Defence Legislation Amendment (First Principles) Bill 2015

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Date introduced: 14 October 2015
House: Senate
Portfolio: Defence
Commencement: Sections 1–4 commence on Royal Assent. Schedules 1–3 commence on 1 July 2016 once Schedule 2 of the Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015 commences.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Purpose of the Bill
The purpose of the Defence Legislation Amendment (First Principles) Bill 2015 (the Bill) is to amend the Defence Act 1903 to:

• recognise the Australian Defence Force (ADF) as an entity
• formally articulate the authority of the Chief of the Defence force (CDF) and the role of the Vice Chief of the Defence Force (VCDF) as CDF’s deputy
• remove the statutory authority of the Service Chiefs in order to clarify the command and authority of the CDF
• clarify the status of the ADF Cadets and
• recognise the role of ADF Reserves.

Structure of the Bill
The Bill consists of three Schedules:

• Schedule 1 amends the Defence Act
• Schedule 2 makes consequential amendments to 27 other acts and
• Schedule 3 repeals the Air Force Act 1923 and the Naval Defence Act 1910.

Background
This Bill aims to implement certain aspects of the recommendations from the First Principles Review of Defence (the Review). The Review was the fulfilment of a commitment made by the Coalition during the lead up to the 2013 Federal election to ‘undertake a first-principles review of the departmental structure and its major processes’. The Minister for Defence announced the composition of the panel appointed to carry out the review on 5 August 2014 and, while doing so, stated that the review would:

...make recommendations designed to ensure Defence’s business structures support the Australian Defence Force’s principal task out to 2030.

As such, the Review team were given very broad Terms of Reference which, in addition to the structure of the Department of Defence (the Department) and the ADF, also included the adequacy of materiel acquisition and sustainment practice and improving the ‘efficiency and effectiveness of Defence’.

When it was released by the Minister for Defence on 1 April 2015, the Review made 76 recommendations. The Government accepted all but one of the recommendations. The review contains extensive discussion and analysis of Defence’s current structure and the extent to which that structure adequately facilitates Defence’s management of its core business. The majority of recommendations relate to matters of internal structure and practice and implementation of most of them, including the reintegration of the Defence Materiel Organisation (DMO) back into the Department as a part of the new Capability Acquisition and Sustainment Group, does not require legislative change. Therefore, the majority of the recommendations are not covered by the Bill.

The Bill seeks to implement a range of recommendations derived from the first part of the Review, being to ‘establish a strong strategic centre to strengthen accountability and top-level decision-making’. In so doing the

4. T Abbott (Leader of the Opposition), D Johnson (Shadow Minister for Defence), The Coalition’s policy for stronger defence, media release, 2 September 2013, accessed 3 November 2015.
7. Ibid., p. 9.
Bill also seeks to ensure that aspects of the law governing Defence are modernised and, in fact, reflect the modern Defence Force.

It is also worth noting that the First Principles Review recommended the retention of the Defence diarchy in which the Secretary of the Department of Defence and the Chief of the Defence Force hold equal status at the top of the Defence structure. The diarchy has sometimes been criticised for its potential to compromise clear accountability but the Review team considered that it is a valid recognition of the dual nature of Defence and also noted that ‘it promotes contestability of the advice given to Government which is required given Defence’s two key outputs of joint warfighting and policy advice’.

**Committee consideration**

**Senate Selection of Bills Committee**

On 15 October 2015, the Senate Selection of Bills Committee determined that it would defer consideration of the Bill until its next meeting.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills had not considered the Bill at the time of publication of this Bills Digest.

**Policy position of non-government parties/independents**

At the time of publication of this Bills Digest there has been no publicly reported reaction to the Bill.

**Position of major interest groups**

Similarly, there has been no public reaction to the Bill from major interest groups. Reaction to the release of the Review itself was generally positive with a number of commentators expressing the view that the review, if implemented, would improve the operation of the Department and the ADF. The Australian Defence Association’s Neil James was, however, critical of some aspects of the Review’s Terms of Reference. James is quoted as saying that the Review:

> while ‘very good in parts’, was a “lost opportunity”. There is no doubt defence can be better managed and many of the recommendations will assist but the terms of reference were framed such that it finished up being a review of the department rather than looking crucially at how defence deals with government. Defence is simply too big and too complex to be under the purview of just one senior minister.

The Australian Strategic Policy Institute’s (ASPI) published analysis of the Review was positive, describing it as ‘sensible, serious and purposeful’. In addition to general discussion, the ASPI report contains a recommendation by recommendation analysis of the Review.

**Financial implications**

The Bill has no apparent financial implications.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Bill amends subsection 23(2) of the Defence Act to allow the CDF to issue a determination permitting flexible service arrangements. While the capacity to provide flexible working arrangements is not new to Defence,
improved access to flexible work arrangement was the subject of a number of recommendations contained in the Australian Human Rights Commission’s *Review into the treatment of women in the Australian Defence Force*. 17 See Key issues and provisions for more.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights had not reported on the Bill at the time of publication of this Bills Digest.

**Key issues and provisions**

Key issues with their related provisions are discussed below. For the remaining provisions the reader is advised to consult the Explanatory Memorandum which provides an adequate overview.

**Control and administration of the ADF**

Item 7 of the Bill repeals and replaces Parts II and III of the *Defence Act*. Within the new Part II—Control and Administration, proposed sections 8 and 9 of the *Defence Act* clarify that the Minister has general control and administration of the Defence Force and that the command structure of the ADF is as follows:

• the CDF will have full command of the Defence Force
• the Vice Chief of the Defence Force is granted command authority under direction of the CDF
• the Service Chiefs will be explicitly subject to direction by the CDF and
• various references to the three service chiefs are removed from Part II of the *Defence Act* having the effect of removing their statutory authority to take action not delegated to them by the CDF. Consequentially, the Bill repeals the *Naval Defence Act* and the *Air Force Act*.

Proposed section 10 of the *Defence Act* retains the diarchy with the CDF and the Secretary having joint responsibility for the administration of the Defence Force under the general authority of the Minister for Defence. The VCDF is also included in the new section and reference to the Service Chiefs and to service specific Defence Instructions is removed.

The Explanatory Memorandum notes that regulations will provide for the appointment of the Service Chiefs. 18

Proposed section 11 permits the CDF and Secretary to issue *Defence Instructions*. 19

None of this affects the existing power in section 120A of the *Defence Act* for the CDF and the Secretary to delegate authority in the usual way.

**Constitution of the ADF**

Within the new Part III—The Australian Defence Force of the *Defence Act*, proposed section 23 more fully incorporates the Royal Australian Navy and Royal Australian Air Force within the *Defence Act*’s definition of the ADF, 20 including specific reference to their respective Chiefs, 21 permanent 22 and reserve elements. 23 The service and training of reserves of the Navy, Army and Air Force are set out in proposed sections 24–26. New Division 3 of Part III of the *Defence Act* specifically provides for calling out of ADF Reserve elements. 24

Item 22 of the Bill repeals and replaces Part V of the *Defence Act*. Under the new Part V—Australian Defence Force Cadets, the Cadets of each of the three arms of the Defence Force are defined. 25 Proposed section 62A of the *Defence Act* provides that the Chief of the Defence Force is to direct and administer the Cadets and that in

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19. Proposed subsection 11(3) states that a *Defence Instruction* may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.
22. *Defence Act*, proposed subsections 18(2), 19(2) and 20(2).
23. *Defence Act*, proposed subsections 18(3), 19(3) and 20(3).
doing so the Chief of the Defence Force must comply with any directions of the Minister. Importantly, proposed section 62C reaffirms the understanding that neither Cadets nor anyone involved in the cadet program is inherently a member of the ADF by virtue of that involvement. Consistent with this distinction, the Bill provides that the CDF may make determinations by legislative instrument for the payment of allowances and benefits to cadets and their families. This is different from the existing arrangement under which such payments are made by Ministerial determination in accordance with section 588 of the Defence Act.

Proposed section 27 incorporates into the Defence Act provisions previously in the Defence (Personnel) Regulations 2002 which state that an ADF member’s service does not create a civil contract with the Crown or the Commonwealth. Essentially, members of the Defence Force are not employees. Rather, military service, once entered into, is an obligation to the Crown. This has been the position since feudal times and it means that the status of members of the Defence Force is subject to defence law. This principle was upheld recently in the case of C v Commonwealth of Australia in which the Full Court of the Federal Court rejected the argument of the plaintiff that he should be subject to the terms of the Fair Work Act 2009 and that the definition of employer in that Act extended to Crown in relation to Defence Force members.

Flexible service determinations

The ADF has previously advocated for more flexible working arrangements for its personnel through the ‘Project SUAKIN’ reforms. This aims to support ADF personnel maintain their required continuous service through allowing approved part-time service for full-time personnel. Flexible service arrangements were also specifically highlighted in the Australian Human Rights Commission 2012 Review into the treatment of women in the Australian Defence Force, which noted that ‘flexible working arrangements are an essential retention tool’ and that ‘it is critical that the availability of flexible working arrangements in the permanent ADF be increased’.

The Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015 provides for flexible service arrangements within the Defence Act 1903, Air Force Act 1923 and Naval Defence Act 1910, with effect from 1 July 2016. However, with the repeal of the Air Force Act and the Naval Defence Act, this Bill incorporates flexible service arrangements across the ADF, with the CDF able to make (or appropriately delegate) flexible service determinations.

According to the Explanatory Memorandum to the Defence Legislation Amendment (Superannuation and ADF Cover) Bill 2015 ‘it is not necessary to provide similar arrangements for members of the Reserves who already have access to flexible service through the use of Reserve service days (in lieu of undertaking continuous full-time service)’. This is consistent with the terms of proposed section 26 which provides that a member of the Reserves may volunteer to render a period of continuous full time service or a period of service other than full time service.

Other provisions

New Division 3 of Part III of the Defence Act (Calling out the Reserves) is in effect the same as the current Division 4 of Part III, which is to say that there are no changes to the call out provisions. Proposed section 29, which deals with the period of service during call out, reflects the changes to command and administration discussed in the Key Issues section in that it removes reference to the Service Chiefs.

The Review was critical of the fact that Defence has a number of geospatial intelligence functions. It noted the administrative inefficiency of this and that a more coordinated and better resourced function would better

26. Defence Act, proposed section 62B.
improve support to the ADF.\textsuperscript{35} To this end, the Bill amends the *Navigation Act 2012* to position the Australian Hydrographic Service within the Department of Defence, as opposed to the Australian Navy.\textsuperscript{36}

**Concluding comments**

In substance the Bill updates the *Defence Act* to clarify the control and administration of Defence in line with the First Principles Review’s first principle, which is that Defence should have ‘clear authorities and accountabilities that align with resources’.\textsuperscript{37} In doing so it seeks to ensure that the *Defence Act* is brought up to date with the way that Defence is actually controlled and administered in the present.

\textsuperscript{35} D Peever, *the Review*, op. cit., p. 49.

\textsuperscript{36} Items 66 and 67 of Schedule 2 to the Bill amend the *Navigation Act 2012*, accessed 8 November 2015.

\textsuperscript{37} D Peever, *the Review*, op. cit., p. 12.