Defence Amendment Act 2005

No. 26, 2005

An Act to amend the Defence Act 1903, and for related purposes

Note: An electronic version of this Act is available in SCALEplus (http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm)
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Schedule 1—Defence Act 1903

3
An Act to amend the Defence Act 1903, and for related purposes

[Assented to 21 March 2005]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the Defence Amendment Act 2005.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.
3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
Schedule 1—Defence Act 1903

1 At the end of section 9A

Add:

(6) Defence Instructions (General), Defence Instructions (Navy), Defence Instructions (Army) or Defence Instructions (Air Force) may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing, whether as in force at a particular time, or as amended and in force from time to time.

2 Part VIII A (heading)

Repeal the heading, substitute:

Part VIII A—Testing for prohibited substances

3 Section 91

Repeal the section, substitute:

91 Application of Part

This Part applies to the following persons:

(a) defence members;

(b) defence civilians.

4 Section 92

Omit all the words after “provision”, substitute “for the testing of persons to whom this Part applies to determine whether they have used any prohibited substance.”.

5 Section 93

Insert:

accredited authority means a laboratory or other body, or a person, specified in the Defence Instructions to be an accredited authority for the purposes of this Part.

6 Section 93 (definition of accredited laboratory)
7 Section 93 (definition of authorised person)
Omit “who, under the regulations, is”, substitute “determined under section 93A to be”.

8 Section 93 (definition of combat duties)
Repeal the definition.

9 Section 93 (definition of combat-related duties)
Repeal the definition.

10 Section 93
Insert:

*defence civilian* has the same meaning as in the *Defence Force Discipline Act 1982*.

11 Section 93
Insert:

*Defence Instructions* means Defence Instructions (General), Defence Instructions (Navy), Defence Instructions (Army) or Defence Instructions (Air Force) issued under section 9A.

12 Section 93
Insert:

*defence member* has the same meaning as in the *Defence Force Discipline Act 1982*.

13 Section 93 (definition of positive test result)
Repeal the definition, substitute:

*positive test result*, in relation to a prohibited substance test in respect of a person, means a finding by an accredited authority that the test in respect of the person reveals:

(a) the presence of a prohibited substance in a sample provided by the person, or otherwise reveals the use by the person of a prohibited substance; and
(b) if a permitted level for that substance is specified in the Defence Instructions—that the permitted level has been exceeded.

14 Section 93
Insert:

*prohibited substance* means:
(a) a narcotic substance; or
(b) any substance that is a prohibited substance because of a determination under subsection 93B(1).

15 Section 93
Insert:

*prohibited substance test* means:
(a) urinalysis; or
(b) another test that:
   (i) is for the purpose of determining whether a person has used a prohibited substance, whether by means of testing a sample provided by the person or by other means; and
   (ii) is a prohibited substance test because of a determination under subsection 93B(2).

16 Section 93 (definition of *relevant authority*)
Repeal the definition, substitute:

*relevant authority* means:
(a) in relation to a defence member who holds a rank not below the rank of Major-General (or an equivalent rank)—the Governor-General; or
(b) in relation to a defence member who holds a rank below the rank of Major-General (or an equivalent rank)—the relevant service chief; or
(c) in relation to a defence civilian—the commanding officer who has responsibility for the defence civilian.

17 Section 93 (definition of *sample*)
Repeal the definition, substitute:
sample means:
(a) any human biological fluid; or
(b) any human biological tissue (whether alive or otherwise); or
(c) any human breath.

18 At the end of Division 1 of Part VIII A
Add:

93A Authorised person
The Chief of the Defence Force or a service chief may, by written instrument, determine that a person is an authorised person for the purposes of a provision of this Part.

93B Determinations about prohibited substances and prohibited substance tests
(1) The Chief of the Defence Force may, by legislative instrument, determine that a substance, or a substance included in a class of substances, is a prohibited substance for the purposes of this Part.

(2) The Chief of the Defence Force may, by legislative instrument, determine that a test, or a test included in a class of tests, is a prohibited substance test for the purposes of this Part.

19 Division 2 of Part VIII A (heading)
Repeal the heading, substitute:

Division 2—Testing for prohibited substances

20 Sections 94, 95 and 96
Repeal the sections, substitute:

94 Requirement to undergo a prohibited substance test
An authorised person may require a person to whom this Part applies:
(a) to undergo a prohibited substance test; and
(b) if the prohibited substance test involves testing a sample—to provide a sample for the purposes of the test.
95 Conduct of testing

(1) The conduct of a prohibited substance test under section 94 must be supervised by an authorised person.

(2) A prohibited substance test:
   (a) must be conducted in circumstances affording reasonable privacy to the person being tested; and
   (b) must not be conducted in the presence of a person whose presence is not necessary for the purposes of conducting or supervising the test; and
   (c) must not involve:
      (i) the removal of more clothing; or
      (ii) more visual inspection;
   than is necessary for the purposes of conducting the test.

96 Notice to person required to provide a sample

If a person is required to provide a sample for the purposes of a prohibited substance test under section 94, the authorised person supervising the test must, before the sample is provided, give to the person a written notice explaining such matters relating to dealing with the sample as are specified in the Defence Instructions.

21 Section 97

Repeal the section.

22 Subsection 98(1)

Omit “the testing of a sample provided by a member”, substitute “a prohibited substance test in respect of a person”.

23 Subsection 98(2)

Omit “narcotic”, substitute “prohibited”.

24 Section 99

Repeal the section.

25 Section 100

Repeal the section, substitute:
100 Notice to be given of a positive test result

(1) If a prohibited substance test in respect of a person returns a positive test result, the relevant authority in relation to the person must:

(a) give the person written notice of the positive test result; and

(b) invite the person to give to the relevant authority a written statement of reasons as to:

(i) if the person is an officer—why the officer’s appointment should not be terminated; or

(ii) if the person is a defence member other than an officer—why the defence member should not be discharged; or

(iii) if the person is a defence civilian—why the arrangement under which the person is a defence civilian should not be terminated.

Note: Subsection 98(2) provides that a positive test result is to be disregarded in specified circumstances, so in such circumstances a notice under this section would not be given.

(2) A notice under subsection (1) must specify a period ending not less than 28 days after the day on which the notice is given as the period within which a statement of reasons must be given to the relevant authority.

26 Section 101

Omit “member” (wherever occurring), substitute “defence member”.

27 At the end of section 101

Add:

(4) If a person to whom a notice is given under section 100 is a defence civilian and:

(a) the person does not give the relevant authority, within the period specified in the notice, a statement of reasons why the arrangement under which the person is a defence civilian should not be terminated; or

(b) having considered such a statement given by the person, the relevant authority is of the opinion that the arrangement under which the person is a defence civilian should be terminated;
the relevant authority must terminate that arrangement.

(5) In considering under this section whether:
   (a) an officer’s appointment should be terminated; or
   (b) a defence member other than an officer should be discharged; or
   (c) the arrangement under which a person is a defence civilian should be terminated;

the relevant authority must take into consideration any warning previously given to the officer, defence member or defence civilian under section 104.

(6) Nothing in this section or in section 104 is to be taken to require that a notice under section 104 must have been given in respect of a previous positive test result before:
   (a) an officer’s appointment is terminated; or
   (b) a defence member is discharged; or
   (c) the arrangement under which a person is a defence civilian is terminated;

under this section.

28 Subsection 102(1)

Omit all the words from and including “officer” (first occurring) to and including “officer” (second occurring), substitute “officer, the discharge under subsection 101(3) of a defence member or the termination under subsection 101(4) of an arrangement in relation to a defence civilian”.

29 Subsections 102(3) and (4)

Omit “member” (wherever occurring), substitute “defence member or defence civilian”.

30 Subsection 103(1)

Repeal the subsection, substitute:

(1) This section applies if a prohibited substance test in respect of a defence member returns a positive test result and:
   (a) if the defence member is an officer—the officer’s appointment is not terminated under subsection 101(1) or (2); or
(b) if the defence member is not an officer—the member is not discharged under subsection 101(3).

### 31 Subsections 103(2) and (3)
Omit “member” (wherever occurring), substitute “defence member”.

### 32 Subsection 103(3)
Omit “member’s”, substitute “defence member’s”.

### 33 Subsection 103(6)
Omit “member” (wherever occurring), substitute “defence member”.

### 34 Section 104
Repeal the section, substitute:

#### 104 Warning if a prohibited substance test returns a positive result

(1) If a prohibited substance test in respect of a defence member returns a positive test result, the relevant authority may give to the defence member a notice containing a warning that, if a subsequent prohibited substance test in respect of the defence member also returns a positive test result:

(a) if the defence member is an officer—the officer’s appointment may be terminated; or

(b) if the defence member is not an officer—the defence member may be discharged; or

(c) in either case—the defence member may be reduced, or further reduced, in rank.

(2) If a prohibited substance test in respect of a defence civilian returns a positive test result, the relevant authority may give to the defence civilian a notice containing a warning that, if a subsequent prohibited substance test in respect of the defence civilian also returns a positive test result, the arrangement under which the person is a defence civilian may be terminated.

### 35 Section 105
Repeal the section.

### 36 Sections 106 and 107
Omit “member” (wherever occurring), substitute “defence member or defence civilian”.

37 Paragraph 107(1)(b)
Omit “regulations”, substitute “Defence Instructions”.

38 Section 108
Omit all the words from and including “laboratory” to and including “member” (second occurring), substitute “authority by means of testing a sample provided by a defence member or defence civilian under this Part is not admissible in evidence in any proceeding against the defence member or defence civilian”.

39 At the end of Part VIII A
Add:

109 Defence Instructions

(1) Without limiting section 9A, the Defence Instructions may make provision, not inconsistent with this Part, in relation to the following:

(a) the persons or classes of persons who may be required to undergo prohibited substance tests under section 94;
(b) laboratories, bodies or persons that are accredited authorities for the purposes of this Part;
(c) the provision of samples for the purpose of prohibited substance tests under section 94;
(d) the conduct of, and procedures relating to, prohibited substance tests under section 94;
(e) the devices used in conducting prohibited substance tests under section 94, including the calibration, inspection and testing of those devices;
(f) levels of prohibited substances that are permitted levels for the purposes of this Part;
(g) the procedures for the handling and analysis of the following:
   (i) samples taken in connection with prohibited substance tests under section 94;
   (ii) the giving of prohibited substance test results in certificates or other documents and the evidentiary effect of such certificates or other documents;
(h) the confidentiality of prohibited substance test results;
(i) notices to be given to persons who are to undergo, or who have undergone, prohibited substance tests;
(j) any other matter or thing that relates to, or is for the purposes of, this Part.

(2) The Defence Instructions may provide that strict compliance with procedures specified in the Defence Instructions is not required and substantial compliance is sufficient, other than in respect of procedures relating to the following matters:
(a) ensuring that a sample is not interfered with;
(b) ensuring that a sample is securely contained and identified.

110 Other administrative action not precluded

Nothing in this Part precludes the taking, in relation to a defence member, of any administrative action that could, if this Part had not been enacted, be lawfully taken because he or she is a defence member.

40 After subsection 120A(2)

Insert:

(3) The Governor-General may, by instrument in writing, delegate all or any of his or her powers under sections 100, 101 and 104 to:
(a) an officer of the Army who holds the rank of Lieutenant-General or a higher rank; or
(b) an officer of the Navy who holds the rank of Vice-Admiral or a higher rank; or
(c) an officer of the Air Force who holds the rank of Air Marshal or a higher rank.

(3A) The Secretary and the Chief of the Defence Force may, by instrument in writing signed by each of them, delegate all or any of the powers that they hold jointly under subsections 9A(1) and (2) to issue the instructions known as Defence Instructions (General) to:
(a) an officer of the Army who holds the rank of Major-General or a higher rank; or
(b) an officer of the Navy who holds the rank of Rear-Admiral or a higher rank; or
(c) an officer of the Air Force who holds the rank of Air Vice-Marshal or a higher rank; or
(d) an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department.

(3B) The Secretary and the Chief of the Defence Force may, by instrument in writing signed by each of them, delegate all or any of the powers that they hold jointly under subsections 9A(1) and (2) to issue the instructions known as Defence Instructions (General) to 2 persons to exercise jointly.

(3C) Each person to whom a power is delegated under subsection (3B) must be a person specified in paragraph (3A)(a), (b), (c) or (d).

(3D) To avoid doubt, the powers of delegation under subsections (3A) and (3B) extend only to the powers of the Secretary and the Chief of the Defence Force to issue Defence Instructions (General), and not to any other powers that the Secretary and the Chief of the Defence Force have under that section.

(3E) The Chief of the Defence Force may, by instrument in writing, delegate his or her power under section 93A to:
   (a) an officer of the Army who holds the rank of Brigadier or a higher rank; or
   (b) an officer of the Navy who holds the rank of Commodore or a higher rank; or
   (c) an officer of the Air Force who holds the rank of Air Commodore or a higher rank.

41 Subsection 120A(4AA)
Omit all the words after “under”, substitute “subsection 9A(3) to issue Defence Instructions (Army) and sections 93A, 100, 101, 103 and 104.”.

42 Subsection 120A(4AB)
Omit all the words after “under”, substitute “subsection 9A(3) to issue Defence Instructions (Navy) and sections 93A, 100, 101, 103 and 104.”.

43 Subsection 120A(4C)
Omit all the words after “under”, substitute “subsection 9A(3) to issue Defence Instructions (Air Force) and sections 93A, 100, 101, 103 and 104.”.
[Minister’s second reading speech made in—
House of Representatives on 10 February 2005
Senate on 7 March 2005]