



## Defence Amendment Bill 2005

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## Defence Amendment Bill 2005

**Date Introduced:** 10 February 2005

**House:** House of Representatives

**Portfolio:** Defence

**Commencement:** Royal Assent

### Purpose

To amend the Defence Act to provide a regime for random testing of service personnel and certain defence civilians for prohibited substances.

### Background

In 1999, the *Defence Act 1903* was amended to establish a process for random urine testing of those members of the Defence Force (or 'ADF') participating in combat or combat related duties.<sup>1</sup> The relevant provisions are found in Part VIIIA of the Defence Act.

In brief, Part VIIIA provides for termination, discharge and other sanctions for ADF members who test positive for narcotic substances. The operation of the regime is contingent on the making of regulations. Although Part VIIIA of the Defence came into effect in March 2000, no regulations were ever made. Instead, the ADF relied on a 'command initiated program of drug testing.'<sup>2</sup> The procedures were set out in Instructions issued by each service chief.<sup>3</sup> Between February and September 2004:

... 7,637 [ADF] members were tested and only 110 of these tests returned confirmed positive test results.<sup>4</sup>

However, in September 2004 a Defence Force magistrate dismissed charges against an officer tested under the command initiated program. The magistrate held that there was no lawful authority for the command program because Part VIIIA constituted an exclusive code for urinalysis.<sup>5</sup> As a result of that case, the command initiated program was 'temporarily suspended whilst changes to part VIIIA [were] ... pursued ...'<sup>6</sup> The Defence Amendment Bill 2005 is the result.

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## Main Provisions

### Scope of new Part VIIIA

As stated above, the application of existing Part VIIIA is confined to urinalysis for narcotics use by Defence Force members who undertake ‘combat and combat-related duties’.<sup>7</sup> The amendments proposed by the Bill create a considerably expanded Part VIIIA. Testing will not be confined to urinalysis, nor to narcotic substances. Instead, it will encompass tests other than urine tests and extend beyond narcotics to other ‘prohibited substances’. Further, the testing regime will apply to ‘defence members’ irrespective of whether they are involved in combat and to ‘defence civilians’,<sup>8</sup> expressions defined in the *Defence Force Discipline Act 1982*.

A ‘defence member’ is a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or a member of the Reserves who is on full-time continuous service, on duty or in uniform.<sup>9</sup>

A ‘defence civilian’ is a person who accompanies the Defence Force outside Australia or on operations against the enemy and who, by consent, is subject to Defence Force discipline.<sup>10</sup>

### When will a defence member or defence civilian be required to undergo a prohibited substance test?

The effect of **new section 94** will be that a ‘defence member’ or ‘defence civilian’ may be required by an ‘authorised person’ to undergo a prohibited substance test or provide a sample for such a test. A number of definitions are relevant to **new section 94**:

- an ‘authorised person’ is a person with written authorisation from the Chief of the Defence Force (CDF), the Chief of Navy, the Chief of Army or the Chief of Air Force (**new section 93A**). CDF may delegate his power to issue **new section 93A** authorisations (see below)
- a ‘prohibited substance’ is a narcotic<sup>11</sup> or any other substance that is the subject of a determination by the CDF [**item 14** and **new subsection 93B(1)**]
- a ‘prohibited substance test’ is urinalysis, another test or a test determined by the CDF (**item 15**), and
- a ‘sample’ means human biological fluid or biological tissue or human breath (**item 17**).

The CDF’s determinations that a substance is a prohibited substance or that a test is a prohibited substance test are legislative instruments<sup>12</sup> and so, under the *Legislative Instruments Act 2003*, must be tabled in Parliament and are subject to disallowance.

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## How will prohibited substance testing be conducted?

If testing involves the provision of a sample, a person must first be given a written notice explaining how the sample will be dealt with under Defence Instructions (**new section 96**).

Testing must be supervised by an ‘authorised person’ and conducted in such a way as to afford ‘reasonable privacy to the person being tested.’ It must not be conducted in the presence of ‘unnecessary’ persons and must not involve the removal of more clothing or more visual inspection than is necessary (**new section 95**).

## What will happen if a test result is positive?

A ‘positive test result’ is a finding by an ‘accredited authority’<sup>13</sup> showing the presence of a prohibited substance or showing that a permitted level of a prohibited substance has been exceeded (**item 13**).

Neither the Defence Act as it currently stands nor the Bill provide that a positive test must result in a person being terminated or discharged. If the presence of a prohibited substance is ‘wholly attributable’ to medical treatment,<sup>14</sup> then the test result is disregarded.

Under existing section 99 of the Defence Act,<sup>15</sup> a positive test result which is not ‘disregarded’ is followed by a medical assessment of the ADF member’s fitness or suitability for further service.<sup>16</sup> A person who is assessed as unfit or unsuitable must be given written notice and asked to submit a written statement within a minimum of 28 days addressing why they should not be terminated or discharged (existing section 100).

In contrast, the Bill provides that if a person’s test returns a positive result and this result is not ‘disregarded’, they must be notified in writing. They then have at least 28 days<sup>17</sup> to submit reasons why they should not be terminated or discharged (**new section 100**). In other words, a medical assessment does not follow a positive test result. The test result in itself is enough to generate a written notice asking the person to show cause.

Additionally, existing section 100 specifies that the show cause period is suspended if the subject of the testing complains to the Defence Force Ombudsman. There is no similar requirement in **new section 100**.

At present, the Defence Act provides that a Defence Force member must be terminated or discharged if :

- they have not submitted a statement of reasons within the prescribed period, or
- their statement of reasons has been submitted and considered and the relevant authority concludes that they should be terminated or discharged.<sup>18</sup>

The Bill adds similar provisions for defence civilians (**item 27**).

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It is important to note that the Defence Act currently provides sanctions other than termination or discharge if an ADF member tests positive. The alternatives are warnings (section 104), reduction in rank (section 103) and administrative action (section 105).<sup>19</sup> The Bill amends the Defence Act to provide that warnings can also be given to defence civilians (**item 34**). A warning advises a person that if they again return a positive test result, they may be terminated, discharged or, in the case of ADF members, reduced in rank.<sup>20</sup> Under the Bill, an expanded range of administrative sanctions will apply for ADF members (**new section 110**).<sup>21</sup>

**New section 109** will enable Defence Instructions to provide details about who can be required to undergo testing, which laboratories are accredited, the conduct of prohibited substances tests, permitted levels of prohibited substances, procedures for the handling and analysis of samples, and the confidentiality of test results. **New subsection 109(2)** states that the Defence Instructions can provide that substantial rather than strict compliance with the Instructions is sufficient<sup>22</sup>—with the exception of procedures ensuring that a sample is not interfered with and procedures ensuring that a sample is securely contained and identified.

It is important to note that Defence Instructions are not legislative instruments and so need not be tabled in Parliament. Nor are they disallowable.<sup>23</sup>

## Offences

At present, it is an offence:

- for an ADF member to refuse or fail to provide a sample when required to do so under section 94 (maximum penalty—6 months imprisonment)<sup>24</sup>
- for an unauthorised person to interfere with a sample that has been provided under section 94 (maximum penalty—6 months imprisonment).<sup>25</sup>

The Bill extends the offence of refusing or failing to provide a sample to ‘defence civilians’ (**item 36**).

## Use of test results in proceedings under the Defence Force Discipline Act

The Defence Act currently provides that test results from a sample provided by an ADF member are not admissible as evidence in proceedings for an offence under the Defence Force Discipline Act or for certain related Crimes Act offences (section 108). Section 108 is amended by the Bill so that defence civilians are similarly immune (**item 38**).

The continued reference to most of the Crimes Act offences listed in section 108 may need to be rectified. Sections 7, 7A and 86 of the *Crimes Act 1914* were repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*. These

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offences (attempt, incitement and conspiracy) are now found in the Commonwealth Criminal Code.<sup>26</sup>

## Delegations

**Items 40-43** of the Bill deal with delegations.

The Governor-General is a ‘relevant authority’ under the Bill in relation to a defence member holding the rank of Major-General or above. As a ‘relevant authority’, the Governor-General can give such officers who return a positive test result a notice and show cause under **new section 100**, has the power to terminate or discharge such persons under **new section 101** and has the power to warn under **new section 104**. **New subsection 120A(3)** enables the Governor-General to delegate these powers to certain high-ranking officers in each of the armed services.

**New subsections 120A(3A) and (3B)** empower the Secretary and CDF to delegate their power to issue Defence Instructions (General) to specified high-ranking officers in each of the armed services or to an SES Band 2 officer in the Defence Department.

Under **new subsection 120A(3E)**, CDF’s power under **new section 93A** to determine that a person is an ‘authorised person’ for the purposes of prohibited substance testing can be delegated to an Army officer of Brigadier or higher rank, a Navy officer of Commodore or higher rank or an Air Force officer of Air Commodore or higher rank. As stated earlier, an ‘authorised person’ has significant authority under the proposed legislation. For instance, he or she can require a person to undergo a prohibited substance test, must supervise the conduct of such a test and must give a written notice to a person who is required to provide a sample.

## Concluding Comments

### Privacy and other matters

The issue of privacy was referred to during the Second Reading debates on the Bill in the House of Representatives. The Shadow Minister for Defence Planning and Personnel pointed out that privacy is particularly an issue for Reservists who test positive for a prohibited substance. Mr Bevis said assurances had been provided in a briefing to the Opposition that the Privacy Act will protect against disclosures to third parties, such as a Reservist’s civilian employer.<sup>27</sup> The Bill enables Defence Instructions to make provision for the confidentiality of information obtained from the testing process. And the Minister has said that non-compliance with Instructions may result in disciplinary action or other sanctions being taken against a person who breaches the confidentiality requirements.<sup>28</sup> However, the Bill does not provide penalties for unauthorised disclosures, unless they fall

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within the prohibition on interfering or ‘otherwise dealing’ with a sample.<sup>29</sup> Parliament may wish to consider whether additional penalties are required.

It does not appear that the Bill specifically gives a person who returns a positive test the right to have part of the sample sent to an accredited laboratory of their own choice for independent testing. Because of the potential ramifications of a positive test result, such as termination or dismissal, Parliament may wish to consider whether a person who returns a positive test should be given a statutory right along these lines.

Finally, the Bill replaces the current statutory requirement that the rules governing testing are contained in regulations subject to parliamentary scrutiny and disallowance to a command initiated scheme, which is not. Parliament may wish to consider the advantages and disadvantages of this change.

## Endnotes

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- 1 *Defence Legislation Amendment Act (No. 1) 1999.*
- 2 Minister for Veterans’ Affairs, Second Reading Speech, Defence Amendment Bill 2005, House of Representatives, *Debates*, 10 February 2005, p. 3. See Defence Instructions (Navy) Issue No. Pers 14/2003 ‘Illegal Use of Drugs and Drug Education in the Royal Australian Navy’; Defence Instructions (Army) Issue No Pers 6/2003 ‘Army’s Random and Targeted Urinalysis Drug Testing Program’, Defence Instructions (Air Force) Issue No Pers 12/2003 ‘Illicit drug testing in Air Force.’
- 3 In a Senate Committee hearing in August 2004, Lt General Leahy said he expected that a Defence Instruction (General) would be issued to provide ‘a common ADF testing regime based on the processes and procedures that Army, Navy and Air Force are implementing now.’ Foreign Affairs, Defence and Trade References Committee, *Committee Hansard*, 5 August 2004, p. FAD&T 44. However, these plans may have been overtaken by the case decided in September 2004.
- 4 Second Reading Speech, op. cit, p. 4.
- 5 See Mrs Danna Vale MP, House of Representatives, *Debates*, 16 February 2005, p. 8.
- 6 Second Reading Speech, op. cit. See also ‘Doubts raised on military’s random drugs testing’, *Sydney Morning Herald*, 8 December 2004; ‘Defence force strikes legal hitch on drug tests’, *The Age*, 20 December 2004.
- 7 The expressions ‘combat duties’ and ‘combat-related duties’ are presently defined in section 93 of the Defence Act. They mean duties requiring a person to commit acts of violence in the event of armed conflict or duties requiring a person to undergo training for such activities. These definitions are repealed by the Bill (see **items 8 and 9, Schedule 1**).
- 8 See **new section 91**.
- 9 Section 3, Defence Force Discipline Act.
- 10 See **item 10 of Schedule 1**, referring to section 3, Defence Force Discipline Act.

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- 11 The expression ‘narcotic substance’ is defined in section 93 of the Defence Act as having the same meaning as in the *Customs Act 1901*.
- 12 See **new section 93B**.
- 13 A laboratory, other body or a person specified in the Defence Instructions as an accredited authority—see **item 5**.
- 14 By a legally qualified medical practitioner. Subsection 98(2), Defence Act.
- 15 Section 99 is repealed by **item 24**.
- 16 One of the purposes of section 99 of the Defence Act appears to have been that if a person was assessed under that section as being fit/suitable for further service or unfit/unsuitable for further service but was able to show that he or she should be retained, a reduction in rank rather than termination or dismissal might follow. Explanatory Memorandum, Defence Legislation Amendment Bill (No. 1) 1999, p. 5.
- 17 Depending on what period is specified [**new subsection 100(2)**].
- 18 Section 101, Defence Act.
- 19 A defence member or defence civilian may also be charged with dealing in or possession of narcotic goods under section 59 of the Defence Force Discipline Act. Other offences under that Act may also be relevant eg driving a service vehicle while under the influence of intoxicating liquor or a drug (section 40) and conduct likely to prejudice the discipline of, or bring discredit to, the Defence Force (section 60).
- 20 The purpose of the warning system, as explained in the Explanatory Memorandum for the Defence Legislation Amendment Bill (No. 1) 1999 was to place the member who returned a positive test result on a regular follow-up testing regime. See p. 6.
- 21 The Explanatory Memorandum explains that existing section 105 is replaced with **new section 110** to clarify that ‘it applies to Part VIIIA in its entirety and that nothing in that Part precludes defence members who refuse to undergo prohibited substance testing or who return a positive test result, from being subject to the full range of administrative action that may be taken against any defence member.’ Explanatory Memorandum, p. 5.
- 22 There is a similar provision in the current Part VIIIA relating to regulations (section 97, repealed by **item 21**).
- 23 See item 8 of the table in section 7, Legislative Instruments Act.
- 24 Section 106, Defence Act.
- 25 Section 107, Defence Act.
- 26 Sections 11.1, 11.4 and 11.5, Criminal Code.
- 27 If such information was passed on a Reservist could face difficulties with their civilian employers as well as being subject to action under the Defence Act. See House of Representatives, *Debates*, 16 February 2005, p. 6.
- 28 *ibid*, p. 9.
- 29 Paragraph 107(1)(aa), Defence Act.

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