The Senate

Standing Committee on Foreign Affairs, Defence and Trade

Defence Legislation Amendment Bill 2007 [Provisions]

September 2007

ISBN 978-0-642-71869-3

Printed by the Senate Printing Unit, Parliament House, Canberra.

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Chapter 1

Introduction

Reference

1.1 On 16 August 2007, the Senate referred the provisions of the Defence Legislation Amendment Bill 2007 (the bill) to the Senate Standing Committee on Foreign Affairs, Defence and Trade for report by 5 September 2007. The committee tabled a four-page interim report on 5 September indicating that it would be tabling a final report on or before 10 September 2007.

1.2 In accordance with the usual practice, the committee advertised the inquiry in *The Australian* on 22 August 2007, calling for submissions by Monday 27 August 2007. The committee also directly contacted a number of relevant organisations and individuals to invite submissions.

1.3 Eight submissions were received as listed in Appendix 1. A public hearing was held in Canberra on the morning of 5 September 2007. The witnesses are listed in Appendix 2.

1.4 Having examined the proposed legislation, the committee prepared written questions on notice to Defence. These questions, included as Appendix 3, were sent to Defence on 30 August 2007. They dealt largely with minor drafting matters or were seeking clarification on terms used in the legislation. Rear Admiral Bonser and the Military Justice Implementation Team replied to the committee's inquires. Their responses are included as Appendix 4.

Acknowledgments

1.5 The committee thanks all those who contributed to its inquiry by preparing written submissions and giving evidence at the hearing. Their work has been of considerable value to the committee. The committee particularly thanks Hansard staff for their efforts in producing a proof copy of the transcript of the committee's public hearing in a very short timeframe.

Background to the bill

1.6 The purpose of the Defence Legislation Amendment Bill 2007 is to give effect to key elements of the government response to certain recommendations of the June 2005 report, *The Effectiveness of Australia's Military Justice System*, by the Senate Foreign Affairs, Defence and Trade References Committee. The changes are intended to ensure the right balance between the maintenance of discipline, which is

critical to operational effectiveness, and the protection of the rights of Australian Defence Force (ADF) members.[1]

1.7 The bill will amend the *Defence Act 1903* and *Defence Force Discipline Act 1982* to streamline and restructure summary discipline procedures, with simplified rules of evidence, a right of appeal from a summary authority to the new Australian Military Court (AMC) and a right to elect trial by the new AMC instead of a summary authority.

Outline of the bill

1.8 The bill is divided into 8 Schedules:

- Schedule 1 introduces amendments for the election for trial by the AMC;
- Schedule 2 introduces amendments for appeals to the AMC;
- Schedule 3 introduces amendments regarding evidence in summary proceedings;
- Schedule 4 provides a mechanism for a review of all levels of summary proceedings;
- Schedule 5 amends various offence and punishment provisions in the *Defence Force Discipline Act 1982*—this includes changes to definitions of illegal drugs;
- Schedule 6 introduces amendments regarding minor disciplinary infringements;
- Schedule 7 introduces other amendments; and
- Schedule 8 deals with application, saving and transitional provisions as the other new amendments take effect and supersedes old legislation.

1 Explanatory Memorandum (EM), p. 2.

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',[1] 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).[2]

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'[3] 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.[4]

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),[5] 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.[6]

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.[7]

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.[8]

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.[9]

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).[10]

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

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).[11]

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

11 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'.[12]

- 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.[13]

12 Explanatory Memorandum, p. 12.

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

Chapter 3

Issues

The Australian Defence Force (ADF) and the three Services

3.1 The Acting Chief of the Defence Force, Lieutenant-General Ken Gillespie, gave his strong support to the bill commenting that:

> The bill as it is framed, provides for the recommendations of the Senate Committee, whilst still enabling the Australian Defence Force to maintain discipline effectively and fairly, thereby facilitating the operational effectiveness of the Australian Defence Force.[1]

3.2 The Acting Chief of Navy, Rear Admiral Russell Crane, indicated that the Royal Australian Navy fully supported the bill as it provided a balance between the Navy's operational requirements and the legal rights of its service personnel. His submission stated:

> I am confident that the provisions of the bill meet Navy's operational requirements and will support the Navy in its ability to operate effectively and safely. I am equally confident that the changes incorporate the safeguards that are necessary to protect the right of individual Navy members.[2]

3.3 Major-General John Cantwell, Acting Chief of Army, believed that the bill would promote increased confidence in the summary trial system and the wider military justice system. Like Rear Admiral Russell Crane, Major-General Cantwell believed that the bill's provisions found the appropriate balance between ensuring that the Army could meet the challenges of the future, while also ensuring that the rights of individual Army personnel were protected.[3]

3.4 Finally, the Royal Australian Air Force (RAAF) endorsed the bill. Acting Chief of Air Force, Air Vice-Marshal John Blackburn, expressed his support for the initiatives in the draft legislation, indicating that the RAAF had been involved in the development of policy proposals given effect to by the bill.[4] Air Vice-Marshal John Blackburn believed that the bill significantly contributed to the ADF's military justice system being fair, transparent and accountable.[5]

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1 Acting Chief of the Defence Force (A/CDF) Lieutenant-General Ken Gillespie, *Submission 4*, p. 2.

2 Acting Chief of Navy (A/CN) Rear Admiral Russell Crane, *Submission 6*, p. 2.

3 Acting Chief of Army (A/CA), Major-General John Cantwell, *Submission 3*, p. 2.

4 Acting Chief of Air Force (A/CAF), Air Vice-Marshal John Blackburn, *Submission 5*, p. 1.

5 A/CAF, *Submission 5*, p. 2.

The Judge Advocate, the Inspector General-ADF and the Director of Military Prosecutions

3.5 The Acting Judge Advocate General (JAG), Brigadier Tracey indicated that the issues that were of concern to him have been accommodated in the bill's provisions. Accordingly, he had no issues to raise, though he suggested that the legislation may need to be 'fine tuned' after its implementation.[6]

3.6 The Inspector General-ADF, Geoff Earley, referred to the Discipline Officer scheme and welcomed the proposal to extend the scheme to junior officer ranks. He noted, however, that the intention was for the scheme to apply to non-commissioned officers. He explained that additional work was required to establish appropriate punishment limits for these ranks which meant that the application of this scheme to non-commissioned officers would 'need to be effected at the first opportunity for subsequent legislative amendment'.[7] Although he believed that there was nothing in the bill that ought to impede its passage to enactment, he agreed with the JAG's observation saying that:

> Inevitably there are likely to be some aspects that will need to be revisited in the light of experience gained through the application of the new system. It is not always possible to foresee what those issues may be during the process of drafting legislation…[8]

3.7 The Director of Military Prosecutions, Brigadier Lynette McDade, also noted the omission of non-commission officers and senior non-commission officers from minor discipline infringements. She regarded this as 'unfortunate' but informed the committee that she had been advised that the omission had been unavoidable.[9] Otherwise, she was generally supportive of the bill, and recommended its passing without delay. Brigadier McDade also provided in-principle support to the powers of the Provost Marshal-ADF, but believed some time would be required to provide suitable feedback on the section's operation.[10]

The Law Council of Australia

3.8 The Law Council of Australia expressed concern over the appeal provisions of the bill. It argued that two distinct lines of authority had developed with respect to appeal provisions in criminal proceedings which require consideration. They were:

> 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 different matters) but will

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6 Acting ADF Judge Advocate General, Brigadier R.R.S Tracey, *Submission 2*, p. 1.

7 Inspector General-ADF, Geoff Earley, *Submission 1*, p. 3.

8 Inspector General-ADF, Geoff Earley, *Submission 1*, pp. 3–4.

9 Director of Military Prosecutions (DMP), Brigadier Lynette McDade, *Submission 7*, p. 1.

10 DMP, *Submission 7*, p. 2.

not interfere with a final verdict in the case in which the reference is brought….

2) that the prosecution be permitted to appeal interlocutory points and, indeed, to reverse a verdict of not guilty. The policy involved recognises that a jury verdict is sacrosanct, but that, as an element of the rule of law, judicial rulings during a trial should be subject to appropriate appellate review, albeit sometimes imposing a leave function to avoid undue disruption….[11]

3.9 The Council did not favour any amendment to the bill that would allow any overturning of a verdict of 'not guilty'. With regard to the second line of authority, the Council proposed the introduction of provisions similar to s.5F of the New South Wales *Criminal Appeal Act,* which have been the subject of much appellate consideration and have a well accepted meaning, would be more appropriate.[12] The suggested provisions are:

(2) The Attorney General or the Director of Public Prosecutions [the bill would refer to the Director of Military Prosecutions ('DMP')] may appeal to the Court of Criminal Appeal [The Defence Force Discipline Appeals Tribunal ('DFDAT')] against an interlocutory judgment or order given or made in proceedings to which this section applies [any Australian Military Court proceeding].

(3) Any other party to proceedings to which this section applies may appeal to the Court of Criminal Appeal [DFDAT] against an interlocutory judgment or order given or made in the proceedings:

a) if the Court of Criminal Appeal [DFADT] gives leave to appeal, or;

b) if the judge or magistrate of the court of trial [the military Judge] certifies that the judgment or order is a proper one for determination on appeal.

(3A) The Attorney General or the Director of Public Prosecutions [DMP] may appeal to the Court of Criminal Appeal [DFDAT] against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.[13]

Hearing testimony

3.10 On Wednesday 5 September 2007, a public hearing on the bill was held in Parliament House, Canberra. Mr Paul Willee QC appeared in his capacity as the Chairman of the Military Justice Working Group in the Law Council of Australia, and also in a private capacity.

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11 Law Council of Australia (LCA), *Submission 8*, p. 1.

12 LCA, *Submission 8*, p. 3.

13 LCA, *Submission 8*, p. 3.

The right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment

3.11 As a representative of the Law Council, Mr Willee reiterated the Council's concern about the omission of the right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order. He reiterated the Council's proposal that the s.5F provisions of the NSW *Criminal Appeal Act,* which he indicated had 'stood the test of time', should be included in the bill. He advised the committee:

> When a ruling is made which in itself will be so fundamental to the way in which the proceedings will or will not go on, there ought to be a provision similar to the provision that we have extracted from the New South Wales act. That provision ought to enable those issues to be dealt with in appropriate cases to prevent unfairness, a miscarriage of justice and, perhaps equally important, a colossal waste of time by people trying to go through the same process using the prerogative writs.[14]

3.12 Mr Willee was of the view that there was 'nothing complex about his proposal': that it was 'a simple thing'.[15]

3.13 Defence noted that the Law Council had correctly observed that two distinct lines of authority had developed with respect to appeal provisions in criminal proceedings relating to matters arising while a trial is underway requiring the judge to make a ruling on a particular issue. In discussing the first approach the Law Council observed that, 'it reflects the position that there should be no unnecessary interference with the course of a criminal proceeding and that the defence is ultimately protected by a right of appeal'.[16] Defence noted that the basis of the provision that Defence is introducing in the bill will enable the Director of Military Prosecutions (DMP) to refer a question of law that arises in a trial before the Australian Military Court (AMC) to the Defence Force Discipline Appeal Tribunal at the conclusion of that trial.[17]

3.14 Defence agreed with the Law Council's view that it does not favour any amendment to the bill that would allow any overturning of a verdict of not guilty. Defence observed that there is no such provision in the bill, and that the safeguards for the accused remain the overriding consideration.[18]

3.15 With regard to the second line of authority, Defence did not discount for future consideration the Law Council's proposal. Rear Admiral Bonser advised the committee that the appeal of matters raised in interlocutory points by the prosecution is a complex issue that is subject to two differing points of view. Defence believed that such a proposal required 'considerable deliberation and policy development

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14 *Committee Hansard*, 5 September 2007, p. 1.

15 *Committee Hansard*, 5 September 2007, pp. 1 and 5.

16 Opening Statement, Rear Admiral Mark Bonser, *Committee Hansard*, 5 September 2007, p. 13.

17 Opening Statement, Rear Admiral Mark Bonser, *Committee Hansard*, 5 September 2007, p. 13.

18 Opening Statement, Rear Admiral Mark Bonser, *Committee Hansard*, 5 September 2007, p. 13.

before being considered for inclusion in the Defence Force Discipline Act (DFDA)' and therefore could be considered in the context of an amendment to the bill.[19] Rear Admiral Bonser told the committee that 'Defence is clearly keen to consider it as a possible provision in legislation to be brought forward in future years'.[20]

3.16 The Director of Military Prosecutions also commented on the Law Council's proposal. She indicated that members of her unit and those involved with Defence legal, have 'struggled long and hard for some time in relation to how the DMP should have an appeal to resolve matters, whether they should be done on interlocutory basis or indeed after the event'.[21] She outlined some of the matters that needed to be considered including the Defence Force Tribunal being ad hoc, questions involving whether a duty judge would be available, and how quickly matters could be heard. She supported Rear Admiral Bonser's observation that: 'there is more debate to be had and more consultation to be had as to whether or not it would ultimately be beneficial to our proceedings to have the capacity to take matters at an interlocutory stage'.[22] She added:

> …we were content at this point in time, given that our court is yet to stand up and given also that we do not have a standing appeals tribunal that still remains ad hoc. The concern was about delays and the fragmentation…It is just a question of time. Ultimately, down the track, it may well be that those amendments will be sought.[23]

Committee view

3.17 The committee notes the conflicting views of the Law Council on the one hand and Defence and the Director of Military Prosecutions on the other. Mr Willee was clearly of the view that amending the bill to allow the Director of Military Prosecutions to seek interlocutory relief would not be complex. Defence noted, however, that a number of matters need 'considerable deliberation'. Even so, Defence indicated that it was keen to consider a possible provision in legislation at a later date.[24]

3.18 The committee urges the government and Defence to give serious consideration to the proposal by the Law Council. As part of its continuing monitoring role on reforms to Australia's military justice system, the committee will continue to seek advice from Defence on the state of its deliberations on this matter. It will monitor closely progress toward introducing legislation that would allow the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals

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19 *Committee Hansard*, 5 September 2007, p. 13.

20 *Committee Hansard*, 5 September 2007, p. 13.

21 *Committee Hansard*, 5 September 2007, p. 14.

22 *Committee Hansard*, 5 September 2007, p. 14.

23 *Committee Hansard*, 5 September 2007, p. 15.

24 *Committee Hansard*, 5 September 2007, p. 13.

Tribunal against an interlocutory judgment or order given or made in any Australian Military Court proceeding.

Rules of evidence

3.19 In his private capacity, Mr Willee, who at various stages in his legal career has been a judge advocate, a Defence Force Magistrate and head of the military bar, was critical of the bill.[25] He expressed particular concern at Section 146A regarding evidence in proceedings before a summary authority. This section requires the summary authority in proceedings before a summary authority, to comply with the Summary Authority Rules. The statutorily independent Chief Military Judge makes these rules which are to be legislative instruments and subject to Parliamentary scrutiny.[26] The section stipulates that the summary authority, consistent with those rules:

(i) must act with as little legal formality or legal technicality as possible, while ensuring fairness; and

(ii) is, subject to this Act, not bound by the rules of evidence, whether statutory or common law; and

(iii) may admit any documents or call any witnesses that the summary authority considers to be of assistance and relevance; and

(iv) may give such weight as the summary authority considers appropriate to any evidence admitted under subparagraph (iii), having regard to the importance of the evidence in the proceedings and its probative value.

3.20 Mr Willee felt that the provision stipulating that a summary authority was not bound by the rules of evidence was a retrograde step. Indeed, in his opinion:

> …this would take us back to the time when we first started to do something about the imperial acts and make sure that there are proper rules for dealing with summary matters—the importance of which cannot simply be downgraded, and never were up until this time, as being something that does not matter. If it is worth doing, it is worth doing well and it is worth doing properly.
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> The problem, then…was of course the caprice and ignorance with which summary authorities treated those brought before them. It was encapsulated in the phrase, which you will excuse me using: 'Wheel the guilty bastard in.' It is one that caused a pervasive feeling right through the service that any summary proceeding was predetermined, and that particular pervasive feeling was not misplaced. That is inevitably what happened in many, many cases, but it made it extremely difficult for those who tried to follow the rule of law—however lacking in legal training they were—to provide a

25 *Committee Hansard*, 5 September 2007, p. 5.

26 Explanatory Memorandum, paragraphs 80 and 81.

> reversal of that feeling and to convince people that they were being dealt with appropriately.
>
> That is why nearly 30 years ago steps were taken to provide a system which did away with that and to make sure that there were provisions for the use of rules of evidence in a proper way and instruction, particularly of commanding officers, to a limited extent as to what was required in that regard.[27]

3.21 Mr Willee argued that proposed s146A would contribute to the undermining of morale in the ADF as there would be a perception by its members that they may not be treated fairly. Moreover, Mr Willee expressed further concern that any appeal to the AMC as described in Section 168B would also be under the same provision—that the rules of evidence would not apply.[28] He explained:

> …in respect of both reviews and appeals, the reviewing authority and the court are bound to take account of the fact that the rules of evidence need not apply. And just because they have been ignored or have been circumvented in a way would be no reason to set aside the result, because the summary authority was entitled to proceed in that way.[29]

3.22 Mr Willee also expressed reservations about the qualifications of the reviewing authorities. He argued that under the bill's provisions a 'competent reviewing authority does not mean competent in the sense of properly or sufficiently qualified, capable or legally fitted for the task; it just means untainted by previous involvement in a particular matter'.[30]

3.23 In response to Mr Willee's testimony, Rear Admiral Mark Bonser argued that the bill addresses widely held concerns that current summary procedures are overly legalistic and complex and introduces a fair but simple and easily understood evidentiary framework, similar to the Canadian Forces summary trial system. He noted that the Explanatory Memorandum clearly indicates that the rights of members to a fair process with regard to the rules of evidence are protected. The Explanatory Memorandum states:

> 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. The requirements in the Criminal Code (Cth) (as applied by section 10 of the DFDA) dealing with the principles of criminal responsibility, including the burden and onus of proof

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27 *Committee Hansard*, 5 September 2007, p. 2.

28 *Committee Hansard*, 5 September 2007, p. 3.

29 *Committee Hansard*, 5 September 2007, p. 3.

30 *Committee Hansard*, 5 September 2007, p. 3.

> will remain applicable in summary trials. The very important protection against self incrimination will also be enshrined in the DFDA to avoid any doubt of its continued application, notwithstanding the exclusion of the rules of evidence.[31]

3.24 Reinforcing his argument that the purpose of the summary authority rules is to ensure that the requirements of natural justice and procedural fairness are adhered to, Rear Admiral Bonser added:

> This includes the absence of bias and the ability for a person to know and to answer a case made against them. The application of the simplified rules of evidence for summary procedures will reflect that relevance is determined by looking at the substance and contents of the evidence put forward and how it is related to a fact in the issue.[32]

He noted further that:

> …the process and procedures to be followed will be established by the Chief Military Judge, and this will clearly overcome the flawed process that Mr Willee described as a case example. In conducting a trial, the proposal requires that the summary authority may determine the probative value of any evidence received during the course of a trial that it considers appropriate, including the relevance, reliability and weight to be given the evidence. The onus of proof will remain 'beyond reasonable doubt'. To say that this means cases are predetermined is grossly incorrect and ignores the good judgement of the officers who will be making these decisions.[33]

3.25 The Inspector General-ADF, Mr Geoff Earley, also advised the committee on the proposed summary authority rules and explained why this position had been taken. Firstly, the reviewing officers—who are laypersons and not trained lawyers—are not sufficiently trained to understand the rules of evidence. Mr Earley used the example of the major fleet unit's three day pre-command course at *HMAS Watson*, to prepare personnel for taking over as ships' Commanding Officers and Executive Officers. He argued that it was simply not possible to bring officers to a sufficient standard where they understood the rather complex formal rules of evidence.[34]

3.26 Secondly, there are the operational demands of units in the field. Mr Earley described how summary trials are conducted in many places: on the decks of ships at sea; out in the bush—and other places where lawyers are not generally available. So summary discipline had to be a system that can be reasonably applied, simply and expeditiously, by laypeople but at the same time preserve the rights of the accused person.

3.27 Finally, the summary system must operate expeditiously. Mr Earley believed these three arguments were sufficient not to have the rules of evidence applicable as

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31 Explanatory Memorandum, paragraph 75.

32 *Committee Hansard*, 5 September 2007, p. 21.

33 *Committee Hansard*, 5 September 2007, p. 13.

34 *Committee Hansard*, 5 September 2007, p. 16.

they normally would in civilian magistrates' jurisdictions. In his view, this bill, with regard to changes to the current summary system, achieved the appropriate balance between these constraints and suitable protections and safeguards for the accused person.[35]

3.28 Rear Admiral Bonser concluded by describing how the ADF was using the Canadian example to construct a new framework for summary discipline. The Canadians had produced a comprehensive training regime which explains the entire application of the summary rules of evidence in 'plain English'. The Admiral believed that this system was easy to teach, easy to learn and easier to apply, yet entirely fair to the accused.[36]

Committee view

3.29 The committee notes Defence's assurances that the purpose of the new summary rules is to ensure that the requirements of natural justice and procedural fairness are adhered to. The committee also notes the wording of section 146A and the impression it conveys about discarding the general guidance of the rules of evidence. The sub sections state that in complying with the Summary Rules, the summary authority 'must act with as little legal formality or legal technicality as possible, while ensuring fairness; and is, subject to this Act, not bound by the rules of evidence, whether statutory or common law.'

3.30 The language is clear about not being bound by the rules of evidence but there is no equally forceful statement in the provision about natural justice and procedural fairness. There is no stated requirement for a summary authority to observe as a minimum the principles that underpin the rules of evidence.

Recommendation 1

3.31 In order to strengthen the recognition of the rules of evidence, but not mandate their application, the committee recommends that the government amend the bill in either of the following way:

Schedule 3, Item 8, page 32, (after line 19) Section 146A, after the note insert:

"Note 2: The Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence."

or

Schedule 3, Item 8, page 32, (after line 25) at the end of Section 146A insert:

"4) The Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence."

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35 *Committee Hansard*, 5 September 2007, p. 16.

36 *Committee Hansard*, 5 September 2007, p. 20.

3.32 It should be noted that paragraph 81 of the Executive Memorandum states clearly that the Summary Authority Rules are to be legislative instruments as defined in the *Legislative Instruments Act 2003* and 'be subject to Parliamentary scrutiny via the registration and disallowance provisions in that Act'.

Committee inquiries to Defence

3.33 In response to the written questions to Defence (Appendix 3), the committee received Defence's responses to the questions on 4 September (Appendix 4). The committee notes that some provisions—such as dealing with mental impairment and the inclusion of warrant and non-commissioned officers in the coverage of the Discipline Officer scheme—remain to be addressed with legislation proposed for introduction in 2008. The committee also notes that some terms in this bill—including the definition of 'hearing' and the clarification of the term 'at the commencement of dealing with the charge'—are still to be developed through a plain English chapter of the Defence Law Manual, an inclusion in the Discipline Law Manual or through a judgment by the Chief Military Judge. Nonetheless, the committee is satisfied with the responses provided by Rear Admiral Bonser and his team and looks forward to examining the anticipated legislation in 2008.

3.34 In this regard, the committee recognises the need for close monitoring of this legislation and the operation of the Australian Military Court and summary proceedings. It will include consideration of these matters as part of its continuing examination of the implementation of reforms to Australia's military justice system.

Consultation

3.35 In its report on the Defence Legislation Amendment Bill 2006, tabled in October 2006, the committee noted that the bill required thorough consultation and open public debate. The committee was of the view that such a process did not take place and because of a number of problems with the proposed legislation recommended that 'the government undertake a comprehensive consultation process designed to promote wide public debate before amending or re-drafting the bill for presentation to the parliament.'[37]

3.36 Evidence to this committee suggests that, although Defence consulted with people such as the Judge Advocate General, the Inspector General-ADF and the Director General of Military Prosecutions, and government agencies including the Solicitor General, it did not consult with external bodies such as the Law Council of Australia. The committee does and has relied on advice from the Law Council. Members of the Council are highly experienced and knowledgeable legal authorities who, on many occasions, have generously given of their time to assist the committee. In particular, the committee notes the assistance offered by Mr Paul Willee who appeared before the committee in its examination of the Defence Legislation Amendment Bill 2006 and of the current bill.

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37 Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions],* pp. 6–7.

3.37 The committee is of the view that the proposed legislation, which represents a significant change in the ADF's disciplinary system, should have been subjected to considerable consultation.

Recommendation 2

3.38 The committee recommends that 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. The committee cites in particular the importance of consulting with the Law Council of Australia.

Committee conclusions

3.39 While the committee notes the strong support for the bill and the need for its speedy enactment, it also notes that a number of witnesses identified important omissions from the proposed legislation. Although they were of the view that such omissions should not impede the passage of the bill, they indicated that future amendments would be needed. In its response to questions on notice Defence indicated that two important matters would be dealt with in legislation proposed for 2008—the detention and release of people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment and the extension of the Discipline Officer scheme to non-commissioned officers. During the public hearing Defence also indicated that it was considering the right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order given or made in proceedings in an Australian Military Court. The committee also notes that the Defence Department is in the process of drafting material, such as the Defence Law Manual, the Discipline Law Manual, and the Summary Authority Rules.

3.40 The committee recognises the need for close monitoring of this legislation and the operation of the Australian Military Court. It will include consideration of these matters as part of its continuing examination of the implementation of reforms to Australia's military justice system.

3.41 The committee has reservations, however, about the provisions governing the evidence in proceedings before a summary authority. It has made a suggestion designed to put beyond doubt that the summary authority rules must be consistent with and adhere to the fundamental principles underpinning the rules of evidence.

Recommendation 3

3.42 The committee recommends that, subject to clear statutory guidance that summary authority rules will not depart from the fundamental principles of the rules of evidence, as set out in recommendation 1, the bill be passed.

3.43 The committee also recommends that there be an evaluation of the new practices involving consultation with the Law Council of Australia.

SENATOR MARISE PAYNE
CHAIR

Appendix 1

Public submissions

1 Geoff Earley, AM Inspector General – Australian Defence Force

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

Appendix 2

Public hearing and witnesses

Canberra, 5 September 2007

BONSER, Rear Admiral Mark, Head, Military Justice Implementation Team, Department of Defence

EARLEY, Mr Geoff, Inspector General, Australian Defence Force, Department of Defence

HARVEY, Air Commodore Simon, Deputy Head, Military Justice Implementation Team, Department of Defence

McDADE, Brigadier Lynette Anne, Director of Military Prosecutions, Department of Defence

WILLEE, Mr Paul Andrew RFD, QC, Chairman, Military Justice Working Group, Law Council of Australia

Appendix 3

Department of Defence:
Written questions

The committee is seeking clarification on a number of minor drafting and other matters in the Bill. They include:

SCHEDULE 1—Election for trial by the Australian Military Court

New subsection 111B (1)

The term 'at the commencement of dealing with a charge' is used—is this term clearly defined in the legislation? Would it be helpful to clarify its precise meaning?

New sub sections 111B(3) and s131(4)

The term 'if a legal officer is reasonably available to give such advice'—is it clear as to what constitutes 'reasonably available'. Would it be helpful to provide some statutory guidance on this matter? Should there be additional safeguards in cases where legal advice is not reasonably available?

New paragraph 111C(1)(b)

The provision reads 'if the exigencies of the service do not permit the person to make that decision within that time [24 hours]—within such longer period (not exceeding 14 days) as the summary authority allows. Would it be helpful to provide some statutory guidance on this matter? Should there be additional safeguards in cases where legal advice is not reasonably available?

New sub sections 111C(6) and 131AA(6)

The term 'at any time before a date is fixed for hearing by the Court' —is there any need to be more specific to take account of, for example, direction hearings?

New sub sections 131AA(3) and (4)

The term 'the first charge' is used—is the meaning of this term clear, is it different from the primary or initial charge?

SCHEDULE 2—Appeals to the Military Court

New paragraph 164(1)(c)

This section deals with mental impairment and is consistent with other provisions in the DFDA referring to mental impairment. It uses the term 'that the appellant be kept in strict custody until the pleasure of the Governor-General is known'. Is there adequate statutory guidance or requirements in place, for example periodic court or

tribunal review procedures, to protect the rights of such a person. Does this provision reflect current approaches taken by other Australian jurisdictions, for example Victoria, to the detention and release of people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment?

New sub section 150(2)

Reads 'A reviewing authority is a **competent reviewing authority** for the purposes of reviewing the proceedings of a summary authority only if the reviewing authority did not exercise any of the powers or perform any of the functions of a superior authority in relation to the charge that is the subject of the proceedings'.

AND

New sub section151 (2)

Reads 'The commanding officer must review the proceedings in accordance with this Part and, for that purpose, the commanding officer is taken to be a reviewing officer.'

The committee on a number of occasions has raised concerns about the real or perceived inappropriate influence of chain of command in legal proceedings. Do these provisions provide adequate protection against real or perceived conflicts of interest?

The Discipline Officer scheme

In his submission, the Inspector General Australian Defence Force referred to the Discipline Officer scheme and providing for the application of this scheme to extend to junior officer ranks. The IGADF noted that 'while the intent was and remains for this scheme to apply to non-commissioned officers, additional work required to establish appropriate punishment limits for these ranks means that the application of this scheme to non-commissioned officers will now need to be effected at the first opportunity…'.

In her submission, the Director of Military Prosecutions regarded the omission of junior non-commissioned officers and senior non-commissioned Officers as unfortunate but noted that she had been informed that the omission was unavoidable.

Could Defence provide the committee with the reasons for the omission and why it could not be remedied by amendment to the proposed legislation?

Limitations on the right to elect trial

In her submission, the Director of Military Prosecutions supported the right of an accused person to elect trial. She noted, however, that the scope of the election appears to be limited; and depending on how it operates in practice might require further subsequent amendment. Could you explain the limitations and the reasons for those limitations on the right to elect trial?

Appendix 4

Department of Defence:
Responses to written questions

Australian Government
Department of Defence

MINUTE

Military Justice Implementation Team

MJIT Out: 213/2007

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

I am writing in response to the committee's correspondence seeking clarification on a number of minor drafting and other matters in the Defence Legislation Amendment Bill 2007 (DLAB 07). The clarification sought by the committee includes matters related to the election for trial by the Australian Military Court and appeals to the Australian Military Court.

The attached clarification addresses the sections and subsections of the Bill in the order referred to by the committee, for ease of reference. I trust that it meets the requirements of the committee. In drafting the Bill, priority was given to those provisions that were related directly to the recommendations of the 2005 Senate Inquiry into *the effectiveness of Australia's military justice system.* Some of these changes, in particular those relating to the rights of appeal and election from summary trials to the Australian Military Court were quite complex and meant that other provisions unrelated to the Senate Report could not be completed in time for inclusion in DLAB 07. These provisions, including those referring to mental impairment and the Discipline Officer scheme are being progressed for inclusion in legislation proposed for 2008.

Should you require any further clarifying information, please do not hesitate to contact me.

Yours sincerely

M.F. BONSER
Rear Admiral
Head Military Justice Implementation Team

FYSH (T)-1-075

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4 September 2007

Attachment
Defence response to questions from the Senate Standing Committee on Foreign Affairs, Defence and Trade seeking clarification on the Defence Legislation Amendment Bill 2007

DEFENCE RESPONSE TO QUESTIONS FROM THE SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE SEEKING CLARIFICATION ON THE DEFENCE LEGISLATION AMENDMENT BILL 2006

SCHEDULE 1 – Election for trial by the Australian Military Court

1. New subsection 111B(1)

The term 'dealing' is currently used in the *Defence Force Discipline Act 1982* (DFDA) and the distinction between dealing with and trying a charge at the summary level is covered in the Discipline Law Manual (DLM). Its meaning in respect of the treatment of a charge at the summary level has been in wide use in the ADF for over 20 years.

The term 'dealing' has been used specifically in this section of the Bill, on the basis of a suggestion from the Acting Judge Advocate General of the Australian Defence Force (A/JAG-ADF). In commenting on an initial draft of section 111B of the *Defence Legislation Amendment Bill 2007* (DLAB07), the A/JAG-ADF stated:

"..currently before DFDA proceedings there are two phases, the first is the 'dealing' phase and the second is the 'trying' phase. Together they are often referred to as a hearing. If the intent is that the accused be ordered to appear before the summary authority and when he so appears he makes the election, rather than introducing another phase of the procedures it would be appropriate for this to occur in the 'dealing' phase."

The A/JAG-ADF then went on to point out that this could be achieved by amending the subsection with words such as "*at the commencement of dealing with the charge*" or words to that effect.

Given its current usage there is no identifiable need to clarify this commonly used term in the DFDA. However, should such a need be identified in the future, then as it is a part of the process and procedures for a hearing, the Chief Military Judge (CMJ) will have the authority under the DFDA (following the commencement of the DLAB 06 and the proposed DLAB07) to make rules as necessary for the purposes of clarification. The process, and the relevant phases of summary hearings as they are proposed in the Bill, will also be explained further in a plain English chapter of the Defence Law Manual specifically intended for summary proceedings.

2. New subsections 111B(3) and 131(4)

The term 'reasonably available' in respect of legal advice in these sections of the Bill means what would be sound judgement in the circumstances of a particular case when determining the availability of legal advice. The term is in the *Defence Force Discipline Rules 1985*, and has been in use by the ADF for over 20 years.

The meaning of the term 'reasonably available' as used in the *Defence Force Discipline Rules* has also been considered by the Federal Court. In Stuart v Sanderson (2000) 100 FCR 150 Justice Madgwick made the following comment:

'Whether the services of a member of the Defence Force which have been requested by an accused person are "reasonably available" is, in my view, to be determined practically and having regard to all the circumstances, which may vary greatly. The request may be in time of war or of peace, in Australia or abroad, in circumstances of isolation of the various persons concerned, or otherwise.

Cases may be attended by various degrees of urgency. The potential seriousness of the consequences of a conviction will have its influence. Questions of cost and convenience cannot be set aside. No doubt there are many other factors that may, in particular cases, be relevant'.

The intent of using this term in these subsections of the Bill is to avoid being unnecessarily prescriptive. This allows the particular circumstances of the accused to be taken into consideration, in conjunction with the operational environment and its potential impact on the availability of legal advice at the time. Given the unpredictability of such circumstances, it is in the interests of the accused to ensure that any arguments he or she advances are given due consideration in the rare circumstances when access to legal advice might not be immediately available. The summary authority then has the maximum flexibility in providing an additional period (up to 14 days) in which the accused may make their election (see paragraph 3 below).

Given modern communications and that legal officers are deployed in most operational theatres, it is envisaged that there would be very few occasions when legal advice would not be reasonably available. However, should this arise, the accused may not only be provided with the provision for an additional period in which to make an election, but by the following additional safeguards which apply in every case:

- The requirement for the automatic review of every summary conviction.
- The requirements for more serious punishments to be approved by a reviewing authority before they can take effect.
- The right of a member convicted by a summary authority to appeal to the Australian Military Court (AMC) against conviction and punishment.

In combination, these are very significant safeguards for the protection of the member.

3. New paragraph 111C(1)(b)

The term 'exigencies of the service' is currently used in the DFDA, and has been widely used by the ADF for over 20 years.

The purpose of this provision is to give an accused an additional period (up to 14 days) within which to decide if he or she wishes to elect to be tried by the AMC rather than a summary authority. Rather than have a definitive list of circumstances which might work to the disadvantage of the accused, the preference is to ensure that any reasonable arguments advanced by an accused are able to be properly considered. One such circumstance might be that the geographic or operational situation means that legal advice is not reasonably available to the accused person to allow them to make an informed election. The exigencies of the service may also be considerations taken into account by a summary authority when making an informed decision whether to grant an additional period in which the accused can make an election, or to try the case as quickly as is required for the maintenance of discipline and operational effectiveness. This may be particularly relevant where the operational circumstances demand immediate disciplinary action to make clear the standards necessary to ensure the safety of all the other ADF members in the force or the unit.

Notwithstanding the advantages of modern communications and the availability of legal officers in most operational theatres that would normally facilitate a timely election, this provision allows for an additional period where circumstances permit. The accused is further protected by the following additional safeguards which apply in every case:

- The requirement for the automatic review of every summary conviction.

- The requirements for more serious punishments to be approved by a reviewing authority before they can take effect.
- The right of a member convicted at the summary level to appeal to the AMC against conviction and punishment.

In combination, these are very significant safeguards introduced to protect the member.

4. New subsections 111C(6) and 131AA(6)

The term 'hearing' in these subsections refers to a hearing before the AMC. Whilst the term is not defined in the DFDA, Butterworths [sic] Australian Legal Dictionary defines a 'hearing' as any proceeding where argument is heard to render a decision. This specifically refers to a proceeding in which oral evidence may be taken and documentary and real evidence tendered.

In the interests of the accused, it is beneficial to use the term 'hearing' to avoid the unintentional inclusion of processes dealing with interlocutory or procedural matters (which may take place at a time prior to fixing the date for the hearing of the substantive issues surrounding the charge), as this could reduce the period of time that is available in which an accused may withdraw his or her election. As these are matters pertaining to the process and procedure of hearings and trials, further clarification of the definition could be provided for in the Rules, if the CMJ considers it appropriate to do so. It could also be expanded upon in the DLM, if necessary.

5. New subsections 131AA (3) and (4)

The term 'first charge' in these subsections is a drafting tool used by the drafters. Its purpose is to identify any charge which attracts an initial right of election. It refers to cases where the charges are linked and some of the charges draw an initial right of election, whilst others may not. [The 'first charge' is any charge that attracts the initial right of election].

The effect of this provision is explained at paragraph 34 of the Explanatory Memorandum. It is a safeguard to the accused because it allows for charges to be dealt with in the one forum. It will avoid subjecting an accused person to separate trials at both the summary and AMC level for offences which stem from the same circumstances and are linked. As a further safeguard, any decision to refer a charge back to a summary authority, where it is appropriate, is now to be made by the statutory Director of Military Prosecutions (DMP) and not within the command chain.

SCHEDULE 2 – Appeals to the Military Court

6. New paragraph 164(1) (c)

The currency of the existing provisions for dealing with mental impairment became apparent during drafting of the Bill. As a result, Defence looked to bringing the provisions up to contemporary standards in this legislation, if it was feasible. However, it became evident during the course of drafting that there were a number of significant practical and policy matters to be resolved to avoid disadvantaging ADF members. A particular matter requiring further detailed consideration is whether a person would be able to appeal to the Defence Force Discipline Appeal Tribunal against a finding that he or she was unfit to stand trial. This right of appeal, and a number of other complex matters requiring further policy consideration, precluded drafting being completed for inclusion in this Bill.

In the interests of giving effect to the Government agreed recommendations flowing from the 2005 Senate Report, which took drafting priority, and to allow the necessary time to ensure that any amendment to the provisions for dealing with mental impairment would not disadvantage ADF members, it was determined that these amendments would be best effected in legislation to be proposed for 2008. The best options for amending these provisions are being developed in consultation with the Attorney General's Department.

7. New subsections 150(2) and 151(2)

Commanders use the summary discipline system on a daily basis. The system is integral to their ability to lead the people for whom they are responsible in order to ensure their welfare and safety. As described in a British military context, '*discipline is inseparable from command and at the centre of the summary discipline system is the commanding officer*'. This tenet is also inherent in all other allied military organisations including the United States, Canada and New Zealand, from which the Australian system has drawn.

The Senate Committee in its 2005 Report recognised that the vast majority of offences prosecuted under the DFDA are tried at the Summary Authority level, and acknowledged the need for speedy and efficiently administered summary justice and further recognised its role in supporting commanding officers and maintaining Service discipline. These are some of the reasons why it is not practical to remove the command chain from the summary system. However, the provisions in DLAB 07 relating to review powers, have been drafted with due regard to the requirement to guard against undue command influence. Indeed, the reviewing authority cannot take any action that would impose additional punishments on a person convicted at a summary trial.

As proposed in the Bill, the existing quasi judicial command based petition and review regime is to be discontinued and will be replaced by a system of appeals to the AMC. However, it is intended to retain a form of review by a 'reviewing authority' (a superior authority) as an additional safeguard for the accused.

The reviewing authority has no part in the summary trial process as the review function does not take place until after a summary conviction has been recorded. Further, and as detailed below, the reviewing authority's powers operate to protect the rights of individuals and provide essential command oversight of the system to guard against its inappropriate use.

Specifically, the powers of a reviewing authority are limited to:

- Approving or not approving 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. A more severe punishment cannot be imposed. The proposed system of appeals to the AMC will then apply from the time the punishment is approved.

- Referring a matter back to the summary authority for the purpose of it reopening the matter and correcting a punishment or order that was imposed incorrectly (i.e., beyond authority to impose). The summary authority will only be able to impose a lesser punishment or order than that originally awarded.

- If it considers that there may have been a more serious defect in the summary proceedings, recommending to the convicted person that an appeal to the AMC may be appropriate.

Other than for approving certain more severe punishments and orders, a reviewing authority will not have the wider quasi-appeal powers currently available to reviewing authorities under the DFDA (for example, quashing a conviction or punishment on review by petition). These powers will now more appropriately reside with statutorily independent Military Judges, under the new appeals regime.

The intention of this review process is to provide additional safeguards for members by providing another avenue by which to correct inappropriately awarded punishments or orders that may not otherwise have been the subject of an appeal to the AMC. A mechanism for correcting these types of errors, where there is no dispute that an error has occurred will help reduce the appellate workload of the AMC. It will also improve command oversight of the summary trial system which is important to the maintenance of discipline. However, in circumstances of excessive but otherwise lawful punishment, an appeal may always be lodged with the AMC.

8. The Discipline Officer Scheme

Defence intends to include warrant officers and non-commissioned officers in the Discipline Officer scheme. However, before these amendments can be completed there are a number of complex practical and policy issues that need further development to ensure that the command authority of these ranks is not inadvertently subordinated.

Warrant officers and non-commissioned officers exercise important levels of command authority, and in the case of warrant officers, can also be appointed as discipline officers. Given this, it is very important that the potential effects of including them in the coverage of the Discipline Officer scheme, in particular the relative punishments, are given detailed consideration.

With the currently proposed provisions for the Discipline Officer scheme in the Bill, Defence has provided parity of the officer ranks with other ranks. That is, the scheme will now cover recruits and ranks below non commissioned rank, and officer cadets and the most junior officer ranks. This will be particularly important in the training environment, where the Discipline Officer scheme can help support the maintenance of discipline amongst the more junior and inexperienced members of the ADF.

It is intended to include warrant officers and non-commissioned officers in the coverage of the Discipline Officer scheme in legislation proposed for 2008.

9. Limitations on the right to elect trial

As discussed in the Explanatory Memorandum and more specifically the submission from the IGADF, if the right of election was completely discretionary on the part of an individual member, it is not difficult to imagine circumstances in which the exercise of that right could have the potential to affect the operational effectiveness of a unit.

It is therefore necessary for some limitation to be placed on the circumstances in which such a right can normally be exercised. This has been done by listing in Schedule 1A a number of offences, essentially 'disciplinary' in nature, in relation to which a member has no initial right to elect trial by the AMC and which must be dealt with by a summary authority in the first instance. For example it would be anomalous if an absence of two hours could not be dealt with by a commanding officer on the spot. This recognises the imperative that discipline must be maintained within Australia and overseas, in peace and in war, and that relatively minor matters of a disciplinary nature ought to be dealt with as speedily as possible.

The list of offences to which this provision will apply was finalised after extensive consultation with the Services and recognises that summary discipline by its nature, has to be quick and as simple as possible while at the same time providing the safeguard of an unlimited right of appeal should a member convicted under this arrangement wish to exercise it. As indicated above, it would be anomalous if a case of absence without leave of two hours could not be dealt with by a commanding officer immediately.

Additional safeguards have been included for these offences, including limited punishments and 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. These additional safeguards for the accused will be further supported by the right of a convicted member to appeal a conviction or punishment to the AMC and the automatic review of all summary trials.