



Military Justice (Interim Measures) Act (No. 1) 2009

No. 91, 2009

**An Act to amend legislation relating to military
justice, and for related purposes**

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An Act to amend legislation relating to military justice, and for related purposes

[Assented to 22 September 2009]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as *Military Justice (Interim Measures) Act
(No. 1) 2009*.

2 Commencement

This Act commences on the day this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to the system of military justice

Part 1—Main amendments

Defence Force Discipline Act 1982

1 Subsection 3(1) (definition of *appropriate authority*)

Repeal the definition, substitute:

***appropriate authority*:**

- (a) in relation to proceedings before a court martial, means:
 - (i) the Registrar; or
 - (ii) the President of the court martial; and
- (b) in relation to proceedings before a Defence Force magistrate, means:
 - (i) the Registrar; or
 - (ii) the Defence Force magistrate; or
- (c) in relation to proceedings before a summary authority, means the summary authority.

2 Subsection 3(1) (definition of *Australian Military Court*)

Repeal the definition.

3 Subsection 3(1) (definition of *Australian Military Court Rules*)

Repeal the definition.

4 Subsection 3(1)

Insert:

Chief Judge Advocate means the Chief Judge Advocate appointed under section 188A.

5 Subsection 3(1) (definition of *Chief Military Judge*)

Repeal the definition.

6 Subsection 3(1) (definition of *class 1 offence*)

Repeal the definition.

7 Subsection 3(1) (definition of *class 2 offence*)

Repeal the definition.

8 Subsection 3(1) (definition of *class 3 offence*)

Repeal the definition.

9 Subsection 3(1) (definition of *competent reviewing authority*)

Omit “subsection 150(2)”, substitute “section 150A”.

10 Subsection 3(1) (definition of *convicted person*)

After “tribunal”, insert “, a reviewing authority”.

11 Subsection 3(1)

Insert:

Court Martial and Defence Force Magistrate Rules means the rules made under section 149A.

12 Subsection 3(1)

Insert:

Defence Force magistrate means a Defence Force magistrate appointed under section 127.

13 Subsection 3(1)

Insert:

judge advocate, in relation to a court martial, means the judge advocate of the court martial.

14 Subsection 3(1)

Insert:

judge advocates’ panel means the panel referred to in subsection 196(1).

15 Subsection 3(1) (definition of *Military Judge*)

Repeal the definition.

16 Subsection 3(1) (definition of *military jury*)

Repeal the definition.

17 Subsection 3(1)

Insert:

prescribed acquittal means an acquittal of a service offence by a court martial or a Defence Force magistrate on the ground of unsoundness of mind.

18 Subsection 3(1)

Insert:

President, in relation to a court martial, means the President of the court martial.

19 Subsection 3(1) (definition of *Provost Marshal Australian Defence Force*)

Repeal the definition.

20 Subsection 3(1) (definition of *Registrar*)

Repeal the definition, substitute:

Registrar means the Registrar of Military Justice appointed under section 188FB.

21 Subsection 3(1) (definition of *review*)

Repeal the definition, substitute:

review means a review by a reviewing authority, or by the Chief of the Defence Force or a service chief, in accordance with Part VIIIA, of the proceedings of a service tribunal.

22 Subsection 3(1) (definition of *reviewing authority*)

Omit “subsection 150(1)”, substitute “section 150”.

23 Subsection 3(1) (definition of *rules of procedure*)

Repeal the definition, substitute:

rules of procedure means the following:

- (a) the Summary Authority Rules;
- (b) the Court Martial and Defence Force Magistrate Rules.

24 Subsection 3(1) (definition of *service tribunal*)

Omit “the Australian Military Court”, substitute “a court martial, a Defence Force magistrate”.

25 Section 5A

Repeal the section, substitute:

5A Appointment of superior authority

The Chief of the Defence Force or a service chief may, by instrument in writing, appoint an officer, or each officer included in a class of officers, to be a superior authority for the purpose of:

- (a) representing the interests of the Defence Force in relation to charges that are being considered by the Director of Military Prosecutions for possible trial by a Defence Force magistrate or a court martial; and
- (b) exercising the powers and performing the functions conferred on superior authorities by or under this Act or the regulations.

26 Paragraph 53(4)(a)

Repeal the paragraph, substitute:

- (a) insults a member of a court martial, a judge advocate, a Defence Force magistrate or a summary authority in or in relation to the exercise of his or her powers or functions as such a member, judge advocate, magistrate or authority; or

27 Paragraph 53(4)(d)

Repeal the paragraph, substitute:

- (d) engages in any other conduct that would, if a service tribunal were a court of record, constitute a contempt of that court.

28 Subsections 53(5) and (6)

Repeal the subsections, substitute:

- (5) If an offence under subsection (4) is committed by a person in relation to a service tribunal that is a court martial or a Defence Force magistrate, during proceedings before the tribunal, the tribunal, if it considers it expedient to do so, may then and there order that the person be taken into custody and call on the person to show cause why the person should not be convicted of the offence.
- (6) If a service tribunal convicts a person under subsection (5), the maximum punishment for the offence is detention for 21 days.

29 Subsection 67(1)

Repeal the subsection, substitute:

- (1) A court martial or a Defence Force magistrate must not impose a punishment in respect of a conviction except in accordance with this Part and Schedule 2.

30 Paragraph 74(4A)(a)

Omit “summary authority”, substitute “service tribunal”

31 Paragraph 74(4B)(a)

Omit “summary authority”, substitute “service tribunal”.

32 Subsection 74(5)

After “service tribunal”, insert “or a reviewing authority that has revoked a suspension of a punishment on the recommendation of a service tribunal”.

33 Subsection 74(5A)

Omit “summary authority” (wherever occurring), substitute “service tribunal”.

34 Section 77

Repeal the section, substitute:

77 Taking other offences into consideration

- (1) Where a convicted person requests a court martial or a Defence Force magistrate to take into consideration, for the purposes of this Part, any other service offence:

- (a) that is similar to the service offence of which the person has been convicted; and
 - (b) that the tribunal has jurisdiction to try; and
 - (c) that the person admits having committed;
- the court martial or the Defence Force magistrate, with the consent of the prosecution, may take the other service offence into consideration.
- (2) A court martial or a Defence Force magistrate shall not impose a separate punishment or make a separate order under subsection 75(1) in respect of a service offence that it has taken into consideration under subsection (1).
- (3) Where:
- (a) a court martial or a Defence Force magistrate does not take a service offence into consideration under subsection (1) by reason of:
 - (i) the withholding of consent by the prosecution; or
 - (ii) the rejection of the convicted person's request; or
 - (b) a reviewing authority, under subsection 162(2), annuls the taking into consideration by a court martial or a Defence Force magistrate of a service offence;
- an admission under and for the purposes of paragraph (1)(c) in relation to that service offence is not admissible as evidence in:
- (c) any other proceeding before a service tribunal in respect of that service offence; or
 - (d) any proceeding in a civil court in respect of a civil court offence that is substantially the same offence as that service offence.

35 Section 80

Repeal the section, substitute:

80 Revocation of suspension of punishment

- (1) Subject to subsection (2), where a person convicted of a service offence by a service tribunal is already subject to a punishment that is suspended, the tribunal may revoke the suspension and, in that event, the punishment that was suspended shall, subject to subsections 172(1) and (2), take effect as if it had been imposed at the time of the revocation.

- (2) A service tribunal shall not revoke the suspension of a punishment if the tribunal would not have had power to impose the punishment if it had convicted the person of the service offence for which the punishment was imposed.
- (3) Where, by virtue of subsection (2), a service tribunal is not empowered to revoke a suspension that it considers should be revoked, the tribunal may recommend to a competent reviewing authority that the suspension be revoked by that authority.
- (4) Where, under subsection (3), a service tribunal recommends to a competent reviewing authority that a suspension of a punishment be revoked, the authority may revoke the suspension and, in that event, the punishment that was suspended shall, subject to subsections 172(1) and (2), take effect as if it had been imposed at the time of the revocation.

36 Subsection 81(2)

After “78(1)”, insert “or 162(8)”.

37 Subparagraph 87(1)(c)(ii)

Repeal the subparagraph, substitute:

- (ii) request the Registrar to refer the charge to a Defence Force magistrate for trial;
- (iii) request the Registrar to convene a court martial to try the charge.

Note: A charge referred to a Defence Force magistrate must be referred to the magistrate nominated by the Judge Advocate General: see subsection 129C(1).

38 Subsection 88(1A)

Repeal the subsection, substitute:

- (1A) The Registrar may carry out an action under subsection (1) only if a judge advocate or a Defence Force magistrate directs the Registrar to carry out the action.

39 Subsection 99(1)

Omit “summary authority” (wherever occurring), substitute “service tribunal”.

40 Paragraph 100(5)(b)

Omit “summary authority”, substitute “service tribunal”.

41 Paragraph 101F(5)(a)

Omit “172(5), substitute “172(3A), (4) or (5)”.

42 Subsection 101J(1)

After “tribunal” insert “or, in the case of a court martial, the judge advocate of the court martial,”.

43 Subsections 101JA(3) and (4)

After “tribunal” insert “or, in the case of a court martial, the judge advocate of the court martial,”.

44 Subsection 101JA(5)

Repeal the subsection, substitute:

- (5) If the judge advocate of a court martial permits evidence to be given under subsection (3) or (4), the judge advocate must inform the members of the court martial of the non-compliance with the requirements of this section, or of the absence of sufficient evidence of compliance with those requirements, as the case may be, and give the members such warning about the evidence as he or she thinks appropriate in the circumstances.

45 Subsection 101K(8)

After “tribunal” (second occurring) insert “or, in the case of a court martial, the judge advocate of the court martial,”.

46 Subsection 101K(9)

Repeal the subsection, substitute:

- (9) Subject to the power of a service tribunal, or, in the case of a court martial, the judge advocate of the court martial, to exclude evidence:
- (a) on the ground of unfairness to the accused; or
 - (b) on the ground that it is evidence of a confession not shown to have been made voluntarily; or
 - (c) otherwise in the interests of justice;
- the prosecution is not prevented from leading evidence of a confession by reason only of anything said by the accused, during,

or at the end of, the reading to the accused of a record in writing containing the confession, concerning the accuracy of the record, but this subsection does not prevent a judge advocate from directing the members of a court martial with respect to the weight to be accorded to the statement as evidence.

47 Subsection 101K(10)

After “tribunal” (first occurring), insert “or, in the case of a court martial, the judge advocate of the court martial,”.

48 Subsection 101K(10)

After “tribunal” (second occurring), insert “or the judge advocate”.

49 Subsection 101K(11)

Repeal the subsection, substitute:

- (11) Where the judge advocate of a court martial, in pursuance of subsection (10), permits evidence to be given before the members of the court martial, the judge advocate shall, if he or she considers that the interests of justice so require, inform the members of the court martial of the non-compliance with the requirements of this section, or of the absence of sufficient evidence of compliance with those requirements, and give the members of the court martial such warning concerning the evidence as he or she thinks appropriate in the circumstances.

50 Paragraph 101Q(13)(b)

After “tribunal”, insert “or, in the case of a court martial, the judge advocate of the court martial,”.

51 Division 6A of Part VI

Repeal the Division.

52 Subsection 101ZB(1)

After “tribunal” (second occurring), insert “or, in the case of a court martial, the judge advocate of the court martial,”.

53 Subsection 101ZB(1)

After “tribunal” (third and fourth occurring), insert “or judge advocate”.

54 Subsection 101ZB(2)

After “tribunal”, insert “or judge advocate”.

55 Subsection 101ZB(3)

After “tribunal”, insert “or, in the case of a court martial, the judge advocate of the court martial,”.

56 Subsection 101ZB(4)

After “tribunal”, insert “or judge advocate”.

57 Subsection 103(1)

Omit “section 101ZAA,”.

58 Paragraph 103(1)(c)

Repeal the paragraph, substitute:

- (c) request the Registrar to refer the charge to a Defence Force magistrate for trial; or
- (d) request the Registrar to convene a general court martial or a restricted court martial to try the charge.

59 Subsection 103(1) (note)

After “Note”, insert “1”.

60 At the end of subsection 103(1) (after the note)

Add:

Note 2: A charge referred to a Defence Force magistrate must be referred to the magistrate nominated by the Judge Advocate General: see subsection 129C(1).

61 Subsection 103(2)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

62 Subsection 103(2A)

Omit “165”, substitute “166”.

63 Subsection 103(2A)

Omit “the Australian Military Court” (first occurring), substitute “a reviewing authority”.

64 Subsection 103(2A)

Omit “appeal relates to the Australian Military Court”, substitute “order relates to a court martial or Defence Force magistrate”.

65 Paragraph 103(4)(a)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

66 Paragraph 103(4)(d)

Repeal the paragraph, substitute:

- (d) request the Registrar to refer the charge to a Defence Force magistrate for trial; or
- (e) request the Registrar to convene a general court martial or a restricted court martial to try the charge.

67 Section 103A

Repeal the section.

68 Subsection 111B(1) (including note 1)

Omit “the Australian Military Court” (wherever occurring), substitute “a court martial or Defence Force magistrate”.

Note: The heading to section 111B is altered by omitting “**the Australian Military Court**” and substituting “**a court martial or Defence Force magistrate**”.

69 Subsection 111B(1) (note 3)

Repeal the note.

70 Section 111C

Omit “the Australian Military Court” (wherever occurring), substitute “a court martial or Defence Force magistrate”.

Note 1: The heading to section 111C is altered by omitting “**the Australian Military Court**” and substituting “**a court martial or Defence Force magistrate**”.

Note 2: The headings to subsections 111C(3) and (5) are altered by omitting “*the Australian Military Court*” and substituting “*a court martial or Defence Force magistrate*”.

71 Subsection 111C(6)

Omit “the Court”, substitute “a court martial or Defence Force magistrate”.

72 Divisions 3 and 4 of Part VII

Repeal the Divisions, substitute:

Division 3—Courts martial

114 Types of court martial

- (1) A court martial shall be either a general court martial or a restricted court martial.
- (2) A general court martial shall consist of a President and not less than 4 other members.
- (3) A restricted court martial shall consist of a President and not less than 2 other members.

115 Jurisdiction of court martial

- (1) A court martial has, subject to section 63 and to subsection (1A) of this section, jurisdiction to try any charge against any person.
- (1A) A court martial does not have jurisdiction to try a charge of a custodial offence.
- (2) A court martial has jurisdiction to take action under Part IV in relation to a convicted person if it has been convened under subsection 125(6) or 129A(4) for that purpose.
- (3) A court martial, before taking action under subsection (2), shall hear evidence relevant to the determination of what action should be taken.

116 Eligibility to be member of court martial

- (1) For the purposes of this Act, a person is eligible to be a member, or a reserve member, of a court martial if, and only if:
 - (a) the person is an officer;
 - (b) the person has been an officer for a continuous period of not less than 3 years or for periods amounting in the aggregate to not less than 3 years; and
 - (c) the person holds a rank that is not lower than the rank held by the accused person (being a member of the Defence Force) or

by any of the accused persons (being members of the Defence Force).

- (2) For the purposes of this Act, an officer is eligible to be President of a court martial if, and only if, the officer holds a rank that is not lower than:
 - (a) in the case of a general court martial—the naval rank of captain or the rank of colonel or group captain; or
 - (b) in the case of a restricted court martial—the rank of commander, lieutenant-colonel or wing commander.
- (2A) Subsection (2) does not apply in relation to a person who becomes President of a court martial in pursuance of:
 - (a) an appointment made by virtue of paragraph 124(1)(e); or
 - (b) subsection 126(1).
- (3) The requirements set out in paragraph (1)(c) and subsection (2) apply only if, and to the extent that, the exigencies of service permit.

117 Eligibility to be judge advocate

For the purposes of this Act, a person is eligible to be the judge advocate of a court martial if, and only if, the person is a member of the judge advocates' panel.

119 Convening order

- (1) The Registrar must, in an order convening a court martial:
 - (a) appoint:
 - (i) the President and the other members;
 - (ii) an adequate number of reserve members; and
 - (iii) the judge advocate; and
 - (b) fix, or provide for the fixing of, the time and place for the assembling of the court martial.

Note: The Registrar must not appoint a person as the judge advocate of a court martial unless the person has been nominated by the Judge Advocate General: see section 129B.

- (2) At any time before a court martial assembles to try a charge, the Registrar may:
 - (a) vary the order convening the court martial; or

- (b) make an order under subsection (1) convening a new court martial.

120 Convening order to be notified to accused person

- (1) The Registrar must, as soon as practicable after he or she makes an order convening a court martial for the purpose of trying an accused person (including an order made by virtue of subsection 119(2)), cause a copy of that order to be given to the accused person.
- (2) If an order convening a court martial is subsequently varied, the Registrar must notify the accused person accordingly.

121 Objection on ground of ineligibility etc.

At any time before a court martial is sworn or affirmed, the accused person may lodge an objection with the Registrar to any member or reserve member of the court martial or to the judge advocate on the ground that the member or judge advocate:

- (a) is ineligible;
- (b) is, or is likely to be, biased; or
- (c) is likely to be thought, on reasonable grounds, to be biased.

122 Notification of belief of bias

A member or reserve member, or the judge advocate, of a court martial who believes himself or herself:

- (a) to be biased, or likely to be biased; or
 - (b) likely to be thought, on reasonable grounds, to be biased;
- shall notify the Registrar forthwith.

123 Substitution of members etc.

At any time before a court martial is sworn or affirmed, the Registrar may revoke the appointment of an officer to be a member or reserve member of the court martial or the judge advocate and appoint an officer to be a member or reserve member or the judge advocate, as the case may be, in the place of that first-mentioned officer.

Note: The Registrar must not appoint a person as the judge advocate of a court martial unless the person has been nominated by the Judge Advocate General: see section 129B.

124 Replacement of members etc.

- (1) Where, after a court martial has assembled but before it is sworn or affirmed, the judge advocate:
 - (a) finds that a member of the court martial who has not appeared at the place of assembly is not, or is not likely to be, available;
 - (b) upholds an objection entered under subsection 141(2) to a member of the court martial; or
 - (c) finds that, for some other reason, a member of the court martial should be excused from further attendance as such a member;the judge advocate shall:
 - (d) where the member concerned is not the President—appoint a reserve member in the place of that member;
 - (e) where the member concerned is the President and the next senior member is not more than one rank junior to the President—appoint that next senior member to be the President in the place of the member concerned; or
 - (f) where the member concerned is the President and the next senior member is more than one rank junior to the President—report the situation to the Registrar and request the Registrar to appoint a President in the place of the member concerned.
- (2) Where, after a court martial has assembled but before it is sworn or affirmed, the judge advocate finds that there are insufficient members and reserve members properly to constitute the court martial, the judge advocate shall report the situation to the Registrar and request the Registrar to appoint as many new members or new reserve members, or both, as the Registrar considers necessary.
- (3) Where the judge advocate upholds an objection entered under subsection 141(3) to himself or herself, he or she shall report the situation to the Registrar and request the Registrar to appoint another judge advocate in his or her place.

Note: The Registrar must not appoint a person as a judge advocate of a court martial unless the person has been nominated by the Judge Advocate General: see section 129B.

125 Dissolution of court martial

- (1) Where, after a court martial has assembled but before it is sworn or affirmed, the judge advocate considers that by reason of the exigencies of service or for any other reason it is desirable to do so, he or she may direct the Registrar to dissolve the court martial.
 - (2) Where:
 - (a) at any time after a court martial is sworn or affirmed, there is an insufficient number of members properly to constitute the court martial; or
 - (b) at any time after the accused person's plea of guilty or not guilty has been recorded by a court martial, the judge advocate is unable to attend;the Registrar must dissolve the court martial.
 - (3) Where, at any time after a court martial is sworn or affirmed, the judge advocate considers that, in the interests of justice, the court martial should be dissolved, the judge advocate must direct the Registrar to dissolve the court martial.
 - (4) Where:
 - (a) a court martial has adjourned the hearing of the proceedings before it; and
 - (b) the judge advocate considers that, by reason of the exigencies of service, it will not be practicable to continue the hearing of the proceedings at a later date;the judge advocate must direct the Registrar to dissolve the court martial.
 - (5) Where a court martial is dissolved under subsection (1), (2), (3) or (4), the Director of Military Prosecutions may request the Registrar to convene another court martial in its stead.
 - (6) Where a court martial is dissolved as mentioned in subsection (2), (3) or (4) after it has convicted a person but before it has taken action under Part IV in relation to the convicted person, the Registrar may convene another court martial for the purpose of taking such action.
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- (7) A court martial, before taking action under subsection (6), shall hear evidence relevant to the determination of what action should be taken.
- (8) For the purposes of this Part, a member of a court martial convened under subsection (6) shall not be taken to be biased by reason only of his or her having been a member of the court martial that was dissolved as mentioned in that subsection.

126 Inability to attend after plea

- (1) Where the President is unable to attend at any time after the accused person's plea of not guilty or guilty has been recorded by a court martial, the next senior member shall become the President of the court martial and the first-mentioned President shall take no further part in the proceedings.
- (2) Where a member of a court martial is unable to attend at any time after the accused person's plea of not guilty or guilty has been recorded by a court martial, that member shall take no further part in the proceedings.

Division 4—Defence Force magistrates

127 Appointment of Defence Force magistrates

- (1) The Judge Advocate General may, by instrument in writing, appoint officers to be Defence Force magistrates.
- (2) An officer is not eligible to be a Defence Force magistrate unless the officer is a member of the judge advocates' panel.

Note: A member of the judge advocates' panel is appointed for a maximum period of 3 years but is eligible for reappointment: see subsection 196(2A).

128 Oath or affirmation of Defence Force magistrate

- (1) A Defence Force magistrate shall, before proceeding to discharge the duties of his or her office, make and subscribe an oath or affirmation in accordance with the form in Schedule 4.

- (2) An oath or affirmation under this section shall be made before the Judge Advocate General or an officer authorized, in writing, by the Judge Advocate General for the purpose.

129 Jurisdiction and powers of Defence Force magistrate

- (1) A Defence Force magistrate has the same jurisdiction and powers as a restricted court martial (including the powers of the judge advocate of a restricted court martial).
- (2) A Defence Force magistrate has jurisdiction to take action under Part IV in relation to a convicted person if the case has been referred to the magistrate under subsection 129A(4) for that purpose.
- (3) A Defence Force magistrate, before taking action under subsection (2), shall hear evidence relevant to the determination of what action should be taken.

129A Discontinuance of proceedings before Defence Force magistrate etc.

- (1) If a charge or case has been referred to a Defence Force magistrate under subparagraph 87(1)(c)(ii), section 103 or subsection (4) of this section, the Registrar must terminate the reference if:
- (a) at a time before the Defence Force magistrate commences to try the charge or hear the case, it appears to the Registrar that, by reason of the exigencies of service, or for any other reason, it is desirable to terminate the reference; or
 - (b) at a time after the Defence Force magistrate commences to try the charge or hear the case:
 - (i) it appears to the Defence Force magistrate that it would not be in the interests of justice for the Defence Force magistrate to continue; and
 - (ii) the Defence Force magistrate directs the Registrar to terminate the reference.
- (2) Where:
- (a) a charge or case has been referred to a Defence Force magistrate under subparagraph 87(1)(c)(ii), section 103 or subsection (4) of this section; and

- (b) at a time after the Defence Force magistrate commences to try the charge or hear the case, the Defence Force magistrate is unable to conclude the trial of the charge or the hearing of the case because of death, illness, the exigencies of service or other circumstances;
the Registrar must terminate the reference.
- (3) Where a reference of a charge is terminated by the Registrar under subsection (1) or (2) at a time before the dismissal of the charge or the acquittal or conviction of the accused person, the charge shall, by virtue of the termination of the reference, be taken to have been referred to the Director of Military Prosecutions.
- (4) Where:
- (a) a reference of a charge is terminated under subsection (1) or (2) after the conviction of the accused person and before action has been taken under Part IV in relation to the person;
or
 - (b) a reference of a case is terminated under subsection (1) or (2) before action has been taken under Part IV in relation to the convicted person;
- the Registrar may:
- (c) refer the charge or case, as the case may be, to a Defence Force magistrate to take action under Part IV in relation to the person; or
 - (d) if no Defence Force magistrate is available or the Director of Military Prosecutions considers that it would be more appropriate for the matter to be dealt with by a court martial—convene a general court martial or a restricted court martial to take action under Part IV in relation to the person.

Note: A charge or case referred to a Defence Force magistrate must be referred to the magistrate nominated by the Judge Advocate General: see section 129C.

Division 5—Nomination of Defence Force magistrates and members of courts martial

129B Appointment of members of courts martial

- (1) The Registrar must not appoint a person as:
- (a) the President of a court martial; or

- (b) a member or reserve member of a court martial; or
 - (c) a judge advocate of a court martial;
- if the Registrar believes the person to be:
- (d) biased or likely to be biased; or
 - (e) likely to be thought, on reasonable grounds, to be biased.
- (2) The Registrar must not appoint a person as a judge advocate of a court martial unless the Judge Advocate General has nominated that person for that position.
- (3) The appropriate service chief must make available, for the purposes of a court martial, a defence member who is appointed to be a member of that court martial.

129C Judge Advocate General to nominate Defence Force magistrates

- (1) The Registrar must not refer a charge to a Defence Force magistrate unless the Judge Advocate General has nominated the magistrate to try the charge.
- (2) The Registrar must not refer a case to a Defence Force magistrate to take action under Part IV in relation to a convicted person unless the Judge Advocate General has nominated the magistrate to take action in relation to the person.

73 Section 129

Renumber as section 129D.

74 Subsection 131(3) (including note 1)

Omit “the Australian Military Court” (wherever occurring), substitute “a court martial or Defence Force magistrate”.

Note: The heading to section 131 is altered by omitting “**the Australian Military Court**” and substituting “**a court martial or Defence Force magistrate**”.

75 Subsection 131(3) (note 3)

Repeal the note.

76 Subsection 131AA(1)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

Note: The heading to section 131AA is altered by omitting “**the Australian Military Court**” and substituting “**a court martial or Defence Force magistrate**”.

77 Subsection 131AA(3)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

Note: The heading to subsection 131AA(3) is altered by omitting “*the Australian Military Court*” and substituting “*a court martial or Defence Force magistrate*”.

78 Subparagraph 131AA(5)(a)(i)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

Note: The heading to subsection 131AA(5) is altered by omitting “*the Australian Military Court*” and substituting “*a court martial or Defence Force magistrate*”.

79 Subsection 131AA(6)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

80 Subsection 131AA(6)

Omit “the Court”, substitute “the court martial or Defence Force magistrate”.

81 Subsection 131AA(7)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

82 Division 2 of Part VIII

Repeal the Division, substitute:

**Division 2—Trial by court martial or Defence Force
magistrate**

132 Trial by court martial

- (1) A court martial shall try a charge in accordance with the following provisions:
 - (a) before the court martial commences to hear the evidence on the charge, the judge advocate shall ask the accused person whether he or she pleads guilty or not guilty to the charge

- and, if the accused person pleads guilty and the judge advocate is satisfied that the accused person understands the effect of that plea, the court martial shall convict the accused person;
- (b) if the accused person pleads not guilty or if the judge advocate is not satisfied that the accused person, in pleading guilty, understands the effect of that plea, the court martial shall record a plea of not guilty and proceed to hear the evidence on the charge;
 - (c) if the judge advocate, after hearing the evidence on the charge adduced by the prosecution, rules that that evidence is insufficient to support the charge, the court martial shall dismiss the charge;
 - (d) if the judge advocate, after hearing the evidence on the charge adduced by the prosecution, rules that that evidence is sufficient to support the charge, the court martial shall proceed with the trial;
 - (e) if the court martial finds the accused person not guilty, the court martial shall acquit the accused person;
 - (f) if the court martial finds the accused person guilty, the court martial shall convict the accused person;
 - (g) if the court martial convicts the accused person, the court martial shall take action under Part IV in relation to the convicted person.
- (2) Where an accused person:
- (a) refuses to plead; or
 - (b) does not plead intelligibly;
- the court martial shall record a plea of not guilty and proceed accordingly in accordance with subsection (1).
- (3) Where, under paragraph (1)(a), an accused person pleads guilty to a service offence that is one (other than the first) of 2 or more charges stated in the charge sheet in the alternative, the court martial shall:
- (a) if the Director of Military Prosecutions notifies the court martial that he or she does not object to the acceptance of the plea—accept the plea and proceed accordingly in accordance with subsection (1); or
 - (b) in any other case—record a plea of not guilty and proceed accordingly in accordance with subsection (1).
-

- (4) Where an accused person who has pleaded not guilty withdraws his or her plea and pleads guilty, the court martial shall, if the judge advocate is satisfied that the accused person understands the effect of that plea, substitute a plea of guilty for the plea of not guilty and proceed accordingly in accordance with subsection (1).
- (4A) Nothing in subsection (1) shall be taken to require the judge advocate to give either a ruling of the kind referred to in paragraph (1)(c) or a ruling of the kind referred to in paragraph (1)(d) unless:
 - (a) the accused person has submitted that the judge advocate should give a ruling of the first-mentioned kind; or
 - (b) the interests of justice require that the judge advocate should give a ruling of the first-mentioned kind.
- (5) A court martial, before taking action under paragraph (1)(g), shall hear evidence relevant to the determination of what action should be taken.

133 Determination of questions by court martial

- (1) Subject to section 134, in any proceeding before a court martial:
 - (a) the President shall preside; and
 - (b) every question shall be determined by the members of the court martial.
- (2) Every question determined by the members of the court martial shall be decided by a majority of the votes of the members.
- (3) Subject to subsections (4) and (5), in the case of an equality of votes on any question referred to in subsection (2), the President has a casting vote.
- (4) In the case of an equality of votes on the question whether an accused person is guilty or not guilty of a service offence, the court martial shall find the accused person not guilty.
- (5) In the case of an equality of votes on the question whether an accused person, at the time of the act or omission the subject of the charge, was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission, the court martial shall find that the person was, at that time, suffering from such unsoundness of mind.

- (6) Notwithstanding anything contained in this Act, the members of a court martial:
- (a) in determining the question whether an accused person:
 - (i) is guilty or not guilty of a service offence; or
 - (ii) at the time of the act or omission the subject of the charge, was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission; or
 - (b) in determining what action shall be taken under Part IV in relation to a convicted person;
- shall sit without any other person present.

134 Powers of judge advocate

- (1) In proceedings before a court martial, the judge advocate shall give any ruling, and exercise any discretion, that, in accordance with the law in force in the Jervis Bay Territory, would be given or exercised by a judge in a trial by jury.
- (2) Where, for any purpose in connection with the giving of a ruling, or the exercise of a discretion, by a judge in a trial by jury in the Jervis Bay Territory, the judge would, in accordance with the law in force in that Territory, sit in the absence of the jury, the judge advocate shall, for any purpose in connection with the giving of such a ruling, or the exercise of such a discretion, by the judge advocate, sit without the members of the court martial.
- (3) Notwithstanding subsections (1) and (2), in a proceeding before a court martial, the members of the court martial shall determine what action shall be taken under Part IV in relation to a convicted person, but the judge advocate shall give a ruling on any question of law arising in connection with the making of such a determination.
- (4) A ruling given by the judge advocate in accordance with subsection (1) or (3) and a decision made by the judge advocate under subsection 141(5) or (6) is binding on the court martial.
- (5) The judge advocate when sitting without the members of a court martial may exercise such of the powers of the court martial or the President as are necessary for the performance of his or her duties.

- (6) The powers conferred on the judge advocate by this section are in addition to any other powers conferred on the judge advocate by any other provision of this Act, the regulations or the rules of procedure.

135 Trial by Defence Force magistrate

- (1) A Defence Force magistrate shall try a charge in accordance with the following provisions:
- (a) before the Defence Force magistrate commences to hear the evidence on the charge, the Defence Force magistrate shall ask the accused person whether he or she pleads guilty or not guilty to the charge and, if the accused person pleads guilty and the Defence Force magistrate is satisfied that the accused person understands the effect of that plea, the Defence Force magistrate shall convict the accused person;
 - (b) if the accused person pleads not guilty or if the Defence Force magistrate is not satisfied that the accused person, in pleading guilty, understands the effect of that plea, the Defence Force magistrate shall record a plea of not guilty and proceed to hear the evidence on the charge;
 - (c) if the Defence Force magistrate, after hearing the evidence on the charge adduced by the prosecution, rules that that evidence is insufficient to support the charge, the Defence Force magistrate shall dismiss the charge;
 - (d) if the Defence Force magistrate, after hearing the evidence on the charge adduced by the prosecution, rules that that evidence is sufficient to support the charge, the Defence Force magistrate shall proceed with the trial;
 - (e) if the Defence Force magistrate finds the accused person not guilty, the Defence Force magistrate shall acquit the accused person;
 - (f) if the Defence Force magistrate finds the accused person guilty, the Defence Force magistrate shall convict the accused person;
 - (g) if the Defence Force magistrate convicts the accused person, the Defence Force magistrate shall take action under Part IV in relation to the convicted person.
- (2) Where an accused person:
- (a) refuses to plead; or

- (b) does not plead intelligibly;
the Defence Force magistrate shall record a plea of not guilty and proceed accordingly in accordance with subsection (1).
- (3) Where, under paragraph (1)(a), an accused person pleads guilty to a service offence that is one (other than the first) of 2 or more charges stated in the charge sheet in the alternative, the Defence Force magistrate shall:
- (a) if the Director of Military Prosecutions notifies the Defence Force magistrate that he or she does not object to the acceptance of the plea—accept the plea and proceed accordingly in accordance with subsection (1); or
 - (b) in any other case—record a plea of not guilty and proceed accordingly in accordance with subsection (1).
- (4) Where an accused person who has pleaded not guilty withdraws his or her plea and pleads guilty, the Defence Force magistrate shall, if the Defence Force magistrate is satisfied that the accused person understands the effect of that plea, substitute a plea of guilty for the plea of not guilty and proceed accordingly in accordance with subsection (1).
- (4A) Nothing in subsection (1) shall be taken to require the Defence Force magistrate to give either a ruling of the kind referred to in paragraph (1)(c) or a ruling of the kind referred to in paragraph (1)(d) unless:
- (a) the accused person has submitted that the Defence Force magistrate should give a ruling of the first-mentioned kind; or
 - (b) the interests of justice require that the Defence Force magistrate should give a ruling of the first-mentioned kind.
- (5) A Defence Force magistrate, before taking action under paragraph (1)(g), shall hear evidence relevant to the determination of what action should be taken.

136 Representatives of parties before court martial or Defence Force magistrate

A person shall not represent a party before a court martial or a Defence Force magistrate unless the person is:

- (a) where the trial is held in Australia—a member of the Defence Force or a legal practitioner; or

- (b) where the trial is held in a place outside Australia—a person referred to in paragraph (a) or a person qualified to practise before the courts of that place.

137 Representation of accused person

- (1) The Chief of the Defence Force shall if, and to the extent that, the exigencies of service permit, cause an accused person awaiting trial by a court martial or by a Defence Force magistrate to be afforded the opportunity to be represented at the trial, and to be advised before the trial, by a legal officer.
- (2) An accused person who is advised or represented in accordance with subsection (1) shall be so advised or represented without expense to the accused person.
- (3) Nothing in this section prevents the operation of any scheme of legal aid, advice or assistance under a law of the Commonwealth or of a State or Territory.
- (4) The Chief of the Defence Force may delegate his or her powers under subsection (1) to a member of the Defence Force who holds a rank that is not lower than the naval rank of captain, or the rank of colonel or group captain.

83 Section 137A

Repeal the section.

84 Subsection 138(4)

After “tribunal”, (first occurring), insert “or, if the service tribunal is a court martial, the President of the court martial”.

85 Subsection 139(2)

After “tribunal”, (first occurring), insert “or, if the service tribunal is a court martial, the President of the court martial”.

86 Subsection 139(2)

After “tribunal”, (second occurring), insert “or President”.

87 After subsection 139(2)

Insert:

- (2A) The President must not make an order under subsection (2) unless the President has first consulted the judge advocate.

88 Section 140

Repeal the section, substitute:

140 Public hearings

- (1) Subject to this section, the hearing of proceedings before a court martial or a Defence Force magistrate shall be in public.
- (2) In proceedings before a court martial or a Defence Force magistrate, the President of the court martial or the Defence Force magistrate may, if the President considers it necessary in the interests of the security or defence of Australia, the proper administration of justice or public morals:
 - (a) order that some or all of the members of the public shall be excluded during the whole or a specified part of the proceedings; or
 - (b) order that no report of, or relating to, the whole or a specified part of the proceedings shall be published.
- (3) The President of a court martial shall not make an order under subsection (2) unless the President has first consulted the judge advocate.
- (4) Where proceedings before a court martial or a Defence Force magistrate are held in a secure place, the appropriate service chief shall cause such steps to be taken as will permit the public to have reasonable access, subject to an order (if any) in force under subsection (2), to the proceedings.
- (5) In subsection (4), *secure place* means a place the entry to which is controlled by guards who are constables or members of the Defence Force.

89 Subsection 141(2)

Repeal the subsection, substitute:

- (2) At any time before a court martial is sworn or affirmed, the accused person may enter an objection to any member or reserve member of the court martial on the ground that the member:

- (a) is ineligible; or
 - (b) is, or is likely to be, biased; or
 - (c) is likely to be thought, on reasonable grounds, to be biased.
- (3) At any time before an accused person is asked to plead at a trial by a court martial, the accused person may enter an objection to the judge advocate on the ground that the judge advocate:
- (a) is ineligible; or
 - (b) is, or is likely to be, biased; or
 - (c) is likely to be thought, on reasonable grounds, to be biased.

90 Subsection 141(4)

After “tribunal,” (first occurring) insert “other than a court martial,”.

91 Paragraph 141(5)(b)

Before “the service tribunal” insert “in the case of a court martial, the judge advocate of the court martial, or in any other case,”.

92 Subsection 141(5)

After “tribunal” (last occurring) insert “or the judge advocate”.

93 Paragraph 141(6)(a)

After “(2)”, insert “, (3)”.

94 Paragraph 141(6)(b)

Before “the service tribunal” insert “in the case of a court martial, the judge advocate of the court martial, or in any other case,”.

95 Subsection 141(6)

After “tribunal” (last occurring), insert “or the judge advocate”.

96 Subsections 141(7) and (8)

Repeal the subsections, substitute:

- (7) An application or objection under subsection (1), (2) or (3) with respect to a trial by a court martial may be notified to the judge advocate of the court martial at any time after the making of the order convening the court martial and, on the notification of such an application or objection, the judge advocate shall sit without the

members of the court martial for a hearing of that application or objection.

- (8) Where a Defence Force magistrate or a judge advocate grants an application, or allows an objection, under this section, the Defence Force magistrate or the judge advocate may refer the charge against the accused person to the Director of Military Prosecutions.

97 Section 141A

Repeal the section, substitute:

141A Amendment of charges

- (1) Where it appears to:
- (a) a summary authority, before dealing with or trying a charge or at any stage of dealing with or trying a charge; or
 - (b) the Director of Military Prosecutions, at any stage when a charge is before him or her under section 103; or
 - (c) the judge advocate of a court martial, before the court martial tries a charge or at any stage of the trial of a charge; or
 - (d) a Defence Force magistrate, before trying a charge or at any stage of trying a charge;

that, for any reason, the charge should be amended, the summary authority, Director of Military Prosecutions, judge advocate or Defence Force magistrate, as the case may be, shall make such amendment of the charge as he or she thinks necessary unless the amendment cannot be made without injustice to the accused person.

- (2) In subsection (1), *amendment* includes the addition of a charge or the substitution of a charge for another charge.

98 Subsection 144(1)(note)

Repeal the note.

99 Subsection 144(2)

Omit “the Australian Military Court”, substitute “a court martial or a Defence Force magistrate”.

100 Paragraph 144(4)(a)

Omit “132B or 132D”, substitute “132 or 135”.

101 Subsection 145(2)

Repeal the subsection, substitute:

- (2) Where a court martial or a Defence Force magistrate is satisfied that an accused person, by reason of mental impairment, is not able to understand the proceedings against him or her and accordingly is unfit to stand trial, the court martial or the Defence Force magistrate shall so find and shall direct that the person be kept in strict custody until the pleasure of the Governor-General is known.

102 Subsections 145(4) and (5)

Repeal the subsections, substitute:

- (4) Where, in a trial of a charge by a court martial or a Defence Force magistrate, the court martial or the Defence Force magistrate finds that the accused person, at the time of the act or omission the subject of the charge, was suffering from such mental impairment as not to be responsible, in accordance with law, for that act or omission, the court martial or the Defence Force magistrate shall find the accused person not guilty on the ground of mental impairment and shall acquit the person of the charge on the ground of mental impairment.
- (5) Where an accused person is acquitted by a court martial or a Defence Force magistrate of a charge on the ground of mental impairment, the court martial or the Defence Force magistrate shall record the ground of the acquittal and shall direct that the accused person be kept in strict custody until the pleasure of the Governor-General is known.

103 Section 145A

Repeal the section, substitute:

145A Notice of alibi

- (1) Where the Registrar:
 - (a) convenes a court martial to try a charge; or
 - (b) refers a charge to a Defence Force magistrate for trial;the Registrar must:
 - (c) inform the accused person of the requirements of subsections (2), (3) and (5); and

- (d) give a copy of this section to the accused person.
- (2) In a trial of a charge by a court martial or Defence Force magistrate, the accused person shall not, without the leave of the judge advocate of the court martial or the Defence Force magistrate, as the case requires, adduce evidence in support of an alibi or assert in any statement made by him or her otherwise than on oath or affirmation that he or she has an alibi unless, before the end of the period of 14 days commencing on the day of the making of the order convening the court martial or the referring of the charge to the Defence Force magistrate, as the case requires, he or she gives notice of particulars of the alibi.
- (3) In a trial of a charge by a court martial or Defence Force magistrate, the accused person shall not, without the leave of the judge advocate of the court martial or the Defence Force magistrate, as the case requires, call a person to give evidence in support of an alibi unless:
- (a) the notice given under subsection (2) includes the name and address of the person or, if the name or address of the person is not known to the accused person at the time he or she gives the notice, all information then in his or her possession that may be of material assistance in ascertaining the identity of, or in locating, the person;
 - (b) if the name or address of the person is not included in the notice—the judge advocate of the court martial or the Defence Force magistrate, as the case may be, is satisfied that, before giving notice, the accused person took, and, after giving the notice, the accused person continued to take, all reasonable steps to ascertain the name and address of the person;
 - (c) if the name or address of the person is not included in the notice, but the accused person subsequently ascertains the name or address of the person or receives information that may be of material assistance in ascertaining the identity of, or in locating, the person—the accused person forthwith gives notice of the name, address or other information, as the case may be; and
 - (d) if the accused person is notified by or on behalf of the prosecution that the person has not been found by the name, or at the address, given by the accused person—the accused person forthwith gives notice of all information that is then in

his or her possession that may be of material assistance in ascertaining the identity of, or in locating, the person and, if the accused person subsequently receives any such information, the accused person forthwith gives notice of the information.

- (4) Evidence to disprove an alibi may, subject to any direction by the judge advocate of a court martial or a Defence Force magistrate, be adduced before or after evidence is adduced in respect of the alibi.
- (5) A notice under this section shall be given in writing to the Director of Military Prosecutions and the Registrar.
- (6) In this section, *evidence in support of an alibi* means evidence tending to show that by reason only of the presence of the accused person at a particular place, or in a particular area, at a particular time the accused person was not, or was unlikely to have been, at the place where the service offence is alleged to have been committed at the time of the alleged commission of the service offence.

104 Subsection 146(1)

Omit “the Australian Military Court” (first occurring), substitute “a court martial or Defence Force magistrate”.

Note: The heading to section 146 is replaced by the heading “**Rules of evidence**”.

105 Paragraph 146(1)(a)

Omit “the Australian Military Court”, substitute “the court martial or Defence Force magistrate”.

106 Subsection 146(2)

Omit “the Australian Military Court”, substitute “a court martial or Defence Force magistrate”.

107 Subsection 147(1)

Repeal the subsection, substitute:

- (1) In addition to the matters of which judicial notice may be taken by a court under the rules of evidence referred to in section 146, a court martial or the Defence Force magistrate shall take judicial notice of all matters within the general service knowledge of the tribunal or of its members.

108 Subsection 148(2)

Omit “The Australian Military Court”, substitute “The President of a court martial or a Defence Force magistrate”.

109 Subsection 148(2)

Omit “the Court” (wherever occurring), substitute “the court martial or Defence Force magistrate”.

110 Subdivision B of Division 3 of Part VIII (heading)

Repeal the heading, substitute:

Subdivision B—Use of video links and audio links by courts martial and Defence Force Magistrates

111 Subsection 148A(1)

Repeal the subsection, substitute:

- (1) The President of a court martial or a Defence Force magistrate may, for the purposes of proceedings before the court martial or Defence Force magistrate, direct or allow testimony to be given by video link or audio link.

112 Paragraph 148A(2)(c)

Omit “Court”, substitute “President or Defence Force magistrate”.

113 Subsection 148A(3)

Omit “Court” (wherever occurring), substitute “court martial or Defence Force magistrate”.

114 Subsection 148A(4)

Omit “the Court” (first occurring), substitute “the President of a court martial or a Defence Force magistrate”.

115 Paragraph 148A(4)(b)

Omit “the Court’s own initiative”, substitute “the initiative of the President of the court martial or the Defence Force magistrate”.

116 Subsection 148B(1)

Repeal the subsection, substitute:

- (1) The President of a court martial or a Defence Force magistrate may, for the purposes of proceedings before the court martial or Defence Force magistrate, direct or allow a person:
- (a) to appear before the court martial or Defence Force magistrate; or
 - (b) to make a submission to the court martial or Defence Force magistrate;
- by way of video link or audio link.

117 Subsection 148B(2)

Omit “on the Court”.

118 Paragraph 148B(2)(b)

Omit “the Court’s own initiative”, substitute “the initiative of the President or Defence Force magistrate”.

119 Subsection 148C(1)

Omit “The Australian Military Court”, substitute “The President of a court martial or a Defence Force magistrate”.

120 Subsection 148C(1)

Omit “the Court” (first occurring), substitute “the President or Defence Force magistrate”.

121 Paragraphs 148C(1)(a) and (b)

Omit “the Court”, substitute “the court martial or Defence Force magistrate”.

122 Paragraph 148C(1)(c)

Omit “the Australian Military Court Rules”, substitute “the Court Martial and Defence Force Magistrate Rules”.

123 Paragraph 148C(1)(d)

Omit “the Court”, substitute “the court martial or Defence Force magistrate”.

124 Subsection 148C(2)

Omit “the Australian Military Court Rules”, substitute “the Court Martial and Defence Force Magistrate Rules”.

125 Subsection 148C(3)

Omit “The Court”, substitute “The President of a court martial or the Defence Force magistrate”.

126 Subsection 148C(3)

Omit “the Court” (first occurring), substitute “the President or Defence Force magistrate”.

127 Paragraphs 148C(3)(a) and (b)

Omit “the Court”, substitute “the court martial or the Defence Force magistrate”.

128 Paragraph 148C(3)(c)

Omit “the Australian Military Court Rules”, substitute “the Court Martial and Defence Force Magistrate Rules”.

129 Paragraph 148C(3)(d)

Omit “the Court”, substitute “the court martial or Defence Force magistrate”.

130 Subsection 148C(4)

Omit “the Australian Military Court Rules”, substitute “the Court Martial and Defence Force Magistrate Rules”.

131 Subsection 148C(5)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate conducting the proceedings”.

132 Section 148D

Omit “the Australian Military Court”, substitute “the President or Defence Force magistrate”.

133 Section 148D

Omit “the Court” (wherever occurring), substitute “the court martial or the Defence Force magistrate”.

134 Section 148E

Omit “the Australian Military Court” (wherever occurring), substitute “the court martial or the Defence Force magistrate”.

135 After section 148E

Insert:

146EA Powers conferred on President

A President must seek the advice of a judge advocate before exercising a power conferred upon the President by this Subdivision.

136 Section 149

Omit “Chief Military Judge”, substitute “Judge Advocate General”.

137 Section 149A

Omit “Chief Military Judge”, substitute “Judge Advocate General”.

Note: The heading to section 149A is altered by omitting “**Australian Military Court Rules**” and substituting “**Court Martial and Defence Force Magistrate Rules**”.

138 Section 149A

Omit “Australian Military Court Rules”, substitute “Court Martial and Defence Force Magistrate Rules”.

139 Paragraph 149A(a)

Omit “Court”(first occurring), substitute “court martial or Defence Force magistrate”.

140 Subparagraph 149A(a)(iii)

Repeal the subparagraph.

141 Subparagraphs 149A(a)(vii), (viii), (ix) and (x)

Omit “Court”, substitute “court martial or Defence Force magistrate”.

142 Subparagraph 149A(a)(xa)

Repeal the subparagraph.

143 Subparagraphs 149A(a)(xi), (xii) and (xiii)

Omit “Court”, substitute “court martial or Defence Force magistrate”.

144 Paragraph 149A(b)

Repeal the paragraph.

145 Part VIIIA (heading)

Repeal the heading, substitute:

Part VIIIA—Review of proceedings of service tribunal

146 Division 1 of Part VIIIA (heading)

Repeal the heading, substitute:

Division 1—Appointment of reviewing authorities

147 Sections 150 and 150A

Repeal the sections, substitute:

150 Appointment of reviewing authorities

The Chief of the Defence Force or a service chief may, by instrument in writing, appoint an officer, or each officer included in a class of officers, to be a reviewing authority for the purpose of reviewing proceedings of service tribunals (whether all service tribunals or service tribunals of a specified kind) and exercising any other powers and functions that are conferred on reviewing authorities by this Act or the regulations.

150A Meaning of *competent reviewing authority*

A reviewing authority is a *competent reviewing authority* for the purposes of reviewing the proceedings of a service tribunal that relate to a particular charge 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.

148 Sections 151, 152 and 153

Repeal the sections, substitute:

152 Automatic review by reviewing authority

- (1) As soon as practicable after a service tribunal convicts a person of a service offence or gives a direction in relation to a person under

subsection 145(2) or (5), the service tribunal shall transmit the record of the proceedings to a competent reviewing authority.

- (2) A reviewing authority shall, as soon as practicable after receiving a record of proceedings under subsection (1), review the proceedings in accordance with this Part.
- (3) After reviewing the proceedings, the reviewing authority must give the person who was convicted of the service offence, or who was the person in relation to whom a direction under subsection 145(2) or (5) was given, and the service tribunal, written notice of the results of the review.
- (4) The reviewing authority must complete the review:
 - (a) within 30 days after receiving the record referred to in subsection (1); or
 - (b) if this is not possible due to the exigencies of service—as soon as practicable after the end of that period.

153 Review on petition to reviewing authority

- (1) Where a service tribunal convicts a person of a service offence or gives a direction in relation to a person under subsection 145(2) or (5), the person may lodge with a competent reviewing authority a petition for a review of the proceedings concerned.
- (1A) The person must lodge the petition within 30 days after the person is given notice of the results of the review under subsection 152(3) unless the reviewing authority extends the period during which the petition may be lodged.
- (1B) If the reviewing authority extends the period during which the petition may be lodged, the petition must be lodged within that extended period.
- (2) Where:
 - (a) a person appeals, or applies for leave to appeal, to the Defence Force Discipline Appeal Tribunal; and
 - (b) the Tribunal dismisses the appeal or the application for leave to appeal;the person may, within 60 days after that dismissal or such further period as a competent reviewing authority allows, lodge with the reviewing authority a petition for a review of the proceedings of

the service tribunal the subject of that appeal or application for leave to appeal.

- (3) A petition under subsection (1) or (2) shall set out the grounds on which the petitioner relies for the exercise of the power of review in accordance with this Part.
- (4) On receipt of a petition under subsection (1) or (2), a reviewing authority shall, as soon as practicable and, in any event, within 30 days after the receipt:
 - (a) review the proceedings in accordance with this Part having regard to the grounds set out in the petition; and
 - (b) notify the petitioner, in writing, of the result of that review.
- (5) Notwithstanding anything in subsection (4), a reviewing authority shall not, in a review of proceedings referred to in subsection (2), exercise any of his or her powers under Division 3 or 4 other than his or her powers under section 162.

149 Sections 153A, 154 and 155

Repeal the sections, substitute:

154 Report to be obtained before commencement of review

- (1) A reviewing authority shall not commence a review without first obtaining a report on the proceedings from:
 - (a) in the case of a conviction, or a direction given under subsection 145(2) or (5), by a court martial or Defence Force magistrate—a legal officer appointed, by instrument in writing, for the purposes of this section by the Chief of the Defence Force or a service chief on the recommendation of the Judge Advocate General; or
 - (b) in any other case—a legal officer.
- (1A) An appointment under paragraph (1)(a) is for the period, not exceeding 3 years, specified in the instrument of appointment.
- (1B) A legal officer appointed under paragraph (1)(a) may be reappointed for a further period or periods.
- (2) Subject to subsection (4), a reviewing authority, in making a review, is bound by any opinion on a question of law set out in a report obtained under subsection (1).

- (3) A reviewing authority may refer a report obtained under subsection (1) to the Judge Advocate General or, if the Judge Advocate General so directs, to a Deputy Judge Advocate General.
- (4) On a reference under subsection (3) of a report, the Judge Advocate General or the Deputy Judge Advocate General may dissent from any opinion on a question of law set out in the report and, if he or she does so, he or she shall furnish to the reviewing authority, in writing, his or her own opinion on that question, which opinion is binding on the reviewing authority.

155 Further review

- (1) A review by a reviewing authority does not prevent a further review of the proceedings concerned by the Chief of the Defence Force or a service chief if it appears to the Chief of the Defence Force or the service chief that there are sufficient grounds for a further review.
- (2) Subject to subsection (3), the Chief of the Defence Force or a service chief shall conduct a further review under subsection (1) in accordance with this Part and, for that purpose, the Chief of the Defence Force or the service chief shall be deemed to be a reviewing authority.
- (3) The Chief of the Defence Force or a service chief shall not commence a review without first obtaining a report on the proceedings from the Judge Advocate General or, if the Judge Advocate General so directs, from a Deputy Judge Advocate General.
- (4) The Chief of the Defence Force or a service chief, in making a review, is bound by any opinion on a question of law set out in a report obtained under subsection (3).

156 Effect on reviews of appeals to Defence Force Discipline Appeal Tribunal

- (1) Subject to subsection (2), where, at any time before or after a reviewing authority commences to review proceedings of a service tribunal that have resulted in a conviction or a prescribed acquittal, the convicted person or the prescribed acquitted person, as the case may be, lodges an appeal, or an application for leave to appeal, to

the Defence Force Discipline Appeal Tribunal, the reviewing authority shall not exercise any of his or her powers under Division 3 or 4 in relation to that review.

- (2) Where the Defence Force Discipline Appeal Tribunal dismisses the appeal, or the application for leave to appeal, the reviewing authority may proceed with a review, not being a review under section 153, but shall not exercise any of his or her powers under Division 3 or 4 other than his or her powers under section 162.
- (3) In this section, *prescribed acquitted person* means a person who has been acquitted of a service offence by a court martial or a Defence Force magistrate on the ground of unsoundness of mind.

150 Division 3 of Part VIII A

Repeal the Division, substitute:

Division 3—Action on review of proceedings that have resulted in a conviction

157 Interpretation

In this Division, *review* means a review under this Part of proceedings of a service tribunal that have resulted in a conviction.

158 Quashing of conviction etc.

- (1) Subject to subsection (5), where in a review it appears to the reviewing authority:
 - (a) that the conviction is unreasonable, or cannot be supported, having regard to the evidence;
 - (b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred;
 - (c) that there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or
 - (d) that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory;the reviewing authority shall quash the conviction.

- (2) Subject to subsection (5), where in a review it appears to the reviewing authority that there is evidence that:
- (a) was not reasonably available during the proceedings;
 - (b) is likely to be credible; and
 - (c) would have been admissible in the proceedings;
- the reviewing authority shall receive and consider that evidence and, if the reviewing authority considers that the conviction cannot be supported having regard to that evidence, the reviewing authority shall quash the conviction.
- (3) Subject to subsection (5), where in a review the reviewing authority is satisfied that, at the time of the act or omission the subject of the charge, the convicted person was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission, the reviewing authority shall:
- (a) quash the conviction;
 - (b) substitute for the conviction so quashed an acquittal on the ground of unsoundness of mind; and
 - (c) direct that the person be kept in strict custody until the pleasure of the Governor-General is known.
- (4) Where in a review it appears to the reviewing authority that the court martial or the Defence Force magistrate should have found that the convicted person, by reason of unsoundness of mind, was not able to understand the proceedings against him or her and accordingly was unfit to stand trial, the reviewing authority shall quash the conviction and direct that the person be kept in strict custody until the pleasure of the Governor-General is known.
- (5) A reviewing authority shall not quash a conviction under subsection (3) or (4) if there are grounds for quashing the conviction under subsection (1) or (2).

159 Person deemed to have been acquitted

For the purposes of this Act, where a reviewing authority quashes a conviction of a person of a service offence and does not order a new trial of the person for the offence, the person shall be deemed to have been acquitted of the offence.

160 New trial

- (1) Where in a review the reviewing authority:
 - (a) quashes a conviction that was recorded within the preceding 6 months; and
 - (b) considers that, in the interests of justice, the person who was convicted should be tried again for the service offence of which the person was convicted;the reviewing authority may order a new trial of the person for that offence.
- (2) An order under subsection (1) for the new trial of a person lapses unless the new trial commences within a period of 6 months commencing on the day on which the order is made.
- (3) Where a reviewing authority makes an order under subsection (1) for a new trial of a person, the reviewing authority may make such further orders for the custody of the person pending the new trial as the authority thinks appropriate.

161 Substitution of conviction of alternative offence

- (1) Where in a review the reviewing authority quashes the conviction of a person of a service offence (in this section referred to as *the original offence*) but considers:
 - (a) that the service tribunal could in the proceedings have found the person guilty of another offence, being:
 - (i) a service offence that is an alternative offence, within the meaning of section 142, in relation to the original offence; or
 - (ii) a service offence with which the person was charged in the alternative and in respect of which the service tribunal did not record a finding; and
 - (b) that the service tribunal, by reason of the finding of the service tribunal finding that the person was guilty of the original offence, must have been satisfied beyond reasonable doubt of facts that prove that the person was guilty of the other offence;the reviewing authority may substitute for the conviction of the original offence a conviction of the other offence.

- (2) Where under subsection (1) a reviewing authority substitutes for the conviction of the original offence a conviction of another service offence, the reviewing authority may take such action in relation to the convicted person as could have been taken under Part IV by the service tribunal that convicted the convicted person of the original offence if that service tribunal had convicted him or her of that other service offence, but the reviewing authority:
- (a) shall not impose a punishment for that other service offence or make a reparation order with respect to that other service offence unless a punishment was imposed for the original offence or a reparation order was made with respect to the original offence, as the case may be; and
 - (b) shall not impose a punishment for that other service offence that is more severe than the punishment that was imposed for the original offence and shall not make a reparation order with respect to that other service offence that is for an amount that exceeds the amount of the reparation order that was made with respect to the original offence.

162 Review of action under Part IV

- (1) Where in a review it appears to the reviewing authority that the action taken by a service tribunal under Part IV (whether by the imposition of a punishment or the making of an order or both) in relation to a convicted person:
- (a) is wrong in law; or
 - (b) is excessive;
- the reviewing authority shall quash the punishment or revoke the order or both quash the punishment and revoke the order, as the case may be.
- (2) Where:
- (a) a court martial or a Defence Force magistrate has taken a service offence into consideration in relation to a convicted person under section 77 and the conviction of the convicted person is quashed; or
 - (b) a reviewing authority considers that a court martial or a Defence Force magistrate, in purporting to take a service offence into consideration in relation to a convicted person under section 77, exceeded the powers conferred by that section;

the reviewing authority shall annul the taking into consideration of that service offence and, thereupon, that service offence shall be deemed not to have been taken into consideration by the court martial or Defence Force magistrate.

- (3) Where in a review it appears to the reviewing authority that a summary authority has imposed an elective punishment on a convicted person otherwise than in accordance with section 131, the reviewing authority shall quash the punishment.
- (5) Where a reviewing authority quashes a punishment or revokes an order under subsection (1) or (3) in relation to a convicted person, the reviewing authority may take such action in relation to the convicted person as could have been taken under Part IV by the service tribunal that convicted the convicted person of the service offence of which he or she was convicted, but the reviewing authority shall not:
 - (a) impose a punishment that is more severe than the punishment that was imposed by the service tribunal;
 - (b) if the punishment imposed by the service tribunal was a custodial punishment—impose a punishment other than a custodial punishment;
 - (c) if the punishment imposed by the service tribunal was not a custodial punishment—impose a custodial punishment; or
 - (d) if the service tribunal made a reparation order—make a reparation order for an amount that exceeds the amount of the reparation order that was made by the service tribunal.
- (6) Where in a review it appears to the reviewing authority that a service tribunal has imposed a punishment of imprisonment on a convicted person and has not fixed a non-parole period during which the person is not to be eligible to be released on parole under the provisions of the *Crimes Act 1914* in their application, by virtue of subsection 72(1) of this Act, to the service tribunal, the reviewing authority may fix such a non-parole period.
- (7) Section 72 applies in relation to the fixing of a non-parole period under subsection (6) as if the reviewing authority were the service tribunal concerned.
- (8) Where in a review it appears to the reviewing authority that a service tribunal that has imposed a punishment of detention on a convicted person should have made an order under subsection

78(1) suspending that punishment, the reviewing authority may, if he or she thinks fit, make an order suspending that punishment or such part of that punishment as has not been served.

- (9) Where a reviewing authority makes an order suspending a punishment of detention or such part of a punishment of detention as has not been served, the punishment, or that part of the punishment, does not begin, and shall not be put into execution, while the suspension is in force.

Division 4—Action on review of proceedings that have resulted in an acquittal on the ground of unsoundness of mind

163 Interpretation

In this Division, *review* means a review under this Part of proceedings before a court martial or a Defence Force magistrate that have resulted in a prescribed acquittal.

164 Quashing of prescribed acquittal etc.

- (1) Subject to subsection (4), where in a review it appears to the reviewing authority:
- (a) that the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;
 - (b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;
 - (c) that there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or
 - (d) that, in all the circumstances of the case, the prescribed acquittal is unsafe or unsatisfactory;
- the reviewing authority shall quash the prescribed acquittal.
- (2) Subject to subsection (4), where in a review it appears to the reviewing authority that there is evidence that:
- (a) was not reasonably available during the proceedings;
 - (b) is likely to be credible; and
 - (c) would have been admissible in the proceedings;

the reviewing authority shall receive and consider that evidence and, if the reviewing authority considers that the prescribed acquittal cannot be supported having regard to that evidence, the reviewing authority shall quash the prescribed acquittal.

- (3) Where in a review it appears to the reviewing authority that the service tribunal should have found that the person, by reason of unsoundness of mind, was unable to understand the proceedings against him or her and accordingly was unfit to stand trial, the reviewing authority shall quash the prescribed acquittal and direct that the person be kept in strict custody until the pleasure of the Governor-General is known.
- (4) A reviewing authority shall not quash a prescribed acquittal under subsection (1) or (2) if there are grounds for quashing the prescribed acquittal under subsection (3).

165 Person deemed to have been acquitted

For the purposes of this Act, where a reviewing authority quashes a prescribed acquittal of a person of a service offence and does not give a direction under subsection 164(3) with respect to the person or order a new trial of the person for the offence, the person shall be deemed to have been acquitted of the offence without qualification.

166 New trial

- (1) Where in a review the reviewing authority:
 - (a) quashes a prescribed acquittal that was recorded within the preceding 6 months; and
 - (b) considers that, in the interests of justice, the person who was acquitted should be tried again for the service offence of which the person was acquitted;the reviewing authority may order a new trial of the person for that offence.
- (2) An order under subsection (1) lapses unless the new trial commences within a period of 6 months commencing on the day on which the order is made.
- (3) Where a reviewing authority makes an order under subsection (1) for a new trial of a person, the reviewing authority may make such

further orders for the custody of the person pending the new trial as the authority thinks appropriate.

Division 5—Action on review of certain punishments and orders that are subject to approval by reviewing authority

167 Interpretation

In this Division, *review* means a review of a punishment specified in section 172 or of an order specified in that section.

168 Approved punishment or order to take effect as determined

Where in a review the reviewing authority approves a punishment or an order, the reviewing authority shall determine when the punishment or order is to take effect.

169 Punishments or orders not approved to be quashed or revoked

- (1) Where in a review the reviewing authority does not approve a punishment or an order, the reviewing authority shall quash the punishment or revoke the order, as the case may be.
- (2) Where a reviewing authority quashes a punishment or revokes an order under subsection (1) in relation to a convicted person, the reviewing authority may take such action in relation to the convicted person as could have been taken under Part IV by the service tribunal that convicted the convicted person of the service offence of which he or she was convicted, but the reviewing authority shall not:
 - (a) impose a punishment that is more severe than the punishment that was imposed by the service tribunal;
 - (b) if the punishment imposed by the service tribunal was a custodial punishment—impose a punishment other than a custodial punishment;
 - (c) if the punishment imposed by the service tribunal was not a custodial punishment—impose a custodial punishment; or
 - (d) if the service tribunal made a reparation order—make a reparation order for an amount that exceeds the amount of the reparation order that was made by the service tribunal.

151 Part IX

Repeal the Part.

152 Subsection 171(1B)

Repeal the subsection.

153 Sections 172, 172A and 173

Repeal the sections, substitute:

172 Punishments and orders subject to approval

- (1) The following punishments imposed by a service tribunal do not take effect unless approved by a reviewing authority:
 - (a) imprisonment for life;
 - (b) imprisonment for a specific period;
 - (c) dismissal from the Defence Force;
 - (d) segregated confinement for a period exceeding 3 days;
 - (e) confinement to cell for a period exceeding 3 days;
 - (f) extra drill for a period exceeding 3 days;
 - (g) restriction of custodial privileges for a period exceeding 7 days.
- (2) The following punishments when imposed by a summary authority do not take effect unless approved by a reviewing authority:
 - (a) detention;
 - (b) reduction in rank;
 - (c) forfeiture of seniority;
 - (d) a fine imposed on a member of the Defence Force that exceeds the amount of his or her pay for 14 days.
- (3) A restitution order or a reparation order imposed by a service tribunal does not take effect unless approved by a reviewing authority.
- (3A) A person on whom a punishment of imprisonment for life or imprisonment for a specific period is imposed may be kept in custody pending approval under subsection (1) of the punishment and, if the punishment is approved, any day on which the person was so kept in custody counts as a day of that imprisonment.

- (4) A person on whom a punishment of dismissal from the Defence Force is imposed may be kept in custody pending approval under subsection (1) of the punishment.
- (5) A person on whom a punishment of detention is imposed by a summary authority may be kept in custody pending approval under subsection (2) of the punishment and, if the punishment is approved, any day on which the person was so kept in custody counts as a day of that detention.

173 Suspension of operation of restitution orders and reparation orders

- (1) Subject to subsection (2), the operation of a restitution order or a reparation order, being a restitution order or a reparation order made by a court martial or a Defence Force magistrate is suspended:
 - (a) until the expiration of the period during which, under the *Defence Force Discipline Appeals Act 1955*, an application for leave to appeal, or an appeal, against the conviction in relation to which the order was made may be lodged, but not in any case beyond the time specified in paragraph (b); and
 - (b) if an application for leave to appeal, or an appeal, against the conviction is duly lodged—until the application is finally dismissed or is withdrawn or the appeal is finally determined or abandoned.
- (2) Where a reviewing authority is satisfied that the title to the property in relation to which a restitution order is made is not in dispute, the reviewing authority may direct that subsection (1) shall not apply in relation to the order.
- (3) Where the operation of a restitution order or a reparation order is suspended by virtue of subsection (1), the order does not take effect if the conviction in relation to which the order is made is quashed on appeal.

154 Section 176

Repeal the section, substitute:

176 Stay of execution of punishment

Where a service tribunal has imposed a punishment on a convicted person and the convicted person:

- (a) lodges a petition under section 153 with respect to the conviction or punishment; or
 - (b) notifies a reviewing authority that he or she has appealed, or applied for leave to appeal, under the *Defence Force Discipline Appeals Act 1955* against the conviction;
- the reviewing authority may order that the execution of the punishment shall be stayed in whole or in part pending the determination of the appeal or petition.

155 Part XI (heading)

Repeal the heading, substitute:

Part XI—Judge Advocate General, Deputy Judge Advocates General, Chief Judge Advocate, and Registrar of Military Justice

156 Divisions 2 and 2A of Part XI

Repeal the divisions, substitute:

Division 2—Chief Judge Advocate

188A Chief Judge Advocate

- (1) The Judge Advocate General may, by instrument in writing, appoint an officer to be the Chief Judge Advocate.
- (2) The appointment is for the period, not exceeding 5 years, specified in the instrument of appointment.
- (3) A Chief Judge Advocate may be reappointed for a further period or periods, but must not hold office for a total of more than 10 years.

188B Role of the Chief Judge Advocate

- (1) The Chief Judge Advocate is to provide administrative assistance to the Judge Advocate General.
-

- (2) Subject to subsection (3), the Judge Advocate General may, by signed instrument, delegate all or any of his or her powers to the Chief Judge Advocate.
- (3) The Judge Advocate General must not delegate his or her powers under any of the following provisions to the Chief Judge Advocate:
 - (a) subsection 127(1);
 - (b) subsection 154(4);
 - (c) subsection 196(2).
- (4) The Chief Judge Advocate is, in the exercise of a delegated power or function, subject to the direction and control of the Judge Advocate General.

188C Eligibility requirements

A person is not eligible to be the Chief Judge Advocate unless the person is:

- (a) an officer holding a rank not lower than the naval rank of commodore or the rank of brigadier or air commodore; and
- (b) a member of the judge advocates' panel.

188D Resignation

The Chief Judge Advocate may resign his or her office by giving to the Judge Advocate General a signed notice of resignation.

188E Remuneration

- (1) The Chief Judge Advocate is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, he or she is to be paid the remuneration that is prescribed.
- (2) The Chief Judge Advocate is to be paid the allowances that are prescribed.
- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

157 Division 3 of Part XI (heading)

Repeal the heading, substitute:

Division 3—The Registrar of Military Justice

158 Section 188F

Omit “the Australian Military Court”, substitute “Military Justice”.

Note: The heading to section 188F is altered by omitting “the Australian Military Court” and substituting “Military Justice”.

159 Section 188FA(1)

Repeal the subsection, substitute:

- (1) The function of the Registrar is to assist the Judge Advocate General and the Chief Judge Advocate by providing administrative and management services in connection with charges and trials under this Act.

160 Subsection 188FF(2)

Repeal the subsection, substitute:

- (2) An oath or affirmation under this section is to be made before:
 - (a) the Judge Advocate General; or
 - (b) a Deputy Judge Advocate General; or
 - (c) the Chief Judge Advocate.

161 Paragraph 188GA(1)(a)

Omit “the Australian Military Court”, substitute “a court martial or a Defence Force magistrate”.

162 Section 188GB

Omit “Australian Military Court”, substitute “a court martial or a Defence Force magistrate”.

163 Subsection 188GJ(2)

Repeal the subsection, substitute:

- (2) An oath or affirmation under this section is to be made before:
 - (a) the Judge Advocate General; or
 - (b) a Deputy Judge Advocate General; or
 - (c) the Chief Judge Advocate.

164 Paragraph 191(1)(b)

Omit “132B or 132D”, substitute “132 or 135”.

165 Paragraph 191(1)(d)

Omit “; or”, substitute “.”.

166 Paragraph 191(1)(e)

Repeal the paragraph.

167 Subsection 193(1)

Repeal the subsection, substitute:

- (1) A member of a court martial, a judge advocate, a Defence Force magistrate, a summary authority or a reviewing authority has, in the performance of his or her duties as such a member, judge advocate, magistrate or authority, as the case may be, the same protection and immunity as a Justice of the High Court.

Note: The heading to section 193 is altered by omitting “**military juries**” and substituting “**courts martial**”.

168 Subsection 194(1)

After “145”, insert “, 158”.

169 Subsections 195(1) and (2)

Omit “the Australian Military Court”, substitute “a court martial or a Defence Force magistrate”.

170 After section 195

Insert:

196 Judge advocates’ panel

- (1) There shall be a panel of officers to be known as the judge advocates’ panel.
- (2) The Chief of the Defence Force or a service chief may, by writing signed by the Chief of the Defence Force or the service chief, appoint officers nominated by the Judge Advocate General to be members of the judge advocates’ panel.

Schedule 1 Amendments relating to the system of military justice

Part 1 Main amendments

- (2A) An appointment under subsection (2) is for the period specified in the instrument of appointment. However, if the specified period exceeds 3 years, the appointment is for a period of 3 years.
- (2B) An officer appointed under subsection (2) may be reappointed for a further period or periods.
- (3) An officer is not eligible for appointment to the judge advocates' panel unless the officer is enrolled as a legal practitioner and has been so enrolled for not less than 5 years.
- (4) The Judge Advocate General shall require an officer appointed under subsection (2) to make and subscribe an oath or affirmation in accordance with the form in Schedule 5.
- (5) An oath or affirmation under subsection (4) shall be made before the Judge Advocate General or an officer authorized, in writing, by the Judge Advocate General for the purpose.

171 Paragraph 196A(1)(a)

Omit “the Procedural Rules and the Summary Authority Rules”, substitute “the rules of procedure”.

172 Subsection 196A(5)

Repeal the subsection.

173 Section 196C

Repeal the section.

174 Schedule 2

Repeal the Schedule, substitute:

**Schedule 2—Punishments that may be
imposed by a court martial or a
Defence Force magistrate**

Section 67

1. Subject to clause 2, a court martial or a Defence Force magistrate may impose punishments on convicted persons in accordance with the table in this Schedule.
2. A restricted court martial or a Defence Force magistrate shall not impose any of the following punishments:
 - (a) imprisonment for life;
 - (b) imprisonment for a period exceeding 6 months;
 - (c) detention for a period exceeding 6 months.

TABLE OF PUNISHMENTS

Column 1	Column 2
Convicted Person	Punishment
Officer	Imprisonment Dismissal from the Defence Force Reduction in rank Forfeiture of service for the purposes of promotion Forfeiture of seniority Fine of an amount not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Reprimand
Member of the Defence Force who is not an officer	Imprisonment Dismissal from the Defence Force Detention for a period not exceeding 2 years Reduction in rank Forfeiture of seniority Fine not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Reprimand
Person who is not a member of the Defence Force	Imprisonment Fine of an amount not exceeding \$500.

175 After Schedule 4

Insert:

Schedule 5

Section 196

OATH

I, *A.B.*, do swear that I will well and truly serve Her Majesty in the office of judge advocate and I will do right to all manner of people according to law, without fear or favour, affection or ill-will: So help me God!

AFFIRMATION

I, *A.B.*, do solemnly and sincerely promise and declare that I will well and truly serve Her Majesty in the office of judge advocate and that I will do right to all manner of people according to law, without fear or favour, affection or ill-will.

176 Schedule 7

Repeal the Schedule.

Part 2—Consequential amendments of other Acts

Defence Act 1903

177 Paragraph 89(1)(a)

Repeal the paragraph, substitute:

- (a) insult a member of a court martial, a judge advocate, a Defence Force magistrate or a summary authority in or in relation to the exercise of his or her powers or functions as such a member, judge advocate, magistrate or authority, as the case may be;

178 Paragraph 89(1)(d)

Repeal the paragraph, substitute:

- (d) do any other act or thing that would, if a service tribunal were a court of record, constitute a contempt of that court.

179 Subsection 89(2)

Repeal the subsection, substitute:

- (2) In this section, *court martial*, *judge advocate*, *Defence Force magistrate* and *summary authority* have the same respective meanings as they have in the *Defence Force Discipline Act 1982*.

180 Subsections 116C(2) and (2A)

Repeal the subsections, substitute:

- (2) Whenever a part of the Defence Force and a part of the forces of another country to which this subsection applies are acting in combination, either within or beyond the territorial limits of Australia, an officer of the forces of that other country may be appointed by the Governor-General, by order in writing, to command the combined force, or any part of the combined force, and an officer so appointed:
 - (a) has, subject to such restrictions and limitations as are specified by the Chief of the Defence Force by order in writing, over members of the Defence Force serving in that combined force or part of that force, the same powers of

command and discipline, including the power to impose punishments; and

- (b) may be invested by the Governor-General, by order in writing, with the same power to convene, and confirm the findings and sentences of, courts-martial;

as if he or she were an officer of the Defence Force holding that appointment and the rank in that Force corresponding with the rank that he or she holds in the force to which he or she belongs.

181 Saving provision

An appointment by the Governor-General that was in force, immediately before the commencement of item 180, under subsection 116C(2) of the *Defence Act 1903* as then in force, continues to have effect after that commencement as if it were an appointment under subsection 116C(2) of that Act as in force after that commencement.

Defence Force Discipline Appeals Act 1955

182 Title

Omit “the Australian Military Court”, substitute “**courts martial and Defence Force magistrates**”.

183 Section 4

Before “In”, insert “(1)”.

184 Section 4

Insert:

appellant means a person who appeals, or applies for leave to appeal under this Act to the Tribunal.

185 Section 4 (definition of *Australian Military Court*)

Repeal the definition.

186 Section 4 (definition of *convicted person*)

Omit “the Australian Military Court (other than under Part IX of the *Defence Force Discipline Act 1982*)”, substitute “a court martial or a Defence Force magistrate”.

187 Section 4 (definition of *conviction*)

Omit “the Australian Military Court (other than under Part IX of the *Defence Force Discipline Act 1982*)”, substitute “a court martial or a Defence Force magistrate”.

188 Section 4

Insert:

court martial means a court martial convened under the Defence Force Discipline Act 1982.

189 Section 4

Insert:

Defence Force magistrate means a Defence Force magistrate appointed under section 127 of the *Defence Force Discipline Act 1982*.

190 Section 4 (definition of *Director of Military Prosecutions*)

Repeal the definition.

191 Section 4 (definition of *Military Judge*)

Repeal the definition.

192 Section 4 (definition of *offender appellant*)

Repeal the definition.

193 Section 4 (definition of *prescribed acquittal*)

Omit “the Australian Military Court (other than under Part IX of the *Defence Force Discipline Act 1982*)”, substitute “a court martial or a Defence Force magistrate”.

194 Section 4 (definition of *prescribed acquitted person*)

Omit “the Australian Military Court (other than under Part IX of the *Defence Force Discipline Act 1982*)”, substitute “a court martial or a Defence Force magistrate”.

195 Section 4 (definition of *punishment*)

Repeal the definition.

196 Section 4

Insert:

review and *reviewing authority* have the same respective meanings as they have in the *Defence Force Discipline Act 1982*.

197 Section 4

Insert:

service tribunal has the same meaning as it has in the *Defence Force Discipline Act 1982*.

198 At the end of section 4

Add:

- (2) For the purposes of this Act, where, in a review under Part VIIIA of the *Defence Force Discipline Act 1982* of the proceedings before a court martial or a Defence Force magistrate, the reviewing authority:
- (a) substitutes for the conviction of a service offence a prescribed acquittal of that service offence or a conviction of another service offence; or
 - (b) takes such action in relation to the convicted person as could have been taken under Part IV of that Act by the court martial or the Defence Force magistrate;
- the conviction or prescribed acquittal so substituted or the action so taken, as the case may be, shall be deemed to have been made or taken, as the case may be, by the court martial or the Defence Force magistrate.

199 Subsection 15(2)

Repeal the subsection, substitute:

- (2) Where an appeal, or a matter preliminary or incidental to an appeal, is to be heard in a place outside Australia, the President may, if he or she thinks fit, direct that paragraph (b) of the last preceding subsection shall not apply in relation to the appeal or matter.

200 Section 16

Repeal the section, substitute:

16 Member ceasing to sit on an appeal

(1) Where:

(a) the hearing of an appeal, or of a matter preliminary or incidental to an appeal, has been commenced before the Tribunal but, before the appeal or matter has been finally determined, a member sitting on the hearing has ceased to be a member or, for any reason, has ceased to sit on the hearing; and

(b) the remaining members sitting on the hearing are not less than 3 in number and, except in the case of an appeal or matter in relation to which the President has given a direction under subsection (2) of the last preceding section, include the President, the Deputy President or a member who is qualified to be appointed as President;

the Tribunal constituted by the remaining members may, if the hearing has not been completed, complete the hearing and, if a majority of those members concur in the decision, but not otherwise, determine the appeal or matter.

(2) If, for any reason, the Tribunal constituted by the remaining members does not complete the hearing or determine the appeal or matter, the Tribunal constituted in accordance with the last preceding section shall, subject to the next succeeding section, hear and determine the appeal or matter and, for that purpose, may have regard to the evidence given, the arguments adduced and the reasons for any decision given during the previous hearing.

201 Paragraphs 17(1)(c), (d) and (f)

Omit “offender”.

202 Paragraph 17(1)(f)

Omit “or (3A)”.

203 Part III (heading)

Repeal the heading, substitute:

Part III—Appeals to the Tribunal

204 Division 1A of Part III

Repeal the Division.

205 Subsection 20(2)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate”.

206 Subsections 20(3) and (4)

Repeal the subsections.

207 Subsection 21(2)

Repeal the subsection, substitute:

- (2) In subsection (1), *appropriate period*, in relation to proceedings before a service tribunal that have resulted in a conviction or a prescribed acquittal, means the period of 30 days commencing immediately after:
- (a) the day on which the results of a review under section 152 of the *Defence Force Discipline Act 1982* of the proceedings are notified to the convicted person or the prescribed acquitted person; or
 - (b) the last day of the period of 30 days after the conviction or prescribed acquittal;
- whichever is earlier.

208 Section 22

Repeal the section, substitute:

22 Frivolous or vexatious appeals

Where:

- (a) the Tribunal dismisses an appeal against a conviction or an application for leave to appeal against a conviction; and
- (b) it appears to the Tribunal that the appeal or application was frivolous or vexatious;

the Tribunal may order that any punishment of imprisonment or detention imposed on the appellant or applicant in the proceedings in relation to which the appeal or application was brought shall be taken to commence on the day on which the Tribunal dismisses the appeal or application.

209 Subsection 23(1)

Omit “against a conviction or prescribed acquittal”.

210 Paragraph 23(1)(c)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate”.

211 Subsection 23(2)

Omit “against a conviction or prescribed acquittal”.

212 Paragraphs 23(2)(a) and (c)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate”.

213 Subsection 23(3)

Omit “offender”.

214 Subsection 23(4)

Omit “against a conviction or prescribed acquittal”.

215 Subsection 23(4)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate”.

216 Subsection 23(4)

Omit “offender” (wherever occurring).

217 Paragraph 26(1)(a)

Omit “the Military Judge or the military jury”, substitute “the court martial or the Defence Force magistrate”.

218 Subparagraph 26(1)(a)(ii)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate”.

219 Paragraph 26(1)(b)

Omit “the Military Judge or the military jury, by reason of its, his or her”, substitute “the court martial or the Defence Force magistrate, by reason of its or his or her”.

220 Subsection 26(2)

Omit “the Australian Military Court if the Court had convicted the person”, substitute “court martial or the Defence Force magistrate that convicted the convicted person of the original offence if the court martial or Defence Force magistrate had convicted him or her”.

221 Subsection 26(4)

Repeal the subsection.

222 Section 27

Repeal the section.

223 Paragraph 31(1)(b)

Omit “the Australian Military Court”, substitute “the court martial or the Defence Force magistrate”.

224 Paragraph 31(1)(c)

Omit “offender” (wherever occurring).

225 Paragraph 31(1)(e)

Omit “a question of law referred to the Tribunal under section 19A or”.

226 Subsection 35(1)

Omit “offender”.

227 Section 36

Repeal the section, substitute:

36 Tribunal may obtain reports to assist in determination of appeals

Where, upon the hearing of an appeal under this Act against a conviction or a prescribed acquittal by a court martial or a Defence Force magistrate, the Tribunal thinks it necessary or expedient in the interests of justice to do so, the Tribunal may direct such steps to be taken as are necessary to obtain from the person who was the judge advocate of the court martial or from the Defence Force magistrate, a report giving his or her opinion upon the case, or upon a point arising in the case, or containing a statement as to any facts the ascertainment of which appears to the Tribunal to be material for the purpose of the determination of the appeal.

228 Subsection 37(1)

Omit “by an offender appellant”.

229 Subsection 37(1)

Omit “offender” (second and third occurring).

230 Subsection 37(1A)

Repeal the subsection.

231 Subsection 37(2)

Omit “offender” (wherever occurring).

232 Subsection 37(2)

Omit “or (1A)”.

233 Subsection 37(3)

Omit “an appeal by an offender appellant or an application for leave to appeal by an offender appellant, it may, if it thinks fit, order the offender appellant”, substitute “an appeal or an application for leave to appeal, it may, if it thinks fit, order the appellant”.

234 Subsection 39(1)

Omit “offender”.

Note: The heading to section 39 is altered by omitting “**offender**”.

235 Subsection 39(1)

Omit “an appeal before the Tribunal to which he or she is a party”, substitute “his or her appeal before the Tribunal”.

236 Subsections 39(2) and (3)

Omit “offender”.

237 Subsection 39(3)

Omit “an appeal to which he or she is a party” substitute “his or her appeal”.

238 Subsection 40(3)

Omit “offender”.

239 Section 42

Omit “by an offender appellant”.

Note: The heading to section 42 is altered by omitting “**by offender appellants**”.

240 Subsection 51(1)

Omit “the offender appellant or the Director of Military Prosecutions”, substitute “appellant or Chief of the Defence Force or a service chief”.

241 Subsection 52(1)

Omit “offender appellant or the Director of Military Prosecutions”, substitute “appellant or Chief of the Defence Force or a service chief”.

242 Paragraph 52(5)(c)

Omit “the Australian Military Court”, substitute “a court martial or a Defence Force magistrate”.

243 Paragraph 60(d)

Omit “offender”.

244 Paragraph 60(d)

Omit “(other than the Director of Military Prosecutions)”.

245 Paragraph 60(f)

Omit “offender”.

246 Paragraph 60(g)

Omit “, a prescribed acquittal, a punishment imposed or a court order made by the Australian Military Court”, substitute “or a prescribed acquittal by a court martial or a Defence Force magistrate”.

247 Subparagraphs 60(g)(i) and (ii)

Repeal the subparagraphs, substitute:

- (i) a record of the proceedings of the court martial or Defence Force magistrate; and
- (ii) a record of any review with respect to the proceedings of the court martial or Defence Force magistrate; and
- (iii) documents that were before the court martial, Defence Force magistrate or reviewing authority in connection

with the proceedings, or the review of the proceedings,
as the case may be; and

248 Paragraph 60(ga)

Repeal the paragraph.

Judges' Pensions Act 1968

249 Subsection 4(1) (paragraph (a) of the definition of *Judge*)

Omit "or the Australian Military Court".

Migration Act 1958

250 Subsection 500A(14) (definition of *court*)

Repeal the definition, substitute:

court includes a court martial or similar military tribunal.

251 Subsection 501(12) (definition of *court*)

Repeal the definition, substitute:

court includes a court martial or similar military tribunal.

Schedule 2—Application and transitional provisions relating to proceedings

Part 1—Definitions and preliminary

1 Definitions

In this Schedule:

AMC means the Australian Military Court purportedly established by Division 3 of Part VII of the old Defence Force Discipline Act.

amended Defence Force Discipline Act means the *Defence Force Discipline Act 1982* as amended by this Act.

commencement day means the day on which this Act commences.

DFDAT means the Defence Force Discipline Appeal Tribunal established by the *Defence Force Discipline Appeals Act 1955*.

High Court decision date means 26 August 2009.

old Defence Force Discipline Act means the *Defence Force Discipline Act 1982* as purportedly in force immediately before the High Court decision date.

Registrar has the same meaning as in the old Defence Force Discipline Act.

Part IV order means a restitution order or a reparation order purportedly made under Part IV of the old Defence Force Discipline Act.

2 Application of amendments

- (1) The amendments made by Schedule 1 apply in relation to a service offence committed by a person on or after the commencement day.
- (2) The amendments made by Schedule 1 apply in relation to a service offence committed by a person before the commencement day if:
 - (a) before the commencement day, the person had not been charged with the service offence under the old Defence Force Discipline Act; or
 - (b) before the commencement day, the person had been charged with the service offence under the old Defence Force Discipline Act, but neither a summary authority nor the AMC

had taken, or had purportedly taken, any action in relation to the charge; or

- (c) the amendments apply because of the operation of the transitional provisions of Part 2 of this Schedule.

Note: The transitional provisions deal with particular situations where a person had been charged with a service offence before the commencement day, but the amendments are to apply (for example, because action in relation to the offence is underway but had not been completed on or before the commencement day).

Part 2—Transitional provisions

Division 1—Incomplete AMC proceedings

3 Charges purportedly referred to the AMC other than as a result of an election—no punishment imposed

- (1) This item applies to a charge of a service offence against a person if:
 - (a) on or before the High Court decision date, the Director of Military Prosecutions requested the Registrar to refer the charge to the AMC; and
 - (b) the request was not made under subsection 103(4) of the old Defence Force Discipline Act (which deals with referrals resulting from an election); and
 - (c) either:
 - (i) the AMC had not, on or before the High Court decision date, purported to convict the person, dismiss the charge or acquit the person; or
 - (ii) the AMC had, on or before the High Court decision date, purported to convict the person, but had not, on or before that date, purported to impose a punishment on the person or make a Part IV order in relation to the charge.
- (2) The charge is taken to be referred to the Director of Military Prosecutions on the commencement day, and the Director of Military Prosecutions may deal with the charge under section 103 of the amended Defence Force Discipline Act.

4 Charges purportedly referred to the AMC as a result of an election etc.—no punishment imposed

- (1) This item applies to a charge of a service offence against a person if:
 - (a) on or before the High Court decision date:
 - (i) the Director of Military Prosecutions requested the Registrar under subsection 103(4) of the old Defence Force Discipline Act (which deals with referrals resulting from an election) to refer the charge to the AMC; or

- (ii) the person had made an election under section 111C or 131AA of the old Defence Force Discipline Act in relation to the charge, but the Director of Military Prosecutions had not, on or before that date, taken action under subsection 103(4) of the old Defence Force Discipline Act in relation to the charge; and
 - (b) the AMC had not, on or before the High Court decision date, purported to convict the person, dismiss the charge or acquit the person.
- (2) As soon as reasonably practicable after the commencement day, action must be taken under Part VII of the amended Defence Force Discipline Act to refer the charge to a summary authority to be dealt with as if no action in relation to the charge had been, or had purportedly been taken, under Part VII of the old Defence Force Discipline Act.

5 Part-heard purported appeals to the AMC

- (1) This item applies to an appeal purportedly made to the AMC against any of the following:
 - (a) a person's conviction by a summary authority of a service offence;
 - (b) a punishment imposed, or a Part IV order made, by the summary authority in respect of a person's conviction by a summary authority for a service offence;if:
 - (c) the appeal was purportedly made on or before the High Court decision date; and
 - (d) in the case of an appeal against a conviction—the AMC had not, on or before that date, purportedly done any of the following:
 - (i) dismissed the appeal;
 - (ii) quashed the conviction; and
 - (e) in the case of an appeal against a punishment imposed, or a Part IV order made—the AMC had not, on or before that date, purportedly done either of the following:
 - (i) confirmed, quashed or varied the punishment;
 - (ii) confirmed, revoked or varied the Part IV order.

- (2) The person may lodge with a competent reviewing authority a petition for a review of the proceedings of the summary authority under section 153 of the amended Defence Force Discipline Act.
- (3) The petition must be lodged within the period of 60 days beginning on the commencement day, or within such extended period as the competent reviewing authority allows.
- (4) If the person lodges a petition under section 153 of the amended Defence Force Discipline Act because of the operation of this item, then sections 153, 154, 155, 156 and 162, and Division 5 of Part VIIIA, and any other provisions of the amended Defence Force Discipline Act necessary for the effectual operation of those provisions, apply to the review.

Division 2—Incomplete summary authority proceedings

6 Division does not apply if an election required

This Division does not apply to, or in relation to, the proceedings of a summary authority in relation to a charge of a service offence against a person if the person was required to be given the opportunity to elect to have the charge of the service offence purportedly tried by the AMC.

7 Summary authority proceedings started but not completed before commencement

- (1) This item applies if:
 - (a) before the commencement day, a person had been charged with a service offence under the old Defence Force Discipline Act; and
 - (b) a summary authority had commenced dealing with the charge; and
 - (c) on or before the commencement day:
 - (i) the proceedings of the summary authority had not been completed; or
 - (ii) the proceedings of the summary authority had been completed, but no action had been taken by a reviewing authority under Part VIIIA of the old Defence Force Discipline Act in relation to the proceedings of the summary authority.

- (2) If the proceedings of the summary authority had not been completed on or before the commencement day, the proceedings of the summary authority are to continue under the amended Defence Force Discipline Act.
- (3) If the proceedings of the summary authority had been completed on or before the commencement day, but no action had been taken under Part VIIIA of the old Defence Force Discipline Act in relation to the proceedings of the summary authority:
 - (a) a reviewing authority must, as soon as reasonably practicable on or after the commencement day, take action under Part VIIIA of the amended Defence Force Discipline Act in relation to the charge; and
 - (b) that Part applies in relation to the charge on and after the commencement day.

8 Summary authority proceedings—review proceedings started but not completed before commencement

- (1) This item applies if, on or before the commencement day:
 - (a) a person was charged with a service offence; and
 - (b) a summary authority:
 - (i) imposed, or purported to impose, a punishment on the person; or
 - (ii) made, or purported to make, a Part IV order in relation to the person; and
 - (c) action had commenced in relation to the proceedings of the summary authority by a reviewing authority under Part VIIIA of the old Defence Force Discipline Act, but review under that Part had not been completed.
- (2) A reviewing authority must, as soon as reasonably practicable on or after the commencement day, take action in relation to the proceedings of the summary authority under Part VIIIA of the amended Defence Force Discipline Act as if no action had been taken, on or before the commencement day, by a reviewing authority under Part VIIIA of the old Defence Force Discipline Act and that Part applies in relation to the proceedings of the summary authority.

**9 Trials resulting in punishment by a summary authority—
review proceedings completed before commencement
day**

- (1) This item applies if, during the period beginning on 20 September 2008 and ending on the commencement day:
 - (a) a person was charged with a service offence; and
 - (b) a summary authority:
 - (i) imposed, or purported to impose, a punishment on the person; or
 - (ii) made, or purported to make, a Part IV order in relation to the person; and
 - (c) on or before the commencement day, review under Part VIIIA of the old Defence Force Discipline Act of the proceedings of the summary authority had been completed.
- (2) The person may lodge with a competent reviewing authority a petition for review of the proceedings or purported proceedings of the summary authority, so far as those proceedings related to the punishment or Part IV order, under section 153 of the amended Defence Force Discipline Act.
- (3) The petition must be lodged within the period of 60 days beginning on the commencement day, or within such extended period as the competent reviewing authority allows.
- (4) If the person lodges a petition for a review because of the operation of this item, sections 153, 154, 155, 156 and 162 and Division 5 of Part VIIIA, and any other provision of the amended Defence Force Discipline Act necessary for the effectual operation of those provisions, apply to the review.
- (5) A person may only lodge a petition for a review of proceedings or purported proceedings of a summary authority, so far as those proceedings related to a punishment or Part IV order, if the person is not entitled to lodge a such a petition in relation to the punishment or Part IV order because of the operation of another provision of this Schedule.
- (6) If:
 - (a) before 20 September 2008 a person was charged with a service offence; and

- (b) no action to deal with the charge had been taken before that day;

this item applies as if the person had been charge with the offence on 20 September 2008.

10 Stays of punishment

- (1) This item applies if:
- (a) before the commencement day, a summary authority had ordered under section 176 of the old Defence Force Discipline Act that the execution of a punishment be stayed pending the determination of a purported appeal to the AMC; and
 - (b) the AMC had not purportedly determined the appeal.
- (2) The stay of the punishment is taken, by force of this item, to continue in force until the end of the period of 60 days beginning on the commencement day.
- (3) This item does not prevent a reviewing authority from ordering that the execution of the punishment is to be stayed in whole or in part pending the determination of a review under Part VIIIA of the amended Defence Force Discipline Act that is conducted because of the operation of item 5.

Schedule 3—Application and transitional provisions relating to office holders

1 Definitions

In this Schedule:

AMC means the Australian Military Court purportedly established by Division 3 of Part VII of the old Defence Force Discipline Act.

amended Defence Force Discipline Act means the *Defence Force Discipline Act 1982* as amended by this Act.

commencement day means the day on which this Act commences.

High Court decision date means 26 August 2009.

member has the same meaning as in the *Defence Act 1903*.

old Defence Force Discipline Act means the *Defence Force Discipline Act 1982* as purportedly in force immediately before the High Court decision date.

Permanent Forces has the same meaning as in the *Defence Act 1903*.

Registrar has the same meaning as in the old Defence Force Discipline Act.

Remuneration Tribunal means the Tribunal established by subsection 4(1) of the *Remuneration Tribunal Act 1973*.

2 Current Chief Military Judge automatically becomes the Chief Judge Advocate

- (1) This item applies to the person who purportedly held office as Chief Military Judge under section 188AC of the old Defence Force Discipline Act immediately before the High Court decision date.

Deemed appointment as Chief Judge Advocate

- (2) The person is taken to have been appointed on the commencement day, by force of this item, as the Chief Judge Advocate, as if the person had been duly appointed by the Judge Advocate General under section 188A of the amended Defence Force Discipline Act.

Term and remuneration

- (3) The person:
- (a) is taken to have been appointed under section 188A of the amended Defence Force Discipline Act, by instrument in writing:
 - (i) for the period of 2 years beginning on the commencement day; or
 - (ii) if the office of Chief Judge Advocate ceases to exist before the end of that 2 year period—for the period beginning on the commencement day and ending when that office ceases to exist; and
 - (b) is taken to have been appointed on the same terms and conditions as to remuneration, allowances and recreation leave and other leave entitlements as purportedly applied to the person immediately before the High Court decision date, subject to regulations made under subitem (4).
- (4) Despite section 188E of the amended Defence Force Discipline Act, the person:
- (a) is entitled to such remuneration and allowances as are prescribed, which must not be less in value than the remuneration and allowances that purportedly applied to the person immediately before the High Court decision date; and
 - (b) is to have such recreation leave and other leave entitlements as are prescribed, which must not be less in value than the recreation leave and other leave entitlements that purportedly applied to the person immediately before the High Court decision date.

Person does not hold a public office

- (5) The person does not hold a public office within the meaning of the *Remuneration Tribunal Act 1973*.

Resignation

- (6) The person may resign his or her appointment by giving the Judge Advocate General a signed notice of resignation.

No employment outside the ADF

- (7) The person must not engage in employment outside the duties of his or her office as Chief Judge Advocate, other than as a member of the Australian Defence Force.

Application of certain provisions

- (8) To avoid doubt, subsection 188A(3) and sections 188B, 188C and 188D of the amended Defence Force Discipline Act apply to the person.

Certain provisions do not apply

- (9) To avoid doubt, the person is not entitled to remuneration, salary, allowances, leave, benefits or any other entitlements (however described) under a determination made under section 58B or 58H of the *Defence Act 1903*.

3 Benefits on ceasing to hold office

- (1) This item applies if the office of Chief Judge Advocate ceases to exist before the end of the period of 2 years referred to in subparagraph (3)(a)(i) of item 2 of this Schedule.
- (2) Subject to subitems (3), (4) and (6), the person is taken to be entitled to be paid the amount that he or she would have been entitled to be paid under Clause 2.7.3 of Determination 2009/07 of the Remuneration Tribunal if:
- (a) the office of Chief Military Judge had existed on the High Court decision date; and
 - (b) the person's appointment to that office had been prematurely terminated on the High Court decision date, other than:
 - (i) for reasons of misbehaviour or unsatisfactory performance; or
 - (ii) on account of mental or physical incapacity, if the person was entitled to receive invalidity retirement benefits under Commonwealth superannuation legislation; and
 - (c) the Commonwealth had not offered the person suitable alternative employment after that premature termination.
- (3) The person is not entitled to be paid an amount under subitem (2) if, before the office of Chief Judge Advocate ceases to exist, the
-

Commonwealth offers the person employment that would have been suitable alternative employment in relation to the office that the person purportedly held as Chief Military Judge.

- (4) The person is not entitled to be paid an amount under subitem (2) if, before the office of Chief Judge Advocate ceases to exist, the person ceases to be a member of the Permanent Forces.
- (5) If a person is paid an amount under subitem (2), the person is taken to have completed a period of service for the purposes of regulation 64 of the *Defence (Personnel) Regulations 2002* at the time the amount is paid.
- (6) For the purposes of working out the amount that the person would have been entitled to be paid under Clause 2.7.3 of Determination 2009/07 of the Remuneration Tribunal, the months of service that would, apart from this subitem, remain is reduced by the number of months during which the person held office as Chief Judge Advocate on or after the commencement day.
- (7) The amount payable under subitem (2) is to be reduced by the amount, if any, that the person has been, or is entitled to be, paid under Clause 2.7.3 of Determination 2009/07 of the Remuneration Tribunal in respect of the premature termination of the person's appointment to the office of Chief Military Judge, and may be reduced to an amount of zero.

4 Current Military Judges automatically become members of the judge advocates' panel

Application

- (1) This item applies to a person who purportedly held office as a Military Judge under section 188AP of the old Defence Force Discipline Act immediately before the High Court decision date.

Deemed appointment as judge advocate

- (2) The person is taken to have been appointed on the commencement day, by force of this item, as a member of the judge advocates' panel, as if the person had been duly appointed by the Chief of the Defence Force under subsection 196(2) of the amended Defence Force Discipline Act.

Term and remuneration

- (3) The person:
- (a) is taken to have been appointed under section 196 of the amended Defence Force Discipline Act, by instrument in writing, for:
 - (i) the period of 2 years beginning on the commencement day; or
 - (ii) if the judge advocates' panel ceases to exist before the end of that 2 year period—the period beginning on the commencement day and ending when the judge advocates' panel ceases to exist; and
 - (b) is taken to have been appointed on the same terms and conditions as to remuneration, allowances and recreation leave and other leave entitlements as purportedly applied to the person immediately before the High Court decision date, subject to regulations under subitem (4).
- (4) The person:
- (a) is entitled to such remuneration and allowances as are prescribed, which must not be less in value than the remuneration and allowances that purportedly applied to the person immediately before the High Court decision date; and
 - (b) is to have such recreation leave and other leave entitlements as are prescribed, which must not be less in value than the recreation leave entitlements that purportedly applied to the person immediately before the High Court decision date.

Person does not hold a public office

- (5) The person does not hold a public office within the meaning of the *Remuneration Tribunal Act 1973*.

Resignation

- (6) The person may resign his or her appointment by giving the Judge Advocate General a signed notice of resignation.

No employment outside the ADF

- (7) The person must not engage in employment outside the duties of his or her office as a member of the judge advocates' panel, other than as a member of the Australian Defence Force.
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Oath

- (8) The person is taken to have made and subscribed an oath in accordance with Schedule 5 of the amended Defence Force Discipline Act.

Application of subsection 196(2B)

- (9) To avoid doubt, subsection 196(2B) of the amended Defence Force Discipline Act applies to the person.

Certain provisions do not apply

- (10) To avoid doubt, the person is not entitled to remuneration, salary, allowances, leave, benefits or any other entitlement (however described) under a determination under section 58B or 58H of the *Defence Act 1903*.

5 Benefits on member of judge advocates' panel ceasing to hold office

- (1) This item applies if the judge advocates' panel ceases to exist before the end of the period of 2 years referred to in subparagraph (3)(a)(i) of item 4 of this Schedule.
- (2) Subject to subitems (3) and (4), the person is taken to be entitled to be paid the amount that the person would have been entitled to be paid under Clause 2.7.3 of Determination 2009/07 of the Remuneration Tribunal if:
- (a) the office of Military Judge had existed on the High Court decision date; and
 - (b) the person's appointment to that office had been prematurely terminated on the High Court decision date, other than:
 - (i) for reasons of misbehaviour or unsatisfactory performance; or
 - (ii) on account of mental or physical incapacity, if the person was entitled to receive invalidity retirement benefits under Commonwealth superannuation legislation; and
 - (c) the Commonwealth had not offered the person suitable alternative employment after that premature termination.
- (3) The person is not entitled to be paid an amount under subitem (2) if, before the judge advocates' panel ceases to exist, the Commonwealth
-

offers the person employment that would have been suitable alternative employment in relation to the office that the person purportedly held as a Military Judge.

- (4) The person is not entitled to be paid an amount under subitem (2) if, before the judge advocates' panel ceases to exist, the person ceases to be a member of the Permanent Forces.
- (5) If a person is paid an amount under subitem (2), the person is taken to have completed a period of service for the purposes of regulation 64 of the *Defence (Personnel) Regulations 2002* at the time the amount is paid.
- (6) For the purposes of working out the amount that the person would have been entitled to be paid under Clause 2.7.3 of Determination 2009/07 of the Remuneration Tribunal, the number of months of service that would, apart from this subitem, remain is to be reduced by the number of months during which the person held office as a judge advocate on or after the commencement day.
- (7) The amount under subitem (2) is to be reduced by the amount, if any, that the person has been, or is entitled to be, paid under Clause 2.7.3 of Determination 2009/07 of the Remuneration Tribunal in respect of the premature termination of the person's appointment as a Military Judge, and may be reduced to an amount of zero.

6 Current Registrar of the AMC automatically becomes the Registrar of Military Justice

- (1) This item applies to the person who purportedly held office as Registrar of the AMC under section 188FB of the old Defence Force Discipline Act immediately before the High Court decision date.
- (2) The person is taken to have been appointed on the commencement day, by force of this item, as the Registrar of Military Justice, as if the person had been duly appointed by the Minister under section 188FB of the amended Defence Force Discipline Act.
- (3) The person:
 - (a) is taken to have been appointed under section 188FB of the amended Defence Force Discipline Act, by instrument in writing, for:
 - (i) the period of 2 years beginning on the commencement day; or

- (ii) if the office of Registrar ceases to exist before the end of that 2 year period—the period beginning on the commencement day and ending when that office ceases to exist; and
 - (b) is taken to have been appointed on the same terms and conditions as purportedly applied to the person immediately before the High Court decision date.
- (4) The person is taken to have made and subscribed an oath in accordance with Schedule 4 of the amended Defence Force Discipline Act.
- (5) To avoid doubt, the person is not entitled to remuneration, salary, allowances, leave, benefits or any other entitlements (however described) under a determination made under section 58B or 58H of the *Defence Act 1903*.

7 Waiver relating to amounts paid to purported office holders

- (1) This item applies to amounts paid by the Commonwealth purportedly by way of remuneration or allowances or other amounts to a person who purportedly held office as the Chief Military Judge, Military Judge or the Registrar of the Australian Military Court immediately before the High Court decision date, during the period:
 - (a) beginning on 1 October 2007; and
 - (b) ending on the commencement of this item.
- (2) If those offices did not exist during that period, the Commonwealth's right to recover an amount that would, apart from this item, be recoverable only on the basis of the non-existence of those offices is, by force of this item, waived.

Schedule 4—Other matters

1 Saving provisions relating to section 5A of the *Defence Force Discipline Act 1982*

- (1) If, immediately before the commencement of this item, an appointment made under section 5A of the *Defence Force Discipline Act 1982* was in force, the appointment has effect after that commencement as if it had been made under section 5A of that Act as amended by this Act.
- (2) If, immediately before the commencement of this item, regulations made for the purposes of section 5A of the *Defence Force Discipline Act 1982* were in force, the regulations have effect after that commencement as if they had been made for the purposes of section 5A of that Act as amended by this Act.

2 Regulations

- (1) The Governor-General may make regulations prescribing matters:
 - (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, regulations may be made prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this Act.

[*Minister's second reading speech made in—
Senate on 9 September 2009
House of Representatives on 14 September 2009*]

(169/09)
