

REPUBLIC OF SOUTH AFRICA

DEFENCE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Gazette No. 33126 of 23 April 2010)
(The English text is the official text of the Bill)*

(MINISTER OF DEFENCE AND MILITARY VETERANS)

[B 11—2010]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Defence Act, 2002, so as to require members of the Reserve Force contemplated in section 53(1) to enter into a contract of service with the South African National Defence Force; to require members of the Reserve Force to comply with a call-up order to report for duty; and to establish the Defence Force Service Commission which is to make recommendations to the Minister of Defence and Military Veterans concerning the salaries, service benefits and other conditions of service of members of the Defence Force; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 42 of 2002

1. Section 1 of the Defence Act, 2002 (Act No. 42 of 2002) (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion in subsection (1) after the definition of “**Code**” of the following definition:

“**conditions of service**” includes conditions relating to—

- (a) recruitment procedures and advertising and selection criteria;
- (b) appointment and appointment processes;
- (c) job classification and grading;
- (d) salaries, allowances and service benefits;
- (e) job assignments;
- (f) working environment and facilities;
- (g) training and development;
- (h) performance evaluation systems;
- (i) promotion;
- (j) transfers;
- (k) demotion;
- (l) disciplinary measures other than dismissals;
- (m) dismissal;
- (n) scarce skills;
- (o) pay progression;
- (p) deployment benefits;
- (q) tools of trade;

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- (r) accommodation; and
- (s) any other matter pertaining to conditions of service;” and
- (b) by the insertion in subsection (1) after the definition of “**superior officer**” of the following definition:
 “**‘the Commission’** means the Defence Force Service Commission established by section 62A;”.

Amendment of section 52 of Act 42 of 2002

2. Section 52 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) The terms and conditions of service in the Regular Force as well as conditions and procedures regarding enrolment, appointment, promotion and transfer[, **but not remuneration,**] are as prescribed.”.

Amendment of section 53 of Act 42 of 2002

3. Section 53 of the principal Act is hereby amended—

- (a) by the addition to subsection (1) of the following paragraph, the existing subsection becoming subsection (1)(a):
 “(b) (i) The members of the Defence Force contemplated in paragraph (a) must, within 18 months after the commencement of the Defence Amendment Act, 2010, enter into a contract of service with the Defence Force as contemplated in subsection (1A)(a).
 (ii) Should any such members fail to conclude a contract contemplated in subparagraph (i), the Minister must give the member notice of his or her intention to terminate the membership of the member and afford such member a reasonable opportunity to conclude the contract.
 (iii) The Minister must terminate the membership of the member if such member fails to conclude the contract following the notice contemplated in subparagraph (ii).”;
- (b) by the insertion after subsection (1) of the following subsection:
 “(1A) (a) Any member of the Reserve Force is liable to render service in terms of a contract entered into between the Defence Force and such member.
 (b) The content and format of the contract contemplated in paragraph (a) must be prescribed.
 (c) The period for which a member of the Reserve Force must render the service contemplated in paragraph (a) and the calculation thereof must be prescribed.”;
- (c) by the substitution for subsection (2) of the following subsection:
 “(2) The terms and conditions of service as well as conditions for and procedures regarding enrolment, appointment, promotion, transfer and termination of service[, **but excluding remuneration,**] in the Reserve Force must be prescribed.”;
- (d) by the insertion after subsection (3) of the following subsection:
 “(3A) (a) A Reserve Force member must comply with a call-up order issued by that member’s commanding officer in terms of which such member must report for service as contemplated in this Act or the Constitution.
 (b) The content and format of such call-up order must be prescribed.”; and
- (e) by the insertion after subsection (4) of the following subsection:
 “(4A) Where a Reserve Force member’s period of service terminates, lapses or expires during any form of employment contemplated in section 18(1), the Minister may, with the concurrence of such member, extend such service for a period not exceeding three months or until the conclusion of the operation, whichever is the shorter.”.

Substitution of section 55 of Act 42 of 2002

4. The following section is hereby substituted for section 55 of the principal Act:

“Pay, salaries and entitlements

55. [(1)] Members of the Regular Force and Reserve Force must receive such pay, salaries and entitlements including allowances, disbursements and other benefits in respect of their service, training or duty in terms of this Act as may from time to time be **[agreed upon in the Military Bargaining Council]** recommended by the Commission and approved by the Minister acting in consultation with the Minister of Finance. 5

[(2) If no agreement contemplated in subsection (1) can be reached in the Military Bargaining Council, the Minister may, after consideration of any advisory report by the Military Arbitration Board and with the approval of the Minister of Finance, determine the pay, salaries and entitlements contemplated in that subsection.]” 10

Insertion of sections 62A, 62B, 62C, 62D, 62E, 62F, 62G, 62H, 62I, 62J, 62K and 62L in Act 42 of 2002 15

5. The following sections are hereby inserted in the principal Act after section 62:

“Establishment and composition of Defence Force Service Commission

62A. (1) There is hereby established a Defence Force Service Commission. 20

(2) The Commission consists of no fewer than eight and no more than ten members appointed by the Minister.

(3) The Minister must designate one member as Chairperson and another as Deputy Chairperson of the Commission. 25

(4) If the Chairperson is absent or for any reason unable to act as Chairperson, the Deputy Chairperson must act as the Chairperson of the Commission.

Functions of Commission

62B. (1) The Commission must— 30

(a) on an annual basis, make recommendations to the Minister on improvements of salaries and service benefits of members;

(b) make recommendations to the Minister on policies in respect of conditions of service;

(c) promote measures and set standards to ensure the effective and efficient implementation of policies on conditions of service within the Defence Force, and make recommendations to the Minister in this regard; and 35

(d) for the purposes of making recommendations contemplated in paragraphs (a), (b) and (c)— 40

(i) enquire into or conduct research on conditions of service;

(ii) review policies;

(iii) evaluate and monitor the implementation of such policies;

(iv) consult with the Secretary for Defence, the Chief of the Defence Force, members of the Defence Force and any other interested person or body on conditions of service and any other matter relating to the purview of its functions; 45

(v) consider any representations made to the Commission;

(vi) consult with National Treasury;

(vii) confer with the Department responsible for public service and administration, the Public Service Commission and any other relevant stakeholder within the public service; 50

(viii) consider, among others—

(aa) the rank structure of the Defence Force;

- (bb) the affordability of different levels of remuneration of the Defence Force;
 - (cc) current principles and levels of remuneration in the public service generally; and
 - (dd) inflationary increases.
- (2) The Commission must perform its functions impartially, without bias, fear or prejudice.
- (3) The Commission may, in consultation with the Minister, call upon any member of the Defence Force or employee of the Department to assist it in the execution of its functions, and such person is obliged to provide the necessary assistance.
- (4) The Minister determines the conditions of service for members of the Defence Force, in consultation with the Minister of Finance, after having received a recommendation from the Commission.

Appointment of members of Commission and conditions of service

- 62C.** (1) For the purposes of appointing the members of the Commission, the Minister must by notice in two national newspapers and in the *Gazette* invite interested persons to submit, within the period and in the manner mentioned in the notice, the names of persons fit to be appointed as members of the Commission.
- (2) The Minister must appoint a nomination committee to make recommendations to the Minister for the appointment of the members of the Commission.
- (3) (a) In establishing a nomination committee, the Minister must ensure that the committee is broadly representative of the South African population and that both males and females are represented.
- (b) The members of the nomination committee must have sufficient knowledge and experience that would enable them to exercise a sound and objective discretion in making recommendations to the Minister.
- (4) The nomination committee must, in making a recommendation to the Minister, consider—
- (a) the proven skills, knowledge and experience of a candidate in matters relevant to the functioning of the Commission; and
 - (b) generally, whether the persons nominated represent a sufficient spread of qualifications, expertise and experience to ensure the efficient and effective functioning of the Commission.
- (5) The nomination committee must submit to the Minister a list of suitable candidates at least one and a half times the number of members of the Commission to be appointed.
- (6) If a suitable person or the required number of suitable persons is not recommended, the Minister must call for further nominations in the manner set out in subsection (1).
- (7) (a) The Minister must appoint members of the Commission from the list of candidates submitted in terms of subsection (5).
- (b) The Minister must, within 30 days after appointing the members, by notice in the *Gazette* publish the names of the members so appointed and the date of commencement of their terms of office.
- (8) Any vacancy occurring in the Commission must be filled in the manner provided for in subsections (1) to (7).
- (9) (a) A member of the Commission—
- (i) holds office for a period not exceeding five years;
 - (ii) may, at the discretion of the Minister and in the interest of continuity, be reappointed, but may not serve more than two terms consecutively;
 - (iii) is appointed according to the terms and conditions determined by the Minister; and
 - (iv) may be appointed either on a full-time or a part-time basis.
- (b) A member of the Commission who is not in the full-time employ of the State must be paid from the budget of the Department such remuneration and allowances in respect of his or her services as the Minister may determine, acting in consultation with the Minister of Finance.

Disqualification from membership and removal from office

- 62D.** (1) No person may be appointed as a member of the Commission if he or she—
- (a) is a member of the Defence Force;
 - (b) is an unrehabilitated insolvent; or
 - (c) has been convicted of any offence for which that person has been sentenced to imprisonment without the option of a fine for a period of not less than 12 months, unless a period of at least five years has expired after the date on which the sentence was served.
- (2) For the purposes of subsection (1)(c), no person is deemed to have been sentenced until an appeal against the conviction or sentence has been disposed of or until the period has expired within which an appeal may be lodged, as the case may be.
- (3) The Minister may remove a member of the Commission from office on account of—
- (a) misconduct;
 - (b) inability to perform the duties of that member's office effectively and efficiently; or
 - (c) absence from three consecutive meetings of the Commission without the prior permission of the chairperson, except on good cause shown.

Vacation of office

- 62E.** A member of the Commission must vacate office if he or she—
- (a) becomes subject to any disqualification referred to in section 62D;
 - (b) becomes of unsound mind;
 - (c) resigns by giving at least 30 days' written notice to the Minister; or
 - (d) for whatever reason, becomes unfit or unable to remain a member of the Commission.

Meetings of Commission

- 62F.** (1) The Commission must meet at least twice a year at a time and place determined by the Chairperson of the Commission.
- (2) Six members of the Commission form a quorum for a meeting of the Commission.
- (3) The decision of a majority of the members of the Commission present at a meeting of the Commission constitutes a decision of the Commission and, in the event of an equality of votes on any matter, the person presiding at the meeting concerned has a casting vote in addition to his or her deliberative vote.
- (4) The Commission must determine its own procedures to be followed at its meetings.

Committees of Commission

- 62G.** (1) The Commission may from time to time appoint one or more committees to perform any duties and exercise any powers assigned or delegated to it by the Commission, and may at any time dissolve or reconstitute such a committee.
- (2) A committee consists of so many members of the Commission as the Commission may deem necessary.
- (3) The Commission must designate one of the members of a committee as chairperson of that committee.
- (4) A committee must perform its duties and exercise its powers subject to this Act and such directives as may be issued by the Commission.
- (5) A decision of a committee taken in the performance of a duty or exercise of a power assigned or delegated to it is a decision of the Commission, subject to ratification by the Commission.

Reporting

62H. (1) The Commission—

- (a) is accountable to the Minister; and
 - (b) must within two months after the end of each financial year submit a report on its activities and findings to the Minister.
- (2) The Minister must, as soon as practicable after receipt of a report contemplated in subsection (1), cause a copy of the report to be lodged with the Cabinet and tabled in Parliament.
- (3) A report contemplated in subsection (1) must not contain confidential information that would be detrimental to national security.
- (4) The Commission must, by notice in the *Gazette*, annually publish its findings and recommendations in respect of its work.

Staff of Commission

62I. The Minister may, after consultation with the Commission, appoint or designate persons to give research, secretariat, logistical and technical support to the Commission or to perform other work incidental to the exercise or performance of the powers and duties of the Commission.

Funding

62J. The costs and expenses connected with the administration of the affairs of the Commission must be defrayed from moneys appropriated by Parliament to the Department for that purpose.

Intervention by Minister

- 62K.** (1) The Minister may direct the Commission to take any action specified by the Minister if the Commission has failed to perform its functions in an effective and efficient manner.
- (2) A directive contemplated in subsection (1) must state—
- (a) the reason for issuing the directive;
 - (b) the steps which must be taken to remedy the situation; and
 - (c) a reasonable period within which the steps contemplated in paragraph (b) must be taken.
- (3) (a) If the Commission fails to comply with the directive contemplated in subsection (1), the Minister may—
- (i) after having given the Commission a reasonable opportunity to be heard; and
 - (ii) after having afforded the Commission a hearing on any submissions received,
- replace the members of the Commission or, where circumstances so require, appoint a person as an administrator to take over one or more functions of the Commission subject to such conditions as the Minister may determine.
- (b) Any vacancy occurring as a result of the application of paragraph (a) must be filled in the manner provided for in section 62C.
- (4) If the Minister appoints an administrator in terms of subsection (3)—
- (a) the administrator may do anything which the Commission might otherwise be empowered or required to do under or in terms of this Act; and
 - (b) the Commission may not, while the administrator is responsible for a particular function, exercise any of its powers or perform any of its duties relating to that function.
- (5) Once the Minister is satisfied that the Commission is able to perform its functions in an effective and efficient manner, the Minister must terminate the appointment of the administrator.
- (6) (a) Notwithstanding subsection (3), the Minister may dissolve the Commission if the Minister loses confidence in the ability of the Commission to perform its functions effectively and efficiently.
- (b) The Minister may dissolve the Commission only after having—

- (i) provided the Commission with reasons for losing confidence in its abilities;
- (ii) given the Commission a reasonable opportunity to respond to those reasons; and
- (iii) afforded the Commission a hearing on any submissions received. 5
- (c) If the Minister dissolves the Commission, the Minister—
- (i) may appoint an administrator to take over the functions of the Commission and to do anything which the Commission might otherwise be empowered or required to do under or in terms of this Act, subject to such conditions as the Minister may determine; and 10
- (ii) must, as soon as it is feasible, but not later than three months after the dissolution of the Commission, appoint the members of the Commission in the manner provided for in section 62C.

Regulations in respect of Commission

- 62L.** The Minister may make regulations regarding— 15
- (a) the manner in which consultation with the Commission must be conducted and the procedures relating thereto;
 - (b) any matter relating to the functioning of the Commission that it is necessary to prescribe in order to ensure the efficient and effective functioning of the Commission; and 20
 - (c) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of the provisions relating to the Commission.”

Amendment of section 82 of Act 42 of 2002

- 6.** Section 82 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph: 25
- “(a) the conditions of service of members of the Defence Force generally[, **excluding pay, salaries and entitlements**], as well as the maximum age to which members may serve, related job descriptions and personnel management codes and job evaluation;” 30

Amendment of section 104 of Act 42 of 2002

- 7.** Section 104 of the principal Act is hereby amended—
- (a) by the substitution for subsection (12) of the following subsection: 35

“(12) Any person who is liable to render service in the Defence Force by virtue of a military service contract with the Defence Force, and refuses or fails to render such service, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year.”;
 - (b) by the deletion in subsection (21)(a) of the word “or” at the end of subparagraph (ii), and the insertion of the expression “; or” at the end of paragraph (iii); and 40
 - (c) by the addition to subsection (21)(a) of the following subparagraph: 45

“(iv) having been duly notified of his or her call-up for service by way of a call-up order issued in terms of section 53(3A), fails to present himself or herself at the time and place specified in the call-up order.”.

Transitional provision and saving

- 8.** (1) Any person who is a member of the body known as the interim National Defence Force Service Commission when this Act takes effect, is regarded as having been appointed in terms of section 62C and holds office until the Minister has appointed the members of the Commission in terms of that section. 50
- (2) Anything done by the interim National Defence Force Service Commission prior to the commencement of this Act which could have been done by the Commission in terms of this Act, must be regarded as having been done by the Commission in terms of this Act.” 55

Short title and commencement

9. This Act is called the Defence Amendment Act, 2010, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE DEFENCE AMENDMENT BILL, 2010

1. OBJECTS OF THE BILL

1.1 The Bill seeks to ensure that Reserve Force members can be utilised and required to perform service in the Defence Force at all times, including during peacetime.

1.2 The Bill also seeks to establish a permanent Defence Force Service Commission, which will advise the Minister of Defence and Military Veterans (Minister) with regard to the improvement of conditions of service of members of the Defence Force.

2. DISCUSSION

2.1 Reserve Force members currently serve on a voluntary basis or render service in terms of a contract. The members of the Reserve Force are only obliged to serve during time of war, a state of national defence or a state of emergency.

2.2 Currently not all members of the Reserve Force have entered into or are required to enter into a contract of service with the South African National Defence Force (Defence Force), and as a result this creates problems with regard to planning. The Bill seeks to make it clear that all Reserve Force members are required to conclude a contract of service with the Defence Force. Such contract will set out the periods of service that a Reserve Force member is liable to render.

2.3 To ensure that Reserve Force members present themselves for service when required to do so, the Bill provides that these members must comply with a call-up order.

2.4 The Bill also seeks to authorise the Minister to extend the period of service of Reserve Force members, with the concurrence of the members.

2.5 In order to relieve the Defence Force from depending solely on the largely dysfunctional bargaining process as the only mechanism towards achieving improved conditions of service and service benefits, the Bill proposes the establishment of an independent Defence Force Service Commission (Commission). The purpose of the Commission would be to render expert advice and provide a mandate to the Minister in respect of the improvement of conditions of service and service benefits for members of the Defence Force.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1

This clause inserts certain new definitions in the Act.

3.2 Clause 2

Currently the Minister may not make regulations regarding remuneration of members of the Regular Force. Clause 2 seeks to omit the provision preventing the Minister from making such regulations.

3.3 Clause 3

3.3.1 Clause 3(a) and (b) seeks to require all members of the Reserve Force to enter into a contract of service with the Defence Force. Provision is also made for the Minister to prescribe periods of service.

3.3.2 As in the case of the Regular Force, the Minister currently may not make regulations regarding remuneration of members of the Reserve Force. Clause 3(c) seeks to omit the provision preventing the Minister from making such regulations.

3.3.3 Clause 3(d) seeks to make it compulsory to comply with a call-up order, failure of which may lead to conviction for an offence [clause 7(c)].

3.3.4 Clause 3(e) seeks to empower the Minister to extend the period of contracted service of a member of the Reserve Force for a period of not more than three months after the expiry of such contracted service or until the conclusion of the operations which are being conducted. This means that the Defence Force can retain the services of Reserve Force members who are engaged in important operations.

3.4 Clause 4

Clause 4 seeks to amend section 55 of the Act by empowering the Commission to recommend pay, salaries and entitlements, including allowances, disbursements and other benefits to the Minister. The Minister may approve these recommendations in consultation with the Minister of Finance.

3.5 Clause 5

3.5.1 Clause 5 inserts sections dealing with the establishment of the Commission and the appointment of the members of the Commission (proposed section 62A).

3.5.2 The Commission will be required to make recommendations to the Minister regarding conditions of service and other benefits, after conducting relevant research, reviewing the relevant policy and consulting various stakeholders (proposed section 62B).

3.5.3 The proposed sections set out in detail the procedure to be followed in the appointing the members of the Commission. The primary responsibility for the selection of the members of the Commission will lie with a nomination committee which will make recommendations to the Minister for suitable candidates (proposed section 62C).

3.5.4 The clause provides for disqualifications from serving in the Commission, for the Minister to remove a member from office under certain circumstances, and for circumstances under which a member must vacate office (proposed sections 62D and 62E).

3.5.5 The clause furthermore makes provision for certain procedural matters, e.g. meetings of the Commission and committees of the Commission (proposed sections 62F and 62G).

3.5.6 The Commission will be accountable to and report to the Minister, who in turn will report to Cabinet and Parliament on the activities and findings of the Commission. (proposed section 62H).

3.5.7 The Minister will appoint or designate the necessary staff to assist the Commission in performing its duties (proposed section 62I).

3.5.8 The Commission will be funded from the budget of the Department of Defence and Military Veterans (proposed section 62J).

3.5.9 The clause furthermore seeks to empower the Minister to intervene where the Commission has not executed its functions effectively and efficiently by directing the Commission to perform certain specified acts to rectify the situation. Where the Commission fails to comply with the directive, the Minister may replace the members or appoint an administrator to take over one or more function of the Commission. The Minister is also authorised to dissolve the Commission if the Minister on good cause shown loses confidence in the Commission to perform its functions properly (proposed section 62K).

3.5.10 The proposed section 62L seeks to give the Minister the power to make regulations regarding the manner in which consultation with the Commission is to be conducted, the procedures in this respect and, generally, regarding the smooth functioning of the Commission.

3.6 Clause 6

Reference has already been made to the fact that the Act currently prevents the Minister from making regulations regarding the remuneration of members of the Defence Force. Section 82 of the Act contains the general authorisation to make regulations. Clause 6 seeks to omit the provision in section 82(1)(a) which prevents the Minister from making regulations in this regard.

3.7 Clause 7

This clause proposes to create offences in respect of a person who fails to render service required in terms of his or her military service contract or to report for duty in terms of a call-up order.

3.8 Clause 8

Clause 8 seeks to ensure a smooth transition from the current dispensation under the interim National Defence Force Service Commission to the new dispensation envisaged in the Bill.

4. CONSULTATION

Stakeholders within the Department of Defence (Reserve Force Council, Human Resource Staff Council and the Plenary Defence Staff Council) have been consulted regarding the proposed amendments.

5. FINANCIAL IMPLICATIONS FOR STATE

Costs resulting from the implementation of this Bill will be borne by the Department.

6. PARLIAMENTARY PROCEDURE

6.1. The Department of Defence and the Office of the Chief State Law Adviser are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2. The Department of Defence and the Office of the Chief State Law Adviser are further of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.