



THE BAR
OF IRELAND

The Law Library

BARRA NA hÉIREANN

An Leabharlann Dlí

SUBMISSION TO
JOINT COMMITTEE ON FOREIGN
AFFAIRS & DEFENCE ON THE
GENERAL SCHEME OF THE DEFENCE
(AMENDMENT) BILL 2023

7 MARCH 2024

INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared this submission in response to the invitation to make a written submission on the General Scheme of the Defence (Amendment) Bill 2023.

GENERAL COMMENTS

Before turning to some of the specific provisions in the Heads of the 2023 Bill, it may be useful to the Committee if The Bar of Ireland makes some general comments for context:

1. The principal Act governing the operation of the Defence Forces is the Defence Act 1954 (“**the 1954 Act**”). This is one of a group of Acts that are collectively cited as the Defence Acts 1954 to 2015. The 1954 Act has been substantially amended across many different pieces of legislation, some of which have no direct relevance to defence matters at all. This makes the Defence Acts confusing and difficult to navigate. Credit is due to the Law Reform Commission for the excellent consolidated version of the 1954 Act that they maintain, which is an essential resource for legislators, legal practitioners, judges and Defence Forces personnel.
2. Even allowing for the many contemporary amendments to the 1954 Act, it was enacted in a very different time. For example, it could not have contemplated the significant expansion in the scope and scale of employment law in the meantime, which gives rise to confusion around the employment status of Military personnel and the terms on which they are engaged. The 1954 Act also uses gendered language in relation to Military personnel in that “man” is used throughout to refer to enlisted personnel who are not officers.
3. It is respectfully suggested that it would be appropriate for a consolidation and modernisation of the Defence Acts to be considered, rather than further piecemeal amendments to diverse pieces of legislation. This comment is made in the context that the Government proposes to bring forward further legislation this year, arising from commitments relating to Defence policy and the transformation of the Defence Forces.

It is now proposed to turn to some of the specific Heads of the 2023 Bill upon which The Bar of Ireland may be able to assist the Committee.

HEAD 8

4. The Bar of Ireland notes the very useful functions proposed to be fulfilled by the External Oversight Body that will be established by Part 2 of the 2023 Bill, building on the important work of the non-statutory External Oversight Body established in 2023.
5. Given the important functions to be performed by the External Oversight Body, it is suggested that it should be a statutory requirement that the chairperson of the External Oversight Body be a retired Judge of the Superior Courts or a barrister or solicitor of at least 10 years' standing. The appointment of a retired member of the Judiciary or senior practising legal professional to the role would assist in ensuring that the levels of independence and rigour required for the External Oversight Body to perform its important work would be achieved.
6. It is also suggested that item (4) of this proposed Head would benefit from specifically stating that the External Oversight Body shall have at least one member having sufficient experience and expertise in employment law (including employment equality law).

HEAD 26

7. The Bar of Ireland notes that the proposal that the representative associations (i.e. PDFORRA and RACO) be permitted to associate with ICTU follows on from well documented legal action by one of the representative associations and undertakings given by the Minister for Defence.
8. The prohibitions in the proposed Head 26 require detailed scrutiny. It is acknowledged that, owing to the unique nature of the Defence Forces and the requirements to maintain Military command and discipline, the activities of the representative associations and of individual Military personnel require some restriction, particularly in relation to matters of politics and public controversy.
9. However, it must also be acknowledged that such prohibitions constitute a very significant restriction on the free exercise of Constitutionally guaranteed rights, for example the right of citizens to express freely their convictions and opinions and to form associations and unions, which are found in Article 40.6 of the Constitution. They also are a restriction on the free exercise of, for example, the rights to freedom of expression and freedom of assembly and association contained in the European Convention on Human Rights.

10. It is necessary, therefore, for any such restrictions to be appropriately justified and for them to be proportionate and go no further than is necessary for the legitimate aim concerned.
11. The Committee's attention is respectfully drawn, in particular, to the restrictions at (i) and (j) of the section proposed in Head 26, which are very far ranging indeed. They would, on their face, seem to prohibit the representative associations from, for example, encouraging their members from participating in a protest or demonstration that ICTU (or any other body) might organise in relation to pay and conditions in the public service generally or for the Defence Forces specifically.
12. Given the very broad and extensive nature of the proposed restrictions, it is certainly open to question as to whether those restriction go further than what is proportionate and necessary in the circumstances. This is an issue that the Committee may wish to consider as part of its work.

HEAD 28

13. While Head 24 is concerned with the representative associations and their spokespersons, Head 28 is directed at members of the Permanent Defence Force generally. It proposes to amend the 1954 Act in order to extend the prohibitions currently imposed on members of the Defences Forces from engaging in certain activities.
14. It is not disputed that there is a legitimate interest in prohibiting members of the Defence Forces from engaging in political activity, including in being members of a political party or campaigning for political causes.
15. However, it is suggested that the section proposed in Head 28 goes considerably further than that. It proposes that:

(1) "A member of the Permanent Defence Force shall not:

(a) without prior authorisation, make, while in uniform, or otherwise identifying themselves as a member of the Permanent Defence Force, a public statement or comment concerning a political matter, or a matter of government policy;

(b) attend, while in uniform, or otherwise identifying themselves as a member of the Permanent Defence Force, [protests, marches or other gatherings] concerned with:

(i) a political matter,

(ii) a matter of government policy;..."

16. It is respectfully suggested that the section proposed in this Head would, for example,

restrict the ability of members of the Permanent Defence Force from attending a protest relating to their pay and conditions or the pay and conditions pertaining in the public sector generally, even if they attended such an event out of uniform.

17. As with Head 24, it is suggested that the proposals in Head 28 represent a significant restriction on the ability of members of the Defence Forces to exercise rights guaranteed by the Constitution and European Convention on Human Rights. Therefore, it is suggested that the Committee should scrutinise carefully the proposal in Head 28 to ensure that the restrictions proposed serve a legitimate aim and are proportionate.
18. It may assist the Committee to be aware that a challenge to the restrictions placed on members of the Permanent Defence Force to attend at protests relating to Military pay and conditions, even in civilian attire, is currently before the High Court in the case of *Martin Bright v. Minister for Defence*. The High Court (Sanfey J) has heard the case and the Court's judgment is awaited.
19. The Bar of Ireland will not comment on an ongoing case but the Committee may wish to consider the content of the imminently due judgment before contemplating any further legislative intervention in the area.

HEAD 38

20. The Bar of Ireland welcomes the proposed amendment under this Head, whereby the Director of Military Prosecutions will have the option of appointing civilian barristers or solicitors to act as prosecutors in courts-martial.
21. We believe that such prosecutions will be greatly assisted by the expertise that our highly qualified members already bring to prosecution work in criminal and regulatory matters in other fora. Expanding the pool of prosecutors will also allow for more timely progression of cases, which is clearly in the interests of justice for all concerned.

CONCLUSION

The Bar of Ireland thanks the Committee, once again, for inviting it to make this submission. We are at the Committee's disposal if we can assist further in the consideration of any of the issues raised in this submission and would be happy to make an oral presentation to the Committee if requested.