the Reserves, the Governor-General is to act with the advice of the Executive Council or if, after the Minister for Defence has consulted the Prime Minister, the Minister is satisfied that there are reasons of urgency, on the advice of the Minister alone **(proposed subsection 50D(3)).** Unlike the current provisions, Parliament does not need to be informed of the call out. The Explanatory Memorandum and Second Reading Speech do not explain this omission. One submission to the recent JCFADT inquiry argued that reporting to Parliament is a costly and unnecessary impediment that would impede selective call out of small numbers of reservists for supplementation of the Regular Defence Force operations.[19] However, this appears to be a weak reason for excluding notification of Parliament.

Proposed section 50E deals with period of service during call out which may be for a specified period or unlimited. The period of service must start on the day on which the relevant call out order takes effect. A reservist covered by a call out order is bound to render the period of service as directed by the particular service chief. These new arrangements regarding call out will apply to all members of the Reserves whether they became members before or after the Schedule commences **(item 3**). In other words there is no transition period allowed for those reservists who are unwilling to accept the increased commitment.

Schedule 2 -Structure of the Defence Forces

The Defence Force consists of the Australian Navy, the Australian Army and the Australian Air Force. Within these are various levels which differentiate between the Regular Forces, the Reserves and the Emergency Forces. Amongst other things, **Schedule 2** amends various Acts to replace the term 'Reserve Forces' with 'Reserves', 'Naval Reserve', 'Army Reserve' or 'Air Force Reserve' as required. References to 'Emergency Forces' will be omitted altogether presumably on the basis that they are no longer in existence.

Item 17 amends the Defence Act to remove definitions of the Permanent Forces (which includes the Regular Army, the Regular Army Supplement and the Regular Army

Emergency Reserve) and the Reserve Forces. These definitions are replaced with definitions of the Australian Army, the Regular Army and the Army Reserve. The Australian Army will consist of 2 parts - the Regular Army and the Army Reserve **(proposed section 31)**. The Regular Army is to consist of offices and soldiers in the Regular Army and officers and soldiers transferred to the Regular Army from the Reserve **(proposed section 32).** The Army Reserve is to consist of offices and soldiers enlisted in the Army Reserve and officers and soldiers tranferred to the Army Reserve from the Regular Army, Navy or Air Force **(proposed section 32A)**. Similar amendments are made to the *Airforce Act 1923* and the *Naval Defence Act 1910*.

Schedule 2 also contains minor technical changes to reflect the proposed amendments to the *Defence Act 1910* regarding call out. Other consequential amendments are also provided for.

Item 22 repeals subsections 50(1), (2), (2A) and (2B) and substitutes **new subsections 50(1), (2), and (2A)**. Essentially a member of the Army Reserve is only bound to render continuous full time service under this section or as a result of a call out order. The regulations must set out the training periods and reservists are bound to render those training periods unless exempted from that obligation by or under the regulations. It is noted that different training periods may be set for different parts of the Army Reserve or for different classes of members of the Army Reserve. The new provision does not appear to make substantive changes but rather simplifies the language and takes account of subsection 33(3A) of the *Acts Interpretation Act 1991*.[20] **Items 3** and **72** make similar changes to the *Airforce Act 1923* and the *Naval Defence Act 1910* respectively.

Item 14 repeals Divisions 2, 3 and 3A of Part II of the *Defence Act 1910*. **Item 19** repeals sections 36 to 44A in Division 2 of Part III. These provisions deal with appointments, transfers and discharge arrangements for Defence Force personnel (that is, officers and soldiers). The Explanatory Memorandum states that these provisions are to be incorporated in the Regulations but does not give the rationale for this change. **Items 67 and 69** repeal similar provisions in the *Naval Defence Act 1910*[21]. As the provisions will be contained in Regulations then Parliament will at some later date have the opportunity to scrutinise them. **Part 2** of **Schedule 2** provides that the current establishment provisions will continue to apply to people who enlisted under them until the new regulations are introduced. To date there are no draft regulations available for scrutiny.

Schedule 3 -Repeal of the *Defence (Re-establishment) Act 1965* and consequential amendments

Item 5 repeals the *Defence Re-establishment Act 1965*. Amongst other things this Act contains the current legislative framework for protection of the civilian employment conditions of reservists. This Act is to be replaced with the proposed *Defence Reserve Service (Protection) Act 2000*. For a fuller analysis of that Act the reader is referred to the Digest for the Protection Bill.

Schedule 3 also makes saving and transitional amendments consequential to the repeal of the *Defence (Re-establishment) Act 1965*. For example **item 7** clarifies that the Defence (Re-establishment) Act will continue to apply in relation to defence service rendered as a result of being called out under the current call out arrangements.

Schedule 4 - Allowances and benefits to employers etc.

Schedule 4 of the Bill amends section 58B of the *Defence Act 1903*. Section 58B gives the Minister power to make determinations regarding allowances and benefits to or in respect of all members of the ADF including the Reserves.

Proposed subsection 58B(1) extends the Minister's power to make written determinations that will give payments by way of compensation, incentives or other benefits to members of the Reserves, their dependants, their employers, business or professional partners, other associates or other person in relation to a reservist's absence on defence service. The paragraph specifies that this includes losses incurred or inconvenience suffered because of the operation of the Defence Reserve Service (Protection) Act 2000. This ties in with the Government's announcement that it plans to pay employers or self employed reservists the average weekly full-time earnings (at present $785) to offset the financial losses incurred when reservists are released for more than two weeks of military service. The payment would only commence after two weeks of military training. Funding for this initiative was allocated in this year's Budget and Minister Scott estimates that the package will cost approximately $16 million.[22] This employer compensation is not limited to call out situations.

It is of note that compensation for employers was introduced with the Ready Reserve Scheme by way of the Employer Support Scheme in May 1991 by the then Labor Government. That scheme was abolished in 1996. A fuller discussion of this matter can be found in the Digest for the Protection Bill.

Concluding Comments

The Bill marks a significant change in defence policy in that for the first time in Australia's history governments will have the power to call up the reserves in situations other than war, defence emergency or for the defence of Australia. Minister Scott has said that the Government does not intend to regularly call out Reservists … 'but to exercise this option only in times of exceptional need'[23] The new call out provisions are undoubtedly worded very broadly and it is of note that the requirement to report to Parliament the reasons for call out have been removed. As Dr Hugh Smith has suggested governments may well lose their nerve to use this power and may well decide it is too difficult to use the call-out legislation, given the personal, social and economic disruption that might occur.[24]

The Minister is optimistic that this Bill together with the compensation package for business and the protection measures for the Reserves will address the problems related to recruitment and retention rates in the Reserves. He has suggested that 'it will lead to much higher numbers of reservists volunteering to complete a tour of duty on full-time service in support of operations'.[25] Admiral Barrie in his estimate of the impact of these measures suggests that it might be expected that the new measures will see an increase of possibly 3,000 to 4,000 volunteers for the Reserves.

However an unknown factor is the possible impact the new call out provisions may have on those reservists or potential reservists who, while being prepared to serve in the Defence Forces on a voluntary and part time basis, may be less willing to serve for longer periods of full-time service and in circumstances other than the defence of Australia.

Regardless of this argument it may well be that the Government is placing too high a stake on the possibility of solving the problems of the Reserves and the ADF generally on this legislation. It could be argued that these legislative changes will need to be followed by more comprehensive changes to the current structure of the Reserves and the ADF so that it can adapt to the type of commitments, the sort of conflicts and peacekeeping roles which the Australian Defence Force is most likely to involved with in the future.

Endnotes

1 Although the definition of Australia was extended in World War 2 to include the South West Pacific zone of operations.

2 Committee of Inquiry into the Citizen Military Forces, *Report*, 1974.

3 John Coates and Hugh Smith, *Review of the Ready Reserve Scheme,* June 1995, p. 3.

4 Joint Standing Committee on Foreign Affairs, Defence and trade, *Inquiry into the Suitability of the Australian Army for Peacetime, Peacekeeping and War*.

5 Joint Standing Committee on Foreign Affairs, Defence and Trade, *From Phantom to Force,* August 2000, para 7.30.

6 Department of Defence, *Annual Report 1999-2000*, p. 288.

7 Joint Standing Committee on Foreign Affairs, Defence and Trade, *From Phantom to Force,* August 2000, para 7.32.

8 ibid, para 7.45.

9 ibid, para 7.47.

10 ibid.

11 Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Suitability of the Australian Army for Peacetime, Peacekeeping and War, *Transcript of Discussion*, 2 June 2000.

12 *Australian Defence* 1976, p .33.

13 Dibb, 1986 p. 158

14 Joint Committee on Foreign Affairs, Defence and Trade, *The Australian Defence Force Reserves*, 1991, p. 56.

15 Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Suitability of the Australian Army for Peacetime, Peacekeeping and War, *Transcript of Discussion*, 2 June 2000.

16 Second Reading Speech, *Hansard*, 9 November 2000, p. 22565.

17 Defence (Re-establishment) Amendment Bill 1999,

18 *Press Release*, 'Beazley and Ferguson don't understand Reserve laws', 12 October 1999.

19 Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Suitability of the Australian Army for Peacetime, Peacekeeping and War, *Submissions*, p. 830.

20 Subsection 33(3A) of the *Acts Interpretation Act 1991* specifies that the power to make regulations with respect to particular matters is to be construed as including a power to make regulations with respect to only some of those matters or with respect to particular classes of those matters and to make different provision with respect to different matters or different classes of matters.

21 To be consistent with similar amendments **item 69** should commence on a day fixed by Proclamation and **item 68** should commence 28 days after Royal Assent.

22 Hon B Scott, Press Release, 'Transcript of Press Conference', 22 August 2000.

23 Press Release, 'Sweeping Changes to Protect the Reserves', 22 August, 2000.

24 Joint Standing Committee on Foreign Affairs, Defence and trade, Inquiry into the Suitability of the Australian Army for Peacetime, Peacekeeping and War, *Transcript of Discussion*, 2 June 2000.

25 *Hansard*, 9 November 2000.