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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE FORCE DISCIPLINE BILL 1982

DEFENCE FORCE (MISCELLANEOUS PROVISIONS) BILL 1982

SUPPLEMENTARY
EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for
Defence, the Rt Hon Ian Sinclair MP)

DEFENCE FORCE DISCIPLINE BILL 1982

INTRODUCTION

This Supplementary Explanatory Memorandum is to be read in conjunction with and amends the Explanatory Memorandum for the Defence Force Discipline Bill 1982 issued on 29 April 1982.

2. When introducing the Bill on 29 April 1982, the then Minister for Defence, Sir James Killen, stated that it would lie on the table during the parliamentary recess to provide interested parties with an opportunity to consider its provisions. He added that the Government stood ready to consider any submission made with respect to the Bill.

3. Certain of the proposed amendments result from such submissions but the majority are to correct technical defects in the Bill as now drafted.

NOTES ON PROPOSED AMENDMENTS

First amendment: new sub-clause 3(15)

4. Add a new paragraph 81C to the Explanatory Memorandum.

"81C. Sub-clause (15) is intended to forestall technical legal arguments that a "service offence", as defined elsewhere in clause 3 is not an offence for the purpose of other laws of the Commonwealth merely because it is of a disciplinary nature and is not criminal in the ordinary sense. In the absence of sub-clause (15) such an argument might be raised by a party relying on the decision in *R v White; ex parte Byrnes* (1963) 109 CLR 665".

Second amendment: revised sub-clause 14(2)

5. See paragraphs 130 to 140 of the Explanatory Memorandum. The expression "clearly unlawful" used in sub-clause (2) as first drafted was intended to mean "manifestly unlawful". Doubts have been raised as to whether it had that effect and the sub-clause is redrafted to overcome these doubts.

/Third amendment:

Third amendment: substituted clause 72

6. Omit paragraphs 635 and 636 of the Explanatory Memorandum and insert the following new paragraphs.

"635. It is intended that a person sentenced to imprisonment by a court martial or Defence Force magistrate should be subject to the same regime, under the Commonwealth Prisoners Act 1967, as any person imprisoned upon conviction by a civil court for an offence against any other law of the Commonwealth. Sub-clause (1) gives effect to that intention.

636. Sub-clause (1) requires service tribunals to make orders fixing non-parole periods as if they were courts of the Australian Capital Territory; the Parole Ordinance 1976 (ACT) is to be applied. Sub-clause (2) allows those orders to be deemed to be orders for the purposes of the Commonwealth Prisoners Act."

Fourth amendment: substituted sub-clause 133(1)

7. Omit paragraph 980 of the Explanatory Memorandum and insert the following new paragraph.

"980. Sub-clause (1) provides that questions are to be determined by the members of the court martial, "subject to clause 134" which has the effect that rulings of the judge advocate prevail. The President presides but in some circumstances must act on advice - see, eg, sub-paragraph 1010. Sub-clause (2) provides that decisions of a court martial are by a majority vote".

Fifth amendment: substituted sub-clause 134(1)

8. Omit paragraph 985 of the Explanatory Memorandum and insert the following new paragraph.

/"985. Sub-

"985. Sub-clause (1) empowers the judge advocate to give any ruling, and exercise any discretion, that would, in the Australian Capital Territory, be given or exercised by a judge in a jury trial. These powers are not limited to matters of evidence. The sub-clause does not allow a judge advocate to preside at a trial unless he is sitting alone for some purpose, as to which see sub-clause (2)".

Sixth amendment: substituted sub-clause 134(3)

9. Omit paragraph 987 of the Explanatory Memorandum and insert the following new paragraph.

"987. The members of a court martial and not the judge advocate determine the punishment to be imposed. Sub-clause (3) provides that he be present when "action under Part IV" (ie, punishment) is considered. He is to rule on legal aspects of the sentencing process".

Seventh amendment: amendment of paragraph 138(4)(b)

10. Add to the end of paragraph 1004 of the Explanatory Memorandum the following sentence -

"This can be done by the President of a court martial or another person at his direction".

Eighth and ninth amendments: amendments of sub-clauses 154(2) and 154(4)

11. Omit the words "or mixed law and fact" from line 4 of paragraph 1098 of the Memorandum of the Bill. (At the stage when a legal officer gives an opinion in this connection matters will not be of a nature that can be characterised as "mixed law and fact". They will be "matters of law".)

/Tenth amendment:

Tenth amendment: amendment of sub-clause 155(4)

12. Omit the words "or mixed law and fact" in the penultimate line of paragraph 1102 of the Explanatory Memorandum (see paragraph 11 above).

Eleventh amendment: substituted sub-clauses 162(6) and (7)

13. These amendments are consequential on the replacement of clause 72 (see paragraph 6 above). Paragraph 1129 of the Explanatory Memorandum refers. The new sub-clauses have a similar effect to those they replace.

Twelfth amendment: omission of clause 174

14. Omit all references to clause 174 from the Explanatory Memorandum (paragraphs 1176 to 1178).

15. An effect of new clause 72 is to remove any need for clause 174.

DEFENCE FORCE (MISCELLANEOUS PROVISIONS) BILL 1982

INTRODUCTION

This Supplementary Explanatory Memorandum is to be read in conjunction with the Explanatory Memorandum for the Defence Force (Miscellaneous Provisions) Bill 1982 issued on 29 April 1982.

Outline

2. A principal purpose of the Defence Force (Miscellaneous Provisions) Bill is to make amendments consequent to the enactment of the Defence Force Discipline Bill 1982.

3. When making a preliminary examination of the Defence Force (Miscellaneous Provisions) Bill, the Senate Standing Committee for the Scrutiny of Bills concluded that, although otherwise unobjectionable, clause 52 was oppressive because of the penalty which it prescribed.

4. The purpose of the proposed amendment of clause 52 is to rectify that situation.

NOTES ON PROPOSED AMENDMENT

5. New section 73 of the Defence Act 1903, as provided for in clause 52 of the Bill, required a court to impose a sentence of imprisonment upon a person convicted of one of the offences created by that section. This effect was not intended.

6. The proposed amendment provides that the prescribed penalty is to be imprisonment or a fine of not more than \$500.

