SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2001

7 March 2001

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2001

The Committee presents its Third Report of 2001 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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

Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 17 of 2000*, in which it made various comments. The Minister assisting the Minister for Defence responded to those comments in a letter dated 5 December 2000.

In its *Second Report of 2001*, the Committee sought further advice from the Minister in relation to commencement and non-reviewable discretion provisions. The Minister has further responded in a letter received on 7 March 2001. A copy of the letter is attached to this report. An extract from the *Second Report of 2001* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 17 of 2000

This bill was introduced into the House of Representatives on 9 November 2000 by the Minister for Veterans' Affairs. [Portfolio responsibility: Defence]

Introduced with the Defence Reserve Service (Protection) Bill 2000, the bill amends the *Defence Act 1903* and other legislation as follows:

Schedule 1 to the bill proposes to amend the *Defence Act 1903* to repeal sections 50D, 50E, 50F and 50G, and substitute new provisions to enable the call out of members of the Reserve Forces in circumstances less than in the defence of Australia.

Schedule 2 proposes amendments to the *Defence Act 1903* and 17 other Acts to modernise the organisation and structure of the Defence Force Reserve. The Schedule also contains saving and transitional provisions.

Schedule 3 repeals the *Defence (Re-establishment) Act 1965*, makes consequential amendments to the *Defence Act 1903* and the *Disability Services Act 1986*, and contains application and transitional provisions.

Schedule 4 proposes to expand the allowances and benefits for employers to better compensate them for the effects of Reservists undertaking defence duties, and makes other consequential amendments.

Commencement
Subclause 2(3)

Subclause 2(3) of this bill provides that many of the amendments proposed in Schedule 2 are to commence on Proclamation or 12 months after Assent – whichever is the earlier.

This is a departure from the practice set out in *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. This provides that, as a general rule, where a clause provides for commencement after assent, the preferred period should not be longer than 6 months. The *Drafting Instruction* goes on to state that, where a longer period is chosen "Departments should explain the reason for this in the Explanatory Memorandum".

The Explanatory Memorandum accompanying this bill provides no explanation for the adoption of a longer period for the commencement of the relevant provisions in Schedule 2. The Committee, therefore, **seeks the Minister's advice** as to why these provisions may not commence until 12 months after Assent.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister dated 5 December 2000

The Committee was concerned by an apparent departure from drafting practice that, where a clause provides for commencement after Royal Assent, the preferred period should be no longer than 6 months. Subsection 2(2) of the Bill provides that Items 12 to 15, 19, 27 to 31, 67, 68 and 75 to 77 commence on a day or days to be fixed by Proclamation. Subsection 2(3) goes onto provide that if anyone of these provisions do not commence under subsection (2) within the period of 12 months from the day of Royal Assent, they will commence on the first day after the end of that period of 12 months.

Item 19, contained in Schedule 2 of the Bill, amends Division 2 of the *Defence Act 1903*. Sections 33 to 44A of that Act mentioned in this Item will be repealed. These provisions provide for the enlistment, discharge and transfer of soldiers. As part of the Government's initiative to modernise the organisation and structure of the Defence Force, these provisions will be transferred into Defence Regulations. This ensures that matters relating to the administration of the Defence Force can be more appropriately prescribed in regulations (where appropriate) rather than in primary legislation. This is already the case in relation to the Air Force, contained in the *Air Force Regulations 1927*.

Item 67 of the Bill will repeal Part II of the *Naval Defence Act 1910* which sets out the regime for the enlistment, discharge and transfer of sailors. These provisions are also being transferred into Regulations for the same reasons mentioned above.

The other Items mentioned are consequential in these two Parts.

The Regulations referred to above are in the process of being developed. Given that this process will take some time, it was considered appropriate to extend the commencement period to ensure sufficient time to properly develop these regulations.

The Committee thanks the Minister for this response which indicates that a 12 month commencement period is required to enable the development of regulations. The Committee notes that a 6 month period is traditionally regarded as sufficient for this purpose, and is the period usually required by most Departments.

In the case of this bill, it seems that provisions are simply being "transferred" from primary to subordinate legislation, as has already occurred in relation to the Air Force. The development of regulations in these circumstances would seem to be straightforward, and requiring 12 months to finalise them to be excessive. The Committee, therefore, **seeks the Minister's further advice** as to why the development of these regulations requires twice as much time as is usual. Pending the Minister's further advice, the Committee continues to draw Senators' attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference

Relevant extract from the further response from the Minister received 7 March 2001

I refer to the Committee's Second Report of 28 February 2001 in which it highlights certain aspects of the Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000 (the Modernisation Bill). In particular, the Committee seeks clarification of the commencement provisions and the availability of the *Administrative Decisions (Judicial Review) Act 1977* in relation to an order of the Governor-General under proposed section 50D of the Modernisation Bill.

As the Committee notes, the *Air Force Regulations 1923* already contain the provisions relating to the enlistment, discharge, transfer, etc. of airmen and airwomen, making such administration of such matters more convenient. On the other hand, the provisions relevant to soldiers and sailors are currently contained in the *Defence Act 1903* and the *Naval Defence Act 1910* respectively. Proposed amendments to these provisions are time consuming and cumbersome. As you are aware, this is why it is intended that these provisions will be "transferred" to subordinate legislation.

As I mentioned in my previous response to the Committee's concerns, the Regulations are in the process of being developed. Unfortunately it is not a merely a matter of transferring the provisions from the primary to the subordinate legislation. The relevant provisions will need to be reviewed and re-drafted to adopt current drafting practices. Given the competing priorities within the Defence portfolio, the officers responsible are endeavouring to develop this project (and the development and drafting of the Employer Support Payment Determination, also required under the legislation) in addition to securing the successful passage of the primary legislation. I am committed to completing this package of initiatives to enable the commencement of this comprehensive scheme to enhance and modernise the Defence Force. I would regret the Committee's decision to characterise the commencement provisions as being an inappropriate delegation of legislative power in breach of Principle 1(a)(iv) of its Terms of Reference.

The Committee thanks the Minister for this further response, which indicates that the provisions are to be extensively reviewed and redrafted rather than simply "transferred" to the regulations.

The Committee notes the Minister's regret at any Committee decision "to characterise the commencement provisions as being an inappropriate delegation of legislative power". This comment by a Minister is unusual. The Committee is governed by its Terms of Reference as set out in the Senate Standing Orders. It simply applies those Terms of Reference to proposed legislation, and alerts the Senate when a provision seems to be in conflict with those Terms of Reference. The Committee does not characterise provisions as inappropriate in the absolute sense inferred by the Minister. It is its duty to advise the Senate when a provision seems to conflict with those Terms of Reference.

Non-reviewable discretion
Schedule 1, item 1

Among other things, item 1 of Schedule 1 to this bill proposes to insert a new section 50D in the *Defence Act 1903*. This new section authorises the Governor-General to call out the Reserves, or a part of the Reserves, for continuous full time service. Some examples of circumstances which may give rise to such a call out are set out in proposed new subclause 50D(2) – these include (but are not limited to) war, defence, emergency, defence preparation, peacekeeping or peace enforcement, civil aid, humanitarian assistance or disaster relief.

Proposed new subclause 50D(3) provides that, in making or revoking a call out, the Governor-General must act with the advice of the Executive Council. However if, after the Minister has consulted the Prime Minister, the Minister is satisfied that, for reasons of urgency, the Governor-General should act on his or her advice alone, then the Governor-General must call out the troops on the advice of the Minister alone.

The exercise of either of these discretions is not subject to any form of review, other than the general accountability of the Executive Council to the Parliament, and where the Reserves are called out on the advice of the Minister alone, not even this level of accountability exists. The Committee, therefore, **seeks the Minister's advice** as to why the bill provides no scope for review of the exercise of these discretions.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister dated 5 December 2000

In relation to the second area of concern regarding non-reviewable exercise of discretion, it is not standard practice in legislation to include provisions that provide for review of Ministerial decisions. Of course, there are exceptions to this, for example under the *Social Security Act 1991* or the *Migration Act 1958* where the respective Ministers make many decisions that affect individual rights and liberties. Where there are no such provisions, the general law, including relief under the *Administrative Decisions (Judicial Review) Act 1977,* applies and furthermore under section 75 of the Constitution, which provides for the original jurisdiction of the High Court in relation to which a writ of mandamus or prohibition or an injunction may be sought against an "officer of the Commonwealth".

Given the circumstances in which a potential challenge to the exercise of the discretion would be exceptionally rare, it was not considered necessary to include separate review provisions in this Bill.

I hope that the above explanation of the matters of concern to the Committee has been of assistance. If you wish, I would be happy to arrange for Defence officials to give the Committee a private briefing on the legislation.

The Committee thanks the Minister for this response. The Committee would **appreciate the Minister's confirmation** that decisions under proposed new section 50D are subject to the *Administrative Decisions (Judicial Review) Act 1977*.

Relevant extract from the further response from the Minister received 7 March 2001

In relation to the Committee's concerns regarding the non-reviewable exercise of discretion, I reiterate my advice contained in my previous response. The *Administrative Decisions (Judicial Review) Act 1977* is available to an aggrieved person in certain circumstances. As the Committee is aware, a decision to which the *Administrative Decision (Judicial Review) Act 1977* applies is a decision of an administrative character made under an enactment, but specifically excludes a decision of the Governor-General or a decision taken under any of the classes of decisions listed in Schedule 1 of the Act. (These are not relevant for the present purposes).

A decision to call out the Reserves is not one that will be taken lightly or frequently. The decision to call out effectively transforms the Reservist into a Regular and he or she is therefore liable to render such periods of full time military service as required. The decision to call out is an Executive one and is not regarded as being subject to appeal. Given the circumstances in which a potential challenge to the exercise of the discretion would be rare, it is not considered necessary to include a separate review provisions in this Bill. Of course, a member may make representations to the Commanding Officer of his or her unit and seek consideration of extenuating circumstances.

The Commanding Officer may accept these and allow a period of leave of absence (or may not). A member, if unsatisfied with the decision of the superior officer, may seek further consideration of the case under the usual Defence Force administrative processes. However, the member is still, theoretically subject to the call out and therefore liable to render the required service. It is hoped that in the majority of cases, negotiation and commonsense will prevail. However a call out would only be invoked because the ADF actually requires the capability.

I trust that the above clarification has been of assistance to the Committee and will avert any further action. Let me take this opportunity to thank the Committee for its efforts in the review and scrutiny of Commonwealth legislation and highlighting matters of concern.

The Committee thanks the Minister for this further response.

Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2001*, in which it made various comments. The Acting Minister for Finance and Administration has responded to those comments in a letter dated 28 February 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 2001

This bill was introduced into the House of Representatives on 7 December 2000 by the Parliamentary Secretary to the Minister representing the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to amend the *Parliamentary Contributory Superannuation Act 1948*, *Superannuation Act 1976* and *Superannuation Act 1990* to allow former members of the Parliamentary Contributory Superannuation Scheme (PCSS) or the Commonwealth Superannuation Scheme (CSS) or their reversionary beneficiaries to commute all or part of their pension to a lump sum to meet their post-retirement superannuation surcharge assessment; and to facilitate introduction of similar arrangements for the Public Sector Superannuation Scheme (PSS).

The bill also proposes the provision of a special appropriation for payments by the Parliamentary Retiring Allowances Trust of superannuation surcharge assessments in respect of a member before the member ceases scheme membership.

Retrospective application
Schedule 1, items 29 and 30; Schedule 2, items 7 and 8

Items 29 and 30 in Schedule 1 to the bill provide that nominated sections of the *Parliamentary Contributory Superannuation Act 1948*, as amended by Schedule 1, apply in relation to an assessment or a death, whether this occurs before, at, or after the commencement of each item. Items 7 and 8 in Schedule 2 to the bill make similar provision in relation to nominated sections in the *Superannuation Act 1976*.

In each case, the amendments may apply to matters which occurred before the bill receives Assent. Unfortunately, the Explanatory Memorandum does not indicate the reason for this apparent retrospective application. The Committee, therefore, **seeks the Minister's advice** as to why these provisions operate retrospectively.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Acting Minister

The Committee has interpreted these provisions as applying retrospectively to a date before the commencement of the proposed provisions at the time the Bill receives Royal Assent.

The Bill proposes to allow former members of the Parliamentary Contributory Superannuation Scheme (PCSS) and the Commonwealth Superannuation Scheme (CSS), or their reversionary beneficiaries, to commute their scheme pensions to a lump sum to pay surcharge assessments issued after the member either leaves the scheme or dies.

The provisions of the Bill which provide this commutation option, including items 29 and 30 in Schedule 1 and items 7 and 8 in Schedule 2, are intended to be beneficial. In addition to future cases the Bill is intended to apply, through those items, to individuals, who have been issued surcharge assessments by the Australian Taxation Office (ATO) before Royal Assent and to reversionary beneficiaries of a deceased scheme member or former member where the death occurred before Royal Assent. Any individual in these circumstances who takes advantage of this option will not be able to make an election that has effect before the date of Royal Assent to the Bill. When a person makes such an election, the person's pension will be reduced with effect from the day of the election to recover the commutation amount paid to the ATO to discharge the person's surcharge assessment.

These provisions could assist individuals who have difficulty in meeting their post-retirement surcharge assessments. They will be able (if they wish) to utilise the commutation option in order to discharge their assessments through a reduction in their annual pension. Those who do not wish to utilise this option will have their superannuation entitlements unaffected. In these circumstances I consider that it is appropriate that the provisions of the Bill apply as widely as possible to former scheme members and their eligible dependants.

Scheme pensions are already reduced at the time a member leaves the scheme to take account of all unpaid surcharge assessments issued before that time, therefore, the availability of the proposed commutation option to discharge unpaid surcharge assessments issued after a member leaves the scheme would be in line with those current arrangements.

I hope this information is of assistance to the Committee.

The Committee thanks the Acting Minister for this response.

Barney Cooney
Chairman

MINISTER FOR VETERANS' AFFAIRS
MINISTER ASSISTING THE MINISTER FOR DEFENCE

PARLIAMENT HOUSE
CANBERRA ACT 2600

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7 MAR 2001
Senate Standing C'ttee
for the Scrutiny of Bills

Senator Barney Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney,

I refer to the Committee's Second Report of 28 February 2001 in which it highlights certain aspects of the Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Bill 2000 (the Modernisation Bill). In particular, the Committee seeks clarification of the commencement provisions and the availability of the *Administrative Decisions (Judicial Review) Act 1977* in relation to an order of the Governor-General under proposed section 50D of the Modernisation Bill.

As the Committee notes, the *Air Force Regulations 1923* already contain the provisions relating to the enlistment, discharge, transfer, etc. of airmen and airwomen, making such administration of such matters more convenient. On the other hand, the provisions relevant to soldiers and sailors are currently contained in the *Defence Act 1903* and the *Naval Defence Act 1910* respectively. Proposed amendments to these provisions are time consuming and cumbersome. As you are aware, this is why it is intended that these provisions will be "transferred" to subordinate legislation.

As I mentioned in my previous response to the Committee's concerns, the Regulations are in the process of being developed. Unfortunately it is not a merely a matter of transferring the provisions from the primary to the subordinate legislation. The relevant provisions will need to be reviewed and re-drafted to adopt current drafting practices. Given the competing priorities within the Defence portfolio, the officers responsible are endeavouring to develop this project (and the development and drafting of the Employer Support Payment Determination, also required under the legislation) in addition to securing the successful passage of the primary legislation. I am committed to completing this package of initiatives to enable the commencement of this comprehensive scheme to enhance and modernise the Defence Force. I would regret the Committee's decision to characterise the commencement provisions as being an inappropriate delegation of legislative power in breach of Principle 1(a)(iv) of its Terms of Reference.

In relation to the Committee's concerns regarding the non-reviewable exercise of discretion, I reiterate my advice contained in my previous response. The *Administrative Decisions (Judicial Review) Act 1977* is available to an aggrieved person in certain circumstances. As the Committee is aware, a decision to which the *Administrative Decision (Judicial Review) Act 1977* applies is a decision of an administrative character made under an enactment, but specifically excludes a decision of the Governor-General

or a decision taken under any of the classes of decisions listed in Schedule 1 of the Act. (These are not relevant for the present purposes).

A decision to call out the Reserves is not one that will be taken lightly or frequently. The decision to call out effectively transforms the Reservist into a Regular and he or she is therefore liable to render such periods of full time military service as required. The decision to call out is an Executive one and is not regarded as being subject to appeal. Given the circumstances in which a potential challenge to the exercise of the discretion would be rare, it is not considered necessary to include a separate review provisions in this Bill. Of course, a member may make representations to the Commanding Officer of his or her unit and seek consideration of extenuating circumstances.

The Commanding Officer may accept these and allow a period of leave of absence (or may not). A member, if unsatisfied with the decision of the superior officer, may seek further consideration of the case under the usual Defence Force administrative processes. However, the member is still, theoretically subject to the call out and therefore liable to render the required service. It is hoped that in the majority of cases, negotiation and commonsense will prevail. However a call out would only be invoked because the ADF actually requires the capability.

I trust that the above clarification has been of assistance to the Committee and will avert any further action. Let me take this opportunity to thank the Committee for its efforts in the review and scrutiny of Commonwealth legislation and highlighting matters of concern.

BRUCE SCOTT

ACTING MINISTER FOR FINANCE AND ADMINISTRATION

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

28 FEB 2001

Dear Senator Cooney

I am writing to respond to a request by the Senate Standing Committee for the Scrutiny of Bills on 8 February 2001 for advice relating to Items 29 and 30 in Schedule 1 and Items 7 and 8 in Schedule 2 of the *Superannuation Legislation Amendment (Post-retirement Commutations) Bill 2000* (the Bill). The Committee has interpreted these provisions as applying retrospectively to a date before the commencement of the proposed provisions at the time the Bill receives Royal Assent.

The Bill proposes to allow former members of the Parliamentary Contributory Superannuation Scheme (PCSS) and the Commonwealth Superannuation Scheme (CSS), or their reversionary beneficiaries, to commute their scheme pensions to a lump sum to pay surcharge assessments issued after the member either leaves the scheme or dies.

The provisions of the Bill which provide this commutation option, including items 29 and 30 in Schedule 1 and items 7 and 8 in Schedule 2, are intended to be beneficial. In addition to future cases the Bill is intended to apply, through those items, to individuals, who have been issued surcharge assessments by the Australian Taxation Office (ATO) before Royal Assent and to reversionary beneficiaries of a deceased scheme member or former member where the death occurred before Royal Assent. Any individual in these circumstances who takes advantage of this option will not be able to make an election that has effect before the date of Royal Assent to the Bill. When a person makes such an election, the person's pension will be reduced with effect from the day of the election to recover the commutation amount paid to the ATO to discharge the person's surcharge assessment.

These provisions could assist individuals who have difficulty in meeting their post-retirement surcharge assessments. They will be able (if they wish) to utilise the commutation option in order to discharge their assessments through a reduction in their annual pension. Those who do not wish to utilise this option will have their superannuation entitlements unaffected. In these circumstances I consider that it is

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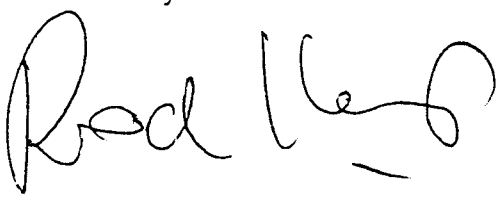
appropriate that the provisions of the Bill apply as widely as possible to former scheme members and their eligible dependants.

Scheme pensions are already reduced at the time a member leaves the scheme to take account of all unpaid surcharge assessments issued before that time. Therefore, the availability of the proposed commutation option to discharge unpaid surcharge assessments issued after a member leaves the scheme would be in line with those current arrangements.

I hope this information is of assistance to the Committee.

Yours sincerely



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