



## Defence Legislation Amendment Bill 2007

Paula Pyburne  
Law and Bills Digest Section

### Contents

Purpose.....	3
Background.....	4
Inquiries and oversight into the military justice system.....	4
2003 Senate inquiry into effectiveness of military justice system.....	4
Government response.....	5
Implementation of change.....	6
Australia’s military justice system.....	6
Financial implications.....	7
Key issues.....	7
Submissions to the Senate Standing Committee on Foreign Affairs, Defence and Trade.....	7
Submission from the Office of the Director of Military Prosecutions.....	8
Submission from the Law Council of Australia.....	8
<a href="#"><i>Commonwealth of Australia v Westwood</i></a> .....	10
Background.....	10
Relevant law.....	10
What the Judge Advocate decided.....	11
What the Federal Court decided.....	11
Hearings by the Senate Standing Committee for Foreign Affairs, Defence and Trade.....	12
Main provisions.....	13

Schedule 1 – election for trial by the Australian Military Court.....	13
Schedule 2 – appeals to the Australian Military Court .....	16
Schedule 3 – evidence in summary proceedings.....	19
Schedule 4 – review of summary proceedings.....	20
Schedule 5 – offences and punishments.....	23
Schedule 6 – minor disciplinary infringements .....	25
Schedule 7 – other amendments.....	26
Schedule 8 – application, saving and transitional provisions .....	28
Concluding comments .....	28

## Defence Legislation Amendment Bill 2007

**Date introduced:** 15 August 2007

**House:** House of Representatives

**Portfolio:** Defence

**Commencement:** Schedules 1 – 6 on a day to be fixed by Proclamation or 1 May 2008, whichever is the earlier; Schedule 7 items 1 and 39 to 43, Parts 2 and 7 and Schedule 8 on the date of Royal Assent; the remaining provisions following the commencement of the *Defence Legislation Amendment Act 2006* or the date of Royal Assent, whichever is the later.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

To give effect to the [Government's response](#) to the [Report](#) by the Senate Foreign Affairs, Defence and Trade References Committee entitled 'The effectiveness of Australia's military justice system' by amending the *Defence Act 1903* (the Defence Act), *Defence Force Discipline Act 1982* (the DFDA) and *Defence Force Discipline Appeals Act 1955* (the DFDA). This will modernise and redesign the summary discipline procedures by providing for:

- an automatic right of appeal from a summary authority to a single Military Judge of the Australian Military Court (AMC)
- the right to elect trial by a Military Judge of the AMC for most disciplinary offences
- simplified rules of evidence
- a form of review for technical errors related to the awarding of punishments and orders
- simplification of offences and punishments, and
- changed jurisdictions of Superior Summary Authorities and Discipline Officers.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Background

### Inquiries and oversight into the military justice system

Over the past decade, a number of court challenges and publicly aired complaints brought by former and serving personnel, their families and other community members suggested that the military justice system was flawed. Significant official inquiries included:

- the 1997 *Study into the Judicial System under the Defence Force Discipline Act* by Brigadier the Hon Mr Justice Abadee
- the 1998 Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*
- the 1999 *Military Justice Procedures in the ADF* by the Joint Standing Committee on Foreign Affairs, Defence and Trade
- the same committee's *2001 Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*
- the 2001 Burchett QC Inquiry into Military Justice in the Australian Defence Force, and
- the 2002-03 West Australian Coroner's investigation of fire on board HMAS *Westralia*.

Each of these inquiries identified flaws in the Australian Defence Force (ADF) military justice system and processes, and recommended changes. As General Peter Cosgrove put it, while some of the recommendations were acted upon, there appeared also to be an element of resistance within the ADF, which viewed the military justice system as 'sound, even if it has sometimes not been applied as well as we would like'.<sup>1</sup>

### 2003 Senate inquiry into effectiveness of military justice system

In March 2003, the Defence Legislation Amendment Bill 2003 was introduced into Parliament. After the second reading, in October 2003 the Senate referred the issue of military justice to the Foreign Affairs, Defence and Trade References Committee for inquiry (the 2003 Committee).

The 2003 Committee was instructed to inquire and report on the effectiveness of the military justice system in a number of areas. These included determining whether the system provided impartial, rigorous and fair outcomes for ADF members; mechanisms to

---

1. General Peter Cosgrove, quoted in the Senate Foreign Affairs, Defence and Trade References Committee report, 'The Effectiveness of Australia's Military Justice system', Commonwealth of Australia, Canberra, p. xxvi.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

improve transparency and public accountability of military justice procedures; the handling of inquiries into peacetime deaths in the ADF, from any cause; and allegations of mistreatment of ADF members and of drug abuse. The 2003 Committee was also to assess the impact, if any, of previous reports on the military justice system, and determine whether recommendations were acted upon effectively. Several well known cases were identified for special evaluation.<sup>2</sup>

The 2003 Committee heard evidence from former and serving members of the ADF, including senior officers, family members, and other interested parties. It concluded that ‘the ADF has proven itself manifestly incapable of adequately performing its investigatory function’.<sup>3</sup> Investigations were found to be inadequate as a result of ‘poorly trained and on occasion incompetent investigating officers’.<sup>4</sup> Boards of Inquiry were lacking in transparency and independence. Processes of investigation and trial were found to have placed great stress on individuals, leading to loss of confidence, loss of employment, suicidal thoughts, and attempted and actual suicides. ADF members were reluctant to lodge complaints about superior officers, non-commissioned officers or their peers because they doubted the effectiveness and impartiality of the system. Review processes were inadequate. The report on military justice declared: ‘The committee believes that the military justice system in its current form clearly needs a comprehensive, ground up reform.’<sup>5</sup>

Its report was released on 16 June 2005. The 2003 Committee concluded that there was a need for a wholesale review of the military justice system and made 40 recommendations.

## Government response

The Government issued its response on 5 October 2005. It agreed that 30 of the 40 recommendations should be accepted in whole, in part or in principle.<sup>6</sup> Many could be dealt with by new or enhanced processes within the ADF. The civil and military

- 
2. There were the death of Private Jeremy Williams, who committed suicide during training at the School of Infantry in 2003; the 1998 fire on board HMAS Westralia, in which four sailors were killed; the suspension and suicide of Cadet Sergeant Eleanore Tibble, Air Training Corps, in 2000; allegations of misconduct by members of the Special Air Service in East Timor in 1999; and the disappearance at sea of Acting Leading Seaman Cameron Gurr, HMAS Darwin, in May 2002.
  3. Senate Foreign Affairs, Defence and Trade References Committee, *op. cit.*, p. 52.
  4. *ibid.*, p. xxiii.
  5. For a rundown of the findings, see *ibid.*, pp. xxi-xxiv.
  6. Department of Defence, ‘Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, Report on the Effectiveness of Australia’s Military Justice System’, Canberra, 5 October 2005.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

leaderships of the Department of Defence expressed their commitment to providing ‘a fair and equitable workplace that includes a transparent and cohesive military justice system’.<sup>7</sup>

### Implementation of change

Because of the extent of the changes that were acknowledged to be necessary, implementation is being staged. The *Defence Legislation Amendment Act 2006* (the 2006 Amendment Act) delivered on some of the recommendations. The relevant [bills digest](#) provides extensive background information and sections of it are reproduced in the ‘Background’ section of this digest.

This Bill provides for a further set of changes which, in part, build on the changes in the 2006 Amendment Act.

### Australia’s military justice system

The military justice system has two distinct but interrelated elements: the discipline system and the administration system. They provide the framework for (discipline) investigation and prosecution of offences committed under the DFDA and (administrative) maintenance of professional standards in the ADF and investigation of certain occurrences, such as accidental deaths of ADF personnel.

Offences dealt with under the discipline system can be grouped into three categories:

- offences peculiar to the defence forces, such as absence without leave, disobedience of a command, and endangering morale
- offences similar or identical to civil offences, but that relate to service personnel or equipment, such as assault of a superior or subordinate, destruction or damage of service property, or dealing in narcotic goods on a base, and
- offences imported from civilian criminal law, such as murder, manslaughter and theft of (non-service) property.<sup>8</sup>

The incorporation of civilian criminal offences into the military discipline system enables these offences to be dealt with should they occur when ADF members are overseas in circumstances where an adequate criminal law framework is absent (for example, in a war-

- 
7. R. C. Smith AO, PSM, Secretary, Department of Defence, and Air Chief Marshal A. G. Houston AO, AFC, Chief of the Defence Force, ‘Year in Review’, in Department of Defence, Annual Report 2003-05, Canberra, 2005, p. 9.
  8. Andrew D Mitchell and Tania Voon, ‘Justice at the sharp end – improving Australia’s Military Justice System’, *UNSW Law Journal*, Vol. 28:2, 2005, p. 396.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

torn country in which law and order has broken down) or if the application of host country law is undesirable (for example, if the death penalty were to apply).<sup>9</sup>

Under the existing discipline system:

- serious offences in the first two (military specific) groups are investigated by military police and may be dealt with by ‘service tribunals’ which may be either Courts Martial or Defence Force Magistrates
- less serious offences may be heard by:
  - a Summary Authority, who is superior officer, given limited powers of punishment, or
  - for officer cadets or any member of the ADF below non-commissioned rank, a Discipline Officer

This Bill relates to those less serious offences and aims to modernise and redesign the summary discipline system.

## Financial implications

The Explanatory Memorandum states that the initial funding for these amendments has been identified and will be provided from current allocations.<sup>10</sup>

## Key issues

Submissions to the Senate Standing Committee on Foreign Affairs, Defence and Trade

The Bill was referred to the Senate Standing Committee on Foreign Affairs, Defence and Trade (the 2007 Committee) on 16 August 2007 with a reporting date of 5 September 2007.<sup>11</sup>

Eight written submissions were received by the Committee from the following:

1. Geoff Earley, AM, [Inspector General – Australian Defence Force](#)

---

9. Senate Foreign Affairs, Defence and Trade References Committee, op. cit., pp. 10–11.

10. Explanatory Memorandum, p. 2.

11. The 2007 Committee reported on 10 September 2007. Recommendations made in the report are discussed in the Conclusion section of this digest.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

2. Brigadier R.R.S. Tracey RFD – [Acting Judge Advocate General Australian Defence Force](#)
3. Major General J.P. Cantwell, AO – [Acting Chief of Army, Army Headquarters](#)
4. Lieutenant General K.J. Gillespie, AO, DSC, CSM – [Acting Chief of the Defence Force Australian Defence Headquarters](#)
5. Air Vice-Marshal J.N. Blackburn, AO – [Acting Chief of Air Force, Air Force Headquarters](#)
6. Rear Admiral, RAN R.H. Crane, [Acting Chief of Navy](#)
7. Brigadier L.A. McDade, [Director of Military Prosecutions](#)
8. Law Council of Australia - [Mr Tim Bugg, President](#)

Of these, submissions 1 to 6 fully support the Bill, on the grounds that its purpose is to put into effect the recommendations of the 2003 Committee.

#### Submission from the Office of the Director of Military Prosecutions

The submission from the Office of the Director of Military Prosecutions makes two comments being that:

- the scope of the right of an accused person to elect trial seems to be limited and may need to be expanded at some later time,<sup>12</sup> and
- the new powers of the Provost Marshal – Australian Defence Force as provided for in Part 2 of Schedule 7 will need to be observed to ensure that they do, in fact, expedite the trial of certain matters as intended.<sup>13</sup>

#### Submission from the Law Council of Australia

The submission from the Law Council of Australia (the Law Council) relates to appeals from summary convictions. The Law Council noted that two distinct lines of authority have developed relating to appeal provisions in general criminal proceedings where matters arise while a trial is underway and the judge is required to make a ruling on a particular issue. These two lines of authority are:

1. that the prosecution should have no rights of appeal which can affect any ruling in favour of the accused at any stage: the most that can be done is that there be a criminal appeal reference which will clarify an issue of law (for future trials in

---

12. Office of the Director of Military Prosecutions, *Submission No. 7*, p. 1.

13. *ibid* p. 2.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

different matters) but will not interfere with a final verdict in the case in which the reference is brought, and alternatively

2. that the prosecution be permitted to appeal interlocutory points and, indeed, to reverse a verdict of not guilty. This approach is favoured, for example, in the State of New South Wales by the terms of section 5F of the *Criminal Appeal Act 1912 (NSW)*.<sup>14</sup>

There is nothing in the existing DFDA or the Bill which would provide for the second approach.

The Law Council submits that the recent Federal Court decision in *Commonwealth of Australia v Westwood* [2007] FCA 1282 (*Westwood*) demonstrates why such provisions are necessary. In that case, Justice Sackville ruled inadmissible a record of interview, without which the prosecution would not proceed. There was no right of appeal under any legislation.

According to the Law Council submission, in *Westwood*, the Court accepted it had jurisdiction to grant a declaration under section 39B of the *Judiciary Act 1903 (Cwth)*, applying the observations of Brennan J in *Sankey v Whitlam* (1978) 142 CLR 1 that 'most exceptional' circumstances would need to be shown before the Court would interfere in proceedings which were underway. However, Sackville J stated in *Westwood*, that it is almost impossible to conceive of a situation where there would be 'most exceptional' circumstances, within the meaning of this test.<sup>15</sup>

The Law Council states that it does not favour any amendment to the Bill which would allow any overturning of a verdict of not guilty. However, it does favour the introduction of provisions similar to those from section 5F of the *Criminal Appeal Act (NSW)* on the ground that they have the advantage of having been the subject of much appellate consideration and have a well settled meaning.<sup>16</sup>

The Law Council also noted that the members of the Australian Military Court will have had very limited experience in relation to the conduct of criminal trials. None of those currently appointed have held civilian judicial office before and some members may have had almost no criminal or litigation experience. That being the case the Law Council considers that it is appropriate that there be the right to bring interlocutory appeals to the

---

14. Law Council of Australia, *Submission No. 8*, p. 1.

15. *ibid.*, p. 2.

16. *ibid.*, p. 3.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Defence Force Discipline Appeal Tribunal which is composed of experienced judges of superior courts around Australia.<sup>17</sup>

## Commonwealth of Australia v Westwood<sup>18</sup>

### Background

The *Westwood* case relates to charges brought against a member of the ADF under the DFDA and so it is directly relevant to the contents of the Bill and the submissions by the Law Council.

### Relevant law

The Registrar of Military Justice has power to convene a court martial and to appoint the members including a Judge Advocate under subsection 119(1) of the DFDA.

Subsections 134(1) and (2) of the DFDA provide that:

- (1) In proceedings before a court martial, the judge advocate shall give any ruling, and exercise any discretion, that, in accordance with the law in force in the Jervis Bay Territory,<sup>19</sup> would be given or exercised by a judge in a trial by jury.
- (2) Where, for any purpose in connection with the giving of a ruling, or the exercise of a discretion, by a judge in a trial by jury in the Jervis Bay Territory, the judge would, in accordance with the law in force in that Territory, sit in the absence of the jury, the judge advocate shall, for any purpose in connection with the giving of such a ruling, or the exercise of such a discretion, by the Judge Advocate, sit without the members of the court martial.

According to subsection 134(4), a ruling given by a Judge Advocate in accordance with subsection 134(1) is binding on the court martial.

---

17. *ibid.*

18. See; Commonwealth of Australia v Westwood  
[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2007/1282.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/1282.html)

19. The Territory was acquired by the Commonwealth from the State of New South Wales in 1915 so that the national seat of government (Canberra ACT) would have access to the sea. *The Jervis Bay Territory Acceptance Act 1915* and Jervis Bay Territory Ordinances made by the Governor-General are administered by the Commonwealth Minister for Regional Services Territories and Local Government.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

At any time before an accused person is asked to plead at a trial by court martial, the accused may make any application he or she considers relevant in connection with the trial: paragraphs 141(1)(a)(v). Once the Judge Advocate is notified of an application the Judge Advocate must sit without members of the court for a hearing of the application: subsection 141(7).

### What the Judge Advocate decided

In *Westwood* a court martial was convened by the Registrar of Military Justice to hear and determine two charges against a Lieutenant Colonel in the Australian Army. The charges related to the alleged loss of classified material giving rise to breaches of the DFDA. The Judge Advocate made an evidentiary ruling in accordance with the above sections of the DFDA that the record of interview with the accused was inadmissible on the grounds that the actions taken by the Senior Investigators who had obtained it, were not in accordance with any law of the Commonwealth.

### What the Federal Court decided

An application was then made to the Federal Court for a declaration that the actions of the Senior Investigators were, in fact, in accordance with a law of the Commonwealth so that the evidence was admissible.

In contemplating whether to grant the declaration that was sought, the Federal Court carefully considered the opinion of the High Court in the earlier case of *Sankey v Whitlam* (1978) 142 CLR 1 as follows:

In any case in which a declaration can be and is sought on a question of evidence or procedure, the **circumstances must be most exceptional** to warrant the grant of relief. The power to make declaratory relief has proved to be a valuable addition to the armoury of the law. ... but the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils that it was designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process.

In *Westwood*, the Court did not consider that the circumstances were sufficiently 'exceptional' to grant the declaration that was sought.

In its written judgment, the Court commented on this Bill which was introduced into Parliament on the day after the date of the hearing, in the following terms:

- if passed, the Bill will amend the DFDA to empower the Director, after the completion of a trial by the new Australian Military Court under the DFDA, to refer a

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

question of law that arises in the trial to the Defence Force Discipline Appeal Tribunal.<sup>20</sup>

- the Explanatory Memorandum records that the rationale for enabling the Director to seek a determination from the DFDAT on a question of law that arises from a trial by the AMC is that there should be a procedure to obtain a correct statement of the law for future cases. This is a standard procedure for correcting an error of law in criminal proceedings.<sup>21</sup>
- If passed, the Bill will protect the position of an accused person by enabling the Director to test the ruling only **prospectively**. If, therefore, an erroneous evidentiary ruling by the AMC leads to the acquittal of an accused person, he or she cannot be deprived of the benefit of that verdict even if the Tribunal ultimately upholds the prosecution's challenge to the correctness of the ruling.<sup>22</sup>

### Hearings by the Senate Standing Committee for Foreign Affairs, Defence and Trade

The 2007 Committee conducted hearings in person on 5 September 2007 at which the persons who had provided submissions numbered 1, 4, 7 and 8 had the opportunity to provide further comment.

The Law Council answered questions about its written submission and provided other comments about the proposed sections 146A<sup>23</sup> and 168B.<sup>24</sup> This digest makes further reference to those comments under the heading of 'Main Provisions'. The spokesperson for the Law Council conceded that the failure to insert a provision into the Bill in the terms they had suggested would not be so serious that the Bill should not be passed.

The Bill provides for rulings such as the one made by the Judge Advocate in *Westwood* to be tested after the trial. This allows for the matters to be considered after the event with a view to creating precedent that can be followed in the future, whereas the Law Council favours the introduction of provisions which would allow for rulings to be appealed during the course of proceedings.

In *Westwood* the Court made it clear that allowing for an appeal on a ruling in mid trial can have the unfortunate effect of fragmenting proceedings. Given that many of the

---

20. *Commonwealth of Australia v Westwood* [2007] FCA 1283, paragraph 72.

21. *ibid.*, paragraph 73.

22. *ibid.*, paragraph 77.

23. Evidence in proceedings before a summary authority.

24. Evidence in appeal proceedings before the AMC which arise from a decision by a summary authority.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

criticisms of military justice have related to inordinate delay in the trial process<sup>25</sup> it is doubtful that the introduction of such an additional amendment would be appropriate at this time. However it may be prudent for the ADF to place it on the agenda for consideration and policy development at some future time.

## Main provisions

It is important to note that, at the time of preparing this Digest, some sections of the 2006 Amendment Act had not yet come into force. If the sections are not formally proclaimed by 1 October 2007, they will come into force on that date.<sup>26</sup>

In addition, the Bill has been prepared with eight schedules which are in topic order rather than in numeric order. This means that there are cross references in the earlier schedules to sections which make their first appearance in the later schedules.

### Schedule 1 – election for trial by the Australian Military Court

The 2006 Amendment Act will create the Australian Military Court (the AMC). The AMC replaces the system of individually convened trials by Courts Martial or Defence Force magistrates. It also establishes the makeup of the AMC which will include a Chief Military Judge and two permanent military judges, a part-time reserve panel and appropriate paralegal support for it to function independently from the chain of command.

The ADF summary discipline system forms one part of the military discipline system which, taken as a whole, must provide the safeguards necessary to protect the interests of ADF members. Commanders use the summary discipline system on a daily basis. It is integral to their ability to lead the people for whom they are responsible in order to ensure their welfare and safety. It must operate quickly, be as simple as possible and it must be capable of proper, fair and correct application by commanding officers.<sup>27</sup>

‘Summary Authorities’ have limited powers of punishment and are generally used to try less serious offences.<sup>28</sup> Section 3 of the DFDA defines ‘summary authority’ as:

---

25. Senate Foreign Affairs, Defence and Trade References Committee, op. cit., p. xxviii.

26. According to the *Report on Unproclaimed Legislation* dated August 2007 which was prepared in accordance with Senate standing order 139(2), the delay is due to the need to amend Defence subordinate legislation and to formulate rules and procedures. Those schedules of the 2006 Amendment Act which are not yet in force will come into force on 1 October 2007.

27. Background brief to the Bill at Department of Defence web site <http://www.defence.gov.au/mjs/docs/DLAB07BB.pdf> accessed on 3 September 2007.

28. Senate Foreign Affairs, Defence and Trade References Committee, op. cit., p. 12.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- a superior summary authority<sup>29</sup>
- a commanding officer, or
- a subordinate summary authority.<sup>30</sup>

The submission by the Inspector General – Australian Defence Force states that:

on a day to day basis the administration of military justice at the summary level will routinely involve many more members. In 2006, for instance, over 2000 summary trials were conducted across the ADF whereas only 54 Defence Force Magistrate/courts-martial trials were held.<sup>31</sup>

**Item 2** of the Bill proposes to insert a **new section 111B**. The proposed section will require a ‘summary authority’ to give an accused person the opportunity to elect to have charges against them tried by the AMC. Where the charge relates to a schedule 1A offence, the opportunity to elect to have the charge tried by the AMC will only be available to certain specified ranks:<sup>32</sup> **subsection 111B(2)**.

**Item 1** of the Bill proposes to insert a new definition of ‘schedule 1A offence’ into subsection 3(1) of the DFDA. A schedule 1A offence is one of 14 specific offences under the DFDA including:

- absence from duty under subsections 23(1) and (2)
- absence without leave under subsection 24(1)
- insubordinate conduct under subsections 26(1) and (2)
- disobeying a lawful command under subsection 27(1)
- failing to comply with a general order under subsection 29(1)
- a person on guard or on watch is sleeping, intoxicated, leaves their post without being relieved or absents themselves from a place that it is their duty to be under subsection 32(1)
- negligence in performance of duty under subsection 35(1)
- intoxicated while on duty under subsection 37(1)
- custodial offences under subsections 54A(1) and (2), and

---

29. Also defined in section 3 of the DFDA as a ‘superior summary authority’ appointed under section 5A.

30. Also defined in section 3 of the DFDA as a ‘subordinate summary authority’ appointed under subsection 105(2).

31. Inspector General – Australian Defence Force, *Submission No. 1*, p. 1.

32. For example, an officer of or below the rank of major-general but above the rank of major.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- prejudicial conduct under subsections 60(1) and 60(1A).

An accused person must be given the opportunity to obtain legal advice about the election if a legal officer is *reasonably available*<sup>33</sup> to give such advice: **subsection 111B(3)**.

Under **proposed subsection 111C(1)** an accused person must make the election within 24 hours or within a longer period that the summary authority allows, but not exceeding 14 days. This conforms with the stated desire of the Acting Chief of the Defence Force that the summary discipline system be able to be applied expeditiously and as consistently as possible across the Australian Defence Force.<sup>34</sup>

If the accused person elects to have the charge tried by the AMC, the summary authority must refer the charge, and any other charges arising from the same circumstances to the Director of Military Prosecutions and inform the Registrar of Military Justice that the charge has been referred: **proposed subsection 111C(3)**. Charges are linked for the purposes of this section to provide an accused person with the additional safeguard of having all charges considered by the Director of Military Prosecutions and dealt with at the same time.<sup>35</sup>

If the accused person elects not to have the charge tried by the AMC, or does not make the election within the time allowed, the summary authority will deal with and try the charge: **proposed subsection 111C(5)**.

Under **proposed subsection 111C(6)**, the accused person may withdraw the election at any time before a date is fixed for hearing by the AMC. In that case the Director of Military Prosecutions must inform the Registrar of Military Justice and refer the charge back to the summary authority who will deal with and try the charge: **proposed subsection 111C(7)**.

**Item 3** proposes to repeal the existing section 131 and insert a **new section 131** which relates to a trial of a charge of a Schedule 1A offence by a summary authority who is either a superior summary authority or a commanding officer (but not a subordinate summary authority). Under **proposed subsection 131(3)**, if it is considered that the evidence adduced during the trial is sufficient to support the charge, and if the accused person were convicted an elective punishment<sup>36</sup> would be imposed upon the person, then the summary authority must give the accused person the opportunity to elect to have the charge tried before the AMC, before making a finding in relation to the charge.

---

33. Where a member of the ADF is on deployment or subject to communication blackout immediate access to legal advice may not be available. It may be that telephone or email advice is subject to delay due to service requirements.

34. Australian Defence Headquarters, *Submission No 4*, p. 1.

35. Explanatory Memorandum, p. 15.

36. 'elective punishment' is defined in section 3 of the DFDA as a punishment set out in column 2 of Table A or B in Schedule 3. These include fines, reduction in rank, forfeiture of seniority or detention.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Under **proposed section 131AA** where the opportunity to elect has been given under the new section 131, the accused person must make the election within 24 hours or within a longer period that the summary authority allows, but not exceeding 14 days.

Proposed **subsections 131AA(3) to (7)** are in the same terms as subsections 111C(3) to (7) as outlined above.

**Item 4** proposes to insert a **new paragraph 132A(3)(c)** which provides that where an accused person has made an election to have the charge tried under subsection 111C(1) or 131AA(1) by the AMC, then the charge will be heard by a Military Judge sitting alone.

**Item 6** proposes to insert a new schedule 3 to the DFDA. Schedule 3 has three sections:

- **Section 1** sets out in tables A and B the punishments that may be imposed by a superior summary authority on certain officers and on other persons respectively
- **Section 2** sets out in table C, those punishments that may be imposed by a commanding officer on various classes of convicted persons, and
- **Section 3** sets out in table D those punishments that may be imposed by a subordinate summary authority on various classes of convicted persons.

## Schedule 2 – appeals to the Australian Military Court

**Items 2 to 4** of Schedule 2 amend sections 115, 116 and 118 of the DFDA. It is important to note that these sections were also the subject of change by the 2006 Amendment Act and have not yet been proclaimed. Proposed changes to subsections 115(3) and (4) establish the AMC's jurisdiction to hear and determine appeals from a decision of a summary authority.

The Chief Military Judge must nominate the Military Judge who is to try a charge referred to the AMC or to determine an appeal to the AMC. According to the Explanatory Memorandum, this reinforces that the determination of appeal is independent of the chain of command.<sup>37</sup>

**Item 9** repeals the existing Part IX relating to review of a decision by a service tribunal and inserts a new Part IX about Appeals to the AMC.

**Proposed section 160** inserts definitions which relate to the new Part IX. In particular 'Part IV order' is defined as a restitution order, a reparation order or an order made under subsection 75(1).<sup>38</sup>

**Proposed sections 161 to 166** are about appeals which arise from a conviction.

---

37. Explanatory Memorandum, p. 17.

38. This definition mirrors the terms of subsection 66(2) of the DFDA which is located in Part IV – Punishments and orders.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Under **proposed subsection 161(1)** a person who has been convicted of a service offence by a summary authority may appeal to the AMC against either the conviction, the punishment imposed or a Part IV order that has been made. The person must specify the grounds of appeal and lodge them with the Registrar within the appropriate period: **subsection 161(2)**. If the appeal is against a conviction the appropriate period is 14 days from the date of the conviction: **paragraph 161(3)(a)**. If the appeal is against a punishment or a Part IV order, the appropriate period is 14 days from the date that the punishment or order took effect: **paragraph 161(3)(b)**. The AMC may allow for a longer period: **subparagraph 161(2)(b)(ii)**.

If the summary authority has reopened proceedings, the **proposed subsections 161(4) and (5)** allow it to complete those proceedings before the convicted person exercises their right to appeal. The convicted person then has 14 days in which to lodge the appeal.

**Proposed sections 162 to 164** set out the circumstances in which the AMC must allow an appeal and quash a conviction by a summary authority where:

- it was unreasonable or
- new evidence has been received or
- the person convicted is suffering from a mental illness.

Where the AMC does quash a conviction, it may:

- decide that no further action is necessary so that the person is taken to have been acquitted of the offence under **proposed section 165A**, or
- order a new trial by the AMC if it considers that it would be in the interests of justice to do so: **proposed subsection 165(1)**, or
- substitute a conviction for an alternative offence: **proposed subsection 166(1)**. In that case **proposed subsection 166(3)** provides protections to the convicted person that the punishment will not be greater than it would have been for the original conviction.

**Proposed section 167** is about appeals which arise from a punishment. The AMC may confirm, quash or vary the punishment. If the AMC varies a punishment, it takes effect as varied: **subsection 167(3)**.

**Proposed section 167A** is about appeals which arise from the imposition of a Part IV order. As with proposed section 167, the AMC may confirm, quash or vary the order, and where the AMC varies the order, it takes effect as varied.

Sections 168 to 168E contain general provisions about the conduct of appeals.

**Proposed section 168B** provides that, in determining an appeal from a summary authority, the AMC must follow the same rules about evidence as a summary authority. Those rules are set out in proposed section 146A. Essentially both the summary authority at first instance and the AMC on appeal:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- must act with as little legal formality or legal technicality as possible, while ensuring fairness
- are not bound by the rules of evidence whether statutory or common law
- may admit any documents or call any witnesses that are considered to be of assistance or relevance
- may give such weight to any evidence submitted to it that is considered to be important or probative.

The Explanatory Memorandum states that the reason for this process is to ensure that an appeal is based on the same evidentiary basis that was used at a summary trial.<sup>39</sup>

Mr Paul Willee QC made comments to the 2007 Committee in relation to this proposed section at the public hearings of 5 September 2007, making clear that the comments should be attributed to him personally rather than the Law Council.<sup>40</sup> He expressed concern that a right of appeal does not provide a protection for an accused person where the appeals body is bound by the same rules of evidence as the original decision maker. It may be that the decision could not be set aside on appeal because the summary authority was entitled to come to the decision that it had.<sup>41</sup>

Neil Rees argues in relation to ‘court substitute tribunals’ that:

The stipulation that a tribunal is not bound by the rules of evidence is not particularly clear for it does not mean that a tribunal may refuse to apply a number of fundamental principles of law which are sometimes cast as the law of evidence.<sup>42</sup>

Even though he directs his comments to ‘court substitute tribunals’ they are analogous to the terms of the Bill. That is, the fact that the summary authority in considering the charges against an accused person, and the AMC in considering an appeal from the same circumstances, are not bound by the rules of evidence does not mean that they will not apply them. Under section 188AR of the 2006 Amendment Act, the AMC is staffed by, amongst other things, military judges who have been enrolled as legal practitioners for not less than 5 years. This creates an expectation that an appeal conducted by the AMC would be conducted in the manner expected of an officer of the Court.

**Proposed section 168** provides that where the appeal hearing is conducted in Australia the appellant person may be represented by a member of the Defence Force or a legal practitioner. Where the appeal is conducted outside Australia the appellant may, in

---

39. Explanatory Memorandum, p. 19.

40. Evidence of P. Willee QC, *Public Hearing before Senate Standing Committee on Foreign Affairs, Defence and Trade*, 5 September 2007, p. 2.

41. *ibid.*, p. 3.

42. Neil Rees, ‘Procedure and evidence in ‘court substitute tribunals’’, *Australian Bar Review* (2006) vol 28, number 1, p. 41.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

addition, choose to be represented by a person qualified to practise in the courts of that place. The AMC must, to the extent that the exigencies of service permit, cause the convicted person to be afforded the opportunity to be represented at the appeal, and to be advised before the appeal, by a legal officer: **proposed subsection 168(2)**.

**Proposed section 168A** provides that the AMC **may** determine an appeal by holding a hearing or by considering the documents or other material provided to it. There is no requirement to hold a hearing if it appears that the issues can be determined in the absence of the parties. The Explanatory Memorandum states that:

The ability of the AMC to deal with an appeal ‘on the papers’ avoids the requirement for evidence to be reheard where the statutorily independent AMC is of the opinion that such a course is unnecessary... A very important protection exists for the accused – that is, if it appears that the issues cannot be adequately determined on the papers, a hearing must be held (and the appeal must be held in the presence of the accused).<sup>43</sup>

According to **proposed section 168E** the AMC may use video and audio links in the hearing of appeals as for conducting trials. The relevant provisions are contained in the 2006 Amendment Act which will come into force on 1 October 2007.

**Part 2 of Schedule 2** contains consequential amendments to the DFDA to reflect the new appeals system. For example **proposed section 172A** provides that the operation of a restitution order or a reparation order made by a ‘summary authority’ is suspended until the appeal is determined or abandoned. Similarly, the **proposed subsection 176(1)** provides that where a punishment is imposed by a ‘summary authority’, it must not be carried out pending the determination of the appeal. The Explanatory Memorandum states that this will ensure that a person is not disadvantaged by having to serve any punishment pending the determination of their appeal which may find the original conviction and punishment were unwarranted.<sup>44</sup>

### Schedule 3 – evidence in summary proceedings

Schedule 3 sets out the rules of evidence to be followed in a trial by a summary authority and in a trial by the AMC of a summary matter.

The amendments to section 146 set out the rules of evidence for a trial by the AMC.

These rules are different from those which are contained in **proposed section 146A** which relate to a trial by a summary authority. The rules in **proposed section 146A** are the same as in proposed section 168B and provide that formal rules of evidence need not be followed.

---

43. Explanatory Memorandum, p. 19.

44. *ibid*.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

As already stated, Mr Paul Willee QC made comments to the 2007 Committee in relation to this proposed section at the public hearings of 5 September 2007, making clear that the comments should be attributed to him personally rather than the Law Council. His concerns were, essentially, that the removal of the requirement that the summary authority must apply the rules of evidence would be a backward step which would return the ADF to an era when summary authorities acted with caprice and there was a pervasive sense that the outcome of summary proceedings was predetermined.<sup>45</sup>

He acknowledged that review and appeal procedures are a protection to an accused person but questioned why a person should be forced through the review and appeal process when it was preferable to make the correct decision at first instance.<sup>46</sup>

The Explanatory Memorandum states that these changes create simplified rules of evidence which are based on the Canadian Forces summary discipline system.<sup>47</sup> In addition

Given the nature of summary proceedings and allowing for the fact that very few summary authorities are legally qualified, complex rules of evidence at this level are inappropriate and can unnecessarily delay and complicate a trial. It is intended to exclude the operation of more complex evidence provisions, such as the *Evidence Act 1995* (Cth) and to allow summary trials to occur on a less formal basis while nonetheless ensuring appropriate safeguards for a fair trial.<sup>48</sup>

**Item 10** revises section 149 which provides for the making of Summary Authority Rules so that they are made by the Chief Military Judge. The effect of **proposed section 146A** is that a summary authority must comply with the summary authority rules in any proceedings which it conducts. The Summary Authority Rules will be legislative instruments as defined by the *Legislative Instruments Act 2003* and may be disallowed by the Parliament. Under **item 9** existing section 147 is repealed and the **proposed section 147** requires that the AMC take judicial notice of all matters within the general service knowledge of the Court and where applicable, the jury.

#### Schedule 4 – review of summary proceedings

Schedule 4 inserts a new Part VIIIA into the DFDA and is about formal review of the proceedings of a summary authority which have resulted in conviction of a person for a service offence: **proposed section 150A**.

---

45. Evidence of P. Willee QC, p. 2.

46. *ibid.*, p. 3.

47. *ibid.*, p. 20.

48. *ibid.*, p. 21.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Review is undertaken in respect of technical errors related to the awarding of punishments and orders, for example where the imposition of a punishment is beyond the power of the summary authority. In the case of certain more severe punishments, an additional safeguard will apply through the continuation of the requirement for them to be approved by a reviewing authority before they take effect.<sup>49</sup>

**Proposed section 150** introduces two new definitions as follows:

- ‘reviewing authority’ means: an officer or class of officers who have been appointed by the Chief of the Defence Force or a service chief to review proceedings of a ‘summary authority’, and
- ‘competent reviewing authority’ means a reviewing authority which did not exercise any of the powers or perform any of the functions of a superior authority in relation to the charge that is being reviewed.

**Proposed section 151** is about reviewing the proceedings of a *subordinate* summary authority and sets out the following process:

- as soon as practicable after a subordinate summary authority convicts a person of a service offence they must give a record of the proceedings to their commanding officer
- the commanding officer is the ‘reviewing authority’
- the commanding officer *may* obtain advice about the matter from a legal officer
- their review must be carried out within 30 days or a longer period depending on the exigencies of service
- after the review is carried out the commanding officer must give a legal officer the record of the proceedings and the commanding officer’s report of their review
- once the legal officer has received the documents from the commanding officer they can either:
  - refer the matter to a ‘competent reviewing authority’ or
  - notify the commanding officer that the matter will not be referred to a ‘competent reviewing authority’.

**Proposed subsections 151(7) to (9)** set out who must notify the parties of the outcome of the review.

**Proposed section 152** is about review of the proceedings of a *superior* summary authority or a commanding officer and sets out the following process:

- as soon as practicable after a superior summary authority or a commanding officer convict a person of a service offence they must give a record of the proceedings to a ‘competent reviewing authority’

---

49. Explanatory Memorandum, p. 8.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- the ‘competent reviewing authority’ *must* obtain advice from a legal officer
- their review must be carried out within 30 days or a longer period depending on the exigencies of service
- after the review is carried out the ‘competent reviewing authority’ must notify the original decision maker and the person who was convicted of the outcome of the review in writing.

**Proposed sections 153 and 153A** are about the circumstances in which proceedings are reopened. If a ‘reviewing authority’ or ‘competent reviewing authority’ concludes that the summary authority imposed a punishment or made an order against the convicted person that it had no power to make, then they can require the ‘summary authority’ to reopen the proceedings. In that case the ‘summary authority’ must:

- tell the convicted person that the proceedings are to be reopened
- take relevant action about the punishment or order and
- report to the reviewing authority which required the proceedings to be reopened.

The exception to this is if the convicted person has lodged an appeal to the AMC. If there is no appeal lodged prior to the reopening, the convicted person has a right of appeal to the AMC after the reopening process has been finalised: **proposed section 154**. In addition, the reviewing authority may recommend to the convicted person that they lodge an appeal to the AMC in the circumstances specified in **proposed section 155**. In those circumstances the reviewing authority must tell the convicted person in writing of the reasons for that recommendation and provide a copy of their notice to the convicted person’s commanding officer.

**Proposed sections 156 to 159** deals with review of certain punishments that are subject to approval by a reviewing authority. If a ‘summary authority’ imposes a punishment specified in section 172(2) or an order under Part IV, the reviewing authority must approve or not approve the punishment or order and the date from which it must take effect.

**Proposed subsection 159(3)** contains a protection for a convicted person so that a reviewing authority cannot impose a punishment or make an order under Part IV that is more severe than that which was originally imposed by the summary authority.

**Items 3 to 20** of Schedule 4 make consequential amendments to various provisions of the DFDA as a result of the new review system and to reflect new definitions and phrases such as ‘review’ and ‘reviewing authority’.

In addition to his earlier comments to the 2007 Committee at the public hearings of 5 September 2007, Mr Paul Willee QC expressed his concern about the qualifications of reviewing authorities. He advised the 2007 Committee that there had formerly, under section 154 of the DFDA been a requirement that a reviewing authority not commence a review without first obtaining a report a legal officer who was appointed by the Chief of

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

the Defence force on the recommendation of the Judge Advocate General.<sup>50</sup> He was concerned that there is no person of that type referred to in the proposed Schedule 4. Mr Willee stated that he was concerned that those persons who were called upon to give advice to reviewing authorities under the proposed legislation would be lacking in military trials experience and that this would be a retrospective step.<sup>51</sup>

By way of response Rear Admiral Bonser, Head of the Military Justice Implementation Team, Department of Defence stated:

... the review process, which is based on legal advice, will provide another avenue by which to correct inappropriately awarded punishments or orders that may not otherwise have been the subject of an appeal to the Australian Military Court, where the Military Judges replaces the previous reviewing officers who were supported by legal officers. The section 154 reports that Mr Willee referred to only apply to Court Martials and Defence Force Magistrate trials, which cease on 1 October. They do not apply to summary procedures.<sup>52</sup>

It should be noted that under **proposed section 151**, the reviewing authority may obtain advice from a legal officer whereas under **proposed section 152**, the competent reviewing authority must obtain advice from a legal officer.

## Schedule 5 – offences and punishments

**Items 1 to 11** of Schedule 5 amend existing section 59 which currently relates to dealing in or possession of narcotic goods by members of the Australian Defence Force either within or outside of Australia. **Proposed subsection 59(9)** provides for three definitions as follows:

- ‘cannabis’ is extended to mean all forms of cannabis, excepting only cannabis fibre
- ‘prohibited drug’ means a narcotic substance as defined by subsection 4(1) of the *Customs Act 1901* or anabolic steroid within the meaning of Part 5 of the *Poisons and Drugs Act 1978* of the Australian Capital Territory
- ‘prescribed quantity’ in relation to a prohibited drug means:
  - for a narcotic substance, a trafficable amount under the Criminal Code and
  - for any other prohibited drug – 50 grams.

---

50. *ibid.*, p. 4.

51. *ibid.*

52. Evidence of Rear Admiral Bonser, *Public Hearing before Senate Standing Committee on Foreign Affairs, Defence and Trade*, 5 September 2007, p. 12.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

According to the Explanatory Memorandum these changes have been made to more properly reflect contemporary illicit drugs use.<sup>53</sup> In particular the limited quantity and range of drugs specified in the existing section 59 is insufficient to support enforcement and application of the Australian Defence Force's 'no drug' policy.

**Items 12 to 17** amend existing section 60. In its current form it provides that a defence member is guilty of an offence if the member engages in conduct that is likely to prejudice the discipline of, or bring discredit on the Defence Force. The maximum punishment is imprisonment for three months. **Item 13** proposes to insert a **new subsection 60(1A)** which will add that the offence can also be committed by omitting to do something. **Item 17** provides for a defence of 'reasonable excuse' for omitting to perform the relevant act.

It is important to note that according to the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, a phrase such as 'without reasonable excuse' should not be used in the context of Commonwealth offences because the phrase is too open-ended. Generally, the only circumstance in which the use of a 'reasonable excuse' defence can be justified is if the potential for innocuous conduct being caught by the offence is so great that it is not practical to design specific defences. In such cases there will be real questions about whether the width of the offence is too broad.<sup>54</sup>

In addition, subsection 60(1) and the **proposed subsection 60(1A)** are strict liability offences. This means that it is not necessary to prove that there has been any mental element such as intent in order to establish guilt. The Explanatory Memorandum states that a trade off for a strict liability offence would normally be to reduce the maximum penalty for the offence, and that criminal law policy considerations provide that for a strict liability offence, the maximum punishment should be limited to a substantial fine.<sup>55</sup>

However in this Bill no such trade off has occurred. As the purpose and jurisdiction of the offence is limited to members of the ADF, the existing maximum punishment of 3 months imprisonment has been retained. It is noted that the Office of the Director of Military Prosecutions has supported these amendments.<sup>56</sup>

Under the current system, sentences of detention must either be served or suspended in full. **Items 19 to 38** amend various provisions in the DFDA so that a service tribunal can suspend part of a punishment in addition to full suspension. The Explanatory

---

53. *ibid.*, p. 26.

54. Criminal Law Policy Section, Criminal Justice Division, Attorney-General's Department, 'Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers', February 2004, p. 27.

55. Explanatory Memorandum, p. 28.

56. Office of the Director of Military Prosecutions, *op. cit.*, p. 1.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Memorandum states that this is consistent with the options available to civilian courts and with section 79 of the DFDA which allows for part suspension of fines.<sup>57</sup>

## Schedule 6 – minor disciplinary infringements

Schedule 6 amends Part IXA of the DFDA.

**Item 1** inserts the definition of ‘prescribed defence member’, being:

- an officer of or below the naval rank of lieutenant, the rank of captain in the Army or the rank of flight lieutenant or
- an officer cadet or
- a defence member who holds a rank below non-commissioned rank.<sup>58</sup>

Existing section 169B provides that a commanding officer may, in writing, appoint officers or warrant officers to be ‘discipline officers’. **Item 3** inserts **proposed subsection 169C(2)** which provides that ‘discipline officers’ have the jurisdiction to deal with discipline infringements by certain classes of specified officers.

**Items 4 to 9** makes consequential amendments to various provisions of Part IXA to reflect the new definition of ‘prescribed defence member’.

**Item 10** inserts **proposed subsection 169F(1A)**. It limits the punishments which a discipline officer can give to a prescribed defence member to

- a fine not exceeding the amount of the officer’s pay for one day or
- a reprimand.

**Item 11** inserts a **new section 169FB** which is about the consequences of punishments. The proposed section allows the Chief of the Defence Force or a service chief to make rules that apply to the punishments imposed by a discipline officer. These rules are legislative instruments under the *Legislative Instruments Act 2003* and as such may be disallowed by the Parliament. Under **proposed subsection 169FB(2)** the commanding officer of a defence member who is subject to a punishment for a disciplinary infringement may moderate the consequences of the punishment in a way that they think is appropriate.

**Item 14** inserts **new section 169GA** to require a discipline officer to provide a report to their commanding officer in relation to the nature and extent of any punishment imposed.

---

57. Explanatory Memorandum, p. 28.

58. According to the Explanatory Memorandum this will have the effect of increasing the jurisdiction of a discipline officer to deal with a matter in respect of an officer of or below the naval rank of Lieutenant, Captain in the Army and Flight Lieutenant in the Air Force, p. 29.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

The Explanatory Memorandum states that the intention of the amendment is to provide a safeguard through legislated oversight of the discipline officer scheme.<sup>59</sup>

## Schedule 7 – other amendments

**Part 1 of Schedule 7** relates to the powers of the Director of Military Prosecutions.

**Items 1-3** clarify the powers of the Director of Military Prosecutions including:

- charging a member with a service offence under paragraph 87(1)(a)
- summoning a member to appear before a summary authority under paragraph 87(1)(b)
- referring a charge to a summary authority under subparagraph 87(1)(c)(i)
- requesting the Registrar of Military Justice to refer the charge to the AMC (once the 2006 Amendment Act comes into force) under subparagraphs 87(1)(c)(ii) and (iii) and
- deciding that a class 3 offence<sup>60</sup> is to be tried by the Military Judge alone under subsection 103A(2).

Brigadier McDade advised the Committee of her approval of these amendments which will enhance the ability of the Office of the Director of Military Prosecutions to perform its statutory functions.<sup>61</sup>

**Items 5 – 14** amend the DFDA. In particular **items 7 to 12** insert new Division 1A in Part III to enable the Director of Military Prosecutions to seek a determination from the Defence Force Discipline Appeal Tribunal on a question of law that arose in a trial before the AMC. See the earlier comments under the heading ‘Key Issues’.

**Part 2 of Schedule 7** relates to the powers of the Provost Marshal Australian Defence Force. **Items 15 – 17** amend the DFDA so that the Provost Marshal Australian Defence Force, defined in **proposed subsection 3(1)**, can refer a serious service offence to the Director of Military Prosecutions in appropriate circumstances. The Explanatory Memorandum states that this provision will allow more serious matters to be referred directly to the Director of Military Prosecutions and trial before the AMC without the requirement for unnecessary proceedings before a summary authority.<sup>62</sup>

---

59. Explanatory Memorandum, p. 30.

60. The 2006 Amendment Act will insert a definition of the term ‘class 3 offence’ at section 3(1) of the DFDA. A ‘class 3 offence’ will be specified in the table in clause 1 of Schedule 7 of the DFDA.

61. Office of the Director of Military Prosecutions, op. cit., p. 1.

62. Explanatory Memorandum, p. 33.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Part 3 of Schedule 7** amends the DFDA to expand the jurisdiction of superior summary authorities. Under proposed amendments a superior summary authority will cover ranks up to rear admiral, major-general or air vice-marshal: **paragraph 106(a)**.

**Item 22** inserts a **new section 108A**. Under the proposed section a ‘summary authority’ is disqualified from trying a charge of a service offence against a person if the ‘summary authority’ has been involved in the investigation of the offence, issuing a warrant for the arrest of the person or charging the person with the offence. If any of those circumstances arise the ‘summary authority’ must refer the charge to another summary authority which is not similarly disqualified from hearing the charge: **proposed subsection 108A(2)**.

Existing subsection 141(1) provides that at any time before an accused person is asked to plead at a trial by a service tribunal the accused person can, according to paragraph (b), enter an objection to the charge on any ground. **Item 23** proposes to insert a **new subparagraph (vi)** which will provide that one of the reasons for objecting is where a summary authority has failed to disqualify itself in accordance with proposed subsection 108A(1).

**Part 4 of Schedule 7** is about trials by summary authorities. **Item 25** inserts **proposed section 129** which provides that the trial of a charge of a service offence by a summary authority must be commenced within the period of 3 months after the person is charged or such longer period if the exigencies of the service do not allow for this time frame. Where the trial cannot be commenced within 3 months the summary authority must refer the charge to the Director of Military Prosecutions.

**Item 26** substitutes a **new paragraph 130(1)(a)** for the existing paragraph. The new paragraph provides that where an accused person is present, pleads guilty and is found to understand the implications of their plea, the person will be convicted. In addition it provides that, subject to subsection 139(4) an accused person may be absent and plead guilty to a charge in writing. In that case, the accused person will be convicted.

**Item 28** inserts **proposed section 131B** which provides that where a person has been convicted by a summary authority of a service offence the conviction has effect for service purposes only and the person is not required to disclose to any person the fact of the conviction.

**Items 31 to 34** make consequential amendments to the DFDA to reflect the functions of the Registrar of the AMC.

**Item 36** provides for **new subsections 171(1B) and (1C)**. These subsections give the AMC the authority to impose a punishment of dismissal which will take effect within a period of 30 days. This is appropriate where a person has been found guilty and dismissed whilst in an operational theatre.<sup>63</sup>

---

63. *ibid.*, p. 36.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Item 37** amends the Defence Act to provide for the rights and duties of legal officers. Proposed section 122B provides that a legal officer in the ADF will discharge their professional rights, duties and obligations in accordance with the generally accepted rights, duties and obligations applying to legal practitioners. The purpose of this new section is to ensure that ADF legal officers are not subject to inappropriate command direction in the exercise of their professional capacity as ADF legal officers.<sup>64</sup>

### Schedule 8 – application, saving and transitional provisions

The transitional provisions in **items 1 -7** of Schedule 8 operate so that:

- any service offence committed
- any act or omission that took place
- any charge that was laid or any action taken in respect of that charge, and
- any proceedings commenced and not finalised (including proceedings before an examining officer)

under the ‘old law’ will continue to be dealt with under that law until completed.

## Concluding comments

There have been a number of formal inquiries since 1997 into the administration of justice within the ADF. Many made suggestions for improvements to the military justice system. Some of those suggestions were acted upon and some were not. By the time the 2003 Committee published its report in June 2005, it acknowledged that ‘for 10 years now, there have been increasing calls from servicemen and women and their families that all is not well in the military justice system.’<sup>65</sup>

That report contains significant criticisms of the existing disciplinary system as follows:

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... It is apparent that Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the detriment of both.

... reform is also needed to impart greater independence and impartiality into summary proceedings. Summary proceedings affect the highest proportion of military personnel. The current system for prosecuting summary offences, however, suffers from a greater lack of independence than courts martial and Defence Force Magistrate

---

64. *ibid.*, p.37.

65. Senate Foreign Affairs, Defence and Trade References Committee, *op. cit.*, xlix.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

processes. The committee therefore recommends an expansion of the right to elect trial by court martial before the permanent military court, and the introduction of the right to appeal summary decisions before the independent permanent military court.<sup>66</sup>

The 2003 Committee made 40 recommendations for change. 30 of the 40 were accepted in whole or in part by the Government. This Bill is a direct response to those recommendations, particularly recommendation 23 and to the above comments about the need for reform of summary proceedings. The Bill contains core initiatives such as:

- an automatic right to appeal on conviction or punishment from a summary authority to a single Military Judge of the AMC
- the Military Judge has a statutory discretion to deal with an appeal on its merits by way of fresh trial or on the papers
- following the appeal process a Military Judge will not be able to impose a punishment greater than the maximum punishment that was available to the summary authority at the original trial
- the right to elect trial by a Military Judge of the AMC for all but a limited number of certain disciplinary offences (Schedule 1A offences)
- additional safeguards such as a requirement for summary authorities to offer a right of election if, prior to making a finding of guilt, they determine that the more severe punishments that are available to them might apply
- simplified rules of evidence
- a review regime in respect of technical errors related to the awarding of punishment and orders and
- changes to certain offences and punishments.

The 2003 Committee stated in its report of 2005 that it ‘believes that the military justice system in its current form clearly needs a comprehensive, ground up reform’.<sup>67</sup> This Bill delivers that ‘ground up’ reform.

On 16 August 2007, the Senate referred the provisions of the Bill to the 2007 Committee for inquiry and report.

As already stated there was some criticism to the 2007 Committee by way of written and oral submissions by the Law Council of Australia about the absence in the Bill of a right for the prosecution to appeal interlocutory points in an appeal from a summary conviction.

---

66. *ibid.*, p. xxii.

67. *ibid.*, p. xxxvii.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

In addition, Mr Willee on his own behalf made oral submissions, critical of the simplification of the rules of evidence in summary trials.

By contrast, the Bill has been fully supported by each of the arms of the ADF. Written and oral submissions endorsed the Bill on the grounds that its terms have been drafted after considerable consultation with those parties who will be most affected by it.

The 2007 Committee report was published on 10 September 2007. Whilst its final recommendation was that the Bill be passed, the 2007 Committee also recommended that:

- the Government make amendments to section 146A (about the simplified rules of evidence at a summary trial) so that the principles of natural justice and procedural fairness which underpin the rules of evidence must be complied with,<sup>68</sup> and
- the Government undertake a comprehensive consultation process on any future proposed legislation that is intended to make significant changes to Australia's military justice system.<sup>69</sup>

The Bill delivers on the recommendations of the 2003 Committee report. It creates a new system with many built in safeguards. There is a system of review and appeal which, on its face, should deliver outcomes that are fair, informal and timely. However, the simplification of the rules of evidence is an issue. The transcript of the hearings by the 2007 Committee shows the following interaction between one of the members of the 2007 Committee and Mr Geoff Early, Inspector General, Australian Defence Force, Department of Defence which cuts to the heart of the matter:

**Senator MARK BISHOP**— ... What is the breakdown in the system that is so extraordinary that persuades you that DLAB07 should take away the rules of evidence in summary matters? What has occurred in the last one, two or four years to overturn that 30 or 40 years of history that Mr Willee referred to?

**Mr Earley**—It is mainly that it was never really able to be applied to its full extent in the way that might have been imagined back in 1985. There is the training burden to raise to a certain level people who are involved in administering this. We are simply not capable of producing people with enough knowledge to apply that to its fullest extent in the sense that a lawyer might be able to. The ADF is looking to try to improve the system to the benefit of its administration so that there will be less work around and at the same time enhance and protect the rights of the individuals who are subjected to it.<sup>70</sup>

---

68. Standing Committee on Foreign Affairs, Defence and Trade, 'Defence Legislation Amendment Bill 2007 [Provisions]', Canberra, September 2007, p.17.

69. *ibid.*, p. 19.

70. Evidence of G. Early, *Public Hearing before Senate Standing Committee on Foreign Affairs, Defence and Trade*, 5 September 2007, p. 20.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

The ADF has asked for simpler rules of evidence and they have been delivered, despite the concerns of the Law Council and the 2007 Committee. However, a system is only as good as those persons who administer it. The Bill proposes legislative change. It is now up to the ADF to do its part.

Implementation of the Bill will require cultural change. The simplification of the rules of evidence does not mean that no evidence is required, rather that evidence will be weighed and analysed and even disregarded if it is unreliable. It will be up to the ADF to put in place sufficient training to ensure that those who operate as a summary authority understand that.

The Bill does not contain any provisions which would require a review of the amendments within a specified time frame. The Bill puts in place many of broad changes recommended by the 2003 Committee. Given the scope of those changes, a timely review would be prudent.

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

---

© Copyright Commonwealth of Australia

This work is copyright. Except to the extent of uses permitted by the *Copyright Act 1968*, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

This work has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Feedback is welcome and may be provided to: [web.library@aph.gov.au](mailto:web.library@aph.gov.au). Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Entry Point for referral.

---

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2784.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*