



LEGISLATION ADVISORY COMMITTEE

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10 April 2012

The Chairperson
Foreign Affairs, Defence and Trade Select Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear John Hayes

DEFENCE AMENDMENT BILL 2011

1. After consideration of issues raised by this bill the Legislation Advisory Committee (LAC) thought it might be helpful for Select Committee members to see a copy of the report on the bill provided to us by the Law Commission. This report analyses the bill in relation to compliance with Legislation Advisory Committee Guidelines.
- 2.. Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
- 3.. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

4. The Committee does not wish to be heard on this submission.

Yours sincerely

A handwritten signature in black ink that reads "Grant Hammond". The signature is written in a cursive style with a large, looping initial "G".

Sir Grant Hammond
Chair

LAW COMMISSION REPORT TO LAC

Name of Bill	Defence Amendment Bill 2011 348-1
Name of Commissioner	Grant Hammond
Report to LAC	30 March 2012
Current Status of Bill	Introduced on 19 October 2011. First reading on 6 March 2012. Referred to the Foreign Affairs, Defence and Trade Committee for report back by 6 September 2012. Submissions due to the Select Committee by 13 April 2012.
Nature & Size of Bill	A Bill amending the Defence Act 1990. There are a number of consequential amendments. 41 clauses, 22 pages, 1 schedule

LAC CHECKLIST

1 Appropriate means of achieving the policy objective

The Bill implements legislative aspects of the Defence White Paper 2010. It aims to:

- clarify the way in which the Secretary for Defence and the Chief of Defence Force (CDF) will work together regarding the procurement, replacement, repair and disposal of defence assets;
- provide for the sharing and mutual access to information held by NZDF and the Ministry of Defence;
- provide for the involvement of the State Services Commissioner in the appointment and performance management of the CDF;
- establish Vice CDF as a statutory position, appointed by the Governor-General in Council;
- provide for the appointment of Chiefs of Services (Navy, Army, Air Force) to be made by the CDF instead of the Governor-General in Counsel;
- clarify that the CDF's role is to command the Armed Forces;
- facilitate the redesignation of military positions as civilian positions and the transfer of staff;
- rename the "territorial forces" the "reserve forces", and establishing a distinction between active reserves and inactive reserves;
- enable the Ministry of Defence to establish a Defence Advisory Board;
- provide for officers to have their rank reduced;
- clarify that a contract entered into involving the application of money from a fund for the benefit of members, ex-members and their families is not a contract involving the use of public money under the Public Finance Act 1989;
- clarify that honorary officers are not members of the NZDF for any purpose.

These reforms require statutory intervention. This is an appropriate means of achieving these objectives.

2 Understandable and accessible legislation

No issues.

3 Basic principles of New Zealand's legal and constitutional system

Clause 16 of the Bill amends s 25 of the Defence Act by allowing the Minister to seek the advice of the State Services Commissioner regarding the terms and conditions of appointment for the CDF. Clause 17 introduces new sections 25A and 25B which provide for the involvement of the State Services Commissioner in the appointment process for the CDF and for the Minister to appoint the Commissioner or another person to review the CDF's performance.

The State Services Commissioner's functions under s 6 of the State Sector Act 1988 include appointing chief executives and reviewing their performance. However, this applies only to departments of the Public Service, which are listed in schedule 1 of that Act. The NZDF is not a department of the Public Service.

The NZDF is part of the Executive, but has traditionally had an independence from some aspects of Public Service accountability. The reforms in this Bill can be seen as reducing this independence by giving the State Services Commissioner a supervisory role over the CDF, making the NZDF more akin to a Public Service department. However, this is in line with other developments relating to the accountability of other non-department Government agencies. For instance, in the Policing Act 2008, the Commissioner of Police is appointed by the Prime Minister but on the advice and with the involvement of the State Services Commissioner.

In addition, under s 11 of the State Sector Act the Prime Minister has the discretion to direct the State Services Commissioner to exercise his or her functions in respect of any part of the State Sector that is not a department. The new provisions in the Defence Act will extend some of this discretion on a permanent basis to the Minister of Defence. The Minister's First Reading speech on this Bill referred to this being a practice that has developed over recent times that should now be codified in legislation.

4 Statutory interpretation

No issues.

5 New Zealand Bill of Rights Act 1990

No issues.

6 Human Rights Act 1993

No issues.

7 Principles of the Treaty of Waitangi

No issues.

8 International obligations and standards

No issues.

9 Relationship to existing law

Clause 37 of the Bill inserts new section 68B which allows the CDF to appoint a

person who has been discharged from the regular forces within the preceding 12 months because his or her functions were transferred to the Civil Staff to a position in the Civil Staff, if he or she has appropriate skills and experience for the position. In this case, provisions in the Defence Act requiring that when appointing to a position in the Civil Staff preference is given to the person best suited to a position (s 62), requiring that vacancies in the Civil Staff are notified (s 63) and requiring that a review procedure for complaints regarding appointments has to be made available (s 67) do not apply.

The requirements to be a “good employer” under the State Sector Act, which include making appointments on merit, notifying vacancies and having a process for complaints about appointments do not apply to the NZDF because it is not a department. However, these requirements have been explicitly included in the Defence Act because there is an expectation that the requirements are necessary for NZDF as a part of the State Sector. The reforms in the Bill remove these good employer obligations in the particular situation of military staff whose positions are civilianised, allowing favour to be shown to the former military members where they are suitable for the new civil positions. The narrow exception to the good employer principles could be seen as warranted because of the upheaval of the civilianisation of jobs within the NZDF.

10 Creation of a new public power

Clause 19 of the Bill replaces section 28 of the Act with a new section that empowers the CDF to appoint a Chief of Navy, Chief of Army and Chief of Air Force. Currently these roles are appointed directly by the Governor-General in Counsel. Under clause 6 of the Bill, new subsections of section 8 of the Act would empower the CDF to command the Armed Forces. Currently under 8(3), the CDF commands each service through the relevant Service Chief. This amendment would on its face give the CDF greater power to directly command the Armed Forces. It could be argued that this concentrates too much power in an individual. However, the amendments may in fact reflect what happens in practice and make little difference in reality. Furthermore, the Bill does contain measures that increase the formal accountability of the CDF to the Executive.

11 Creation of a new public body

Clause 39 introduces new s 91B which allows the Minister of Defence to appoint the new Defence Advisory Board to provide independent and specialist advice to the Minister on defence matters.

12 Delegation of legislative power

No issues.

13 Remedies

No issues.

14 Criminal offences

No issues.

15 Appeal and review

As discussed in (9), the review process that applies under s 67 of the Defence Act does not apply under new s 68B where a person who has been discharged from the regular

force within the preceding 12 months because his or her position has been civilianised is appointed to the Civil Staff, if he or she has appropriate skills and experience.

16 Powers of entry and search

No issues.

17 Cross-border issues

No issues.

18 Alternative Dispute Resolution

No issues.

19 Privacy/Information Sharing

Clause 22 of the Bill provides for the sharing of information between the Ministry of Defence and the NZDF. Both agencies must provide information they hold in relation to the exercise of their own powers of the performance of their own duties or obligations that is needed to assist the other agency. Both agencies are entitled to use the information. The provision does not set out which categories of personal information may be shared or the uses to which information can be put, so is not in line with the Law Commission's recommendations regarding information sharing or the principles applying to information sharing agreements under the Privacy (Information Sharing) Bill 2011 (before the House).

Defence Amendment Bill

11 October 2011

ATTORNEY-GENERAL

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

1. We have considered whether the Defence Amendment Bill ('the Bill') (PCO 14982/6.4) is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand the Bill is likely to be introduced into the House of Representatives on or before 19 October 2011. We also understand that the Bill may be subject to further amendments before it is introduced into the House. We will provide you with advice on further amendments should this prove necessary.
2. The Bill amends the Defence Act 1990 to implement Government policy as set out in the Defence White Paper 2010. In particular, the Bill strengthens the authority and accountability of the Chief of Defence Force in the role of Chief Executive. It also makes changes in respect of other matters, particularly relating to rank and conditions of service for members of the Armed Forces.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr, Chief Legal Counsel
Office of Legal Counsel