



## Defence Legislation Amendment Bill (No. 2) 2005

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## Defence Legislation Amendment Bill (No. 2) 2005

**Date Introduced:** 12 October 2005

**House:** Senate

**Portfolio:** Defence

**Commencement:** Sections 1 to 3; Items 2, 100 – 105, 108 and 115 of Schedule 1; and Items 1, 2, 5 and 7 of Schedule 2, commence on the day on which the Act receives Royal Assent.

Items 1, 3-99, 106, 107 and 109-114 of Schedule 1; Items 3 and 4 of Schedule 2, commence on a day to be fixed by Proclamation or if any provisions(s) do not commence within 6 months of the Act receiving Royal Assent, on the first day after the end of that period.

### Purpose

The Defence Legislation Amendment Bill (No. 2) 2005 (the Bill) is the first instalment in a planned suite of legislation that is intended to address problems in the Australian military justice system.<sup>1</sup> Recommendations from several reports into the Australian military justice system, dating from 1997 to 2005, are included in the Bill.

An overview of the Australian military justice system can be found in Chapter 2 of the 2005 Senate Foreign Affairs Defence and Trade References Committee's *Report into the Effectiveness of Australia's Military Justice System* (the [Senate Report](#)).<sup>2</sup>

This Bill makes various amendments to the *Defence Force Discipline Act 1982* (DFD Act) and *Defence Act 1903* including the creation of three new statutory appointments:

- Director of Military Prosecutions (Director),
- Registrar of Military Justice (Registrar), and
- Inspector General of the Australian Defence Force (Inspector-General).

The positions of Director and Registrar, along with the newly created 'superior authorities', will take over the responsibilities of 'convening authorities'. Currently, the DFD Act provides that convening authorities are responsible for prosecution functions including determining whether to proceed with a charge, and also for administrative duties associated with trial and case management. Under the Bill, these duties will largely be divided between the Director and Registrar. Some duties now undertaken by convening authorities, such as arranging legal representation for an accused person, will pass to the 'superior authorities'. The Bill provides for the appointment of 'superior authorities' by

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the Chief of the Defence Force (CDF) or a service chief to represent the interests of the Defence Force.

The positions of Director and Inspector-General were created administratively in 2003. The position of Registrar also currently exists. What the Bill does is provide a legislative base for these appointments. These appointments will be made by the Minister. The Bill sets out their functions and terms of remuneration. In particular, the Director's duties will be greatly expanded under the Bill to include many of the prosecution functions now undertaken by convening authorities.

The Bill largely reflects the recommendations pertaining to military justice contained in two previous reports by:

- Mr James Burchett, QC, in his *Report of an Inquiry into Military Justice in the Australian Defence Force, July 2001* (the [Burchett Report](#))<sup>3</sup>, and
- Brigadier the Honourable Justice A.R. Abadee in his *Study into the Judicial System under the Defence Force Discipline Act, 1997* (the Abadee Report).

To a lesser extent, the Bill draws upon the [Senate Report](#). The Government has noted that there will be a need for further legislative amendments as additional parts of the Government Response to the Senate Foreign Affairs, Defence and Trade References Committee *Report on the Effectiveness of Australia's military justice system*, October 2005 ([Government Response](#))<sup>4</sup> are implemented in the future.

## Background

### The Abadee Report

The Abadee Report was an internal report commissioned by the Department of Defence in 1995 by the then CDF, General Baker, and submitted to him in August 1997. The recommendations of, and the Department of Defence response to, the Abadee Report, were published as Appendix E of the 1999 report by the Joint Standing Committee on Foreign Affairs, Defence and Trade titled *Military Justice Procedures in the Australian Defence Force* ([Joint Standing Committee Report](#))<sup>5</sup> released in June 1999. The Abadee Report itself is not widely released, or readily available. To assist with the preparation of this Bill Digest, the Department of Defence kindly provided an edited copy to the authors.

Justice Abadee outlined the philosophy guiding the preparation of his report when he wrote that:

... the integrity of the chain of command can only be preserved if discipline is inculcated at each level of the military hierarchy and there exists a system of justice which is specifically designed to respond to the unique needs of the military. Discipline is at the heart of efficient and effective military forces. This reality

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explains and justifies the existence of a separate justice system, with a unique Code of Service Discipline so important it should be embodied in a separate statute.<sup>6</sup>

In his report Justice Abadee often compared the Australian military legal system with that of Canada and the UK. In particular, he noted the distinction between, what he termed, 'military offences' and 'civilian offences'.<sup>7</sup>

Justice Abadee maintained that the legal process needed to be one that would not compromise the integrity of the senior military chain of command and, as such, needed to function within a military environment and be run by military officers.

However, the [Joint Standing Committee Report](#) reported that Justice Abadee specifically recommended greater autonomy be granted to defence legal personnel from the normal military chain of command.<sup>8</sup> In addition, Justice Abadee was of the view that many of the senior legal personnel should be Reservists who could bring civilian experience to military courts martial in particular. His report strongly advocated the continued employment of Reserve legal officers in the permanent military justice system because 'the civilian influence is extremely strong in the Australian military context'.<sup>9</sup>

### The Burchett Report

The [Burchett Report](#) was submitted to the then CDF, Admiral Barrie, in July 2001, and publicly released by the CDF on 16 August 2001. The Burchett inquiry was instigated to investigate the Australian military justice system because of reports and perceptions of numerous incidents of unacceptable and violent behaviour across the Australian Defence Force (ADF) as well as the use of illegal punishments being used instead of recourse to the DFD Act.

The Burchett Report noted that, as of 2001, there continued to be objectionable practices in terms of training and justice occurring at military institutions:

Under the heading "*Keeping Things 'In-House'*", reference is made to the suggestion, which came up in discussion groups, that COs [Commanding Officers; personnel ordinarily of the rank of Lieutenant-Colonel equivalent] were tempted to maintain appearances in respect of their commands by keeping matters that ought to be prosecuted "*in-house*". Sometimes, of course, this may have been the observer's perception. But sometimes it may really happen.<sup>10</sup>

However, in the opinion of Admiral Barrie (the CDF at the time), the Burchett Report found that there was not a culture in the ADF of widespread or systemic avoidance of due disciplinary processes or the use of violence to maintain discipline.<sup>11</sup>

The Burchett Report recommended that the military establish an office of Director of Military Prosecutions as an independent prosecutorial authority for the ADF. It was intended that this office would undertake prosecutions of members of the ADF facing trial

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by either court martial or Defence Force Magistrate (or DFM) under the DFD Act.<sup>12</sup> The implementation of this aspect of the Burchett Report recommendations is reflected in provisions of the Bill for the appointment of the statutory office of Director.

In April 2001 the Joint Standing Committee on Foreign Affairs, Defence and Trade handed down its report, *Rough Justice - An Investigation into Allegations of Brutality in the Army's Parachute Battalion*, Report No. 99 ([Rough Justice Report](#)),<sup>13</sup> about allegations of misconduct in the 3<sup>rd</sup> Battalion, Royal Australian Regiment. In August 2001, when the Burchett Report was made public, Admiral Barrie was moved to make the following comments on the Rough Justice Report in the context of the broader issue of the general effectiveness of the Australian military justice system:

...there are some matters of concern in a small number of units. I want to assure everybody in the Australian community, everyone of those matters will be investigated actively and thoroughly.

A number of personal issues raised by individuals are also the subject of ongoing examination. Again I want to stress these ongoing issues are few in number and are now being dealt with properly and expeditiously.<sup>14</sup>

## The Senate Report

Despite the assurances offered by CDF Admiral Barrie at the time the Burchett Report was publicly released in 2001, public perception remained that there continued to be significant problems with the Australian military justice system. On 30 October 2003 the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee (the Committee). The Committee conducted an inquiry, resulting in the tabling of the [Senate Report](#) in June 2005.

The Committee received evidence detailing a series of flaws in investigations, prosecutions, tribunal structures and administrative procedures used by the military justice system in Australia. Significantly, the Committee found that:

Despite several attempts to reform the military justice system, [ADF] personnel continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.

A decade of rolling inquiries has not met with the broad-based change required to protect the rights of Service personnel. The committee considers that major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.<sup>15</sup>

The Senate Report recommended, amongst some 40 recommendations in total:

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- the referral of all civilian and all criminal offences<sup>16</sup> by ADF members to civil authorities (That is, all offences except strictly military discipline or service offences which should be prosecuted by the military in order to maintain discipline<sup>17</sup>).
- the establishment of a permanent military court under Chapter III of the Constitution and,
- the establishment of an ADF Administrative Review Board.

To effect the Senate Report recommendations would require wide-ranging fundamental changes to the Australian system of military justice. The Senate Report justified its recommendations for change to the military justice system on several grounds. Notably, that the submissions to the Committee were made by a range of military personnel, current and past, of all different ranks, as well as by civilian Defence employees, community groups and 'most poignant of all, the next of kin of deceased members.'<sup>18</sup> The problems with the military justice system, therefore, were problems apparent across all services and ranks.

In respect to the ADF's military discipline system the Committee noted that:

After extensive consideration and significant evidence, the committee considers that the ADF has proven itself manifestly incapable of adequately performing its investigatory function.<sup>19</sup>

As to the ADF's disciplinary tribunals, the Senate Report noted that:

Evidence to the committee cast considerable doubt over the impartiality of current structures, and argued that Service personnel's rights to access fair and independent tribunals are under threat.<sup>20</sup>

In discussing the competency of internal criminal investigations, the Senate Report noted:

Civilian police investigators, however, are generally better trained and more experienced in the conduct of criminal investigations than military personnel. Whilst knowledge of the military context is important, the attainment of rigorous and fair outcomes should be the primary aim of a competent system of military justice.<sup>21</sup>

The Senate Report further observed that:

Civilian management principles of 'core business' and 'outsourcing' have been widely applied across the military. Civilian contractors are everywhere, including Iraq, and have played a significant role in most of the recent ADF operational deployments. The committee believes the role of a criminal law system in the 'core business' is past, and it is appropriate to 'outsource' what is essentially a duplication of an existing civilian system.<sup>22</sup>

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The Senate Report argued strongly, not for greater Reserve appointments, as in the Abadee Report recommendations, but for increased civilian involvement in the military justice system.<sup>23</sup>

The Government, as detailed in the [Government Response](#), has not accepted all of the Senate Report recommendations and, in fact, has rejected (either in whole or in part) the three key proposals noted above. It has rejected the recommendations for the referral of civilian and criminal offences to civilian authorities and for the establishment of an ADF Administrative Review Board. It has accepted the recommendation to establish a permanent military court but not under Chapter III of the Constitution.

### Other Reports

There are several additional reports that have either directly or indirectly questioned the effectiveness of Australia's military justice system. The [Joint Standing Committee Report](#) and the [Rough Justice Report](#) have been referred to above. Also of significance is the [Defence Force Ombudsman's report](#) (*The ADF: own motion investigation into how the ADF responds to allegations of serious incidents and offences*), January 1998.<sup>24</sup>

These reports present additional information detailing shortcomings in the military justice system and recommending review of that system.

### Basis of policy commitment

This Bill is the first instalment of the Government Response to various inquiries into the operation and effectiveness of the Australian military justice system over the last eight years.

Senator Hill confirmed at Senate Estimates on 2 November 2005 that recommendations made in those previous inquiries had not yet been enacted, and the Bill in part enacts those previous recommendations. Senator Hill indicated that he anticipates the introduction of additional legislation some time in 2006 to further reform the military justice system.<sup>25</sup>

While the [Government Response](#) states that 30 of the 40 recommendations contained in the Senate Report will be accepted in whole, in part or in principle,<sup>26</sup> significantly, the Government announced it would implement *alternative* legislative solutions to a number of the recommendations in the [Senate Report](#), notably the three recommendations previously referred to: the referral of some offences to civil authorities, and the establishment of a Chapter III permanent military court and an ADF Administrative Review Board.<sup>27</sup>

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## Overview/Pros and Cons

### Director of Military Prosecutions

Recommendation 2 of the Abadee Report questioned the role of ‘convening authorities’ in the ADF. Recommendation 4 of the Abadee Report sought consideration of appointing an ‘independent’ Director of Military Prosecutions.<sup>28</sup> To the extent that the newly created position of Director, and also the Registrar, may be drawn from the Reserves if the Reservist is in continuous full-time service and holds a certain specified rank or above, the Bill sits comfortably with Abadee’s Report which advocated the continued involvement of Reservists in the military justice system.

Parliament should note that, in 1999, the Department of Defence rejected Abadee’s recommendation to establish an independent Director’s position, stating:

A DMP [Director] will not be established. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders must retain the power to prosecute. This is vital especially during operations and when forces are deployed overseas. Moreover the establishment of a DMP would place limitations on commanders and would result in unacceptable delays in the administration of discipline.<sup>29</sup>

Despite this objection, a Director was appointed by the administration in mid-2003, in preparation for a statutory appointment. The ‘interim’ role of the Director has been to provide independent legal advice to commanders to assist them in determining how to proceed with serious charges, to provide independent pre-trial advice to convening authorities for all courts martial and trials by Defence Force magistrates, and to conduct prosecutions at these trials.<sup>30</sup>

The Senate Report observed that the position is currently part-time (one day per month) with the Director based in Melbourne and the office and staff based in Sydney. The Senate Report supported the establishment of a statutory Director of Military Prosecution position.<sup>31</sup> The Bill, by enacting a statutory full-time appointment, will consolidate the Director’s position and its functions.

Under the Bill, the Director will be appointed by the Minister. The Director will also be required to submit an annual report to the Minister.

Parliament may wish to reflect whether the subordination of the Director to Ministerial authority sufficiently removes the Director from outside the influences of the military chain of command in light of the following view expressed in the [Senate Report](#).

The Senate Report noted that internally appointed administrators of military justice remained subservient to their military superiors and this was perceived to be both a problem and perhaps to have contributed to miscarriages of military justice in that claims were not actioned. The Committee remained concerned that if such an environment were

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maintained, those seeking justice would find it difficult to receive a sympathetic hearing given the collective careers of those administering the military justice system of the ADF remained subject to higher military command.

Under the Bill, the Director will not be appointed internally, but will nonetheless be an appointment made from within the military ranks. One of the eligibility criteria for appointment is that the Director must either be a permanent member or a Reservist rendering continuous full-time service (**new section 188GG**). Thus, the Director will still remain subject, albeit indirectly, to higher military command. This may be less problematic if the Director is a Reservist which is the case at present. The Committee believed this was ‘highly desirable’ as ‘the occupant of the position requires considerable civilian and military legal experience’ and ‘sufficient civilian experience cannot generally be readily acquired by permanent ADF legal officers.’<sup>32</sup>

Specifically, the Senate Report expressed reservations regarding the rank of the person to be appointed Director when it observed that:

The proposed DMP [Director] role, of making the decision to prosecute charges, will take over that function from some thirty or so one and two star General equivalent officers. However, under the current rules the DMP [Director] cannot be above a Colonel rank or equivalent. This means that a person expected to exercise independent judgment operates in the shadow of, and in the service of, the command chiefs who have ultimate power over his or her future (and in particular, future promotion).<sup>33</sup>

Under the Bill, the Director’s minimum ranking has been increased to Commodore, Brigadier or Air Commodore, that is, a one star General, in line with Recommendation 14 of the Senate Report. (See Appendix 1 – Current Ranks in the Australian military). However, the Senate Report’s comment still stands in so far as a statutorily appointed Director may still operate in the shadow of the more senior command chiefs depending upon the level of the appointment. (See further comments as to rank, under ‘Superior authorities’).

The nature of the appointment is important because, under the Bill, the Director’s powers relate to civilian, criminal and military discipline offences, not just military discipline offences as was recommended in the Senate Report. Specifically the Senate Report recommended that the Director ‘should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law.’<sup>34</sup> The Government did not agree to this.<sup>35</sup> The Bill merely transfers the existing prosecution powers of convening authorities to the new position of Director.

Those powers are extensive. For example, even if a new trial has been ordered by a reviewing authority, the Defence Force Discipline Appeal Tribunal or the Federal Court, the Director may decide not to proceed to a new trial if of the view that there is not sufficient cogent evidence to proceed.<sup>36</sup> An added dimension to this analysis is that, under

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the amendments in the Bill, one of the Director's functions is to represent the interests of the service chiefs at any hearing before the Defence Force Discipline Appeal Tribunal (**new section 188GG**). These aspects of the current system could be perceived as blurring the lines of accountability.

It should be observed, generally, that commanding officers are pivotal to the operation of military justice under the DFD Act. Notably, since the introduction of the administratively appointed Director in 2003, commanding officers have tended to pass matters involving criminal conduct to the Director. The Senate Report argues that this shows an eagerness by commanding officers to refer such matters and get on with the core business of training to fight. The Committee also uses it as evidence for its recommendation that criminal offences by defence members should properly be dealt with by civilian courts and not military officers or tribunals;<sup>37</sup> as noted, a recommendation rejected by the Government.

As there will no longer be convening authorities, the Bill removes the provisions that enable a convening authority to transfer its responsibilities to another convening authority if there is a real or potential issue of bias. There are no equivalent provisions relating to the Director presumably because the office will have many prosecutors and cases could be allocated to avoid any such issues. However, whereas there may not be cause for concern with the comparable position of a public prosecutor, the complicating factor with the Director of Military Prosecutions is that this position, and positions within the Director's office, will be held by military officers. These officers, by reason of their position within the military, will remain accountable, even if indirectly, to the military command.

Inspector-General of the ADF

Justice Burchett specifically recommended the appointment of a Military Inspector General.<sup>38</sup>

An Inspector-General position was created administratively, in January 2003. The Department of Defence Annual Report 2003-2004 provides an overview of the position as it currently exists, available at [http://www.defence.gov.au/budget/03-04/dar/07\\_07\\_igadf.htm](http://www.defence.gov.au/budget/03-04/dar/07_07_igadf.htm). The functions of the Inspector-General as set out in the Bill will largely reflect the functions of the position as they are at present.

Under the Bill, a statutory appointment of Inspector-General of the ADF will be made by the Minister. In making that appointment, the Minister must have regard to any recommendation by the CDF. The Inspector-General must have knowledge of and experience in relation to military justice issues and an understanding of their relevance to the role of the Defence Force. The requirement for the Minister to have regard to the CDF's recommendation and the military experience requirements for the position of Inspector-General may bring the independence of the position into question, especially in light of submissions to the Senate Committee regarding the independence of the Inspector-General and his office.<sup>39</sup> The Senate Report specifically questioned the need for the Inspector-General to have military knowledge noting that:

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...the Defence Force Ombudsman and his staff have performed their administrative review function for many years without this military background.<sup>40</sup>

The [Explanatory Memorandum](#) justifies the approach taken in the Bill partly on the basis of the Burchett Report recommendation that the Inspector-General should be directly responsible to the CDF.<sup>41</sup> The *Explanatory Memorandum* also maintains that:

For the position of Inspector General ADF to work successfully, he or she must enjoy the confidence of Chief of the Defence Force and be able to work with the Chief of the Defence Force...<sup>42</sup>

The Inspector-General is *to provide the CDF* with a means by which to (**new section 110A**):

- conduct internal audit and review of the military system independent of the ordinary chain of command; and
- an avenue to examine and expose the failures and flaws of in that system so as to remedy the causes of any injustice, systemic or otherwise.

The functions of the Inspector-General, set out in **Schedule 2** of the Bill (see Main Provisions), are not as comprehensive or as explicit as those proposed by the Burchett Report. However, in some respects, the powers are broader and, under the Bill, the regulations may prescribe 'such other functions' (See **Schedule 2, Item 2, new section 110C(2)(b)**). Burchett, for example, recommended that the Inspector-General would be:

[Empowered to] investigate, as directed by the CDF, or as may be requested by a Service Chief, such matters as may be referred to the Military Inspector General, or to investigate a matter of his or her own motion, concerning the operation of the military justice system.<sup>43</sup>

The Bill both broadens and narrows these functions. Under the Bill, the Inspector-General may:

- initiate an inquiry
- be directed by the CDF to conduct an inquiry; and
- may or may not choose to comply with a request for an inquiry by a service chief or 'any other individual' (See **Schedule 2, Item 2, new section 110D**).

Thus, the Inspector-General may refuse to conduct an inquiry referred to it be a Service Chief, and alternatively, may pursue an inquiry undertaken at the request of a member of the public.

Under the recommendations made by Justice Burchett, the Inspector-General was to be given the power to refer matters to the civil police. The Bill is less clear. Specifically, the Inspector-General's functions include the vague statement of 'referring matters to other appropriate authorities to be dealt with' (subsection (c)).<sup>44</sup>

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The Inspector-General is to report to the CDF only as directed by the CDF. This is consistent with the recommendation of the Burchett Report. The [Explanatory Memorandum](#) states:

A formal Annual Report is not required, as this provision formalises what currently occurs in practice. In any case, the Inspector General ADF contributes to the Defence Annual Report.<sup>45</sup>

However, this casual justification does not sit well with the Inspector-General's purpose. According to the *Explanatory Memorandum*, this is to provide for review independent of the ordinary chain of command and an avenue by which failures in the military justice system can be exposed and examined in order to assist in remedying any injustice.<sup>46</sup> Such exposure would seem to imply a degree of public accountability and scrutiny. The lack of this has the potential to undermine the Government's commitment to 'an open, transparent and fair military justice system.'<sup>47</sup>

The Senate Report draws comparison to the Canadian Forces Grievances Board, an independent, administrative tribunal with quasi-judicial powers, which reviews military grievances and submits recommendations to the Chief of Defence Staff. Importantly, the Chief of Defence Staff must give written reasons for not accepting the Board's recommendations, and the Board must publish an Annual Report.<sup>48</sup> The Senate Report advocated a similar body be established in Australia, namely the ADF Administrative Review Board, with similar reporting requirements.<sup>49</sup> This ADF Administrative Review Board would subsume the Inspector-General and the Defence Force Ombudsman,<sup>50</sup> which, if necessary, could refer matters to a military division of the Administrative Appeals Tribunal for formal inquiry with that tribunal consisting of at least one suitably qualified military officer nominated by the CDF.<sup>51</sup>

The [Government Response](#) rejected this recommendation outright because, amongst other reasons, it 'would not support the relationship between command and discipline'.<sup>52</sup> The Government plans to streamline the complaints and grievances process through adopting other measures.

#### Registrar of Military Justice

The Registrar is currently responsible for case management.<sup>53</sup> Under the Bill, the Registrar will undertake some of the administrative duties now undertaken by the convening authorities. This should avoid the potential for conflict that currently exists in the system where convening authorities undertake both prosecution and administrative duties. It should also help streamline the trial process by having a full-time central coordinating position to oversee case management and avoid some of the problems, identified in the Senate Report, inherent in an *ad hoc* trial system.<sup>54</sup>

However, the Senate Report noted that, as the Registrar will not be empowered to deal with interlocutory matters and make interim orders,<sup>55</sup> it will not be possible in some

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circumstances to expedite a hearing. It is also recommended that the establishment of an impartial and permanent military court would ensure a more comprehensive and structured approach to trial management.<sup>56</sup> The Government has accepted this recommendation though not on the terms set out in the Report.<sup>57</sup>

Superior authorities

Under the Bill, superior authorities, appointed by the CDF or a service chief, will represent the interests of the ADF in relation to charges being considered by the Director (see **Item 8** of the Main Provisions).

The [\*Explanatory Memorandum\*](#) sets out their purpose as follows:

In the exercise of the prosecution discretion currently vested in convening authorities, convening authorities have regard to the impact on discipline of alleged offences. Where there is a significant disciplinary impact, it may be appropriate to refer such offences to a court martial or Defence Force magistrate. As matters are currently referred by summary authorities to senior officers who exercise the functions of convening authorities, senior officers have proper oversight of discipline within their respective commands. To maintain this oversight within the new regime proposed under the Bill, the concept of “superior authority” is being incorporated. These will be appointed by a Service Chief and will represent the Service interest in pursuing a matter at the court martial or Defence Force magistrate level.<sup>58</sup>

The Second Reading Speech notes that the superior authorities would ‘ensure that the DMP [Director] is aware of the service aspects of offences’ and the ‘functions of a Superior Authority will be performed by senior officers, and most likely by the appointments currently performing functions as convening authorities.’<sup>59</sup>

This raises some questions as to the exact nature of the interaction between these authorities and the DMP in the course of an investigation. The *Explanatory Memorandum* maintains that their purpose is to maintain input into the disciplinary process ‘without interfering with the independence of the Director of Military Prosecutions’.<sup>60</sup> However, this is not clearly set out in the provisions of the Bill with the result that there may be potential for superior authorities to impede the ability of the Director to act independently. This is especially relevant when one considers that there is no provision setting out the rank, or minimum rank, for superior authorities. As noted in the Second Reading Speech, likely appointments will be those currently acting as convening authorities, and these are ‘thirty or so one and two star General equivalent officers’.<sup>61</sup> It is therefore likely that some superior authorities will be of two star rank or more senior whereas the Director will be (at minimum) a one star officer. If a supervising authority were more senior than the Director, it is difficult to imagine a military culture where a junior officer will choose to ignore the wishes of a superior in rank no matter how well intentioned the legal environment.

In addition, superior authorities, like the convening authorities now, will be responsible for organizing the legal representation of an accused person (see **Item 88** of the Main

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Provisions). As their primary obligation is to represent the interests of the ADF, it may be questioned whether there is a very real conflict of interest in undertaking this role.

It should be noted that this amendment runs contrary to the course proposed by the Senate Report:

The final matter raised in submissions is the position of those military officers who act as counsel representing the accused in a military trial. Following the Federal Court decision of *Stuart v Sanderson*, members are entitled to the counsel of their choice (at Commonwealth expense if the counsel is a military officer) if that officer is reasonably available. It has been submitted that those officers should form part of an organization similar to the US military Trial Defense Service headed by a senior officer with independent status similar to the DMP [Director], so that they may be free of and be seen to be free of command influence.<sup>62</sup>

The Senate Report advocated the establishment of an independent position of Director of Defence Counsel Service.<sup>63</sup>

In the Government's Response to the Senate Report, it accepted that this position should be established but only as a military staff position within the Defence Legal Division.<sup>64</sup>

### Position of significant interest groups/press commentary

There has been press comment on the Senate Report which reveals bipartisan concern at the state of the military justice system. Comments criticising the Government's response have also been made by the father of an Air Force cadet who committed suicide.<sup>65</sup>

Ex-army personnel have been reported as critical of the Government's limited response to the perceived flaws in the system.<sup>66</sup>

### ALP

Labor's Defence Spokesperson, The Hon. Robert McClelland, has expressed his support for the findings and recommendations of the Senate Inquiry, and has described the Government Response as 'shortsighted and disappointing' in opting to keep the prosecution of offences in the hands of the military.<sup>67</sup>

## Main Provisions

### Schedule 1 – Director of Military Prosecutions and Registrar of Military Justice

**Schedule 1** amends the *Defence Force Discipline Act 1982* (DFD Act).

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**Items 1 and 3** effectively omit the term ‘convening authority’ and its definition from subsection 3(1). A convening authority is currently a senior commander appointed by a Service Chief.

Under the Bill, the functions of a convening authority will largely be divided between the newly created positions of the Director (**new section 188GF**) and the Registrar (**new section 188FB**). **Items 5 and 6** insert these definitions respectively, into subsection 3(1). Superior authorities will also take on some of the duties of a convening authority.

### Superior authorities

**Item 8** inserts a **new section 5A** into the DFD Act covering the appointment of a superior authority. The CDF or a service chief may appoint an officer to be a superior authority for the purpose of:

- representing the interests of the Defence Force in relation to charges that are being considered by the Director of Military Prosecutions, and
- exercising the powers and performing the functions conferred on superior authorities under the DFD Act and regulations.

As noted already, the role of a superior authority in considerations by the Director is potentially too vague and could possibly lead to situations where the interaction between the two bodies could give rise to allegations of interference in the prosecution process.

### Summons, arrest, and custody

Section 87 of the DFD Act deals with summons and charges related to service offences by defence members or others. Under current subsections 87(1)(a) and (b), an ‘authorized member of the Defence Force’, that is, a member of the Defence Force with written authorization by a commanding officer, has authority to charge and summons a defence member. This will then be dealt with under either section 110 (by a commanding officer) or section 111 (by a subordinate summary authority) if the person charged is a defence member, and only under section 110, if not a defence member.

**Item 11** substitutes a **new section 87(6)**. This clarifies that the Director is an ‘authorized member of the Defence Force’ for the purposes of section 87.

**Item 9** inserts a **new subsection 87(1)(c)** which provides the Director with additional powers under section 87 to those in subsections (a) and (b). **New subsection (c)** provides that the Director may choose to refer such matters to a superior summary authority or a commanding officer for trial under sections 106 and 107 of the DFD Act respectively. Alternatively, the Director may request the Registrar to refer the charge to a Defence Force magistrate for trial or to convene a court martial to try the charge.

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**Item 10** inserts a **new section 87(1A)** that clarifies that the Director's powers under **new subsection (c)** are in addition to the powers of the Director under subsections (a) and (b).

It should be noted that other authorized members of the Defence Force retain the powers currently available under section 87. The fact that the Director also has such powers will not affect this situation.

**Items 12 and 13** provide that the Registrar, only if directed by a judge advocate or a Defence Force magistrate, may use the powers of arrest and summons under section 88 to ensure the attendance of an accused person before a service tribunal.

**Items 14 to 17** deal with any delay in dealing with charges after the arrest of an accused person (section 95 of the DFD Act). The purpose of the amendments is to include the Director and a superior authority in the notification process when an accused is arrested so as to ensure 'that someone in the command hierarchy is aware that a person is being held in custody.'<sup>68</sup>

- If no proceedings are commenced within 48 hours, the Director and a superior authority must be notified of the reasons for this (subsubsection 95(4)).
- If the accused remains in custody for 8 days or more without the charge being dealt with, the Director and a superior authority must be provided with reasons for the delay after the first 8 days and each subsequent 8 day period (subsubsection 95(5)), and
- If the accused remains in custody for 30 days, and the 8 day notification(s) and reasons have not been provided under subsection (5), but reasons have been provided under subsection (7) which allows for a commanding offer to report when reasonably practicable rather than on each 8<sup>th</sup> day, a superior authority who receives such a report must notify the Director, the CDF, a service chief or an authorized officer of the reasons why the charge has not been dealt with (subsubsection 95(8)).

It is unclear why the presumption in subsection 95(8) is that a report will have been given to a superior authority under subsection (7) but not to the Director.

Subsection 95(9) remains in its current form. The Director has no power to release the accused from custody. After receipt of a report dealing with an accused who has been in custody for 30 days, only the CDF, a Service chief or an authorized officer shall, unless satisfied that it is proper that the person should continue in custody, order the release of the person from custody.

#### Redistribution of the powers of a convening authority

**Item 20** repeals section 102 which currently provides for the appointment of convening authorities for the purpose of convening court martials and performing other functions. Under **item 21, 25 and 26** the Director is granted similar powers as the convening authorities under section 103, namely:

- direct that a charge not be proceeded with

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- refer, for trial, prescribed charges to a superior summary authority or the commanding officer
- request the Registrar to refer the charge to a Defence Force magistrate for trial, or
- request the Registrar convene a general or restricted court martial to try the charge.

The powers of the Director proposed by these amendments to section 103 differ from the current powers of the convening authorities in that the convening authorities could themselves refer the charge to a Defence Force Magistrate or to convene a general or restricted court martial to try the charge. Under these amendments the Director will need to request that the Registrar take these steps.

The *Explanatory Memorandum* explains the general purpose of distinguishing between the roles of the Director and the Registrar as follows:

The allocation of responsibilities between the Director of Military Prosecutions and the Registrar of Military Justice reflects the functions of the two appointments and recognises the independence of the prosecutorial function from the administration of courts and trials.<sup>69</sup>

**Items 28 and 29** similarly amend section 103(2) by replacing the term, ‘a convening authority’, with the Director. This section deals with a situation where a reviewing authority, the Defence Force Discipline Appeal Tribunal or the Federal Court of Australia, orders a new trial of a person. In such situations, the Director, as under section 103(1)(a), has the power to:

- refer the charge to a superior summary authority or the commanding officer for trial, or
- to request the Registrar either to refer the charge to a Defence Force Magistrate for trial (see **item 30**), or to convene a general or restricted court martial.

**Items 31 and 32** replace the ‘convening authority’ in subsection 103(3) with the ‘Director’. Currently section 103(3) provides that the convening authority is not required to proceed with a new trial unless satisfied that there is sufficient cogent evidence to do so. Therefore, it still remains within the power of a person appointed by the military to determine whether to proceed with a new trial, or not, regardless of any order from a reviewing authority, the Defence Force Discipline Appeal Tribunal or even the Federal Court.

**Items 33 to 47** deal with section 103 provisions concerning an accused person’s election to be tried or punished by a DFM or a court martial. The responsibilities of a convening authority in those provisions will, under the amendments, become the responsibilities of the Director.

**Item 48** repeals subsections 103(8) to 103(11). These subsections deal with situations where a convening authority believes that it may not be able to make an unbiased decision and might choose to refer its responsibilities in relation to a charge, order for a new trial, or conviction under section 103 to another convening authority.

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As there could be a number of convening authorities, it was possible to take this approach. With one Director, the responsibility must remain with that one office. Commentary on this amendment is included under the heading Outcomes/Pros and Cons section.

Those charges to which section 103 relate will also include, under **item 22** of the Bill, **new section 105A** inserted by **item 49**. This new section provides for direct referral of a charge by the person's commanding officer, or a superior officer in relation to the person's commanding officer, to the Director if the charge has not yet been dealt with by a superior summary authority under section 109, a commanding officer under section 110 or a subordinate summary authority under section 111. The *Explanatory Memorandum* notes that:

The intent of this item is to allow for direct referrals to the Director of Military Prosecutions where there would be little or no benefit from a summary hearing. For example, either highly complex charges, or simple charges against senior officers that cannot be tried by a summary tribunal.<sup>70</sup>

Once referred, the Director may choose to proceed under those options set out in section 103, including not proceeding with the charge (s 103(1)(a)), or referring the charge to the superior summary authority or the commanding officer for trial (s 103(1)(b)). There is no provision requiring that the Director give reasons for whatever course is ultimately taken.

## Courts Martial

Sections 114 – 126 of the DFD Act deal with court martials. **Items 51 to 70** deal with amendments to the court martial provisions in the DFD Act by transferring the functions of the convening authority to the Registrar. They are in keeping with the Bill's intention to give responsibility for trial, post-trial administration and case management to the Registrar.<sup>71</sup>

**Item 51** provides that the Registrar (substituted for the convening authority) will appoint the President and other members, reserve members and the judge advocate of a court martial.

The Registrar will be responsible for notifying the accused person of an order convening a court martial (**Items 54 and 55**).

Sections 121, 122 and 123 of the DFD Act deal with objections to, and substitution of members of a court martial by the convening authority. **Item 56** amends sections 121, 122 and 123 of the DFD Act by replacing 'convening authority' with the Registrar, so that:

- an accused person may notify the Registrar of any objection to the appointment of particular members or the judge advocate,
- a member who believes that she or he may be biased in a matter, must also notify the Registrar; and

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- Registrar is able to substitute members under section 123 before a court martial is sworn or affirmed.

Apart from replacing the convening authority with the Registrar, there is no further change proposed to section 122 (notification by a member of believed bias), under which there is no obligation upon that member to disqualify himself or herself or that the Registrar inform the accused person of any such notification.

However, under the amendments to subsection 129B(1)(see **Item 79**), the Registrar (previously the Judge Advocate General) must not appoint a person as a member, President or judge advocate of a court martial, if she or he believes the person to be biased or likely to be biased.

### Proceedings before a Defence Force magistrate

Sections 127 – 129A of the DFD Act deal with Defence Force magistrates. **Items 73, 74 and 76** replace ‘convening authority’ with the ‘Registrar’ in relation to these provisions.

**Item 71** substitutes a **new subsection 129A(1)**. Whereas the current subsection provides that a convening authority may discontinue proceedings before a Defence Force magistrate either before or *after* commencement of the case, the new subsection provides that the Registrar can only make such a decision before commencement of the case. Under **new subsection (1)**, after commencement, only the Defence Force magistrate can direct the Registrar to terminate the reference if it would be in the interests of justice to do so.

The purpose of this amendment is unclear. The *Explanatory Memorandum* is somewhat confusing on the point and in its reference to subsection 129A(2). Subsection (2) gives authority to a convening authority to discontinue proceedings after commencement if ‘the Defence Force magistrate is unable to conclude the trial of the charge or the hearing of the case because of death, illness, the exigencies of service or other circumstances.’

The amendment to subsection (2) (see **item 73**) merely replaces the convening authority with the Registrar and does not alter the substance of the subsection. And yet the *Explanatory Memorandum* maintains that it will be amended to allow an exception to the rule that once a Defence Force magistrate has commenced to sit, the reference can be terminated only at the direction of the Defence Force magistrate. It gives the example of exceptional circumstances where a Defence Force magistrate was unwilling to make a direction to discontinue but where the interests of justice plainly required such a decision.<sup>72</sup> Arguably, ‘other circumstances’ might be given a very broad reading. However, it is equally arguable that the authority of the Registrar (replacing the convening authority) to discontinue proceedings before a Defence Force magistrate is diminished as under new section 129A(1)(b)(ii) there is no longer any express provision that empowers the Registrar to terminate proceedings in the interests of justice.

It may be that the purpose is to distinguish the administrative role of the Registrar from the Defence Force Magistrate’s role. The Defence Force Magistrate should decide what issues

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are 'in the interests' of justice whereas the Registrar makes administrative arrangements if the Defence Force Magistrate cannot continue, for example, due to illness. However the *Explanatory Memorandum* does not take this approach to the interpretation of the subsections.

It perhaps should be borne in mind that there has been a marked trend towards matters being heard by a single Defence Force magistrates rather than court martial. The 2002 figures were 46 Defence Force magistrates and only 3 courts martial.<sup>73</sup>

### Nomination of Defence Force magistrates and members of courts martial

Under **new section 129B(1)** the Judge Advocate General (JAG) retains the responsibility for nominating a person as the President, members or reserve members and judge advocate of a court martial. The Registrar, like the convening authority in the current Act, can not make appointments to a court martial unless the people have been nominated to the positions by the Judge Advocate General (**Items 78 and 80**). However, the Judge Advocate General does not retain the right, as under the current subsection 129B(1), to reject a potential nominee on the basis of bias, or likely bias. This becomes the role of the Registrar (**Item 79**).

The Judge Advocate General remains responsible for nominating a Defence Force magistrate, and the Registrar may not refer a charge to a magistrate unless such a nomination has been made (see section 129C and **Item 81**).

### Procedure of service tribunals

Subsection 130(5) currently provides that a summary authority when trying a charge may, at any stage of the trial, refer the charge to a convening authority. **Item 82** replaces convening authority with the Director.

Sections 131 and 131A cover situations where an accused person may have opportunity to elect the nature of the trial and punishment. In certain circumstances, the summary authority may then decide to refer the charge or conviction to the convening authority. Under **items 83 and 85**, that referral is made to the Director. Under **item 84**, any notice by the accused to withdraw his or her election will be made to the Registrar, thus maintaining the distinction between the prosecution and administrative functions of these respective positions.

**Items 86 and 87** respectively provide that a court martial and a Defence Force magistrate may, if the Director (replacing the convening authority) does not object, accept a guilty plea.

**Item 88** relates to representation of an accused person under subsection 137(1). Under the current provision, a convening authority is responsible for affording an accused person the

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opportunity to be represented at trial by a court martial or Defence Force magistrate. The amendment in item 88 gives this responsibility to a superior authority. The *Explanatory Memorandum* notes that:

The role of superior authorities is to represent the service interests in the proper administration of discipline, one aspect of which is ensuring appropriate representation for an accused. The appropriate superior authority to ensure representation for a defendant will usually be a superior authority in the defendant's chain of command.<sup>74</sup>

However, as a superior authority is an authority appointed to represent the interests of the Defence Force, it is possible that there may be situations where this gives rise to a conflict of interest. Further commentary on this amendment is made in the Outcomes/Pros and cons section.

Under section 141, an accused may make a number of applications such as for an adjournment, or objections regarding the bias of members. If a Defence Force magistrate or a judge advocate grants an application or objection, they may then refer the charge to 'a convening authority' which term is now replaced by the Director (see **item 89**).

**Item 92** amends section 145. This section provides that a summary authority, if it considers an accused person unable to understand the proceedings by reason of mental impairment, may now refer the charge to the Director.

The amendments to section 145A, which deals with notices in relation to an alibi, as administrative requirements, are to be dealt with by the Registrar (**Items 93, 94 and 95**).

**Item 97** amends section 149 making the Judge Advocate General responsible for the rules of procedure governing the duties of the Registrar.

**Item 98** amends section 150A so as to ensure that an officer can only be authorised to act either as a superior authority or as a reviewing authority in any given case.

#### Judge Advocate General and Chief Judge Advocate

**Item 100** amends section 180(3) to provide that not only may the Deputy Judge Advocate General be a defence member, as provided for now under the Act, but also the Judge Advocate General. The *Explanatory Memorandum* states that this amendment clarifies the situation.<sup>75</sup>

The Senate Report notes that the Judge Advocate General 'is a Reserve officer and a civilian judge'.<sup>76</sup> The Senate Report is strongly supportive of the Judge Advocate General and the Judge Advocates and Defence Force magistrates having considerable experience in civilian courts and noted the Abadee Report's support for this also. The Senate Report

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went on to note that such experience ‘is not and will not be present for some time, in the pool of permanent military legal officers available for judicial appointments.’<sup>77</sup>

**Items 101 to 105** deal with amendments to the remuneration and length of service provisions. The Chief Judge Advocate may be appointed for 5 years (**Item 102**), increased from the current three years, but under the amendments, may not hold office for more than a total of ten years (**Item 103**).

The threshold eligibility requirement for the Chief Judge Advocate has also been raised. Currently an officer must hold a rank of captain, colonel or group captain, or above these. **Item 104** provides that an officer holding a rank not lower than commodore, brigadier or air commodore, will be eligible.

### Registrar of Military Justice

A **new Division 3** is inserted covering the functions, appointment, qualifications, tenure, resignation, remuneration and other conditions of the position of the Registrar. Primarily, the Registrar is to provide administrative and management services in connection with charges and trials under the Act (**new section 188FA(1)**). Appointment is made by the Minister (**new section 188FB**) and must not exceed 5 years (**new section 188FD(1)**) though reappointment is possible (**new section 188FD(2)**).

The appointee must be a legal practitioner of at least 5 years standing and must be a member of the defence forces rendering full-time continuous service with a rank not lower than captain, colonel or group captain (**new section 188FC**). If the Registrar ceases to be enrolled as a legal practitioner or a member of the defence forces or a member of the Reserves who is rendering continuous full-time service, then the Registrar ceases to hold office (**new section 188FJ**). The Registrar is obliged to disclose any conflict of interest (**new section 188FK**).

### Director of Military Prosecutions

**Item 107** inserts a **new Part XIA** which details the functions, role and conditions of service of the new position of Director. Those functions include:

- to carry on prosecutions for service offences in proceedings before a Defence Force magistrate or a court martial
- to represent the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal, and
- to make statements or give information to particular persons or to the public relating to the exercise of the Director’s powers (**new section 188GA**).

This latter function, notes the *Explanatory Memorandum*, ‘could, for example, relate to a decision taken whether or not to prosecute an offence and the reasons for that decision.’<sup>78</sup>

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However, it is not a specific mandatory provision that the Director give reasons for such decisions.

The Director is empowered to give undertakings relating to statements given or disclosures made in the course of giving evidence, that such information will not be used in evidence against the person in any other proceedings unless the evidence is false, and may further give an undertaking that the person will not be prosecuted for a service offence (**new section 188GD**).

The Director is appointed by the Minister (**new section 188GF(1)**) and like the Registrar must be a legal practitioner of five years standing and a member of the defence forces holding a rank not lower than commodore, brigadier or air commodore (**new section 188GG**). The appointment must not exceed five years and the appointee is eligible for reappointment to a maximum period of 10 years in total (**new section 188GH**). The conflict of interest disclosure provisions mirror those for the Registrar's position (**new section 188GO**).

As with the appointment of the Registrar, it may be observed that the necessary qualifications of rank ensure that the person appointed is a long standing defence force member and this may raise the question as to the independent nature of the office.

## Immunities

**Item 108** inserts a **new section 193(1A)** extending the same protection and immunity as a Justice of the High Court to the position of Judge Advocate General.

**New subsection 193(4)** extends more limited immunity for actions of Director and the Registrar, and persons assisting those offices (**Item 109**).

The Director is required to submit an annual report to the Minister (**new section 196B; item 112**).

The transitional arrangements in **Item 114** provide that where a convening authority has been exercising powers that, due to the amendments, should be exercised by the Director, the Registrar or a superior authority, a judge advocate, Defence Force magistrate or superior authority, these powers must now be exercised by persons in those positions.

## Schedule 2 – Inspector-General of the Australian Defence Force (Inspector-General)

**Schedule 2** amends the *Defence Act 1903* by inserting a **new Part VIII B** which establishes the office and functions of the Inspector-General. **New section 110A** sets out the object of the new Part which is to provide the CDF with:

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- (a) a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and
- (b) an avenue by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.

To achieve this objective, the Inspector-General is given power to investigate matters concerning the military justice system which includes carrying out preliminary assessments to assess whether an inquiry should be undertaken and referring matters to other appropriate authorities, conduct performance reviews, advise on matters and make recommendations and promote military justice values across the ADF (**new section 110C**).

An inquiry or investigation may be initiated by the Inspector-General, the CDF, or a service chief although if the latter, the Inspector-General does not have to comply with the request. Similarly, the Inspector-General may act on a request 'by any other individual' but again, need not comply or even conduct any preliminary assessment. (See **new section 110D**).

The Inspector-General is to be appointed by the Minister who must have regard to any recommendation made by the CDF (**new subsections 110E(1) and (2)**). Importantly, a person must not be appointed to the position unless they have knowledge of and experience in relation to military justice issues and an understanding of their relevance to the role of the Defence Force (**new subsection 110F**).

The appointment will be for 5 years and reappointment is possible (**new section 110G**). Appointees will be required to give notice to the Minister of all interests that could conflict with the duties of the office (**new section 110M**).

The Inspector-General's office is to be staffed by defence force members made available by the appropriate service chief and public service officers made available by the Department (**new section 110O**). Although consultants may also be engaged, this reliance on defence force and department personnel at the discretion of service chiefs and the Department may potentially limit the Inspector-General's capacity to fulfil the duties of the office. There is provision for the Inspector-General to appoint persons to investigative positions. Such a person must meet the eligibility criteria yet to be set out under the regulations (**new section 110P**).

The Inspector-General is given limited immunity from civil proceedings for any loss, damage or injury suffered by a third party as a result of performing the duties of the office (**new section 110Q**).

The only reporting provision is that the Inspector-General must prepare reports for the CDF on the operations of the Inspector-General as directed to by the CDF (**new section 110R**). There is no provision for reporting to the Minister.

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## Concluding Comments

The Bill does address some of the shortcomings in military justice identified in the several inquiries over the past decade. By separating the prosecution and administrative functions, between the Director and Registrar, it does achieve a conceptual change, as described in the *Explanatory Memorandum*. And it does create three statutory appointments appointed by the Minister, a potentially significant development in changing the dynamics of control of the military justice system.

Nonetheless, in line with the Government's Response, this first instalment of legislative change does not attempt fundamental structural change; it does not seek to clearly distinguish between the military justice system and the military. In this respect, the Bill arguably continues the long tradition of implementing 'broadly reactive and piecemeal'<sup>79</sup> reforms, an approach strongly criticized in the Senate Inquiry.

Ultimately, the proposed legislative framework is a small improvement on the current military justice system and anticipated future amendments may well improve upon these.

## Endnotes

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- 1 Senator The Hon Robert Hill, Minister for Defence, indicated this was the case during Defence Estimates on the afternoon of 2 Nov 2005.
  - 2 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system, June 2005* (Senate Report), June 2005, available at [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/miljustice/report/report.pdf](http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/report.pdf)
  - 3 Mr James Burchett QC, *Report of an Inquiry into Military Justice in the Australian Defence Force Discipline Act 1997* (Burchett Report) available at <http://www.defence.gov.au/media/DeptTpl.cfm?CurrentID=893>
  - 4 Government Response to the Senate Foreign Affairs, Defence and Trade References Committee *Report on the Effectiveness of Australia's military justice system*, October 2005 (Government Response) available at [http://www.defence.gov.au/mjs/docs/MJI\\_GOVERNMENT\\_RESPONSE\\_4oct052.pdf](http://www.defence.gov.au/mjs/docs/MJI_GOVERNMENT_RESPONSE_4oct052.pdf)
  - 5 Joint Standing Committee on Foreign Affairs, Defence and Trade titled *Military Justice Procedures in the Australian Defence Force* (Joint Standing Committee Report) available at <http://www.aph.gov.au/house/committee/jfadt/military/reptindx.htm>
  - 6 *A study into the judicial system under the Defence Force Discipline Act*, Brigadier The Honourable A.R. Abadee, RFD, Deputy Judge Advocate General, p. 5, copy undated, delivered to CDF General Baker in 1997 (the Abadee Report).
  - 7 *ibid.*, p. 6.
  - 8 Joint Standing Committee Report, *op cit.*, Recommendation 7.

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- 9 Abadee Report, op. cit., p. 8.
- 10 [Burchett Report](#), op. cit., para 53.
- 11 ‘Admiral Barrie releases the Burchett Report into Military Justice today for the public domain "too tough"’, [Defence Media](#).
- 12 [Burchett Report](#), op cit., Recommendation 47.
- 13 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice - An Investigation into Allegations of Brutality in the Army's Parachute Battalion*, Report No. 99 ([Rough Justice Report](#)) available at:  
[http://www.aph.gov.au/house/committee/jfadt/DOD\\_Rept/MJindex.htm](http://www.aph.gov.au/house/committee/jfadt/DOD_Rept/MJindex.htm)
- 14 ‘Admiral Barrie releases the Burchett Report’, *Defence Media*, [op. cit.](#)
- 15 [Senate Report](#), op. cit., preface p.xxi.
- 16 Some more serious criminal offences are currently referred to civilian authorities for investigation and prosecution: see Senator Hill, Government to strengthen military justice system, Media Release, 5 October 2005, available at:  
<http://www.minister.defence.gov.au/Hilltpl.cfm?CurrentId=5149>.
- 17 Senate Report, op. cit., p.xxx, para 29, p.xxxv, para 49, p..54, para 3.116.
- 18 *ibid.*, p.xxvii.
- 19 *ibid.*, p. xxi.
- 20 *ibid.*, preface p.xxii.
- 21 *ibid.*, preface p.xxx
- 22 *ibid.*
- 23 *ibid.*, p.xxxiii.
- 24 Defence Ombudsman, *The ADF: own motion investigation into how the ADF responds to allegations of serious incidents and offences*), January 1998  
[http://www.comb.gov.au/publications\\_information/Special\\_Reports/Defence-Own-Motion.pdf](http://www.comb.gov.au/publications_information/Special_Reports/Defence-Own-Motion.pdf)
- 25 Senator The Hon Robert Hill, *Defence Estimates*, Parliament of Australia, 2 Nov 2005.
- 26 [Government Response](#), op. cit., p. 2.
- 27 *ibid.*
- 28 Joint Standing Committee Report, [op cit](#), Recommendation 4.
- 29 *ibid.*, Defence response to Recommendation 4.
- 30 The Hon. Dana Vale MP, Minister assisting the Minister for Defence, First Australian Director of Military Prosecutions, Media Release, 30 June 2003,  
<http://www.minister.defence.gov.au/Valetpl.cfm?CurrentId=2915>
- 31 Senate Report, op. cit., p. Liii, Recommendation 10, para 4.47.

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- 32 *ibid.*, p. 67, para 4.38.
- 33 *ibid.*, preface p.xxxi,
- 34 *ibid.*, p. Lii, Recommendation 8, para 4.45.
- 35 Government's Response, *op. cit.*, p. 14.
- 36 See section 103(3) of the DFD Act; Items 31 and 31 of the Bill.
- 37 *ibid.*, p.xxxviii, para 60.
- 38 Burchett Report, *op cit.*, Recommendation 55.
- 39 Senate Report, p. xLiv, para 82.
- 40 *ibid.*, p. xLv, para 92.
- 41 Para 113.
- 42 *ibid.*
- 43 Burchett Report, *op cit.*, Recommendation 55.
- 44 *Defence Legislation Amendment Bill (No.2) 2005*, Part VIIIIB (Section 110C)
- 45 [Explanatory Memorandum](#), para 127.
- 46 *ibid.*, para 106.
- 47 Senator Kay Patterson, [Second Reading Speech](#), 12 October 2005.
- 48 Senate Report, *op cit.*, p.XLv, para 89.
- 49 *ibid.*, p. xLviii-xLiv, para 106. See also Recommendations 29–34, pp. Lv-Lviii, and Chapter 11.
- 50 *ibid.*, p.xLvi, para 95.
- 51 *ibid.*, p.xLviii, paras 102, 104.
- 52 Governments Response, *op cit*, pp.18, 20–21.
- 53 Senate Report, p. 14, para 2.33.
- 54 *ibid.*, p. xxxiii, paras 37, 38.
- 55 *ibid.*, para 39.
- 56 *ibid.*, p. xLiii, para 5.94, Recommendation 18.
- 57 Governments Response, *op. cit.*, pp. 5, 15–16
- 58 *Explanatory Memorandum*, para 7.
- 59 Senator Kay Patterson, [Second Reading Speech](#), 12 October 2005
- 60 Para 16.
- 61 Senate Report., *op cit.*, preface p.xxxi,
- 62 *ibid.*, xxxvi-xxxvii, para 54.

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- 63 *ibid.*, p. Liii, para 4.76, Recommendation 17.
- 64 Governments Response, *op. cit.*, p. 4.
- 65 Senate reports find problems, [The 7.30 Report](#), 6 October 2005; [Government promises to strengthen military justice system](#), PM, 5 October 2005.
- 66 [Military justice reforms 'window dressing'](#), The Age, 6 October 2005.
- 67 [Government promises to strengthen military justice system](#), PM, 5 October 2005.
- 68 *Explanatory Memorandum*, para 24.
- 69 *ibid.*, para 32.
- 70 *ibid.*, para 33.
- 71 *ibid.*, paras 4, 6.
- 72 *ibid.*, para 39.
- 73 Senate Inquiry Report, *op. cit.*, p. xxxv, para 48.
- 74 *Explanatory Memorandum.*, para 43.
- 75 *ibid.*, para 47.
- 76 Senate Inquiry Report, *op. cit.*, p. xxxiv, para 42.
- 77 *ibid.*, p. xxxv, para 45.
- 78 *Explanatory Memorandum.*, para 70.
- 79 Senate Inquiry Report, *op. cit.* p. xLiv, para 87.

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## Appendix 1

## Current ranks in the Australian military

Navy	Army	Air Force
Seaman	Private Bandsman Craftsman Gunner Sapper Signaller Trooper	Aircraftsman/woman
<b>Non-Commissioned Officers</b>		
Able Seaman	Lance Corporal Lance Bombardier	Leading Aircraftsman/woman
Leading Seaman	Corporal Bombardier	Corporal
Petty Officer	Sergeant	Sergeant
	Staff Sergeant	
<b>Warrant Officers</b>		
Chief Petty Officer	Warrant Officer Class 2	Flight Sergeant
Warrant Officer	Warrant Officer Class 1	Warrant Officer
Midshipman		
<b>Commissioned Officers</b>		
	Second Lieutenant	Pilot Officer
Sub-Lieutenant	Lieutenant	Flying Officer
Lieutenant	Captain	Flight Lieutenant
Lieutenant Commander	Major	Squadron Leader

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Commander	Lieutenant Colonel	Wing Commander
Captain	Colonel	Group Captain
Commodore *	Brigadier *	Air Commodore *
Rear Admiral **	Major General **	Air Vice Marshal **
Vice Admiral ***	Lieutenant General ***	Air Marshal ***
Admiral ****	General ****	Air Chief Marshal ****
Admiral of the Fleet	Field Marshal	Marshal of the RAAF

**Source:** Australian War Memorial, 'Military Organisation and Structure: Comparative Table of Ranks', [http://www.awm.gov.au/atwar/structure/rank\\_comparative.htm](http://www.awm.gov.au/atwar/structure/rank_comparative.htm), accessed on 8 November 2005; ranks no longer used have been deleted.

Information added:

\* Indicates star ranking eg. a Commodore in the Navy is a one star General equivalent officer ; an Air Marshal in the Air Force is a three star General equivalent officer.

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