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Committee Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee
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Defence Legislation Amendment (Discipline Reform) Bill 2021–
Defence Submission

We refer to your letter dated 1 September 2021 inviting Mr Greg Moriarty, Secretary Department of Defence, to make a written submission concerning the provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021.

It is the submission of Defence that the provisions of the Bill will make long overdue and important changes to the efficiency, effectiveness and fairness of military discipline to be achieved by the proposed amendments to the *Defence Force Discipline Act 1982* (DFDA). A core objective of these changes is to reduce risks to the mental health and well-being of all individuals effected by their involvement in a disciplinary event.

Background to the DFDA

Military service and discipline are unique as they accrue challenges, constraints and responsibilities that few other Australians experience. In addition to civilian law, members of the Defence Force (including in certain circumstances, part-time members and former members), defence civilians and prisoners of war are subject to military law.

The DFDA provides a system of military discipline that applies to members of the Defence Force at all times, whether they are deployed on operations or exercises within Australia or overseas, in times of peace, conflict and war. The purpose of the DFDA is to enable the Chief of the Defence Force, through delegated command authorities, to enforce and maintain discipline within the Defence Force. The legitimacy of legislation for the purposes of military discipline has been consistently upheld by the High Court of Australia.

Discipline lies at the heart of service in any defence force. Australian Defence Force members are legally bound to follow all lawful commands, including orders that involve considerable risk to their own life or may require them to use and apply lethal force against an enemy. High standards of discipline, enforced and maintained through the DFDA, and in a manner that minimises risks to members' mental health and well-being, is essential to the capability of the Australian Defence Force to protect Australia and its national interests.

Disciplinary breaches under the DFDA. The DFDA regulates three kinds of disciplinary breaches:

1. **Disciplinary infringements:** examples include absence without leave, absence from duty, disobeying a lawful command. These are minor forms of disciplinary breaches.

2. **Service offences:** examples include assaulting a superior officer, theft of service property, alteration / falsification of service documents, conduct relating to operations against an enemy force. Some service offences have elements that are the same or similar to a civilian offence.

3. **Territory offences:** these are service offences applicable by virtue of the incorporation of the law of the Australian Capital Territory and certain Commonwealth law into the DFDA through section 61.

Discipline authorities. The DFDA creates three methods, or discipline authorities, for dealing with breaches of discipline:

1. **Discipline Officer:** deal with certain minor disciplinary breaches by way of infringement conducted on a non-adversarial basis applying procedural fairness. A member must voluntarily elect to be dealt with by a Discipline Officer, and accordingly this system only relates to circumstances where a member admits to the infringement. The range of punishments a Discipline Officer can impose is limited and includes a small fine or minor punishments such as extra duties and stoppage of leave.

2. **Summary authority service tribunal:** deal with service offences, applying principles of criminal responsibility and are adversarial in nature, conducted at unit level by non-legally qualified personnel. There are three types of summary authority; subordinate summary authority, commanding officer and superior summary authority. The maximum punishment that can be imposed depends upon the type of summary authority and the rank of the offender and includes detention, reduction in rank and a fine.

3. **Superior service tribunal:** generally reserved for the trial of serious service offences by court martial (General or Restricted) or Defence Force magistrate. The maximum punishment a superior service tribunal can impose depends upon the type of tribunal and the rank of the offender and can include severe punishments such as imprisonment and dismissal from the Defence Force.

Reviews of the DFDA

The DFDA commenced in July 1985 and has now had the benefit of more than 35 years of operation, and significantly, on a wide range of operational deployments. It has been reviewed extensively, but incomplete and overlapping implementation of recommended changes has reduced the coherency of the discipline system.

External reviews. Reviews of the DFDA, commencing with the *Defence Force Discipline Legislation Board of Review* chaired by the Hon Xavier Connor AO, QC (1989), and including the *Inquiry into Military Justice* conducted by Hon James Burchett QC (2001) and the *HMAS Success Commission of Inquiry* presided over by the Hon Roger Gyles AO, QC (2011), have identified a common theme and shortcoming of the DFDA. That is, it is not appropriate for minor discipline matters to be subject to criminal justice court-like procedures.

The 1989 Board of Review commented:

> *'For the most part…service discipline, particularly as administered by summary authorities, has to do with matters which do not contain an element of criminality and which do not constitute an 'offence' under civil law"* and *"Many of them…are of quite a minor nature and probably in more than 90% of these the facts are not in dispute.'*[1]

The Board recommended that a number of identified minor disciplinary breaches not be classified as service offences under the DFDA and that discipline officers, who would deal with minor breaches of discipline as infringements not service offences, would not be service tribunals. The Board's recommendations were accepted by Parliament and enacted via the Defence Legislation Amendment Bill 1995. The accompanying Explanatory Memorandum to the Bill states:

> '*New sections 169A, 169C and 169F make it clear that discipline officers are not service tribunals and the infringements with which they can deal are not service offences.*'

In response to reports of 'rough justice' being applied within 3 RAR an inquiry was conducted into military justice within the Australian Defence Force. Burchett J noted that the complexities of the summary discipline system in dealing with minor breaches of discipline resulted in:

> '*…many non-commissioned officers do not bring charges in cases in which they should*.'[2]

The inability to deal with various minor breaches of discipline without recourse to using the summary discipline system resulted in unsanctioned and informal punishments being applied in the form of what was described as 'extras'.[3]

Burchett J made a number of recommendations to broaden the scope of the discipline officer scheme. All were agreed by Government and publically announced in August 2001, but only some of the recommendations were implemented by the Defence Legislation Amendment

[1] At 3.05.
[2] At 4.06.
[3] At 2.19-28.

Bill 2008 which expanded the rank coverage of the scheme to include the rank of Captain (Army equivalents). Importantly the recommendations to retain infringement records until the next promotion and to consider raising the penalties if the scheme was expanded to higher ranks (as occurred), were not progressed, nor was the increased punishment for more senior ranks (Recommendations 9 and 11 respectively).

Internal review. In 2016 the Chief of the Defence Force directed a comprehensive internal review of the summary discipline system in response to his concerns and those of the Service Chiefs that the summary discipline system was not working effectively.

Consistent with the findings of Connor and Burchett JJ this internal review by Defence, the *Review of the Summary Discipline System 2017*, found that the current summary discipline system is complex, difficult to use, unresponsive and because of its complexity, results in unnecessary delay resolving minor wrong-doing, especially where the facts are not in dispute. Smaller units in particular found the procedures so complex that they frequently conducted multiple rehearsals to ensure procedural errors were not made, and summary authorities read from lengthy scripts rather than interacting with their subordinate accused of wrong-doing. It was found that units often did all they could to avoid using the summary discipline system; a finding consistent with that of the *HMAS Success Inquiry*.[4] The Review found, however, that experienced commanders, well supported by more senior non-commissioned officers in larger commands, were better able to navigate the summary system.

The finding about diminishing use is borne out by data which shows a significant decline in use of the summary system, by about 60% since 2008. The decline has been consistent and constant. Conversely, the disciplinary infringement scheme is widely regarded across the Australian Defence Force; it is simple, quick, fair and operating well.

This internal review of the summary discipline system was cognisant of previous reviews into military justice and discipline, in addition to those reviews mentioned above, and undertook wide consultation across Defence, including with all military justice stakeholders. The Review made a number of recommendations to improve the effectiveness, efficiency and fairness of dealing with breaches of discipline at the Discipline Officer and summary authority level. Those recommendations were accepted by the Chief of the Defence Force, the Vice Chief of the Defence Force and the Service Chiefs and many are reflected in the proposed changes to the DFDA by the Defence Legislation Amendment (Discipline Reform) Bill 2021.

Why does Defence consider the changes proposed in the Bill essential

Australian Defence Force personnel work and live with one another, whether in Australia or when deployed on operations, and within highly trained teams, and they have a perfectly reasonable expectation that any wrong doing or breach of discipline is dealt with quickly and fairly. Commanders at all levels have a command responsibility to maintain and enforce

[4] HMAS Success Commission of Inquiry Part Three.

discipline and need to have confidence in their use of discipline system. Failure to maintain discipline may put the lives of others at risk, erode morale and adversely impact unit cohesion and fighting capability.

Unlike criminal justice authorities, those in positions of command of Australian Defence Force personnel have a continuing responsibility for the well-being and safety of all their subordinates, including those accused of wrongdoing, at all times and in all locations. This responsibility of command is even more acute in deployed operational environments. An important component of that command responsibility is supporting, through delegated responsibility under the DFDA, the Chief of the Defence Force to enforce and maintain discipline across the Australian Defence Force.

The current adversarial court-like summary discipline system is disproportionately complex in dealing with minor disciplinary breaches where the beach of discipline is admitted. Senior non-commissioned officers and junior officers remain reluctant to use it.

The adversarial summary tribunal proceedings remain important and are appropriate for ensuring fairness and justice to members in more serious disciplinary matters or where matters are contested, but are ill suited to dealing with minor disciplinary breaches.

Almost invariably when Australian Defence Force members are charged with a service offence they admit their wrong doing. The Judge Advocate General's Annual Report to Parliament for 2019-2020 cites pleas of guilty in over 99.5% of cases before summary authority service tribunals.[5]

The nature of modern operations means that the DFDA has not always met the discipline needs of deployed units, particularly for those operating at great distances away from the support of formation headquarters. On recent operations in the Middle East and Afghanistan breaches of discipline were often dealt with by sending the accused back to Australia and leaving matters unresolved until witnesses returned from deployment. This erodes the ability of command to immediately and effectively deal with breaches of military discipline in theatre and adversely impacts the capability of operations through loss of personnel and decline in morale. Delays in finalising disciplinary matters can cause prolonged mental anguish and stress not just to the returned member, but also their family.

Defence considers it is now time to make changes to the DFDA to enable a broader range of minor breaches of military discipline to be dealt more simply and quickly and to ensure that the purpose of the DFDA to enforce and maintain discipline meets the requirements of the Australian Defence Force now and into the future.

In his 2019-2020 Annual Report to Parliament the Judge Advocate General made the following comment in support of the proposals in the Bill, with a cautionary note regarding

[5] At Annex E.

the cyber-bullying service offence (which is addressed below by this submission), to amend the DFDA:

> '*As they are described and subject to the final form of legislation, these proposals appear to be consistent with the continued fair and efficient operation of the summary discipline system*.'[6]

Discipline Reform. The Bill seeks to amend the DFDA in three core areas:

1. Schedule 1 - expand the disciplinary infringement scheme.

2. Schedule 2 - re-align the structure of the summary discipline authorities consistent with the seriousness of the offending, the rank of the accused and the seniority of the summary discipline authority.

3. Schedule 3 - introduce new service offences relevant to the contemporary Australian Defence Force.

The aim of the disciplinary reforms to the DFDA proposed in the Bill is to make the discipline system easier to use, particularly whilst deployed on operations, by allowing for more minor disciplinary issues to be managed quickly and simply under the disciplinary infringement scheme by a Discipline Officer or Senior Discipline Officer where appropriate, while including additional fairness safeguards; re-align the jurisdiction and application of punishments at the commanding officer and superior summary authority level; and deter behaviour inconsistent with the Defence Values of 'Service, Courage, Respect, Integrity and Excellence'.

1. **Schedule 1 - Expanded disciplinary infringement scheme**. The ability to deal with a broader range of minor breaches of discipline as disciplinary infringements will reduce the stress on Australian Defence Force members who admit the breach of discipline as they will not be subjected to a formal summary hearing and will have their matter finalised within two to three days. This is achieved by removing the lowest level subordinate summary authority to be replaced with a Senior Discipline Officer with broadly the same punishment authority as the subordinate summary authority with an increased rank range up to Captain (Army equivalents).

The Senior Discipline Officer will have authority to deal with a wider range of common minor disciplinary breaches than the Discipline Officer. The scope of the existing Discipline Officer jurisdiction and punishments are preserved.

Additional Safeguards and fairness. Current safeguards for the disciplinary infringement scheme will remain; crucially the requirement that the infringed member make a positive election to be dealt with under the discipline infringement scheme and that such an election is

[6] At paragraph 48.

an admission to committing the disciplinary breach. Additional safeguards included in the Bill are:

- The requirement for any reasonable excuse to be considered before issuing a disciplinary infringement notice. The Infringement Notice will require the Infringement Officer to specify if a reasonable excuse was offered and the outcome of its consideration.

- The ability of a Discipline Officer/Senior Discipline Officer to dismiss an infringement if the officer considers the infringed member has a reasonable excuse for committing the infringement. The Discipline Officer is also required to inquire if the infringed member has a reasonable excuse for committing the breach of discipline.

- Punishments imposed by a Senior Discipline Officer must be reviewed by a commanding officer. On review, a commanding officer will have the power to confirm a punishment decision, substitute a punishment decision with a reduced punishment, decide that no punishment be imposed, or that the discipline infringement be dismissed and no punishment imposed.

The Bill provides that the Chief of the Defence Force may, by legislative instrument, make rules for, or in relation to the keeping of disciplinary infringement records and the retention, use or destruction of disciplinary records.

2. **Schedule 2 - Restructure of summary authorities.** The Bill institutes a more logical structure and progression between the new two tiered disciplinary infringement scheme and the summary authority service tribunals, based on the seriousness of the disciplinary breach, available punishments, and rank of the individual.

Currently the most junior discipline authority, the Discipline Officer, is able to deal with alleged wrong-doing by a much broader rank range, from Private to Captain (Army equivalents), than the more senior subordinate summary authority, who can only deal with the ranks of Private to Corporal (Army equivalents). In creating the position of a Senior Discipline Officer in lieu of the subordinate summary authority, this Bill will align the ranks each can deal with from Private to Captain.

Inequities persist at the upper scale of summary service tribunals. The most senior summary authority, a superior summary authority, can only deal with the ranks of Warrant Officer Class 2 up to the rank of Major General (Army equivalents), and has less power of punishment than the intermediate commanding officer level; this gives the impression of more senior officers being treated more favourably than junior offenders. This is both iniquitous and opaque. The Bill addresses this by providing for the superior summary authority to deal with all ranks up to Major General (Army equivalents) and align the punishments that apply to those of a commanding officer; new punishments have been provided where they exceed the rank jurisdiction of a commanding officer.

3. **Schedule 3 - New service offences.** The Bill proposes the creation of new service offences to better manage breaches of discipline in the modern Australian Defence Force. They include failure to perform duty or carry out an activity; cyber-bullying; and failure to notify a change in circumstances concerning the receipt of a benefit or allowance.

Failure to perform duty or carry out an activity and **Failure to notify a change in circumstances concerning the receipt of a benefit or allowance.** These new service offences deal with common circumstances of failure to perform at the high level of personal and professional conduct required of Australian Defence Force members and support the operational effectiveness of the Australian Defence Force. Consistent with a number of other offences in the DFDA, strict liability applies to elements of these offences, offset by the availability of a defence of reasonable excuse.

Cyber-bullying. The creation of a cyber-bulling service offence is critically important to the maintenance of discipline in the modern Australian Defence Force. Military discipline needs to reflect contemporary society and respond to how technology is used, but with the unique needs of the Australian Defence Force in mind.

Cyber-bullying exists on a spectrum of seriousness ranging from a one-off comment to persistent targeted attacks against an individual. Such conduct by Defence members is corrosive to discipline and can have an extremely adverse effect on the mental well-being of its victims. The new cyber-bullying service offence will send a very strong message to Defence members that the use of social media to cyber-bully another person is unacceptable in a disciplined force. It is unlikely that the Australian Defence Force or broader Australian community would expect otherwise as any such behaviour is inconsistent with good order and discipline and appropriate that it be dealt with under the DFDA.

Defence considers that cyber-bullying is not a minor breach of discipline suitable for the disciplinary infringement regime. As with all offences, matters will vary in the seriousness of the conduct, and the level of complexity. Conduct at the lower end of the scale, where there is limited legal complexity, is appropriate to be dealt with by a summary authority service tribunal. More serious conduct, or where there were legal complexities, would be tried before a superior service tribunal or referred to the civil police.

The scope of the cyber-bullying service offence by a defence member extends to *another person,* meaning that the victim of the proposed offence could be any person, including a victim who is not a member of the Defence Force. The offence does not require that the conduct occur on service land, or that a defence member is on duty at the time of offending. It is sufficient that the accused is a Defence member (as defined under the DFDA) for the good order and discipline of the Australian Defence Force to be impacted. The discipline and good order of the Australian Defence Force can be impacted by such conduct, regardless of the identity of the victim.

The *Criminal Code Act 1995* contains an offence of using a carriage service to *menace, harass or cause offence* (s.474.17). This offence carries a maximum punishment of three

years imprisonment and can be charged under the DFDA as a Territory Offence (s.61). However, as a prescribed offence[7] it cannot be heard and determined before a summary authority, with the consequence that the charge can only be determined before a superior tribunal.

The s.474.17 *misuse of a carriage service* offence is not tailored to support the Australian Defence Force to maintain good order and discipline by taking swift action in respect of cyber-bullying. A tailored offence, able to be dealt with by summary discipline authorities within weeks of the alleged offending, is necessary to meet the disciplinary needs of the Australian Defence Force, particularly in deployed environments.

The proposed s.48A has broader application than the s.474.17 offence, as it deals with cyber-bullying that would be regarded as *threatening, intimidating or humiliating* another person. It is appropriate that this higher threshold for behaviour be applied to a disciplined force, where it is not applied to civilians. As individuals authorised and trained to apply lethal force in service of their nation, members of the Australian Defence Force must be trusted to apply violence only in a disciplined and lawful way. Cyber-bullying behaviour evinces a willingness to de-humanise and de-value another person, a clear risk factor for a deviation from norms in the controlled application of violence.

The proposed cyber-bullying offence is complemented by two other provisions. Firstly, at s.84A a service tribunal (including a summary authority) that convicts a defence member of a cyber-bullying offence (s.48A), may make an order that the convicted person take reasonable action to *remove, retract, recover, delete or destroy* the offending cyber-bullying material. By extension, the Bill proposes the creation of a new service offence at s.48B of *failure to comply with a removal order* and will carry a maximum punishment of two years imprisonment.

In combination, the proposed offences at s.48A and 48B, and complemented by s.84A, are unique and will meet the disciplinary needs of the Australian Defence Force. Critically, the ability to make a removal order under s.84A, will enable the Australian Defence Force to take timely action to limit the hurt and anguish that sufferers of cyber-bullying may endure, protect the reputation of the subject of the cyber-bullying, and maintain the community standing of the Australian Defence Force. In contrast, protracted proceedings under s.474.17 of the Criminal Code by a superior service tribunal, without recourse to the removal order provisions within s.84A, would unnecessarily prolong the suffering of those subject to cyber-bullying, and harm the reputation of the Australian Defence Force.

The misuse of social media is a phenomenon that is occurring in the Australian Defence Force, as it is in the wider community. The combined effect of the cyber-bullying provisions will send a very strong and clear message that cyber-bullying, wherever and whenever it occurs, and whomever it is directed to, is anathema to a disciplined force and contrary to Defence Values.

[7] DFDA s.104(b) and Defence Force Discipline Regulations Reg 51 which defines a prescribed as carrying more than two years imprisonment

Concluding remarks

The Chief of the Defence Force's requirement is for a military justice system[8] that is fair and just, is easier to use, particularly at the lowest levels and particularly in a deployed environment, and is trusted by our members of the Australian Defence Force and our nation. A critical aspect of fairness is timeliness. Matters must be concluded without undue delay in order to minimise the impact on all individuals involved. This approach is vital to enable commanders to effectively manage personnel and immediately address disciplinary concerns. Unnecessary delays can have a corrosive effect on operational capability, as well as individuals and their families.

It is the Defence submission that if the amendments to the DFDA proposed in the Bill are enacted, this will have a substantial and positive effect on the administration of discipline and improving the well-being for all those who serve in our Defence Force.

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[8] The military justice system encompasses disciplinary and administrative actions.