



Defence Legislation Amendment Bill (No. 1) 2010

Paula Pyburne
Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
Enquiries into the award system	3
Committee of Inquiry into Defence and Defence Related Awards	3
Report of the Independent Review Panel of the End of War List—Vietnam.....	4
Subsequent inquiries	5
Basis of policy commitment.....	7
Nature of honours and awards	8
For service.....	8
For conduct	9
Committee consideration	10
Financial implications.....	10
Main provisions	10
Schedule 1—Defence Honours and Awards Appeals Tribunal.....	10
Review of decisions.....	11
Inquiries by the Tribunal	12
Operation of the Tribunal	13
Tribunal members.....	14
Schedule 2—procedure for termination in relation to prohibited substances.....	15
Schedule 3—determinations under section 58B of the Defence Act.....	16
Schedule 4—amendment of the Defence Home Ownership Assistance Scheme Act	16
Schedule 5—discipline officers	17

Defence Legislation Amendment Bill (No. 1) 2010

Date introduced: 17 March 2010

House: House of Representatives

Portfolio: Defence

Commencement: Sections 1–3, Schedule 2 and Schedule 5 on the day of Royal Assent; Schedules 3 and 4 on the 28th day after the Royal Assent; Schedule 1 on a day to be fixed by Proclamation, or at the latest, six months after the date of Royal Assent.

Links: The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, 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

The primary purpose of the Bill is to amend the *Defence Act 1903* (Defence Act) to formally establish the Defence Honours and Awards Appeals Tribunal.

In addition the Bill contains amendments to:

- ensure that there is procedural fairness in the termination and discharge process which arises from a Defence member testing positive for a prohibited substance
- clarify that certain determinations made in accordance with the Defence Act are disallowable instruments
- amend the *Defence Home Ownership Assistance Scheme Act 2008* to include all Reserve members, and
- make minor amendments to the discipline scheme in the *Defence Force Discipline Act 1982*.

Background

The Imperial system of honours and awards, including orders, decorations and medals had exclusive application in Australia until 14 February 1975, when the Australian system 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.

honours and awards was first introduced to reflect the changing nature and character of Australia.¹

In April 1983, the Hawke Government announced that the Federal Government would no longer make recommendations under the Imperial honours system, and would use only the Australian system of honours and awards. Until this time, the two systems operated in parallel. Then in 1986, an announcement was made about the institution of new awards for the Australian Defence Force replacing the Imperial awards for gallantry, distinguished service and campaign and other service.²

A bipartisan agreement announced by Prime Minister Keating on 5 October 1992 recognised the agreement between Federal and State Governments (as well as the Federal Opposition) and Her Majesty Queen Elizabeth II, that all Australian citizens be recognised exclusively in the future by the Australian system of honours and awards.³

Enquiries into the award system

Committee of Inquiry into Defence and Defence Related Awards

In accordance with that agreement, the Keating Government announced in the following year that it intended to establish a comprehensive public inquiry into the Australian system of honours and awards. The terms of reference for the inquiry extended to a comprehensive review of Defence and Defence-related areas of interest, including the application of Australian awards in recognition of service by Australians in Defence-related activities.⁴

The Committee of Inquiry Report (CIDA report) commented on the decision-making process as follows:

The final set of issues raised with the Committee in relation to the Order of Australia was a perceived lack of transparency in the decision making process relating to the nominations made for appointments to the Military Division of the Order. There was

-
1. P Gration (Chairman), *Report of the Committee of Inquiry into Defence and Defence Related Awards*, Australian Government Publishing Service, Canberra, March 1994, p. 2, viewed 22 March 2010, http://www.defence.gov.au/medals/Content/+060%20Reviews%20and%20Reports/CIDA_Report.pdf
 2. N Tanzer (Chairman), *Report of the Independent review panel of the end-of war list—Vietnam*, Department of Defence, Canberra, 25 August 1999, viewed 22 March 2010, http://www.defence.gov.au/MEDALS/Content/+060%20Reviews%20and%20Reports/Vietnam_Report.pdf
 3. *Ibid.*, p. 7.
 4. P Gration (Chairman), *op. cit.*, p. ii.

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 feeling that nominations, once made, disappeared into the system and there was no feedback on their progress or their merits.⁵

That being the case, the Committee of Inquiry recommended that the processes by which nominations in the Military Division of the Order of Australia are formulated, handled and approved, should be made public. In addition, the Committee recommended that the Department of Defence examine its existing internal decision-making processes and guidelines leading to the award of service medals.⁶

Report of the Independent Review Panel of the End of War List—Vietnam

The Howard Government recommended various honours and awards as part of an End of War List for the Vietnam conflict as a way of providing appropriate recognition to Australians who served during the conflict. The decision was based, amongst other things, on the principles that:

- the list should comprise those persons who were recommended for an Imperial honour or award at the time of the conflict, but whose awards were subsequently not awarded or downgraded, and
- as Imperial awards were no longer available, the original Imperial awards recommended were to be translated to the nearest equivalent honour or award in the Australian system.

In response to representations from the ex-service community, the Government appointed an independent panel (the End of List panel) to carry out a review and report to the Government on any further action that may be required (the End of List report). The End of List panel heard criticism that, in many cases, the recommendations of field commanders had been downgraded by senior commanders who were not involved in the action, but who allegedly wished to ensure that there was an ability to grant higher level service awards to themselves. Lack of consistency was also cited.⁷

In light of those criticisms, the End of List panel concluded that it was time that the system of handling award recommendations after completion by the field or ship commander was reviewed:

- to arrive at more objective assessments, and
- to streamline the levels of recommendation then in existence.⁸

5. Ibid., p. 79.

6. Ibid., p. 94.

7. N Tanzer, *op. cit.*, p. 34.

8. 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.

Subsequent inquiries

Subsequent inquiries were carried out, including:

- a review of the action of Flight Lieutenant GG Cooper on 18 and 19 August 1968 to determine whether his actions were worthy of a recommendation for the award of the (Imperial) Victoria Cross⁹
- a review of service entitlement anomalies in respect of South-East Asian service 1955–1975 to assist in the assessment by the Government of entitlements to repatriation benefits and service medals flowing from service during this period¹⁰
- review to consider the recognition for Air Force personnel stationed at Ubon during the Vietnam War and to determine whether there is sufficient evidence to amend the regulations governing the award of the Vietnam Logistic and Support Medal to cover the Ubon service from 25 June 1965 to 31 August 1968,¹¹ and
- a review of post-armistice Korean service to consider the level of recognition of Australian service in Korea between 28 July 1953 and 26 August 1957, following the armistice.¹²

Each of these reviews clearly demonstrates the complexities faced by the Australian Defence Force (ADF) in making a determination about whether particular service should be given recognition for the purpose of defence honours or awards. In particular, the *Report of the Post-Armistice Korean Service Review* stated that:

-
9. Australian Government, *Report of the Panel Appointed to review the action of FLTLT GG Cooper on 18 and 19 August 1968*, Department of Defence, Canberra, 4 January 2000, viewed 25 March 2010, http://www.defence.gov.au/medals/Content/+060%20Reviews%20and%20Reports/Report_FLTLT_%20Cooper_1968.pdf
 10. R F Mohr RFD ED RL (Chairman), *Review of Service Entitlement Anomalies in respect of South-East Asian Service 1955–75*, Defence Publishing Service, Canberra, February 2000, viewed 25 March 2010, http://www.defence.gov.au/medals/Content/+060%20Reviews%20and%20Reports/SE_Asian_Review.pdf
 11. D J S Riding AO DFC (Ret'd) (Chairman), Report to the Minister Assisting the Minister for Defence by the Independent Review Panel on Vietnam Campaign Recognition for RAAF Service at Ubon, Thailand, 25 June 1965 to 31 August 1968, Department of Defence, Canberra, 9 July 2004, viewed 25 March 2010, <http://www.defence.gov.au/medals/Content/+060%20Reviews%20and%20Reports/Complete%20Ubon%20Report.pdf>
 12. I Crawford AO AM (Mil) RAN Ret'd and G Nehl AM (Co-chairmen), *Report of the Post-Armistice Korean Service Review*, Commonwealth of Australia, Canberra, December 2005, viewed 25 March 2010, <http://www.defence.gov.au/medals/Content/+060%20Reviews%20and%20Reports/Korea/Korea.htm>

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.

‘Complexity’ and ‘anomaly’ are two of the words we have encountered most in the course of this Review. Given the high degree of interest that ADF members, both past and present, take in their medal entitlements, there is a case for reducing the complexity and increasing the transparency of the Australian Honours and Awards System, and increasing the effort devoted to prior consultation and explaining the System to its clients—many of whom are not able to cope easily with technical explanations.¹³

On that basis, it recommended that the Department of Defence ‘examine options for modifying the medal system’s rule-making, and making it more transparent and reviewable for the future’.¹⁴

The Review also recommended that an independent, part-time, military honours tribunal be established.¹⁵ It stated that such a tribunal would:

- overcome veterans’ current sense of exclusion from the decision-making process
- protect the important national institution of military honours from instability, undue political pressure and short-term decision-making
- be able to recommend ways of making the process more transparent
- provide a forum for independent advice to the Minister on any difficult remaining anomalies from past campaigns, on the institution of new medals, and on any major changes in the military honours system
- avoid the need for further external reviews of specific medal issues, and
- require an adequately resourced and accommodated secretariat provided by the Department of Defence.¹⁶

The Howard Government did not accept either of these two recommendations on the grounds that the existing honours and awards system was ‘already subject to the highest levels of scrutiny, with an interdepartmental committee being the principal advisory body to government’.¹⁷

13. Ibid., chapter 8, p. 3.

14. Ibid., recommendation 8B.

15. Ibid., recommendation 8C.

16. Ibid., chapter 8, p. 4.

17. B Scott MP, ‘Private Members Business: Post-Korean Service Review’, House of Representatives, *Debates*, 9 October 2006, p. 16, viewed 24 March 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2006-10-09%2F0026%22>

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.

Basis of policy commitment

During the 2007 election campaign, the Australian Labor Party (ALP) unveiled its plan to form an independent Defence Honours and Awards Tribunal stating:

A Rudd Labor Government will form a permanent and independent tribunal to consider issues arising in the area of Defence Honours and Awards, to take the politics out of medals policy.

This tribunal will constitute [sic] seven members appointed by the Minister. For each issue, a three member panel will be formed from the appointed seven members.

The Tribunal's decisions will be binding upon the Government. The Tribunal will have matters referred to it by the Minister.

It will also have the power to self initiate investigations if sufficient evidence presents itself.¹⁸

Consistent with this election promise, on 30 April 2008, Mike Kelly MP, the Parliamentary Secretary for Defence Support, announced that the position of chair of the independent Defence Honours and Awards Tribunal would be advertised on 3 May 2008.¹⁹ The announcement of the inaugural members of the Defence Honours and Awards Tribunal was made on 23 July 2008.²⁰ However, as the Tribunal, at that time, was not supported by legislation, the Department of Defence issued an initiating directive which set out the roles and responsibilities of the Tribunal and its members.²¹ There is no indication in the directive, or on the Tribunal's website, of the origin of, or the authority for, this directive.

-
18. K Rudd MP (then, Leader of the Opposition) and A Griffin MP (then, Shadow Minister for Veterans' Affairs), 'Labor's plan for Veterans' Affairs', *Election 2007 Policy Document*, Australian Labor Party, Canberra, November 2007, viewed 24 March 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FA8XO6%22>
 19. M Kelly MP (Parliamentary Secretary for Defence Support), *Independent Defence Honours and Awards Tribunal Chairperson to be Advertised*, media release, Canberra, 30 April 2008, viewed 24 March 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FSYCQ6%22>
 20. M Kelly MP (Parliamentary Secretary for Defence Support), *Appointment of independent Defence Honours and Awards Tribunal members*, media release, 23 July 2008, viewed 25 March 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FZN2R6%22>
 21. The text of the initiating directive, (undated), viewed 25 March 2010, <http://www.defence-honours-tribunal.gov.au/initiating-directive>

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 difference between the Defence Honours and Awards Tribunal which was set up as an interim administrative measure and the Defence Honours and Awards Appeals Tribunal which is established by the Bill is that

the current Tribunal can only inquire into and make recommendations relating to issues referred to it by Government and the Government has undertaken to be bound by [those recommendations]. The current Tribunal, however, has no authority to make separate decisions or to independently review Defence decisions concerning eligibility for Defence honours and awards.²²

Nature of honours and awards

Medals are created by Letters Patent and Regulations and administered in accordance with Determinations made under the Regulations.

In Australia the system of honours and awards can be broadly divided into two main categories—those relating to service and those relating to individual, or unit, conduct.

For service

Those awards relating to service include but are not limited to:

- the Australian Active Service Medal (AASM), which was introduced in 1988 to recognise service in prescribed warlike operations since 14 February 1975. A clasp with the name of the theatre or action for which the award is made, is presented with the medal²³
- the Australian Service Medal (ASM), which was approved in 1988, and may be awarded for service in, or in connection with, a prescribed non-warlike operation²⁴
- the Australian Defence Medal (ADM), which was established to recognise Australian Defence Force Regular and Reserve personnel who have demonstrated their

22. Explanatory Memorandum, Defence Legislation Amendment Bill (No. 1) 2010, p. 4.

23. The text of the relevant Letters Patent and relevant regulations relating to the Australian Active Defence Medal can be viewed at:
<http://www.defence.gov.au/medals/Content/+040%20Campaign%20Medals/+010%20Since%201975/+010%20AASM/S335-88%20AASM.pdf>

24. The text of the relevant Letters Patent and most recent regulations relating to the Australian Service Medal can be viewed at:
<http://www.defence.gov.au/MEDALS/Content/+040%20Campaign%20Medals/+010%20Since%201975/+020%20ASM/S336-88%20ASM.pdf>

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.

commitment and contribution to the nation by effective service for an initial enlistment period or four years' service whichever is the lesser.²⁵

The award of service medals is dependent on whether or not the relevant service was in a warlike or non-warlike operation. It sometimes occurs that different operations in the same country, for instance Somalia, may be classed as warlike, whilst others are not. A separate declaration and determination under the relevant regulations is made for each theatre of action and each operation.²⁶

A person who believes that he or she is entitled to any of these medals is able to lodge an application with the Department of Defence.

For conduct

Those honours and/or awards relating to conduct include but are not limited to:

- Victoria Cross for Australia²⁷
- Star of Gallantry, Medal for Gallantry and Commendation for Gallantry (which are governed by specific Letters Patent and regulations)²⁸
- Distinguished Service Cross, Distinguished Service Medal and Commendation for Distinguished Service (which are also governed by specific Letters Patent and regulations).²⁹

25. The text of the relevant Letters Patent and most recent regulations relating to the Australian Defence Medal can be viewed at:
<http://www.defence.gov.au/medals/Content/+047%20ADM%20+%20ANSM/+070%20ADM/S48-06%20ADM.pdf>

26. For example, the Declaration and Determination under the Australian Active Service Medal regulations in relation to Somalia can be viewed at:
<http://www.defence.gov.au/medals/Content/+040%20Campaign%20Medals/+010%20Since%201975/+010%20AASM/+010%20Table%20Of%20Clasps/S102-01%20AASM%20SOMALIA.pdf>

27. The text of the relevant Letters Patent and relevant regulations relating to the Victoria Cross for Australia can be viewed at:
<http://www.defence.gov.au/medals/Content/+032%20Gallantry%20and%20Distinguished%20Service%20Awards/+010%20VC/S25-91%20VC%20for%20Aust.pdf>

28. The text of the Letters Patent and relevant regulations relating to awards for gallantry can be viewed at:
<http://www.defence.gov.au/medals/Content/+032%20Gallantry%20and%20Distinguished%20Service%20Awards/+050%20SG/S25-91%20S420-96%20SG%20MG%20Comm.pdf>

29. The text of the Letters Patent and relevant regulations relating to awards for distinguished service can be viewed at:
<http://www.defence.gov.au/medals/Content/+032%20Gallantry%20and%20Distinguished%20Service%20Awards/+200%20DSC/S25-91%20DSC%20DSM%20Comm.pdf>

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.

Each of these awards has a different nomination procedure.³⁰ It is also notable that:

Traditionally, Gallantry and Distinguished Service awards—except the Victoria Cross—have been subject to an allocation by operational scale. The purpose of this scale is to maintain control over the number of awards made to members during a campaign.³¹

In short, they are subject to a quota.

Overall, the major complexity of the honours and awards system is that the regulations and determinations which govern the decision-making process may contain discretions, thus introducing a subjective element into the consideration of whether an honour or award is merited.

Committee consideration

At its meeting of 18 March 2010, the Selection of Bills Committee deferred consideration of the Bill to the next meeting.³² That being the case, at the time of writing this Digest, the Bill is not subject to inquiry and report by any Parliamentary Committee.

Financial implications

According to the Explanatory Memorandum, ‘the amendments in the Bill will have no additional impact on Commonwealth expenditure or revenue’.³³

However, the establishment of the Tribunal may well have modest downstream financial implications if the Tribunal makes decisions or recommendations which ultimately open up the eligibility to a defence award to a broader class of persons than currently exists.

Main provisions

Schedule 1—Defence Honours and Awards Appeals Tribunal

Item 1 of Schedule 1 to the Bill inserts **proposed Part VIIIIC** into the Defence Act to formally establish the Defence Honours and Awards Appeals Tribunal (the Tribunal).

30. The relevant nomination procedures are set out in Defence Instructions (General) PERS 31-3: *Australian Gallantry and Distinguished Service Decorations*.

31. *Ibid.*, p. 3.

32. Selection of Bills Committee, *Report No. 6 of 2010*, Senate, Canberra, 18 March 2010, viewed 25 March 2010, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2010/report0610.pdf

33. Explanatory Memorandum, *op. cit.*, 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.

Proposed section 110T contains those definitions which will apply to proposed Part VIIC. In particular, the terms *‘defence award’* and *‘defence honour’* have the meaning given by the regulations.³⁴

Proposed Division 2 establishes the Tribunal and sets out its two functions:

- to review reviewable decisions, and
- to inquire into matters concerning honours or awards for eligible service.

Proposed section 110UB provides that (except as provided in proposed Part VIIC or another commonwealth law) neither the Tribunal nor any Tribunal member is subject to direction from anyone in relation to the performance or exercise of his or her powers and functions. On its face, this would appear to guarantee the independence of the Tribunal. However, **proposed subsection 110VB(6)** provides that when reviewing a reviewable decision, the Tribunal is bound by the *‘eligibility criteria’* that governed the making of the original decision. The regulations which apply to the particular honour or award in question, may define or clarify the *‘eligibility criteria’*.

Review of decisions

Proposed Division 3 provides the framework for the Tribunal’s review of decisions function. Specifically, **proposed section 110V** defines those decisions which are *‘reviewable decisions’* as decisions:

- to refuse to recommend a person, or group of persons, for a defence honour or award, or a foreign award: **proposed paragraph 110V(1)(a)**³⁵
- made by the Minister or a former Defence Minister whose responsibilities included Defence of Defence-related matters; or by a person within the Department of Defence or a department which was administered by a former Defence Minister; or by a person within the Defence Force: **proposed paragraph 110V(1)(b)**, and
- made in response to a formal application by a person, or group of persons, for a defence honour or award, or a foreign award : **proposed paragraph 110V(1)(c)**.

Only a person, or one or more of a group of persons, who has made a formal application may apply for a review of the decision arising from that application: **proposed section 110VA**.

Where the Tribunal reviews a decision relating to a defence honour it has no power to make a new decision. Instead it is only empowered to make recommendations to the Minister: **proposed subsection 110VB(1)**.

34. The access details for the relevant regulations are set out in footnotes 23–29 above.

35. This subsection operates to exclude civilian awards from consideration by the Tribunal.

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 contrast, **proposed subsection 110VB(2)** empowers the Tribunal to review and either affirm or set aside a decision relating to a defence award or a foreign award. Where the Tribunal sets aside the original decision, it must either substitute a new decision (to recommend a person or group for the award), or refer the matter to a specified person for reconsideration in accordance with any directions which the Tribunal gives. In that circumstance, the substituted decision has effect on and from the date determined by the Tribunal: **proposed paragraph 110VB(4)(b)**.

If the Tribunal refers the original decision relating to defence awards or foreign awards to a specified person for consideration in accordance with its directions, and the outcome of that consideration is a refusal—then that new decision is also reviewable by the Tribunal: **proposed subsection 110VB(5)**. This will afford an applicant, or group of applicants, procedural fairness.

In addition to affirming or setting aside the decision under review, **proposed subsection 110VB(3)** authorises the Tribunal to make recommendations to the Minister about matters that arise out of, or relate to, the review. This will afford the Tribunal the opportunity to inform the Minister of such things as inconsistent decision-making, anomalies in the application of the regulations and determinations to a certain group or groups of persons, or any perceived lack of clarity in regulations and determinations.

Proposed section 110VC empowers the Chair of the Tribunal to dismiss an application for review in circumstances where:

- there is another process of review available—and it would be preferable for the decision to first be reviewed by that process
- the matter has already been adequately reviewed, or
- the application is frivolous or vexatious.

The dismissal must be made in writing: **proposed subsection 110VC(1)**. The dismissal is not a legislative instrument and is, therefore, not subject to Parliamentary scrutiny and disallowance: **proposed subsection 110VC(4)**.

Inquiries by the Tribunal

The Tribunal's second function is detailed in **proposed section 110W** which provides that the Minister may direct the Tribunal to hold an inquiry into specified matters concerning honours and awards.³⁶ The Minister's direction must be in writing and is not a legislative instrument.

36. This has been the case since the current interim Tribunal was created administratively in 2008. At that time the eligibility criteria for the Australian Defence Medal and the claims of the Merchant Navy, including recognition for those who served with the United States Army Small Ships Fleet were specified to be 'priority issues'. See M Kelly MP (Parliamentary

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.

Where the Minister makes a direction, the Tribunal must hold an inquiry and must provide a report to the Minister detailing the outcomes of the inquiry. The Tribunal may also make any recommendations it considers appropriate about matters arising out of, or relating to, the inquiry.

Operation of the Tribunal

Under **proposed section 110X**, the Chair is the executive officer of the Tribunal and is responsible for its overall operation and administration. The Chair may delegate any or all of his or her functions or powers to another Tribunal member.

If the Tribunal is undertaking an inquiry, it must be constituted by three or more members. For all other proceedings, the Tribunal is to be constituted by one or more Tribunal members: **proposed section 110XA**.³⁷ Where the Tribunal is constituted by more than one member, the decision of the majority of the members prevails. If there is no majority, the decision of the presiding Tribunal member prevails: **proposed subsection 110XA(4)**.

The Tribunal may summon a person to attend before the Tribunal to give evidence or produce documents. The Bill does not contain a definition of '*person*'. That being the case it is presumed to include serving and former members of the ADF and Defence Force officials. A person commits a criminal offence if he or she fails to comply with the summons: **proposed section 110XC**.³⁸ The defence of 'reasonable excuse' is available to a person who fails to comply with the summons.³⁹ The Bill does not specify whether this would include an ADF member or Defence Force official refusing on 'public interest' grounds.

Proposed section 110XD authorises the Tribunal to make an order prohibiting or restricting the publication of specified confidential or sensitive evidence, documents or submissions. A person commits a criminal offence if his or her conduct contravenes such an order.⁴⁰

Secretary for Defence Support), *Appointment of independent Defence Honours and Awards Tribunal members*, op. cit.

37. The Chair must also comply with any requirements of the procedural rules relating to the constitution of the Tribunal for Tribunal proceedings: **proposed subsection 110XA(3)**. See also **proposed section 110XH**.
38. The maximum penalty for the offence is six months' imprisonment or a fine of \$3 300, or both.
39. For example, self-incrimination.
40. The maximum penalty for the offence is two years' imprisonment or a fine of \$13 200, or both.

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.

Proposed section 110XE sets out certain formal requirements which the Tribunal must satisfy as follows:

- all decisions, orders, determinations, reports and recommendations of the Tribunal must be in writing
- review decisions must include a statement of reasons
- copies of review decisions must be given to the person or persons who applied for the review and any other person that the Tribunal considers appropriate, and
- inquiry reports are (subject to any order made under section 110XD) to be published on the Tribunal's website or by any other means that the Tribunal considers appropriate.

Importantly, **proposed section 110XH** lists those matters about which the Chair of the Tribunal may, by legislative instrument, make procedural rules in relation to the practice and procedure to be followed by the Tribunal. They include but are not limited to:

- how the Tribunal is to be constituted for certain proceedings
- the form of Tribunal proceedings including whether they are to take the form of a hearing, and whether the hearing is to be held in public or in private
- circumstances in which a person may be represented by a lawyer or other person in a Tribunal proceeding, and
- the manner in which evidence is given, submissions made or persons summoned.

Tribunal members

According to **proposed section 110Y**, the Tribunal consists of the Chair of the Tribunal plus no less than six and no more than ten others.

The Minister is to appoint members in writing on a part-time basis, taking into account the desirability of having diverse expertise, experience and gender of members. In addition, the Minister must have regard to the need of Tribunal members to be independent of the original decision-makers. To that end, the following persons are not eligible for appointment:

- as Chair—a person who is, or has been, a member of the Defence Force rendering continuous full-time service, or a person who (in the Minister's opinion) does not have an appropriate level of security clearance: **proposed subsection 110YA(4)**
- as a member—a person who is, or has been in the last 12 months, a member of the Defence Force rendering continuous full-time service, or a person who (in the Minister's opinion) does not have an appropriate level of security clearance: **proposed subsection 110YA(5)**.

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 initial period of appointment must not exceed three years, although a Tribunal member may be reappointed at the end of a term. However, neither the Chair nor any other Tribunal member may hold office for more than six consecutive years: **proposed section 110YB**.

The Remuneration Tribunal determines what remuneration Tribunal members are to be paid. If there is no determination in operation, then Tribunal members are paid the remuneration that is prescribed by regulations. Tribunal members also get paid any allowances prescribed by the regulations. **Proposed section 110YE** has effect subject to the *Remuneration Tribunal Act 1973* which would prevail in the case of any inconsistency.

The Minister may terminate the appointment of a Tribunal member for misbehaviour or physical or mental incapacity. In addition the appointment of a Tribunal member may be terminated by the Minister in specified circumstances listed in **proposed subsection 110YH(2)**.

Proposed section 110Z contains a regulation-making power which is to operate in addition to the general regulation making power already contained in section 124 of the Defence Act. **Proposed section 110Z** governs the making of regulations about:

- any fees that are payable in respect of applications to the Tribunal
- prohibiting disclosure of information obtained by the Tribunal, a member of the Tribunal or a person assisting the Tribunal, and
- proof of decisions or orders of the Tribunal.

Part 2 of Schedule 1 of the Bill contains transitional provisions which will allow the Tribunal created by this Bill to complete reviews and inquiries by the current Tribunal which was established on an interim basis in 2008. These provisions effectively override the eligibility criteria for membership to the Tribunal contained in **proposed subsections 110YA(4)–(5)**. This will be possible because the members of the current Tribunal will be automatically appointed to the proposed Tribunal upon the enactment of the Bill for a period of either 12 months or 24 months. The period is to be determined by the Minister in writing.

Schedule 2—procedure for termination in relation to prohibited substances

Schedule 2 to the Bill amends Part VIIIA of the Defence Act which relates to testing for prohibited substances. The purpose of the amendments is ‘to ensure there is procedural fairness in the discharge and determination process which relate to a person who has returned a positive test result for a prohibited substance’.⁴¹

Essentially, Part VIIIA currently provides for the following to occur:

41. Explanatory Memorandum, op. cit., p. 11.

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 Chief of the Defence Force or service chief may determine that a person is an **‘authorised person’** under this Part and that **‘authorised person’** may require a person to undergo a prohibited substance test⁴²
- the Chief of the Defence Force may determine that a substance is a **‘prohibited substance’** and that a test is a **‘prohibited substance test’**⁴³
- if the prohibited substance test returns a positive test result, the **‘relevant authority’** must give the person a written notice of the result, and invite the person to provide a statement of reasons as to why his or her appointment should not be terminated or why the person should not be discharged (depending on the nature of their engagement)⁴⁴
- the circumstances in which the **‘relevant authority’** is to terminate or discharge the person.⁴⁵

Items 1 and 2 of Schedule 2 to the Bill amend paragraph (c) of the definition of **‘relevant authority’** in section 93 and section 101 respectively so that different people make the decisions (a) to issue the written notice of positive test result and (b) to terminate or discharge the person.

Items 3–8 amend section 120A of the Defence Act which authorises the Chief of the Army, Chief of the Navy and Chief of the Air Force to delegate their powers in respect of these decisions.

Schedule 3—determinations under section 58B of the Defence Act

Schedule 3 to the Bill amends Part IIIA of the Defence Act which relates to remuneration, allowances and other benefits. Existing section 58B provides for the Minister to make determinations about these matters. **Item 1** operates so that any Ministerial determination under section 58B may incorporate, by specific reference, other determinations under sections 58B or 58H of the Defence Act or under section 24 of the *Public Service Act 1999*. **Item 2** repeals existing subsections 58B(4) and (5) and substitutes **proposed subsections 58B(4)–(5C)** which ensure that determinations made under section 58B are not legislative instruments but are subject to the tabling and disallowance procedures set out in section 46B of the *Acts Interpretation Act 1901*.

Schedule 4—amendment of the Defence Home Ownership Assistance Scheme Act

Schedule 4 to the Bill contains amendments to *the Defence Home Ownership Assistance Scheme Act 2008*. The Defence Home Ownership Assistance Scheme applies to eligible members of the ADF serving on or after 1 July 2008. The scheme provides a subsidy on

-
42. Sections 93A and 94 of the Defence Act.
 43. Section 93B of the Defence Act.
 44. Section 100 of the Defence Act.
 45. Section 101 of the Defence Act.

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 home loan interest expense incurred in purchasing a home in which a member of the ADF and his or her family are to live. It allows for progressively higher levels of benefits to members as an incentive to remain in active service. Those higher levels of assistance become available on completion of eight and 12 years service for permanent ADF members and on completion of 12 and 16 years for Reserve Force members.⁴⁶

Item 1 amends existing subsection 5(1) of the *Defence Home Ownership Assistance Scheme Act 2008* so that members of the Reserve Force will be covered by the scheme regardless of the way in which they became a Reserve member.

Schedule 5—discipline officers

Schedule 5 to the Bill contains amendments to the *Defence Force Discipline Act 1982*.

Part IXA of the *Defence Force Discipline Act 1982* (DFDA) deals with minor disciplinary infringements—that is, an act or omission that constitutes:

- an offence against section 23,⁴⁷ section 27,⁴⁸ section 29,⁴⁹ subsection 32(1),⁵⁰ section 35⁵¹ or section 60,⁵² or
- an offence against section 24⁵³ in relation to an absence without leave for a period not exceeding three hours.

Existing section 169D provides for the issuing of an infringement notice to a prescribed defence member where there are reasonable grounds for believing that the person has committed a disciplinary infringement. In that case, existing section 169E provides that the prescribed defence member may elect to have the disciplinary infringement which is set out in the infringement notice dealt with by a discipline officer.

According to the Explanatory Memorandum:

On 23 January 2009, the final report into the *Health of the Reformed Military Justice System* ... recommended that the [Discipline Officer] scheme be extended to allow

-
- 46. Information about the levels of assistance is available on the Defence Home Ownership Assistance Scheme homepage, viewed 30 March 2010, <http://www.dhoas.gov.au/www/html/462-home-page.asp>
 - 47. Absence from duty.
 - 48. Disobeying a lawful command.
 - 49. Failing to comply with a general order.
 - 50. Person on guard or on watch.
 - 51. Negligence in the performance of a duty.
 - 52. Prejudicial conduct.
 - 53. Absence without leave.

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 Navy and Air Force equivalents of Warrant Officer Class 2 ranks to be discipline officers.⁵⁴

The amendments in **Schedule 5** to the Bill put this recommendation into effect. **Items 1 and 2** amend the existing definition of *'junior officer'* in section 169A of the DFDA to exclude a person who holds the rank of officer cadet. This means that *'discipline officers'* have jurisdiction over all officer cadets and that all officer cadets may be subject to the punishments set out in the table contained in section 169F.

Items 3 and 4 will overcome the current limitation on who can be appointed as a *'discipline officer'*. The amendment to section 169B will operate so that a commanding officer may appoint not only officers and warrant officers (Army), but also sailors holding the rank of chief petty officer and airmen holding the rank of flight sergeant as discipline officers.

Item 5 inserts **proposed subsections 169BA(3) and (4)** so that a service chief may determine that certain chief petty officers and certain flight sergeants are not subject to the discipline officer scheme.

Items 6–8 update the table in section 169BB which sets out which discipline officer which has authority over the separate categories of prescribed defence members.

Items 10 and 11 extend the discipline officer scheme to visiting, transient or members attached to another unit.

54. Explanatory Memorandum, op. cit., p. 16.

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. 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 2434.

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.