

# Chapter 2

## Provisions of the Bill

### Introduction

2.1 The Defence Legislation Amendment Bill 2007 follows on from the findings of the June 2005 Senate Foreign Affairs, Defence and Trade References Committee report, *The Effectiveness of Australia's Military Justice System*. The proposed amendments recognise that a separate system of military justice is essential to enable the Australian Defence Force (ADF) to deal promptly and effectively with matters of discipline, and in a different environment than that which would apply to a civilian. According to Defence, not only must the ADF deal with 'matters of a criminal nature applicable to the wider community',<sup>1</sup> but also a range of disciplinary matters that constitute significant failings in a professional and disciplined armed force.

2.2 However, the proposed amendments also reform the system to provide a greater degree of scrutiny, and a strengthening of safeguards so that the military justice system is far less vulnerable to potential abuse.

### *The bill's core initiatives*

#### *Appeal to the Australian Military Court (AMC)*

2.3 While the *Defence Force Discipline Act 1982* (DFDA) provides a quasi-appeal system of rights to petition a Reviewing Authority (which includes a Service Chief and the Chief of the Defence Force), there is currently no mechanism available for an ADF member to appeal to a Court Martial (CM) or Defence Force Magistrate (DFM) in respect of a conviction and/or punishment imposed by a summary authority.

2.4 In its 2005 report on Australia's military justice system, the committee recommended the introduction of a right to appeal from a summary authority to the permanent military court. It argued that service personnel should have this right for all charges that could potentially lead to a criminal record which could have a significant impact on their lives after they leave the military. The bill gives effect to the recommendation by introducing an automatic right of appeal from a summary authority to a single military judge of the Australian Military Court (AMC). The appeal may be in respect of a conviction, any punishment imposed, or the imposition of a 'Part IV order' (primarily reparation or a restitution order).<sup>2</sup>

2.5 The bill provides that a Military Judge of the AMC will have a statutory discretion to deal with an appeal on its merits by way of a fresh trial and/or a 'paper review'<sup>3</sup> of the evidence. Should the punishment be altered following the appeal

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1 Explanatory Memorandum, p. 3.

2 Explanatory Memorandum, p. 5.

3 This means by oral argument on the basis of evidence given at the summary hearing or by way of hearing new evidence. See Explanatory Memorandum, p. 5.

process, a Military Judge shall not be able to impose a punishment greater than the maximum punishment available to the summary authority at the original trial.

### *Election for trial by the AMC*

2.6 According to the Explanatory Memorandum (EM), the DFDA currently allows an accused the opportunity to elect punishment or trial by a CM or DFM, but only in certain limited circumstances, namely where a summary authority believes that in the event of conviction, a more severe ‘elective punishment’ is likely to be awarded. In seeking more appropriate mechanisms for the ADF's justice system, in 2005 the committee reviewed both the United Kingdom and the Canadian armed forces' mechanisms for dealing with justice issues. The committee considered that the British summary discipline model—including the right to elect trial by a court martial—as implemented in the *Armed Forces Discipline Act 2000* provided a greater degree of independence than the ADF system. It considered that the introduction of similar mechanisms would better protect ADF members' rights, and contribute to the provision of impartial and fair disciplinary outcomes.<sup>4</sup>

2.7 This bill will provide the accused with 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),<sup>5</sup> similar to the scheme available in the Canadian armed forces summary discipline system. Although these offences are dealt with at the summary level, according to the EM they will find the balance between reinforcing the maintenance of service discipline and preserving the rights of individual members who will still have an automatic right of appeal.<sup>6</sup>

2.8 Additional safeguards have been included for these offences including, for example, limited punishments. These additional safeguards for the accused person will be further supported by the new appeals system and automatic reviews of all summary trials.

### *Simplified rules of evidence*

2.9 The Explanatory Memorandum noted that there has been widely held concerns that current summary procedures are overly legalistic and complex. It cited in particular, the evidence regime currently applicable to summary trials, which it deemed to be overly complex and not easy to apply by persons without formal legal training.

2.10 The bill stipulates that a summary authority will not be subject to the same formal rules of evidence that apply to the AMC. The Explanatory Memorandum suggests that the bill 'will provide that evidentiary principles continue to apply at the

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4 Explanatory Memorandum, p. 6.

5 The reason for a list of Schedule 1A offences is that it serves the purpose of a summary system and prevents minor infractions of discipline – such as straightforward cases of absence without leave – going unnecessarily to the AMC. See Explanatory Memorandum, p. 6.

6 Explanatory Memorandum, p. 6

summary level to ensure a fair trial and the protection of individual rights'. It noted that summary hearings will become more efficient and timely, while maintaining all the necessary safeguards for an accused person.<sup>7</sup>

### *Review of proceedings of summary authorities*

2.11 The existing petition and command review regime contained in Part IX of the DFDA is to be discontinued and replaced by a system of appeals to the AMC. However, a form of review—by a 'reviewing authority'—is to remain in respect of technical errors related to the awarding of punishments and orders.

2.12 In terms of more severe punishments, an additional safeguard will apply through a pre-existing requirement for those punishments to be approved by a reviewing authority before they take effect. In exercising this power, a reviewing authority will be able to quash a punishment or revoke an order and substitute a less severe punishment or order within the trying authority's jurisdiction—there will be no power to increase a punishment. The proposed system of appeals to the AMC will then apply from the time the punishment is approved.<sup>8</sup>

2.13 According to the Explanatory Memorandum, the intention of this review process is to provide additional safeguards for ADF members by providing another mechanism by which to correct inappropriately awarded punishments or orders that may not otherwise have been the subject of an appeal to the AMC. A review of this type will also give commanders an overview of disciplinary issues in their commands.<sup>9</sup>

2.14 In summary, a reviewing authority may:

- approve or not approve certain more severe punishments or orders. In the case where the reviewing authority does not approve a punishment or order, it must quash the punishment or revoke the order and impose a lesser punishment or order;
- refer the matter back to the summary authority for the purpose of it reopening the matter and correcting the punishment or order that was imposed incorrectly (the summary authority will only be able to impose a lesser punishment or order than that originally awarded).<sup>10</sup>

### *Offences and punishments*

2.15 A review of offences and punishments in the DFDA resulted in a number of proposed changes that will be effected in the bill. These changes will make an immediate contribution to the improvement and simplification of offences and

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7 Explanatory Memorandum, p. 7.

8 Explanatory Memorandum, p. 8.

9 Explanatory Memorandum, p. 9.

10 Explanatory Memorandum, p. 9.

punishments in the DFDA. The Explanatory Memorandum summarises these changes as follows:

- enabling service tribunals to deal with offences in respect of certain amounts of a more contemporary range of illegal drugs under section 59;
- amending section 60 to include that a member is guilty of an offence if he or she ‘omits’ to perform an act (in addition to ‘acting’);
- making the offences of ‘unauthorised discharge of a weapon’ and ‘negligent discharge of a weapon’ (sections 36A and section 36B) alternative offences;
- allowing the suspension in whole or part of a greater range of punishments under the DFDA;
- removing all references in the DFDA to section 40B – ‘negligent conduct in driving’ (as this provision was repealed in 2004);
- ensuring that Defence Force Discipline (Consequences of Punishment) Rules apply to punishments imposed by discipline officers, so that in the interests of consistency and fairness the same consequences can be made to apply to all DFDA punishments whether they are imposed by the AMC, a summary authority or a discipline officer;
- providing that the status of a summary conviction is expressed to be for service purposes only; and
- allowing the AMC to order that the punishment of dismissal is effective on a day no later than 30 days after it has been imposed (rather than immediately as is currently the case).<sup>11</sup>

### *Additional changes*

2.16 The 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force* by Mr J.C.S. Burchett QC also made a number of recommendations. This bill provides the opportunity to introduce those agreed recommendations. When implemented these are intended to streamline and improve the ADF discipline system. In summary, these changes are:

- The jurisdiction of superior summary authorities will be expanded to include ranks up to Rear Admiral in the Navy, Major-General in the Army and Air Vice Marshal in the Air Force.
  - Currently, only ranks up to Lieutenant Commander, Major and Squadron Leader may be tried at a summary trial.
- A summary authority is to be automatically disqualified from trying offences where it has been involved in the investigation of the service offence, the

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<sup>11</sup> Explanatory Memorandum, p. 9.

issuing of a warrant, or preferring the charge. This will reinforce current practice and remove doubt about such decisions.

- The change will also help in reducing any perceptions about the possible bias of commanders, and promote further confidence in the impartiality and fairness of summary proceedings.
- The Examining Officer scheme contained in section 130A of the DFDA is to be removed.
  - This change will remove an unnecessary and rarely used procedure that provides for a third person to hear complex or lengthy evidence for a commanding officer before proceeding with the summary trial.
- A new time limit of up to three months from the time the member is charged to the date of trial by summary authority will be introduced. If the trial does not commence in the time allowed then the summary authority must refer the charge to the Director of Military Prosecutions (DMP). This will improve the timeliness of summary proceedings.
- The powers of the DMP in respect of a charge preferred by the DMP to proceed directly to trial by the AMC are to be clarified.
  - This amendment will clarify the DMP's powers under section 87 and make it clear that they have the full range of options that are required by the position.
- A discipline officer will be required to provide a report to their commanding officer so as to provide a safeguard through legislated oversight of the discipline officer scheme.
  - This will facilitate the maintenance of discipline and transparency of the discipline officer scheme.
- A right to request no personal appearance, subject to approval, is proposed for summary proceedings. The personal appearance of the accused will remain the norm, noting that the consequence of a summary proceeding may be a conviction for a service offence.
  - This new provision will allow the expeditious completion of proceedings where there may be a necessity for the accused to remain deployed on operations. The timeliness of summary proceedings will be improved whilst also maintaining operational effectiveness.
- A provision is proposed to reflect the creation of the new Provost Marshal Australian Defence Force (PMADF). The PMADF was appointed on 14 May 2006 to head the newly established ADF Investigative Service (ADFIS). Among other things, the PMADF (and ADFIS) is to investigate or refer all complex service offences for investigation within Defence and to 'work

closely with the Director of Military Prosecutions...to achieve oversight of ADF criminal investigations'.<sup>12</sup>

- Rights and duties of legal officers, in particular the exercise of their legal duties independently of command influence, will be further strengthened in an amendment to the *Defence Act 1903*. The Government agreed that the matter of their independence would be in part established through amendment of the *Defence Act 1903* and commitment to professional ethical standards.
  - 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.
- To give effect to a recommendation made by the October 2006 Senate Standing Committee on Foreign Affairs, Defence and Trade report, it is intended that the DMP be able to require that a trial of a class 3 offence is to be by a Military Judge alone, accompanied by a reduction in the maximum available punishment.
  - This amendment reflects civilian criminal and overseas military systems which enable a prosecutor to require that a charge be dealt with by a judge alone for a range of more minor offences and will minimise the number of jury trials.
- The DMP to be able to seek a determination from the Defence Force Discipline Appeal Tribunal on a point of law that arose in an AMC trial, at the conclusion of that trial.
  - This will allow for precedents, so that the law will be applied correctly in future cases.<sup>13</sup>

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12 Explanatory Memorandum, p. 12.

13 These dot points are a summary of the explanations in the Explanatory Memorandum, pp. 11–14.