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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 183 2002-03

Defence Legislation Amendment Bill 2003

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Law and Bills Digest Group
23 June 2003

Contents

Purpose	1
Background	1
Defence Force discipline	1
Abadee report and its aftermath	3
Main Provisions	6
Amendment of the <i>Defence Force Discipline Act 1982</i>	6
Criminal Code harmonisation	6
Investigation of service offences	6
Amendments relating to Convening Authorities	7
Amendments relating to the Judge Advocate General	8
Reviewing the proceedings of service tribunals	8
Amendments relating to the Discipline Officer scheme	9
Chief Judge Advocate	9

Amendments consequential on the High Court's decision in <i>Re Tracey; Ex parte Ryan</i>	10
Judge Advocate's Panel	10
Punishments	11
Amendments relating to the cadet services	11
<i>Air Force Act 1923</i>	11
<i>Archives Act 1983</i>	11
<i>Defence Act 1903</i>	11
<i>Freedom of Information Act 1982</i>	12
<i>Naval Defence Act 1910</i>	12
<i>Privacy Act 1988</i>	12
<i>Safety, Rehabilitation and Compensation Act 1988</i>	12
Impersonation and service medal offences	12
Amendments relating to Defence Act inquiries	13
Amendments relating to the <i>Defence Force (Home Loans Assistance) Act 1990</i>	13
Amendments relating to the application of the Criminal Code	14
Endnotes	15

Defence Legislation Amendment Bill 2003

Date Introduced: 26 March 2003

House: House of Representatives

Portfolio: Defence

Commencement: Amendments of the *Defence Force Discipline Act 1982* commence 28 days after the date of Royal Assent. Other amendments commence on a variety of dates. Where necessary, these commencement dates are stated in the Main Provisions section of this Digest.

Purpose

Among other things, to make changes to the *Defence Force Discipline Act 1982* in response to recommendations made by the Abadee report, *A Study into the Judicial System under the Defence Force Discipline Act*.

Background

Defence Force discipline

Australia's system of Defence Force discipline is summarised in the 1999 report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, [*Military Justice Procedures in the Australian Defence Force*](#). The *Defence Force Discipline Act 1982* (DFDA) is the primary statute. It:

... creates service offences and service tribunals, vests service tribunals with jurisdiction to hear and try service offences and provides for the punishment of persons convicted of service offences. The Act also contains detailed provisions in respect of arrest, search and custody and the investigation of service offences and establishes a comprehensive system for the appeal and review of convictions and punishments. Finally, it creates the office of the Judge Advocate General, details procedural matters and details the principles of criminal liability that are to apply to proceedings conducted by service tribunals.¹

Also relevant are regulations and rules made under the DFDA, other Commonwealth statutes such as the Criminal Code, the *Evidence Act 1995* and the *Defence Force*

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Discipline Appeals Act 1955. The last piece of legislation provides the means by which those convicted by courts martial or Defence Force magistrates can appeal their conviction.²

Three categories of offence are created by the DFDA. First, there are offences ‘peculiar to the defence forces, such as endangering morale, absence without leave, and disobedience of command.’³ Second, there are offences that are the same or similar to, civil offences but that apply only to service equipment, defence members or defence civilians.⁴ These offences include destruction or unlawful possession of service property and dealing in narcotic goods. Last, the DFDA imports offences ‘directly from the general law.’⁵ However, certain very serious offences are not tried before service tribunals. Thus, the DFDA provides that offences like treason, murder, manslaughter and bigamy cannot be tried by a service tribunal without the consent of the Commonwealth Director of Public Prosecutions.⁶

Convening Authorities—who are appointed by Service Chiefs—have important roles in relation to prosecutions under the DFDA. For instance, they decide whether there should be a trial and what the charges should be. Prior to the administrative changes made in the aftermath of the Abadee report (see below) a Convening Authority also exercised other functions—for instance, it decided who would try a matter and selected the trial judge.

Under the DFDA, minor disciplinary breaches can be dealt with by Discipline Officers. Additionally, the DFDA establishes two classes of service tribunal authorised to try less trivial ‘service offences’.⁷ Service tribunals are ad hoc tribunals rather than bodies with a permanent existence. ‘Service offences’⁸ include offences against the DFDA or regulations (see above). The first class of tribunal is the ‘summary authority’. Summary authorities deal with most matters and are drawn from the ranks of ADF officers. They try the less serious service offences, conduct preliminary hearings for more serious offences and have more limited powers of punishment than courts martial.

The second class of tribunal consists of courts martial and Defence Force Magistrates (DFMs). The DFDA provides that a General Court Martial consists of a President, who cannot be below the rank of Colonel, and at least four other members.⁹ It is able to try serious offences and is empowered to hand down the most severe penalties of all the service tribunals. A Restricted Court Martial consists of a President who cannot be below the rank of lieutenant-colonel and at least two other members.¹⁰ It hears matters like absence, insubordination, assault and theft.

A court martial performs a ‘jury-like’ function and also determines punishment.¹¹ Members of courts martial are all serving officers and, until recently, were appointed by a Convening Authority.

Binding legal rulings are provided to courts martial by Judge Advocates (JAs) who are legal practitioners of at least 5 years standing.¹² Judge Advocates perform essentially the same function as is performed by a judge in a jury trial.

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Trial before a Defence Force Magistrate is another way of dealing with service offences, particularly offences not suitable for trial before a summary authority or court martial, like complex fraud matters.¹³ DFMs are appointed by the Judge Advocate General (JAG). However, the JAG can only appoint a person who is a member of the judge advocate's panel. A person cannot be appointed to the panel unless he or she is a legal practitioner of at least 5 years' standing who has been appointed by a Chief of Staff nominated by the JAG. Typically, DFMs are 'senior full-time ADF legal officers or senior part-time ADF lawyers, such as Queen's Counsel and civilian magistrates.'¹⁴

The JAG is an independent statutory office created under section 179 of the DFDA. The JAG must be a Federal Court or State Supreme Court judge. The functions of the office include:

... making procedural rules for service tribunals, providing the final legal review of proceedings within the ADF, participating in the appointment of Judge Advocates, Defence Force Magistrates and legal officers for various purposes and reporting upon the operation of laws relating to the discipline of the ADF.¹⁵

Abadee report and its aftermath

In 1995 Brigadier the Hon Mr Justice Abadee, a NSW Supreme Court judge and a Deputy Judge Advocate General, was commissioned by the Chief of the Defence Force (CDF) to examine arrangements for the conduct of trials under the DFDA in order to determine whether those arrangements satisfied current tests of judicial impartiality and independence.¹⁶ The Abadee inquiry was appointed in the aftermath of a number of High Court challenges to the system of military justice established under the DFDA.¹⁷ Additionally, judicial decisions in the United Kingdom and Canada had determined that aspects of the military justice systems in those countries did not satisfy standards of judicial independence and impartiality.¹⁸

Brigadier Abadee's report, *A Study into the Judicial System under the Defence Force Discipline Act* was presented to the CDF on 11 August 1997. It was not made public. However, its 48 recommendations are summarised in an Appendix to the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force* (see below).¹⁹ Thirty-nine of Brigadier Abadee's recommendations were agreed to by the CDF.²⁰ Among the most important of Brigadier Abadee's comments were those relating to the Convening Authority. He said:

There is a most powerful case for eliminating the multiple roles of the convening authority.²¹

In its report on military justice, the Joint Committee described the multiple roles of the Convening Authority and also set out Brigadier Abadee's concerns:

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Under current arrangements the Convening Authority in ADF disciplinary proceedings has the power to:

- determine whether there should be a trial;
- determine the nature of the tribunal and the charges;
- select the trial judge and jury;
- select the prosecutor; and
- review the proceedings.

Justice Abadee noted concerns that these arrangements may engender a perception of unfairness regardless of the actual fairness of the particular proceedings. Having initiated the prosecution, the Convening Authority could be seen to have an interest in the outcome of the case justifying the decision to prosecute. Further, where the officer presiding at the trial is under the command of the Convening Authority, allegations may be levelled regarding the undue influence of the Convening Authority, to the possible detriment of the accused individual. As one of a number of measures to address this shortfall in the current system, Justice Abadee recommended that the multiple roles of the Convening Authority be removed.²²

In his 1997 Annual Report, the Judge Advocate General commented:

The recommendations in the Abadee report are based on a recognition of the importance of maintaining service discipline whilst, at the same time, paying proper regard to both the existence and appearance of a fair trial and independent system of trial. ...

The most important recommendations relate to the multiple roles presently vested in the Convening Authority. The first of those roles is concerned with the decision to lay charges and the selection of appropriate charges. However the Convening Authority also appoints the Judge Advocate and the members of the court or the Defence [F]orce Magistrate. It is my firm view that Command influence should cease at the point at which charges are laid. In the light of present day concerns for an independent trial in disciplinary procedures and the experience in other military jurisdictions, I regard it as essential that both the Judge Advocate and members of the court or the Defence Force Magistrate be appointed by an authority other than the Convening Authority. If the reforms presently under consideration are implemented these functions will be vested in the Judge Advocate General.²³

In June 1998, the position of Judge Advocate Administrator (JAA) was created by administrative decision. The JAA is now called the Chief Judge Advocate²⁴—a position that will be statutorily constituted by the Defence Legislation Amendment Bill 2003. The position was established to consider requests for the selection of Judge Advocates and Defence Force Magistrates and to send the requests to the JAG for decision. As the JAG remarked:

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In practical terms this procedure separates the process of selecting a JA or DFM from the convening authority and accordingly, makes the appointment of this officer independent of the authority preferring the charges against the accused.²⁵

In June 1999, the Joint Standing Committee on Foreign Affairs, Defence and Trade reported that the Australian Defence Force (ADF) had agreed that Convening Authorities would continue to decide whether to prosecute but would no longer select the members of a Court Martial or Defence Force Magistrate, that a prosecution policy would be introduced to guide Convening Authorities and that reviews of court martial proceedings and DFM trials would be conducted by an authority other than the Convening Authority.²⁶ The ADF said that the function of selecting members of courts martial and DFM would be transferred from the Convening Authority to the JAG.²⁷

In his annual report for 1999, the Judge Advocate General reported that 'administrative policy and procedures' designed to respond to the Abadee report were being implemented 'where possible in order to give practical effect to the recommendations in anticipation of legislative change'.²⁸ These changes included:

... administrative directions which give effect to the separation of review of courts martial and Defence Force magistrate trials from the power to convene, and the transfer of the power to select Judge Advocates, Defence Force magistrates and Section 154 Reporting Officers to [the office of the Judge Advocate General].²⁹

Additionally, the Judge Advocate General reported in 1999 that the Judge Advocate Administrator had been consulting with the three Services to develop 'appropriate procedures for the transfer of responsibility for selection of courts martial members from the convening authority to my office.'³⁰

In his annual report for 2000, the Judge Advocate General said that ministerial approval had been obtained for statutory amendments to give effect to the Abadee report recommendations but that, due to other legislative priorities, legislation was unlikely to be introduced before 2002.³¹

The need for the post-Abadee reforms to be reviewed has also been considered. For instance, the Joint Standing Committee has said it:

... accepted that the proposed post-Abadee reforms to the ADF discipline system **appear** to establish a balance between 'the needs of the ADF, the interests of justice per se and its practical administration in the ADF.' However, ... the issue of institutional independence in relation to prosecution should be reviewed after the proposed post-Abadee arrangements have been in operation for sufficient time to allow the impact to be assessed. ... a review after three years would be appropriate.³²

This recommendation was supported by the Government Response to the Joint Standing Committee report.³³

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Main Provisions

Amendment of the *Defence Force Discipline Act 1982*

Criminal Code harmonisation

Part of the Model Criminal Code project, in which the Commonwealth has been involved, has included the enactment of principles of criminal responsibility which now apply to all Commonwealth offences. These principles are found in Chapter 2 of the Commonwealth Criminal Code. Before Chapter 2 could be applied to all Commonwealth offences, existing offence provisions were reviewed with a view to harmonising them with Chapter 2, modifying its application where necessary or clarifying the application of Chapter 2.

During 2001 application statutes were passed for legislation in each Commonwealth Government portfolio. However, not all offence provisions were clarified in this process. **Items 4 and 5 of Schedule 1** are designed to do so. They repeal and replace sections 35 and 36A of the DFDA. Three separate offences are created as a result—negligent performance of duty, unauthorised discharge of a weapon and negligent discharge of a weapon.³⁴ Further, as a result of re-structuring the offences, the amendments clarify that the fault element of ‘intention’ applies to the element of conduct in the offences and ‘negligence’ to the result of that conduct.

Item 6 repeals section 40B of the DFDA (‘negligent conduct in driving’ by a defence member or defence civilian).

Investigation of service offences

Part VI of the DFDA provides for the investigation of service offences. Section 101C sets out the rights of a person in custody in respect of a service offence, before they have been charged or summoned. For instance, a detainee cannot be questioned by an investigating officer unless he or she has been told the name and rank of the investigating officer [subsection 101C(1)] and either:

- cautioned as required by ‘subsection 101D(2)’. This inserts a requirement that the caution³⁵ must be given in a language in which the person is reasonably fluent, or
- informed, in a language in which they are reasonably fluent, ‘of the matters referred to in subparagraphs 101D(2)(a)(i), (ii) and (iii)’.

The caution need not be given in writing. The references to subparagraphs 101D(2)(a)(i), (ii) and (iii) quoted above are otiose because they were repealed by the *Defence Legislation Amendment Act 1995*. The effect of **items 8 and 9** is remove the repealed references, re-insert the cautioning requirements and add two new requirements that apply when a person is detained and questioned:

- if practicable the caution and the response to it must be tape recorded, and

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- if no tape recording is made then, in any proceedings before a service tribunal, the prosecution has the burden of proving it was not practicable to make the recording.

Amendments relating to Convening Authorities

As stated in the Background section of this Digest, the DFDA establishes ‘convening authorities’ to convene courts martial and restricted courts martial and to exercise other statutory powers and functions.³⁶ Under the DFDA, where a charge is referred to a Convening Authority, it may direct that the charge not be proceeded with, it may refer the charge for trial or convene a court martial.³⁷ A Convening Authority has similar referral powers if a reviewing body, the Defence Force Discipline Tribunal or the Federal Court orders a new trial for a person.³⁸ The Convening Authority also has decision-making and referral powers where a person elects to be tried or punished by a Defence Force magistrate.³⁹ Last, where proceedings before a DFM are terminated by a Convening Authority under subsection 129A(4) of the DFDA, the Convening Authority may refer the matter to a DFM or court martial for action under Part IV of the DFDA.

Notes inserted by **items 12-15** and **22** state that where a charge or a case is referred to a DFM, it must be referred to the magistrate nominated by the Judge Advocate General. It appears that, in practice, this power is already with the JAG as a result of the implementation of administrative directions. However, the notes foreshadow the substantive amendment of the DFDA which gives an explicit statutory power to the JAG to effectively select Defence Force Magistrates (see below, **new subsection 129C(1)**).

Item 16 adds some natural justice requirements to provisions relating to the Convening Authority. For instance, if a Convening Authority believes that he or she would be biased or seen to be biased in exercising powers in relation to charging a person, or ordering a new trial referring a convicted person for punishment or other action to a Defence Force Magistrate or court martial, the Convening Authority will be able to refer the charge, order or conviction to another Convening Authority [**new subsection 103(8)**]. New provisions will also enable the Convening Authority to refer a matter to another Convening Authority if the interests of justice require it [**new subsection 103(9)**]. The Explanatory Memorandum explains that:

There is currently no provision in the DFD Act that allows one convening authority to refer a charge to another convening authority. In certain circumstances this may be required in the interests of justice because of service exigencies or the need to maintain the independence of the convening process.⁴⁰

Item 17 repeals section 118 of the DFDA. Section 118 provides that a Convening Authority cannot appoint a person to be a member or JA of a court martial if he or she believes the person would be biased or be seen to be biased. Section 118 is no longer needed because Convening Authorities will no longer have independent powers of appointment under the DFDA. The requirement to avoid bias in the appointment of court martial members or JAs will be part of the responsibility of the JAG, who will effectively

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determine who will sit on courts martial as a result of the amendments made by **new section 129B** (see below).

Items 18-20 insert notes into relevant provisions in the DFDA to the effect that a Convening Authority must not appoint a person as a member or JA of a court martial unless the person has been nominated by the JA. These notes also refer to **new subsection 129B**, which will contain the JA's substantive powers in relation to the appointment of courts martial members and JAs.

Amendments relating to the Judge Advocate General

Part XI of the *Defence Force Discipline Act 1982* provides for the appointment of a Judge Advocate General and Deputy Judge Advocates General. The JAG must be a person who is or has been a judge of a federal court or a State or Territory Supreme Court. Deputy Judge Advocates may be drawn from the ranks of legal practitioners with five years standing.

As stated earlier, the functions of the Judge Advocate General include 'making procedural rules for service tribunals, providing the final legal review of proceedings within the ADF, [and] participating in the appointment of Judge Advocates, Defence Force magistrates and legal officers for various purposes ...'⁴¹ As a result of administrative directions issued in the aftermath of the Abadee report, the JAG's role has been enhanced. For instance, the JAG selects Judge Advocates for courts martial.

New sections 129B and **129C** give a statutory power to the Judge Advocate General to effectively determine who will be appointed to courts martial and who will be the DFM trying a particular charge. While a convening authority will appoint the person, it cannot do so unless the JAG has nominated the person for the position. **New subsection 129B(2)** provides that the JAG cannot nominate a person as a member or JA of a court martial if he or she believes the person is biased or would be seen to be biased.

Reviewing the proceedings of service tribunals

Part IX of the DFDA contains provisions relating to the review of service tribunal proceedings. All convictions and punishments are automatically reviewed by a 'reviewing authority'.⁴² Additionally, a person convicted of a service offence can petition for a review by a reviewing authority appointed by the Service Chief. This petition must be lodged within 90 days of the conviction.⁴³ There may then be a further review by the Service Chief. A person convicted by a court martial or DFM may also be able to appeal their conviction to the Defence Force Discipline Appeals Tribunal.⁴⁴

The requirement that a petition for review by a reviewing authority be lodged within 90 days of conviction is amended by **items 28** and **29** so that a person will have 30 days after the automatic review has been completed to lodge their petition. The amendments also give the reviewing authority the power to extend the 30 day period.

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Item 24 makes an amendment designed to ensure that reviewing authorities are impartial. It provides that a ‘reviewing authority’ will only be a ‘competent reviewing authority’ in relation to a particular charge if it has not exercised any powers as a Convening Authority in relation to that charge (**new section 150A**). Consequential amendments are also made which either replace the expression, ‘reviewing authority’ with the expression ‘competent reviewing authority’ or use the expression ‘competent reviewing authority’, where relevant (**items 26, 28 and 30**).

Section 154 of the DFDA presently provides that a ‘reviewing authority’ cannot commence a review of court martial or DFM proceedings that have resulted in a conviction without first obtaining a report on the proceedings from a legal officer appointed by the CDF or a service chief. **Item 31** provides that such a legal officer cannot be appointed for more than three years but can be reappointed.

Items 32, 33 and 45 correct outdated references to the ‘Chief of Staff’ that were missed when the *Defence Legislation Amendment Act (No. 1) Act 1997* was enacted.

Amendments relating to the Discipline Officer scheme

The DFDA empowers Discipline Officers to deal with minor discipline infringements that would otherwise be dealt with as service offences and to do so ‘without resort to the more formal and administratively complex summary trial procedures.’⁴⁵

The disciplinary infringements that can be dealt with by Discipline Officers include absence from duty, disobedience of a lawful command, failure to comply with a lawful general order, and sleeping or being drunk on watch.⁴⁶ The powers of Discipline Officers include imposing fines, restricting privileges, stopping leave, and imposing extra duties or extra drill. A Discipline Officer may decide not to impose any penalty if the infringement is trivial or decline to deal with a matter that is too serious.⁴⁷

At present the jurisdiction of Discipline Officers extends only to defence members who hold a rank below non-commissioned rank.⁴⁸ The effect of **items 34-36** is that ‘officer cadets’⁴⁹ will also be subject to the jurisdiction of Discipline Officers for minor disciplinary infringements under Part IXA of the DFDA.

Item 38 is designed to provide certainty about when punishments imposed by a Discipline Officer take effect. It inserts **new section 169FA** into the DFDA, which states that a Discipline Officer may impose a punishment that takes effect immediately or one which commences on a specific day. In the latter case, the punishment must commence within 14 days of its imposition.

Chief Judge Advocate

New sections 188A-188B provide for the appointment of a Chief Judge Advocate whose functions are to provide administrative assistance to the Judge Advocate General. Additionally, the JAG can delegate his or her powers to the Chief Judge Advocate—

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except for the power to appoint Defence Force Magistrates, to dissent from a legal opinion in a report of a reviewing authority, or nominate members of the judge advocates' panel. In exercising a delegated power the Chief Judge Advocate is subject to the direction and control of the JAG.

A person cannot be appointed as a Chief Judge Advocate unless he or she holds the rank of naval captain, colonel or group captain and is a member of the judge advocates' panel (**new section 188C**).

Amendments consequential on the High Court's decision in *Re Tracey; Ex parte Ryan*⁵⁰

In 1989 the High Court handed down its decision in *Re Tracey; Ex parte Ryan*. In this case Staff Sergeant Ryan challenged the jurisdiction of a Defence Force Magistrate to hear and determine three charges that had been brought against him under the DFDA. He argued that the DFM's statutory powers offended the constitutional separation of powers found in Chapter III of the Constitution and, further, that by reason of section 80 of the Constitution, a jury trial was mandated in his case.

The High Court rejected these arguments.⁵¹ However, a majority of the Court concluded that two particular provisions, severable from the rest of the DFDA, interfered with the exercise by State courts of their criminal jurisdiction and thus exceeded the Commonwealth's powers in sections 51(vi) and (xxxix) of the Constitution. The provisions were subsections 190(3) and (5) of the DFDA. They were designed to protect a defence member from the 'double jeopardy of prosecution before a service tribunal and before a civil court.'⁵²

The result of the invalidity of the two subsections is that, in the words of Brennan and Toohey JJ:

[A] defence member whose conduct renders him liable to punishment for a service offence and a corresponding civil offence is amenable to the jurisdiction of a civil court as well as the jurisdiction of a service tribunal and (subject to any common law protection from double jeopardy) punishment as for a civil offence as well as for a service offence.⁵³

Having been invalidated by the High Court, subsections 190(3) and (5) have no operation and are thus repealed by **items 41-44**.

Judge Advocate's Panel

Item 46 provides that appointments to the judge advocate's panel cannot exceed three years. However, a person can be reappointed. This amendment applies to appointments made after the proposed legislation receives Royal Assent (**item 48**).

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Punishments

Schedule 3 of the DFDA sets out tables of punishments that can be imposed by a superior summary authority (Table A), a commanding officer (Table B) and a subordinate summary authority (Table C). Subordinate summary authorities can be either Naval officers above a certain rank (in which case certain punishments can be imposed) or ‘any other subordinate authority’ (in which case lesser punishments can be imposed). **Item 47** repeals and replaces those parts of Table C that relate to ‘any other subordinate authority’ so that they reflect the hierarchy of punishments contained in section 68 of the DFDA. The amendments are also designed to clarify that ‘commanding officers and executive officers of ships and naval establishments have the power to impose punishment on soldiers and airmen, as well as the power to try soldiers and airmen under subsection 108(2).’⁵⁴

Amendments relating to the cadet services

Amendments relating to the cadet services commence six months after the date of Royal Assent unless earlier proclaimed (**clause 2**).

In 2000, the Government released a review of the Australian Services Cadet Scheme (ASCS), *Cadets: The Future*.⁵⁵ Its purpose was to provide a strategic plan for the ASCS. Among other things, it recommended that the Australian Army Corps Cadets, the Naval Reserve Cadets and the Air Training Corps should be re-named as the Australian Army Cadets, the Australian Naval Cadets and the Australian Air Force Cadets, respectively.⁵⁶

Amendments to the Air Force Act and the other statutes listed below reflect these recommendations.

Air Force Act 1923

The Air Force Act establishes the Air Training Corps. **Item 1** of **Schedule 2** provides that the Air Training Corps will continue in existence as the Australian Air Force Cadets. **Items 2-7** make consequential changes. **Item 8** is a transitional provision which continues appointments of anyone who holds an appointment to the Air Training Corps as members of Australian Air Force Cadets.

Archives Act 1983

Items 9-11 change references in the Archives Act to reflect the new names of the cadet services.

Defence Act 1903

Items 12-15, 20 and 25 make consequential and transitional amendments to the Defence Act as a result of the name changes to the cadet services.

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Freedom of Information Act 1982

Items 30-32 make changes to the *Freedom of Information Act 1982* that are consequential to the name changes to the cadet services.

Naval Defence Act 1910

Item 33 provides that the Naval Reserve Cadets continues in existence as the Australian Navy Cadets and **item 38** continues the appointments of members of the Naval Reserve Cadets as Australian Navy Cadets. **Items 34-37** make consequential name changes.

Privacy Act 1988

Item 39 makes changes to the *Privacy Act 1988* consequential on the name changes to the cadet services.

Safety, Rehabilitation and Compensation Act 1988

Item 40 makes changes to the *Safety, Rehabilitation and Compensation Act 1988* consequential on the name changes to the cadet services.

Impersonation and service medal offences

Section 80A of the *Defence Act 1903* creates an offence of falsely representing oneself to be a returned soldier, sailor or airman. Section 80B creates an offence of improper use of service decorations.

Items 16-19 of **Schedule 2** convert penalties in sections 80A and 80B from dollar amounts to penalty units and also increase the penalties that can be imposed. As a result of the amendments, a person convicted of a section 80A offence will be liable to a maximum penalty of 30 penalty units (\$3 300) or 6 months imprisonment, or both. The maximum penalty that can be imposed at present is \$200 or 6 months imprisonment, or both.

The maximum penalties for wearing a service decoration when not entitled to do so or falsely representing oneself to be the person on whom a service decoration has been conferred will be increased from a fine of \$200 to a penalty of 30 penalty units or 6 months imprisonment, or both. The maximum penalties for defacing or destroying a service decoration will be increased from a fine of \$200 to a penalty of 60 penalty units or 12 months imprisonment, or both.

Items 16-19 commence 28 days after the date of Royal Assent (**clause 2**).

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Amendments relating to Defence Act inquiries

Section 124 of the *Defence Act 1903* enables the Governor-General to make regulations ‘not inconsistent’ with the Defence Act in order to give effect to the Act and also to prescribe a large range of matters. One of these matters is:

The appointment, procedures and powers of courts of inquiry, boards of inquiry and investigating officers.⁵⁷

These matters are set out in the Defence (Inquiry) Regulations 1985. As the Explanatory Memorandum points out, those regulations were amended in 2000, in part to create the position of ‘inquiry assistant’ and thus allow ‘greater efficiency in the board or court inquiry process relating to Defence Force matters.’ The powers of an inquiry assistant include assisting an investigating officer to gather evidence for the purposes of an inquiry and giving that evidence to the investigating officer.⁵⁸

As section 124 of the Defence Act recognises, a regulation cannot be inconsistent with the primary statute under which it is made. However, there appears to be some doubt that existing paragraph 124(1)(gc) enables regulations to be made about ‘inquiry assistants’. **Item 21** amends paragraph 124(1)(g) so it is clear that subordinate legislation can be made on this subject.

Subsection 124(2A) of the Defence Act enables regulations to be made requiring a witness appearing before a court of inquiry or board of inquiry to answer questions even if the answer might incriminate the person.⁵⁹ **Items 22-24** extend the power to compel answers to investigating officers and inquiry assistants.⁶⁰ Investigating officers and inquiry assistants include officers, warrant officers, the holder of an office above APS Level 4 classification, and certain other non-APS civilians.

The amendments relating to Defence Act inquiries commence on Royal Assent (**clause 2**).

Amendments relating to the *Defence Force (Home Loans Assistance) Act 1990*

The Defence HomeOwner Scheme was introduced in 1991 and is administered under the *Defence Force (Home Loans Assistance) Act 1990* (the Home Loans Act). It is designed ‘to assist eligible members and ex-members of the Australian Defence Force to purchase their own homes by providing a subsidy on the interest of an \$80,000 home loan borrowed from the approved lender, the National Australia Bank.’⁶¹

Eligible ex-members who wish to use the scheme have, in general, two years after their discharge date to apply for the subsidy entitlement. Exemption from this sunset clause applies to members ‘who have transferred directly (with a break of less than 21 days) to the Emergency, Inactive or Active Reserves, or served in the Gulf War between 2 August 1990 and 9 June 1991.’⁶²

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Item 27 of Schedule 2 will enable the Secretary of the Defence Department to make a determination extending the eligibility of certain incapacitated ex-members⁶³ beyond 2 years if the person's failure to apply for an entitlement within the 2 year period was caused by a compensable disability that resulted in the person's discharge. The Secretary's refusal to make such a determination will be reviewable by the Administrative Appeals Tribunal (**item 26**).

Amendments to the Home Loans Act commence on Royal Assent (**clause 2**).

Amendments relating to the application of the Criminal Code

The purpose of the *Defence Legislation Amendment (Application of Criminal Code) Act 2001*, the Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 and the Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 (No. 2) was to 'harmonise the offence-creating and related provisions ... with the general principles of criminal responsibility as codified in Chapter 2 of the ... Criminal Code whilst at the same time ensuring that the offences continue to operate as intended by Parliament.'⁶⁴

Subsection 2(2) of the *Defence Legislation Amendment (Application of Criminal Code) Act 2001* provides that certain parts of that Act commence on the later of:

- (a) the day on which Chapter 2 of the Criminal Code commences; and
- (b) the day after the day on which this Act receives the Royal Assent.

Subsection 2(2) may have been designed to ensure that the relevant parts of the Act commenced no earlier than 15 December 2001—the date on which it was planned that Chapter 2 of the Criminal Code would apply to all pre-existing Commonwealth offences. However, the 'day on which Chapter 2 of the Criminal Code commences' could be read in other ways because, for example, Chapter 2 applied to Criminal Code offences and new Commonwealth offences before 15 December 2001. On such readings, the *Defence Legislation Amendment (Application of Criminal Code) Act 2001* commences on 2 October 2001, the day after Royal Assent. **Item 28 of Schedule 2** repeals and replaces subsection 2(2) to provide that the Act commenced on 15 December 2001.

Items 1 and 2 of Schedule 3 change the commencement date for the Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 and the Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 (No. 2) from 'the day on which Chapter 2 of the Criminal Code commences' to specify a date of 15 December 2001. The Explanatory Memorandum says that the purpose of these changes is the 'remove any ambiguity.'⁶⁵ This ambiguity may arise for similar reasons as those stated in the previous paragraph.

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Subclause 3(2) of the Bill provides regulations ‘are taken to still be regulations’ despite being changed by amendments in primary legislation.

Endnotes

- 1 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, 1999, p. 23.
- 2 *ibid.*
- 3 AD Mitchell & T Voon, ‘Defence of the indefensible? Reassessing the constitutional validity of military service tribunals in Australia’, *Federal Law Review*, vol. 27, no. 3, 1999, pp. 499–525 at p. 501.
- 4 *ibid.*
- 5 As Mitchell & Voon, *ibid.*, point out section 61 of the DFDA provides that a defence member or defence civilian is guilty of an offence if he or she commits what would be an offence in the Jervis Bay Territory, irrespective of whether that offence is committed inside or outside the Jervis Bay Territory. The Jervis Bay Territory is generally subject to ACT law.
- 6 Section 63, DFDA.
- 7 Joint Standing Committee, *op.cit.*
- 8 Section 3, DFDA.
- 9 See paragraph 116(2)(a) and subsection 114(2), DFDA.
- 10 See subsection 114(3), DFDA.
- 11 Joint Standing Committee, *op.cit.*, p. 28.
- 12 Section 196 & subsections 134(1) and (4), DFDA.
- 13 Mitchell & Voon, *op.cit.*, citing S Thompson, ‘An Officer and a Gentleman’, *Law Society Journal*, 1982, pp. 306-307 at p. 307.
- 14 Joint Standing Committee, *op.cit.*, p. 28.
- 15 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the period 1 January to 31 December 2001*, p. 1.
- 16 *Government Response to the Report on Military Justice Procedures in the Australian Defence Force by the Joint Standing Committee on Foreign Affairs, Defence and Trade*, March 2001, p. 1.
- 17 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.
- 18 Joint Standing Committee, *op. cit.*
- 19 In 1997, the Joint Standing Committee on Foreign Affairs, Defence and Trade commenced an inquiry into military justice procedures in the Australian Defence Force. The Committee

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ceased when Parliament was prorogued for the 1998 General Election, re-convened early in 1999 and reported in June that year. The Joint Committee also examined the system of military inquiry operating in the Australian Defence Force. The military inquiry system had been the subject of public scrutiny following cases involving both the deaths of service personnel and complaints against ADF members. The Committee's report, *Military Justice Procedures in the Australian Defence Force* was presented in June 1999.

- 20 Recommendations that did not find favour included the proposal that consideration be given to establishing an independent Director of Military Prosecutions on a tri-service basis. The Government Response to the Joint Standing Committee report stated, 'The Australian Defence Force was of the view that the recommendations that were agreed would significantly improve institutional independence with respect to prosecution in Courts Martial and Defence Force Magistrate trials without creating the position of an independent Director of Military Prosecutions. The [ADF] held serious reservations about the practicality and need for such an appointment under present circumstances.'
- 21 Joint Standing Committee, *op. cit.*, p. 203.
- 22 *ibid*, p. 121.
- 23 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the period 1 January to 31 December 1997*, p. 5.
- 24 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the period 1 January to 31 December 2001*, p. 11.
- 25 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the period 1 January to 31 December 1998*, p. 5.
- 26 Joint Standing Committee, *op. cit.*, p. 121.
- 27 *ibid*, p. 203.
- 28 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the period 1 January to 31 December 1999*, p. 4.
- 29 *ibid*.
- 30 *ibid*, p. 3.
- 31 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the period 1 January to 31 December 2000*, p. 4.
- 32 Joint Standing Committee, *op. cit.*, p. 136. Emphasis in the original.
- 33 *Government Response to the Report on Military Justice Procedures in the Australian Defence Force by the Joint Standing Committee on Foreign Affairs, Defence and Trade*, March 2001, p. 1. See response to recommendation 46.
- 34 **New subsections 35, 36A and 36B**, respectively.
- 35 The caution involves the person being told that they need not answer questions but that anything said or done by them may be used in evidence.
- 36 See sections 3 & 102, DFDA.

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- 37 Subsection 103(1), DFDA.
- 38 Subsection 103(2), DFDA.
- 39 See subsections 103(4) & (6), DFDA.
- 40 Explanatory Memorandum, p. 4.
- 41 Judge Advocate General, *Defence Force Discipline Act 1982. Report for the Period 1 January to 31 December 2001*, p. 1.
- 42 Section 152, DFDA.
- 43 Subsection 13(1), DFDA.
- 44 Joint Standing Committee, *op. cit.*, p. 32.
- 45 *ibid*, p. 29.
- 46 Section 169A, DFDA.
- 47 Section 169F, DFDA.
- 48 Section 169C, DFDA.
- 49 The expression, ‘officer cadet’, is defined to mean a person holding the rank of midshipman in the Navy or officer cadet in the Army or Air Force.
- 50 (1989) 166 CLR 518.
- 51 A unanimous High Court rejected the section 80 (trial by jury) argument. Mason CJ, Wilson, Brennan, Dawson & Toohey JJ rejected the separation of powers argument on the basis that although the Defence Force Magistrate was exercising judicial power, he was not exercising the judicial power of the Commonwealth because section 51(vi) of the Constitution enabled laws to be made for a military disciplinary code outside Chapter III and to impose a duty to act judicially on those administering that code.
- 52 (1989) 166 CLR 518 at 545 per Mason CJ, Wilson & Dawson JJ.
- 53 (1989) 166 CLR 518 at 755 per Brennan & Toohey JJ—quoted in S Gaegler, ‘Gnawing at a file: An analysis of *Re Tracey: Ex parte Ryan*’, *University of Western Australia Law Review*, 20(1), June 1990, pp. 47–60 at p. 57.
- 54 Explanatory Memorandum, p. 8.
- 55 John Topley et al. *Cadets: The Future. Review. A Strategy for the Australian Services Cadet Scheme*, 2000.
- 56 *ibid*, p. 45.
- 57 Paragraph 124(1)(gc), Defence Act.
- 58 Defence (Inquiry) Amendment Regulations 2000 (No. 1) No. 327, *Explanatory Statement*.
- 59 Within limits—for instance, an answer cannot be compelled if the witness is a defendant in ‘live’ criminal proceedings. Further, compelled evidence is not admissible in criminal or civil proceedings against the witness, unless he or she is being prosecuted for false testimony. See subsections 124(2B) & (2C), Defence Act.

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- 60 The protections that apply to witnesses before courts of inquiry and boards of inquiry also apply.
- 61 <http://www.dha.gov.au>
- 62 <http://www.dha.gov.au>
- 63 There are two classes of incapacitated ex-member under the Home Loans Act. First, there are incapacitated ex-members who on or after 15 May 1991, are discharged from the Defence Force because of a compensable disability. Second, there are incapacitated ex-members who were discharged before this date. This second class of ex-member stopped being eligible to apply for Home Loans Act assistance on 1 December 1994. The amendments made by **item 27** affect the first category of ex-member, not the second category.
- 64 See, for example, Defence Legislation Amendment (Application of Criminal Code) Regulations 2001 (No. 1), *Explanatory Statement*, p. 1.
- 65 Explanatory Memorandum, p. 12.

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