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## Defence Reserve Service (Protection) Bill 2000

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
No. 71 2000–01

Defence Reserve Service (Protection) Bill 2000

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27 November 2000

# Contents

Purpose .....	1
Background .....	1
Sources of obligation for defence training and participation .....	3
Main Provisions .....	6
Part 4 - Discrimination .....	6
Part 5 - Employment protection .....	7
Concluding Comments .....	12
Section 118A of the <i>Defence Act 1903</i> .....	12
State awards and legislation .....	14
Endnotes .....	14

# Defence Reserve Service (Protection) Bill 2000

**Date Introduced:** 9 November 2000

**House:** House of Representatives

**Portfolio:** Defence

**Commencement:** 28 days after Royal Assent

## Purpose

The Bill provides for the protection of the Reserves in their (primary) employment and education. It facilitates their return to civil life. The Bill sets out entitlements and prohibitions which will apply to reservists rendering defence force service.

## Background

The Defence Reserve Service (Protection) Bill 2000 is closely related to the Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000 ('Enhancement Bill'). The reader should also refer to the background in the Digest for the Enhancement Bill.

The background to these two Bills relates primarily to the Reserves' role in regional defence and security matters. Australian Defence Force (ADF) Reserves number approximately 21 000 according to the 1999-2000 Annual Report of the Department of Defence. They perform a crucial role as noted in the Second Reading of the sister Bill, the Enhancement Bill by the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, the Hon. Bruce Scott MP:

The Australian Defence Force reserves make a vital contribution to Australia's defence. Reserves constitute over 40 per cent of the Australian Defence Force and one-half of the Army's combat force. They provide the nation's mobilisation and expansion base. They are an essential link between the Defence Force and the Australian community.<sup>1</sup>

The number of reservists includes 1200 navy and 2200 air force personnel.<sup>2</sup> Clearly the East Timor crisis has been a trigger for a further review of the role of the armed forces, their structures and operations. The Government seeks to increase the numbers of trained

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reservists to about 27 000. The two Bills comprise part of a package of measures designed to achieve this. Australia committed to a role in the East Timor multinational peacekeeping force (INTERFET) on 15 September 1999.<sup>3</sup> At that time it was foreshadowed by defence specialists that there may be some call on the Defence Reserve Service, given the demands which would be made on the permanent members of the ADF. For example, a Parliamentary Library brief contended:

... if, as expected, the deployment lasts beyond the New Year (2000), the Australian people should expect that, at a minimum, specialist ADF Reservists will be called out. Indeed, the ADF concedes that it would have to call-up all reservist doctors and nurses for active duty.<sup>4</sup>

An increased role for the Reserves was one recommendation of a government commissioned review of Australia's defence capabilities in 1986 by Paul Dibb. The consequent Government white paper, *The Defence of Australia* (1987) accepted Dibb's recommendations on the role of the Reserves and announced a modest increase in ADF reserve forces to a target of 30 000.<sup>5</sup> Later the Government announced the establishment of the Ready Reserve Scheme in May 1991.<sup>6</sup> According to Allan Shephard, it was expected that the Ready Reserve (RRes):

should provide the ADF with a reservist whose readiness was superior to that of the General Reserves but less than that of a member of the Permanent ADF.<sup>7</sup>

RRes members were expected to undertake initial 12 months ADF training supplemented by 30-35 days training each year.<sup>8</sup> However defence specialists are far from unanimous on the success of the RRes exercise.

For the purposes of this Bill, the establishment of the Ready Reserves in 1991 is very important as that scheme placed additional demands on the employers of RRes members (as will the current package of measures) in respect of the additional time spent in RRes related activities and less time spent in the employer's business. As an offset for these demands, a compensation package was offered to employers called the Employer Support Scheme.

The Government commissioned a review of the RRes scheme in 1994. In their report, Coates and Smith supported the RRes scheme, but were aware of the tensions which RRes participation generated with employers. They noted that there was often reluctance by employees (RRes members) to approach employers for leave to attend training, or even to inform the employer of membership of the RRes, fearing that this would prejudice their continued employment. Coates and Hughes thus recommended that an explicit agreement between employer and RRes members be required. They noted:

Such an agreement would also ensure that an employer became aware of the benefits available through the Employer Support Scheme (ESS). This scheme pays the equivalent of four times the male full-time adult Average Weekly Earnings — Ordinary Time Earnings, which is reviewed in August each year. The current rate is 4 x \$633.80 (\$1995).

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This is an area in which we experienced some difficulty in finding reliable data. On the face of it, it seemed to be the least successful of the original package of conditions of service since relatively few employers have applied for it - a total of 106 at the present time (1995). In some cases this may be because they did not know about the scheme. In some cases, it seems that employers have advised their employees that the level of payment is insufficient compensation when the employee is a key position in their enterprise and his or her absence would adversely affect production runs ... etc.<sup>9</sup>

In opposition, the Coalition queried the value of the RRes scheme given the considerable money being spent. The change of government in 1996 provided the opportunity to abolish the RRes scheme, allowing RRes members to transfer to the General Reserve or the regular forces. The Government released its own public discussion paper *Defence Review* in June 2000 which, in part, reviewed the role for an upgraded Reserve Service. Shephard, however, has noted that the abolition of the RRes scheme over 1997/98 and the expansion of the role of the General Reserves provides the opportunity for the traditional 'cultural divide' between the regular forces and the Reserves to resurface. Shephard suggested an increase in training and resources going to the Reserves to address the divide.

### Sources of obligation for defence training and participation

According to the CCH *Research Manual on Industrial Law*, the two key Defence Acts override other industrial instruments:

Leave of absence from employment to attend defence force obligations **must** be granted to employees when required. The *Defence Act 1903* and the *Defence (Re-Establishment) Act 1965* override federal and State awards and industrial agreements. (emphasis added)<sup>10</sup>

It notes that:

- defence force obligations can include camps of continuous training which seldom exceed 14 days (10 working days), and courses of instruction
- leave of absence without pay or, if requested, leave at credit must be granted to employees who are to attend camps of continuous training
- the taking of military leave does not affect the accumulation of other benefits under an award such as sick leave or annual leave
- the employee must, if required, produce proof of attendance at camp to his employer<sup>11</sup>

Until recently, many of the above provisions were contained in the relevant provisions of some federal awards. There has never been an Australian Industrial Relations Commission test case setting a standard entitlement for military leave. Where awards contained military leave it was most often by consent of the employer. Industry awards (applying to many employers) typically did not contain the provision, and Minister for Employment

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Workplace Relations and Small Business the Hon. Peter Reith MP refers to about 152 federal awards (out of 3000 in 1998) containing military leave.<sup>12</sup>

Where federal awards did contain military leave it was often the case that these were single enterprise awards covering a large number of employees working for large companies or public utilities. Perhaps such employers have been in a better position to afford the temporary loss of service of an employee and had agreed to military leave being included in their awards.

Outlined below is a characteristic award provision addressing military leave, which in this case applies to the employer, Vicgrains Ltd (a large utility in the wheat and grains marketing industry). This award provided (and appears to still provide) the following provisions which act to offset initial income losses associated with the reserve member's ADF participation. It is noted that the provision provides two weeks of paid leave per year for the Reserve to attend training followed by a further two weeks of unpaid leave:

**32.1** Leave of absence without loss of pay shall be granted for two weeks in any year to an employee (other than a casual) who is a voluntary member of the Citizens' Forces for the purpose of attending an annual training camp and a further four days a year for the same purpose on the certification of the Commanding Officer of the particular service unit concerned.

**32.2** In addition to any leave granted under this clause, leave of absence without pay, subject to the remaining provisions of this clause, may be granted to an employee who is a voluntary member of the Citizens' Forces for the purpose of attending not more than two schools, classes or courses of instruction in any one year. Where the amount of pay (not including any payment by way of overtime, penalty rates, higher position allowances or any payment of a temporary character) which an employee would have received had the employee remained on duty, exceeds the amount of pay (including marriage and separation allowances) received by the employee as a member of the Citizens' Forces at any such school, class or course, the employee shall be entitled to receive an amount equal to the difference between the two.

**32.3** An employee may elect to be granted any annual leave due in lieu of an equivalent period of leave under this clause.

**32.4** Application for Military Leave shall be submitted for approval to the Chief Executive Officer and satisfactory evidence of attendance at the annual training camp, etc., shall be forwarded on resumption of duty.

**32.5** Leave granted under this clause shall be included as service for the purpose of annual, sick and long service leave.

**32.6** An employee, while serving with the Citizens' Forces, who sustains an injury or contracts an illness necessitating an absence from duty beyond the period of leave granted under this attachment may be granted leave as follows:

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**32.6.1** if not paid compensation by the appropriate Commonwealth Department in respect of such absence the employee shall be granted sick leave;

**32.6.2** if paid compensation and the amount is equal to or exceeds the amount of pay which would have been received had the employee been granted sick leave, leave shall be granted without pay;

**32.6.3** if paid compensation and the amount is less than the amount of pay which would have been received had the employee been granted sick leave, the employee may be paid an amount equal to the difference between the two and the sick leave credit will be reduced by the amount of such payment.<sup>13</sup>

Similar provisions concerning employees' access to military leave are now likely to be contained in provisions of certified agreements and/or Australian Workplace Agreements (AWA), or indeed under 'company policy', eg personnel manuals. At the time of the East Timor mobilisation it was alleged that Telstra had offered a superior military leave arrangements to those employees who signed AWAs, compared to the conditions offered to employees who did not sign AWAs.<sup>14</sup>

Military leave was not specified as an allowable award matter in the relevant schedule of the *Workplace Relations and Other Legislation Amendment Act 1996*. The parties to federal awards were given 18 months (to July 1998) to remove inconsistent provisions. According to Minister Reith, military leave has been removed from federal awards as the old award system was not working to provide this leave:

In respect of defence force leave, the fact is that, if you are an employee and you are required to perform your necessary service under the reserve system, your employment is protected by section 118A of the Defence Act ... We did have defence force leave and it did go out as an allowable matter—that is true. The coverage was no more than about five per cent. Of that five per cent, about half of it—and that is at the top end of the range—was public sector and in the Australian Public Service we have determinations covering it. So you are down to about 60 or 70 awards.<sup>15</sup>

The question then arises as to what effects arose by removing military leave from federal awards in workplaces. The perceived effect of this on employers was put by Mr L. Ferguson MP:

We have a situation where both for this six- or seven-week induction period ... and for actually getting away for any reserve training, reservists are increasingly coming under pressure not to take that time. The coalition often recites words about encouraging employers to look after reservists. But, if reserve service is not important enough to be an allowable award matter, employers could be forgiven for thinking that the government's attitude towards reservists is that they are not important, not necessary.<sup>16</sup>

The case for the retention of military leave in awards has also been put by the Shadow Minister for Industrial Relations, the Hon. Arch Bevis MP. He disputes the effectiveness

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of the sanctions available under current defence legislation, as the evidence shows that Reserve members are unlikely to make recourse to sanctions against their employer, and the ADF, it is alleged, was not supportive of sanctions being applied to employers.<sup>17</sup> It is also important to note that where a matter is retained in federal awards as an allowable matter, it will form part of the 'no disadvantage test' for any subsequent agreement. Put another way, if military leave was retained in awards it would be more difficult not to include it in any subsequent industrial agreements applying to the enterprise.

Michael O'Connor writing in *The Australian* in July 1997 criticised the Coalition Government for both authorising the doubling of the annual training days for the General Reserves while not improving means of protecting the General Reserve member's employment, nor improving relations (and compensation) with employers. O'Connor was also critical of the army's assumption that it could mobilise its Reserves in the event of a call-out.<sup>18</sup> Allan Shephard noted that section 118A of the *Defence Act* prohibits employer discrimination against reservists, 'but the penalties are inadequate'.<sup>19</sup> A comparison of existing and proposed prohibitions and sanctions is provided for in the concluding comments section of this Digest. The enhanced compensation scheme is discussed in the Digest for the Enhancement Bill.

## Main Provisions

**Proposed section 7** contains definitions relevant to the Bill. In particular a 'member' is a person who is or who has been a member of a part of the Reserves<sup>20</sup>. 'Defence service' is service and training in a part of the Reserves.<sup>21</sup>

**Proposed section 11** sets out in tabular form the types of protection given to the different types of reserve service.

**Proposed section 12** stipulates that civilian employment protection, partnership protection and education protection do not apply in relation to continuous full time service that a member voluntarily undertakes under subsection 32A(4) of the *Naval Defence Act 1910* (note that this should be subsection 32A(3)), subsection 50(3) of the *Defence Act 1903* or subsection 4J(3) of the *Air Force Act 1923* unless a service chief requested the service..

**Proposed section 13** stipulates that the parts of the Bill that provide financial liability protection, bankruptcy protection, and facilitate loans and guarantees will only apply to reservists who are called up for full-time service under the *Defence Act 1903*.

### Part 4 - Discrimination

**Proposed section 14** provides an overview of Part 4 and reinforces the general principle that it is unlawful for employers to discriminate against a reservist. Discrimination may be either a criminal or civil offence.

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**Proposed section 15** provides that an employer must not fail to employ another person because that person:

- may volunteer for the Reserves
- is in the Reserves, or
- has previously been in the Reserves.

Employment is defined broadly to include employment by the Commonwealth, a State or Territory body or authority, apprenticeships, traineeship arrangements and full-time, part-time and casual work (**proposed section 7**).

**Proposed section 16** provides that an employer must not:

- change the terms and conditions of employment of an employee to his or her detriment
- discriminate against an employee, or
- dismiss an employee.

on the grounds that the employee is or has previously been in the Reserves or may volunteer to join the Reserves.

**Proposed section 17** provides that an employer must not hinder or prevent an employee from volunteering to join the Reserves or from being a reservist.

An employer who breaches these sections is guilty of an offence, the maximum penalty for which is 30 penalty units (currently \$3300).<sup>22</sup> Note that under subsection 4B(3) of the *Crimes Act 1914* a body corporate convicted of an offence under these section may receive a penalty equal to five times this amount (ie \$16500).

Discrimination in other types of working arrangements is also prohibited. In particular discrimination against commission agents (**proposed sections 20-21**), contractors (**proposed sections 22-23**) and in partnership arrangements (**proposed sections 18-19**) is prohibited. Breach of these provisions is subject to the same maximum penalty of \$3300.

## Part 5 - Employment protection

Part 5 provides civilian employment protection for employees while undertaking service in the Reserves. However employment protection is not available for certain types of voluntary continuous full time service as set out in **proposed section 12 (proposed section 24)**.

**Proposed subsection 25(1)** stipulates that reservists are not required to take any of their civilian leave entitlements while absent on Defence service.

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According to **proposed section 26**, if a member was employed before starting reserve service, the contract is suspended and not terminated while he or she is absent with the Reserves. However the employer may terminate the contract if the reservist does not apply in writing to resume employment within 30 days of finishing reserve service (**proposed subsection 26(4)**).

After receiving an application for reinstatement, an employer must re-employ a reservist as soon as reasonably practicable in the same capacity and must ensure that the conditions of employment (including remuneration) are at least as favourable as what they were before reserve service (**proposed section 28**).

This obligation will not exist if:

- the reservist does not take up the work as agreed, or
- there are changed circumstances since the reservist was employed
  - and the employer no longer had the power to allow reinstatement, or
- the employer offered to employ the reservist in a capacity and under terms and conditions that were the most favourable that it was reasonably practicable to offer (**proposed subsection 28(2)**).

**Proposed section 27** also provides that if the contract is suspended the employee may apply for reinstatement under proposed section 28. If the contract was terminated in accordance with law while the reservist was absent, and another employer is carrying on the business in which the member was employed, the member may apply in writing to the new employer for reinstatement. **Proposed subsection 27(4)** provides that if an employee is reinstated in employment with a new employer, the employment contract under which the member was previously employed is transferred to the new employer.

**Division 4** relates to the effect of Defence service on particular entitlements of members. In particular **proposed subsection 30(2)** provides that the entitlements for the period of service with the Reserves must be at least the equivalent of leave without pay entitlements. In addition, the continuity of a member's employment is taken not to have been broken by his or her absence on reserve service.

**Proposed section 31** deals with other types of reserve service. If a member is reinstated in employment after doing reserve service other than continuous full time service, then the period of absence is taken to have been paid service and the continuity of the member's employment is not broken by his or her absence on reserve service. Similar conditions apply where the member is reinstated in employment with a new employer (**proposed subsection 31(3)**).

When an employer reinstates a reservist after any Defence service the employer must not terminate the reservist's employment or employ the member in conditions less favourable to their previous employment. These obligations will continue for either twelve months or

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for a period equal to the time of Defence service, which ever is the shorter (**proposed section 32(2)**).

These obligation can be waived on two grounds namely:

- misconduct of the reservist serious enough to justify termination or variation (**proposed subsection 32(4)**), or
- changed circumstances since the member resumed work so that it was not within the employer's power to retain the member in employment (**proposed subsection 32(3)**).

The employer of a reservist who is absent on Defence service is not required to do any of the following in respect of the period of service:

- pay remuneration or grant entitlements in respect of the employment
- meet the employer's obligations under workers' compensation law, and
- meet the employer's obligations under the *Superannuation Guarantee (Administration) Act 1992* in relation to the reservist (**proposed section 33**)

unless the employee would otherwise be entitled to them (eg the employee is on paid leave).

## **Part 6 – Partnership protection**

**Proposed Part 6** relates to partnership protection and protects reservists from having their partnerships dissolved while absent on reserve service or after they have completed their service for the lesser of 12 months or a period equal to their period of service. No reason is given as to why a person should be protected from such action after they have finished their service and it is possible that this could lead to hardship for other members of the partnership.

## **Part 7 – Education protection**

**Proposed Part 7** provides education protection. This applies in relation to all continuous full time reserve service except for certain kinds of voluntary service as set out in proposed section 12.

**Proposed section 38** states that Part 7 applies to members of the Reserves who are enrolled in a course at an Australian education institution during a period of service and do not complete the course before finishing reserve service.

If a reservist applies to re-enrol and to resume the course within 30 days of finishing the Defence service then the education institution must not exclude the reservist from the course or subject the member to any other disadvantage because of doing reserve service (**proposed subsection 39(1)**).

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The education institution must:

- allow the member to re-enrol and resume the course at an appropriate time, and
- ensure that the conditions on re-enrolment are at least as favourable as those that would have applied to a person who is not a reservist (**proposed subsection 39(2)**).

This obligation is waived where because of a change in the nature of the courses offered:

- it was not reasonable or practicable to allow the member to re-enrol or resume the course in which he or she was previously enrolled
- the education institution offered to enrol the member in another closely related course, and
- the conditions of resumption were the most favourable that it was reasonable or practicable to offer (**proposed subsection 39(3)**).

### **Part 8 - Financial Liability Protection.**

**Proposed subsection 40(1)** provides an overview of Part 8 and specifies that financial liability protection is only available to members doing continuous full time service as a result of a call out.

**Proposed subsection 40(2)** provides that a reservist may postpone payment of many types of debts that a reservist or his or her dependant would be liable to pay after commencing reserve service. The liability must have arisen before the member's call out day.

Debts are postponed for either:

- the period of time after reserve service equal to the length of the service, or
- 12 months beginning immediately after service, which ever is the shorter. (**proposed subsection 40(3)**).

Interest accrues on the postponed payment regardless of whether the reservist or the dependant had to pay interest on the original liability (**proposed subsection 40(4)**).

The types of liabilities on which payment can be postponed include:

- a secured or unsecured loan
- an agreement to buy something (including land)
- an agreement to lease something (including land)
- a guarantee
- a hire purchase agreement, (**proposed section 41**), and

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- rates (**proposed section 43**).

There is also a range of exceptions where payment of debts may not be postponed (**proposed sections 44-46**). These include situations such as:

- court orders made before call out
- bankruptcy
- death of the reservist, and
- where the reservist is acting as a trustee.

**Proposed sections 50 – 54** deal with the mechanics of rescheduling payments and the calculation of interest rates on rescheduled payments.

**Proposed subsection 55(1)** provides that while payments are postponed, all proceedings commenced to recover the debts before call out of the reservist are stayed. Remedies against the member or dependant are also stayed (**proposed subsection 55(3)**). However as soon as the period of postponement ceases, all stayed proceedings may be continued and all stayed remedies may be pursued (**proposed subsection 55(3)**).

**Proposed section 56** provides that a court may order that the provisions allowing a reservist to postpone the payment of debts will not apply. In making such an order the court must be satisfied that the postponement of payment would cause hardship or unreasonable loss to someone other than the reservist or dependant.

**Proposed subsection 61(1)** confirms that the right of a reservist or dependant to commence a proceeding or to enforce a right is not barred while payments of debts are postponed.

### **Proposed Part 9 - Bankruptcy Protection.**

**Proposed section 63** provides that bankruptcy proceedings against a reservist or dependants while the reservist is called out to do defence service are not allowed.

However bankruptcy proceedings can be instituted with leave of a court. In order to grant leave the court must be satisfied that, having regard to all the circumstances of the case, including the conduct and the financial situation of the reservist or dependant, and of the applicant, it would be inequitable to refuse to grant leave.

**Proposed section 64** specifies the orders the court may make where a court allows bankruptcy proceedings against a reservist on call out.

It is of note that the protection afforded to a dependant under Parts 8 and 9 will not apply to a same sex partner unless the partner was or becomes wholly or partly financially dependant on the reservist. The requirement for financial dependence does not apply to

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partners of the opposite sex. This is due to the definition of dependant contained in proposed section 7.

### **Part 10 - Loans and Guarantees**

This Part allows a reservist who has given Defence service after being called out, to get access to loans and guarantees to enable him or her to resume civilian life after returning from service.

**Proposed section 66** provides that a prescribed authority may make loans and give guarantees to enable a member to resume civilian life after call out. The amount of the loan or the guarantee must not be more than the prescribed amount (**proposed section 67**) and interest is payable on the loan at the rate prescribed by the Regulations (**proposed section 69**).

**Proposed section 70** prohibits a prescribed authority from making a guarantee or loan unless certain requirements are met. Amongst other things the authority must:

- approve the particular purpose for which the loan is made or the guarantee given
- be satisfied that the applicant is likely to repay the amount of the loan made or guaranteed within a reasonable period, and
- take into account the effect of the reservist's service on his or her capacity and opportunities to establish or re-establish himself or herself in civilian life without the loan or guarantee.

A decision to refuse to make a loan or give a guarantee is reviewable in the Administrative Appeals Tribunal (**proposed section 71**).

## **Concluding Comments**

### **Section 118A of the *Defence Act 1903***

It was noted that employment protection is currently afforded by s.118A of the *Defence Act 1903*. It helps to reflect upon this provision. Section 118A provides:

118A Employer not to prevent employee from serving

(1) An employer shall not prevent any employee and a parent or guardian shall not prevent any son or ward from rendering the personal service required of him under [Parts III](#) and [IV](#). Penalty: \$200.

(2) An employer shall not in any way penalize or prejudice in his employment any employee for rendering or being liable to render the personal service required of him under [Parts III](#) and [IV](#) or for voluntarily enlisting or attempting to enlist in any force

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raised under [section 35](#), either by reducing his wages or dismissing him from his employment or in any other way. Penalty: \$200.

(3) The rendering of the personal service or the enlistment referred to in this section shall not terminate a contract of employment, but the contract shall be suspended during the absence of the employee for the purposes referred to in this section; but nothing in this section shall render the employer liable to pay an employee for any time when he is absent from employment for the purposes referred to in this section.

(4) In any proceedings for an offence against this section it shall lie upon the employer to show that any employee proved to have been dismissed or to have been prejudiced or penalized in his employment or to have suffered a reduction of wages, was so dismissed penalized or prejudiced in his employment or reduced for some reason other than that of having rendered the personal service required of him under [Parts III](#) and [IV](#) or of having voluntarily enlisted or attempted to enlist in a force raised for active service, either within or without the limits of Australia.

(5) The Court may direct that the whole or any part of the penalty recovered from an employer for an offence against this section shall be paid to the employee.

(6) This section does not apply in relation to personal service required of a person under [Part III](#) if the person is a member, and the service is Defence service, within the meaning of Part II of the [Defence \(Re-establishment\) Act 1965](#).

It can be seen that this protection is limited to an employer-employee relation. In contrast, this Bill will protect the Reserve members in the following business arrangements:

- a broad protection against all forms of discrimination in respect of all kinds of defence service
- employment protection in respect of all kinds of defence service except for certain kinds of voluntary, continuous full-time service with the ADF. For example under proposed section 32 of the Bill an employer who allows an employee to resume work after service is not allowed to terminate that employee for a period equal to the employee's period of service. Under proposed section 22 protections are extended to ADF Reserves who conduct contracting businesses
- partnership protection in respect of all kinds of defence service (except for certain kinds of voluntary continuous full-time service with the ADF)
- education protection in respect of all kinds of defence service (except for certain kinds of voluntary continuous full-time service with the ADF)
- financial liability protection in respect of continuous full-time service following a callout
- bankruptcy protection in respect of continuous full-time service following a callout, and

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- protection against default on loans in respect of continuous full-time service following a callout.

As well a reservist can call on provisions of the Bill to require a person to comply with the Bill (ie, whose conduct would constitute an offence under the Bill), for example, by seeking an injunction against the person's proposed action.

### State awards and legislation

While key Commonwealth legislation will be amended by this Bill, it should be noted that State awards, agreements and legislation also address defence service leave. For example the NSW *Long Service Leave Act 1955* provides that where military service is required under a Commonwealth Act and the employee may be entitled to reinstatement to his/her former position under that Act, that service does not break the employee's service with the employer.

There is a certain irony in the Government's defence of its policy to simplify federal awards (removing military leave). It has argued that the award system did not work and individual workplaces should determine their own arrangements for military leave. Yet the combined affect of the two Bills will serve to act as a clout against employers who will not co-operate by releasing (and reinstating) employees. Further, the Bill offers protections in a variety of commercial situations far beyond an employer-employee relation, and thus beyond the matters which federal award provisions can address (both before and after award simplification). Protections against one partner in a business disadvantaging another because of that partner's ADF commitments, is an example. Parallels between the prohibitions against discriminatory conduct contained in this Bill are likely to be made with the prohibitions detailed in section 170CK of the *Workplace Relations Act 1996* and in other discrimination legislation (eg the *Sex Discrimination Act 1975*). It is suggested that the prohibitions and remedies provided for in this Bill are equal to, if not superior, to provisions in other legislation.

## Endnotes

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- 1 The Hon. Bruce Scott MP, 2<sup>nd</sup> Reading Speech: Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000, House of Representatives *Hansard*, 9 November 2000, p. 22565.
- 2 Department of Defence, *Annual Report 1999-2000*, p. 292. This number are Reserves 'with training' which means that they complete a minimum of 14 days military training each year.
- 3 Department of the Parliamentary Library, 'East Timor and Australia's Security Role: Issues and Scenario' *Current Issues Brief No. 3 1999-2000*, 21/9/99.
- 4 *ibid*, p. 12.

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- 5 Allan Shephard, *Trends in Australian Defence: A Resources Survey*, Australian Defence Studies Centre, 1999 p. 8.
- 6 *ibid.* p. 8.
- 7 *ibid.* p. 126.
- 8 Lt Gen John Coates and Dr Hugh Smith, *Review of the Ready Reserve Scheme*, University of New South Wales, Canberra 1995, p. viii.
- 9 *ibid.* p. 83.
- 10 CCH *Research Manual on Industrial Law* (electronic version), see under: Defence Force Service Leave.
- 11 *ibid.*
- 12 For example military leave was not a provision of the Metal Industry Award 1984 (simplified and retitled as the Metals Engineering and Associated Industries Award in 1998). Quoted by the Hon. Peter Reith MP on Radio 2GB, interview on 23/9/99.
- 13 The Vicgrain Limited, Administrative, Technical and Maintenance Employees Award, 1998. Print V0384. This award had been simplified to comply with the *Workplace Relations and Other Legislation Amendment Act 1996*, however the military leave provision appears to have been retained.
- 14 Reported on ABC, Radio National Breakfast 27/9/99. Report by Fiona Reynolds in which it was stated that Telstra employees who had signed individual contracts and who had been called up in their ADF Reserve capacity would receive full pay for their tour of duty while those who had not signed the contract would receive 14 days pay.
- 15 The Hon Peter Reith MP, Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 29/9/1999 *Hansard* p. 10943.
- 16 House of Representatives, *Hansard*, Matter of Public Importance: Defence Reserves, 11 May 1999, p. 5010.
- 17 See the reference to ADF Reserves by the Hon Arch Bevis MP in consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill, *Hansard*, 29/9/99, p. 10944.
- 18 Quoted in *Trends in Australian Defence: A Resources Survey*, Australian Defence Studies Centre, 1999, p. 112.
- 19 Allan Shephard, *Trends in Australian Defence: A Resources Survey*, Australian Defence Studies Centre, 1999, p. 112.
- 20 The terms 'member' and 'reservist' are used interchangeably in this Digest
- 21 The terms 'Defence service' and 'reserve service' are used interchangeably in this Digest.
- 22 See section 4AA of the *Crimes Act 1914*.

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