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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE LEGISLATION AMENDMENT BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Defence Science and Personnel the Hon Warren Snowdon MP)

DEFENCE LEGISLATION AMENDMENT BILL 2008

OUTLINE

This Bill will amend the *Defence Force Discipline Act 1982* and the *Defence Act 1903* to simplify and redesign summary discipline procedures, with simplified rules of evidence, a right of appeal from a summary authority to the new Australian Military Court (AMC), a right to elect trial by the new Australian Military Court instead of a summary authority (except for certain Service offences that must be tried summarily to maintain discipline and morale) and review of summary proceedings. The Bill also deals with related matters including offences and punishments, the jurisdiction of Superior Summary Authorities and Discipline Officers, certain powers available to the Director of Military Prosecutions and the Provost Marshal of the Australian Defence Force and the rights and duties of Australian Defence Force legal officers.

The purpose of this Bill is to give effect to certain recommendations contained in the 2005 Senate report *The effectiveness of Australia's military justice system*. The changes are intended to ensure the right balance between the maintenance of discipline, which is critical to operational effectiveness and the protection of the rights of Australian Defence Force members.

The *Defence Force Discipline Appeals Act 1955* will also be amended to give effect to certain aspects of the intended regime.

FINANCIAL IMPACT STATEMENT

The initial funding for these amendments has been identified and will be provided from current allocations.

DEFENCE LEGISLATION AMENDMENT BILL 2008

ADF requirement for a summary discipline system

A separate system of military justice is essential to enable the Defence Force to deal with matters that pertain directly to the discipline, efficiency and morale of the services. To maintain the Defence Force in a state of readiness, the services must be in a position to enforce internal discipline effectively and efficiently. Breaches of service discipline must be dealt with speedily and, sometimes, more severely than would be the case if a civilian engaged in such conduct. As a result, the Defence Force has its own code of discipline under the *Defence Force Discipline Act 1982* (DFDA) to allow it to meet its particular disciplinary needs. The system needs to be one that can operate in Australia and overseas in peace and war. It is not practicable to have different systems with different standards applying in each of these circumstances.

Because of the unique nature of warfare, the ADF applies a far greater level of additional regulation than that encountered in other forms of employment and demands behaviour which is consistent with its role as an armed force. Proscribed behaviour under the provisions of the DFDA includes not only matters of a criminal nature applicable to the wider community, but a range of Service disciplinary matters which constitute significant failings in the context of a disciplined armed force.

Members of the ADF who choose to serve the nation are aware that in doing so they are subjecting themselves to constraints and standards over and above those pertaining to civilian society. These additional constraints and standards, and the military justice procedures that accompany them, must be demonstrably objective, independent, timely, impartial and fair to ADF members, and they must be seen to be so by the Australian community. It is upon this premise that the Australian military justice system is based and the amendments proposed in this bill have been drafted.

For the reasons detailed above, the ADF must be in a position to maintain and enforce internal discipline effectively and efficiently. The purpose of a military discipline system, in particular the summary trial system, is the maintenance of operational effectiveness; it is the cornerstone of command authority and enables the timely maintenance of discipline and morale. It must support commanding officers and protect the rights of members and is vital to the successful conduct of operations and to facilitate activities in peace time and in time of war. The ability to deal with discipline under the DFDA is particularly necessary during operational deployments outside Australia; it can provide a stand-alone code where civilian jurisdiction may either not apply or does not exist and it also provides a means to deal with misconduct that might otherwise be subject to the jurisdiction of foreign countries or international tribunals.

Commanders use the summary discipline system on a daily basis. The system is integral to their ability to lead the people for whom they are responsible in order to ensure their welfare and safety. It must operate quickly, be as simple as possible and it must be capable of proper, fair and correct application by persons who do not possess legal qualifications.

As described in a British military context, '*discipline is inseparable from command and at the centre of the summary discipline system is the commanding officer'*. This tenet is also inherent in all other allied military organisations including the United States, Canada and New Zealand, from which the Australian system has drawn. The ADF summary discipline system underpins effective military operations and morale. It also enhances the capability of defence personnel by providing unit commanders with a quick, effective and consistent means of dealing with misconduct that can undermine command authority and impinge on successful military operations.

A summary discipline system, by its very nature, will not have the status, level of independence or the judicial attributes of the AMC, established by the *Defence Legislation Amendment Act 2006*. However, while a summary discipline system should have as many of those attributes as practicable, its primary purpose, as discussed above, is to facilitate operational effectiveness and, through the maintenance of discipline, support ADF operations. Consistent with the British and Canadian systems, the ADF summary discipline system forms one part of the military discipline system which, taken as a whole, must provide the safeguards necessary to protect the interests of ADF members. The Bill's comprehensive system of elections and appeals in respect of summary authority proceedings provides a direct link to the statutorily independent AMC and in so doing enhances existing safeguards.

CORE INITIATIVES IN THE BILL – GENERAL OUTLINE

Appeal to the AMC

1. The *Defence Legislation Amendment Act 2006* established the Australian Military Court, to replace the system of ad hoc trials by courts martial (CM) and Defence Force magistrates (DFM). Under the latter system, there was no mechanism available to a member to appeal to a CM or DFM in respect of a conviction and/or punishment imposed by a summary authority. That said, the DFDA provided a system of rights to petition a 'reviewing authority' (which includes a Service Chief and the Chief of the Defence Force), which has the power to quash a conviction or to alter a punishment.

2. A right to appeal from a summary authority to the AMC was proposed following the 2005 Senate report *The effectiveness of Australia's military justice system*. It was considered that service personnel should have this right for all charges that could potentially lead to a criminal record, which could have a significant impact on their lives after they leave the military. The Bill will enable-

- *the concept of an automatic right to appeal, on conviction or punishment, from summary authorities* ..... to be included (bearing in mind that this may result in an increase in the level of punishment); and

- the *'current process of review will be discontinued'*. This refers to the removal of the current system in the DFDA that provides an ADF member with a system of automatic review and the right to submit a petition for further review of a conviction and/or punishment imposed by a summary authority to a Chief of Service or other senior commanders and to have matters reviewed by his or her chain of command.

3. As mentioned above, the Bill will introduce an automatic right of appeal from a summary authority to a Military Judge of the AMC, sitting alone. The appeal may be in respect of a conviction, any punishment imposed, or the imposition of a 'Part IV order' (reparation or a restitution order).

4. The Bill will provide that a Military Judge of the AMC will have a statutory discretion to deal with an appeal on its merits by way of a fresh trial and/or a 'paper review' of the evidence. The discretion for the Military Judge to deal with an appeal 'on the papers' (by oral argument on the basis of evidence given at the summary hearing or by way of hearing new evidence) avoids the requirement for evidence to be reheard where the statutorily independent AMC is of the opinion that such a course is unnecessary. The availability of an appeal to be considered 'on the papers' will not unnecessarily increase the appellate workload of the AMC; it will facilitate more timely proceedings of those matters that do proceed to trial. It will also help reduce disruptions to normal command function and the conduct of operations. Following the appeal process (via any of the ways mentioned above), should the punishment be altered, a Military Judge will not be able to impose a punishment greater than the maximum punishment available to the summary authority at the original trial.

5. The Australian Government Solicitor has advised that there are no legal impediments to the proposed appeal process in the Bill. Individual clauses relating to appeals to a Military Judge of the AMC from summary procedures are discussed below.

Election for trial by AMC

6. The current election for trial system in the DFDA allows an accused the opportunity to elect punishment or trial by the AMC, but only in certain limited circumstances, namely where a summary authority is of the opinion that in the event of conviction, a more severe 'elective punishment' (for example detention exceeding 7 days, a fine in excess of 7 days pay or reduction in rank) is likely to be awarded.

7. Changes in British summary discipline system in 1996 introduced a right to elect trial by a court martial, provided for in the *Armed Forces Discipline Act.* This model provides a greater degree of independence than the ADF system. The introduction of similar mechanisms would also protect ADF members' rights and contribute to the provision of impartial, rigorous and fair disciplinary outcomes.

8. The Bill will provide an accused with the right to elect trial by a Military Judge of the AMC for all but a limited number of certain disciplinary offences (*Schedule 1A offences*), similar to the scheme available in the Canadian Forces summary discipline system. The reason for a list of Schedule 1A offences is that it serves the purpose of a summary system and prevents minor infractions of discipline such as straightforward cases of absence without leave, going unnecessarily to the AMC. Dealing with these offences at the summary level will not only reinforce the maintenance of service discipline, but will also preserve the rights of individual members who will still have an automatic right of appeal from a summary trial. These offences are ones that must be dealt with expeditiously by a summary authority in order to maintain discipline and morale.

9. Additional safeguards have been included in respect of these offences, including limited punishments and a requirement for summary authorities to offer a right of election if, prior to making a finding of guilt, they determine that the more severe punishments that are available to them might apply. These additional safeguards for the accused person will be further supported by the new appeals system and automatic reviews of all summary trials that result in a conviction.

10. The Australian Government Solicitor has advised that there are no legal impediments to the election scheme as proposed in the Bill.

Simplified rules of evidence

11. The evidence regime currently applicable to summary trials is overly complex and not easy to apply by persons without formal legal training. It includes both Commonwealth and ACT evidence legislation, in addition to extensive policy guidance. This has been a basis for widely held concerns that current summary procedures are overly legalistic and complex. The importance of having a fair but simple and easily understood evidence framework is recognised in the current British and Canadian Forces summary trial systems which do not use formal and technical rules of evidence.

12. The Bill will make it clear that a summary authority will not be subject to the formal rules of evidence that apply in respect of a trial in the AMC. Nevertheless, the Bill will provide that the rules of natural justice, together with basic evidentiary principles, continue to apply at the summary level to ensure a fair trial and the protection of individual rights. These principles are relevance, reliability, weight and probative value. This will mean that summary hearings will be more efficient and timely, while maintaining all the necessary safeguards for an accused person. Nothing in this proposal will affect a member's appeal or election rights to the AMC from a summary trial.

13. In conducting a trial, the proposal requires that the summary authority may determine the probative value of any evidence received during the course of a trial that it considers appropriate (including the relevance, reliability and weight to be given to the evidence), and comply with the practices and procedures established in the Summary Authority Rules made under the DFDA.

14. The intended provisions are based on consultation with the Australian Government Solicitor and reflect the successful Canadian Forces summary trial system. More extensive details of the intended provisions are discussed below.

Review of proceedings of summary authorities

15. The existing petition and command review regime contained in Part IX of the DFDA is to be discontinued. However, it is intended to retain a form of review (to complement the system of appeals to the AMC) by a 'reviewing authority' (a superior officer in relation to a summary authority) in respect of technical errors related to the awarding of punishments and orders, for example where the imposition of a punishment is beyond the power of the summary authority. Additionally, in the case of certain more severe punishments, an additional safeguard will apply through the continuation of the requirement for those punishments to be approved by a reviewing authority before they take effect. In exercising this power, a reviewing authority will be able to quash a punishment or revoke an order and substitute a less severe punishment or order within the trying authority's jurisdiction – there will be no power to increase a punishment. The proposed system of appeals to the AMC will then apply from the time the punishment is approved.

16. Other than for approving certain more severe punishments and orders, a reviewing authority will not have the wider powers currently available to reviewing authorities under the DFDA (for example, quashing a conviction or punishment on review from a petition). These powers will now reside with statutorily independent Military Judges, under the new appeals regime. The reviewing authority's powers will, apart from the power to approve certain punishments or orders, be limited to referring a punishment or order beyond the authority of the reviewing authority back to the summary authority which originally tried the matter for it to be reopened. The summary authority must then impose a less severe punishment or order that is in accordance with its power to impose.

17. Additionally, if the reviewing authority considers there may have been a more serious defect in the summary proceeding, it must recommend to the convicted person that an appeal to the AMC may be appropriate.

18. The intention of this review process is to provide additional safeguards for members by providing another avenue by which to correct inappropriately awarded punishments or orders that may not otherwise have been the subject of an appeal to the AMC. A mechanism for correcting these types of errors, where there is no dispute that an error has occurred will help reduce the appellate workload of the AMC. It will also improve command oversight of the summary trial system which is important to the maintenance of discipline. However, in circumstances of excessive but otherwise lawful punishment, an appeal may always be lodged with the AMC. That said, should a convicted person lodge an appeal to the AMC before the reviewing authority has completed its review, the appeal process will take precedence and the reviewing authority cannot request the summary authority to reopen the matter.

19. In summary, a reviewing authority may do any of the following –

- approve or not approve certain more severe punishments or orders. In the case where the reviewing authority does not approve a punishment or order, it must quash the punishment or revoke the order and impose a lesser punishment or order.

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

20. This intended review system will further protect the rights of ADF members who are tried and convicted by a summary authority and who may not exercise their right of appeal to the AMC. It adds an additional layer of oversight and protection for a member in circumstances where a punishment has been imposed that was beyond the power of the summary authority. A review of this type will also give commanders an overview of disciplinary issues in their commands. A more detailed explanation of the intended review system is outlined in the discussion of the individual clauses below.

Offences and Punishments

21. A review of offences and punishments in the DFDA resulted in a number of proposed changes that will be effected in the Bill. In summary, these changes include –

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

22. Many of theses changes will make an immediate contribution to the improvement and simplification of offences and punishments in the DFDA and are discussed in more detail below.

23. **Additional changes**

- A number of other recommendations, including those from the 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force* by Mr J.C.S Burchett QC, will now be effected in the Bill. These include-

    i. expanding the Discipline Officer scheme under Part IX of the DFDA to include junior officers up to and including the ranks of Lieutenant in the Navy, Captain in the Army and Flight Lieutenant in the Air Force and warrant officers and non commissioned officers (with limited punishments);
    ii. removing the separate and more severe scale of punishments for Navy.

- The jurisdiction of superior summary authorities will be expanded to include ranks up to Rear Admiral in the Navy, Major General in the Army and Air Vice Marshal in the Air Force. Currently, only ranks up to Lieutenant Commander, Major and Squadron Leader may be tried at a summary trial. This change will allow simple and minor offences committed by more senior officers to be dealt with expeditiously at the summary level, rather than awaiting (the currently mandatory) trial by the AMC. This change will enhance the efficient maintenance of discipline in operational circumstances where it is important that matters be dealt with expeditiously. The scale of punishments for these higher ranks will be a fine up to a maximum of 7 days pay, a severe reprimand or a reprimand. However, in order to preserve their existing entitlement, these officers will be provided with the right to elect to have these matters dealt with by the AMC.

- Adding the automatic disqualification of a summary authority to try offences where it has been involved in the investigation of the service offence, the issuing of a warrant for the arrest of a person, or preferring the charge, will reinforce current practice and remove doubt about such decisions. The change will also help in reducing any perceptions about the possible bias of commanders, and promote further confidence in the impartiality and fairness of summary proceedings. It is based on similar provisions in the Canadian Forces summary system.

- The Examining Officer scheme contained in section 130A of the DFDA is to be removed. This change will remove an unnecessary and rarely used procedure that provides for a third person to hear complex or lengthy evidence for a commanding officer before proceeding with the summary trial. This change has been enabled by the new capacity for matters with complex evidentiary requirements to be referred directly to the Director of Military Prosecutions (DMP) for possible trial by the AMC. It will improve the timeliness and simplicity of the summary system by removing an extra layer of process.

- A new time limit of up to three months from the time the person is charged to the date of trial by summary authority will be introduced. The summary authority will be required to commence summary trials as soon as

practicable, within three months of the accused being charged, and complete the trial as soon as practicable, unless a longer period is allowed by a superior authority for operational reasons. If the trial does not commence in the time allowed then the summary authority must refer the charge to the DMP. This will improve the timeliness of summary proceedings and prompt referrals to the Director of Military Prosecutions so that complex or serious matters are tried by the AMC as quickly as possible.

- Amending section 87 to clarify the powers of the DMP in respect of a charge preferred by the DMP to proceed directly to trial by the AMC. This amendment will clarify the DMP's powers under section 87 and make it clear that he or she has the full range of options that are required by the position. It is not intended to add to or diminish the existing options under this provision.

- Requiring a discipline officer to provide a report to his or her commanding officer. The intention of this amendment is to provide a safeguard through legislated oversight of the discipline officer scheme. It will also provide statistical information to commanding officers of the nature and frequency of disciplinary infringements within their command. This will facilitate the maintenance of discipline and transparency of the discipline officer scheme.

- A right to request no personal appearance, subject to approval, is proposed for summary proceedings. The personal appearance of the accused will remain the norm, noting that the consequence of a summary proceeding may be a conviction for a service offence. However, where the accused intends to plead guilty, the member may apply to not personally appear at a summary proceeding and to have the matter heard in his or her absence, subject to the approval of the summary authority. The member will have the right to be represented at such a hearing, consistent with the existing right to be defended pursuant to the *Summary Authority Rules*. This new provision will allow the expeditious completion of proceedings where there may be operational imperatives for an officer of appropriate rank in Australia to deal with a simple, uncontested service offence, where it is necessary for the accused to remain deployed on operations. The timeliness of summary proceedings will be improved whilst also maintaining operational effectiveness.

- A provision is proposed to reflect the creation of the new Provost Marshal Australian Defence Force (PMADF). The PMADF was appointed on 14 May 2006 to head the newly established ADF Investigative Service (ADFIS). Among other things, the PMADF (and ADFIS) is to investigate or refer all complex service offences for investigation within Defence and to '*work closely with the Director of Military Prosecutions...to achieve oversight of ADF criminal investigations'*.

  Part VI of the DFDA provides for investigative action in respect of service offences, including *'serious service offences'*. A serious service offence is defined as a service offence punishable by a maximum punishment of life imprisonment or a fixed period exceeding six months. It is intended to amend the DFDA to enable the PMADF to refer a serious service offence to the DMP where he or she considers it appropriate to do so. Such a referral

will take place after the completion of an investigation and after a charge or charges have been laid. 'Appropriate' in the context of a referral to the DMP means that the alleged offence is of such a serious nature, and the investigation has produced sufficient evidence, to justify a trial by the AMC rather than a summary authority. Adoption of this provision will improve efficiency by streamlining military justice procedures by allowing more serious matters to be referred directly to the DMP and trial before the AMC without the requirements for unnecessary proceedings before a summary authority.

- Rights and duties of legal officers, in particular the exercise of their legal duties independently of command influence, will be further strengthened in an amendment to the *Defence Act 1903*. There are practical difficulties inherent in requiring all permanent legal officers to hold practising certificates; therefore, their independence will, in part, be established through amendment of the *Defence Act 1903* and commitment to professional ethical standards.

  Some limited provisions already exist in respect of the independence of and avoiding undue command 'influence' over ADF legal officers (section 193 of the DFDA, regulation 61 of the *Defence (Inquiry) Regulations 1985* and regulations 583 and 585 of the *Australian Military Regulations 1928* (Australian Army Legal Corps). These provisions are specific in their application and it is intended to include a broader statement in the *Defence Act 1903*, having regard to advice from the Australian Government Solicitor, to reflect that a legal officer in the Australian Defence Force acting in that capacity shall discharge their professional rights, duties and obligations in accordance with generally accepted rights, duties and obligations applying to legal practitioners.

  The purpose of this new section is to ensure that ADF legal officers are not subject to inappropriate command direction in the exercise of their professional capacity as ADF legal officers. It is not intended to prevent an ADF legal officer who is superior in rank or appointment from issuing technical directions to subordinate ADF legal officers in relation to matters they are responsible for. It also does not exempt ADF legal officers from compliance with lawful orders in the performance of their military duties.

- It is also intended that the DMP be able to require, that a trial of a class 3 offence is to be by a Military Judge alone, accompanied by a reduction in the maximum available punishment. This amendment reflects civilian criminal and overseas military systems which enable a prosecutor to require that a charge be dealt with by judge alone for a range of more minor offences. Providing the DMP with an election for trial by Military Judge alone is consistent with the approach in the *Crimes Act 1914* (Cth) which allows for summary disposal of certain offences without the accused's consent. This will minimise the number of jury trials, which will be of significant benefit to the ADF, given their potential to impact adversely upon ADF operations.

  The maximum powers of punishment will be limited to 6 months imprisonment. As an additional safeguard, this is considerably less than that allowed for in the civilian system. In comparison, the Commonwealth

Constitution provides that indictable offences shall be tried by jury and the *Crimes Act 1914* (Cth) section 4G defines an indictable offence as offence against a law of the Commonwealth punishable by a period of imprisonment exceeding 12months.

- Consistent with civilian practice, it is intended to provide in the Bill that the DMP be able to seek a determination from the Defence Force Discipline Appeal Tribunal on a point of law that arose in an AMC trial, at the conclusion of that trial. The rationale for the intended proposal is for precedent purposes, to allow the law to be applied correctly in future cases.

24. These initiatives, when implemented, will streamline and improve the ADF discipline system.

25. Notes on the individual clauses together with an explanation of the above initiatives follow.

NOTES ON INDIVIDUAL CLAUSES

26. Item 1 cites the Bill as the *Defence Legislation Amendment Act 2008.*

27. Item 2 outlines in a table the commencement regime for various clauses in the Bill. There are different commencement provisions for certain Schedules and items. Those provisions that require no consequential legislative or administrative action are expressed to commence on Royal Assent. The provisions requiring follow on administrative and training action as a precursor to their commencement are expressed to commence six months from the day the Bill receives Royal Assent. This period will allow for the administrative arrangements required to support the new summary system to be in place.

28. Item 3 provides that the Schedules in the Bill will detail how each Act mentioned will be amended or repealed.

Schedule 1 – Election for trial by the Australian Military Court

29. Item 1 inserts into subsection 3(1) a new definition of *Schedule 1A offence*, required for the new election for trial by the AMC. It means an offence specified in Schedule 1A or an offence that is ancillary in relation to one of those offences (*ancillary offence* is currently defined in the DFDA).

30. Item 2 inserts new sections 111B and 111C which introduce the new election regime. These provisions are in respect of a service offence (other than a prescribed offence) and a Schedule 1A offence. An accused person must be given an opportunity to elect to be tried by the AMC rather than a summary authority in respect of one of these offences. The summary authority must offer this opportunity at the commencement of dealing with the charge and it must give the accused the opportunity to obtain legal advice (that is reasonably available). The note contained in this section makes it clear that where an election has been made under subsection 111C (1), the charge will be tried by a Military Judge alone. This ensures that the trial of a relatively minor offence that would otherwise have been dealt with by a summary authority is dealt with by a Military Judge alone as it would not warrant a jury trial.

31. New section 111B also makes it clear that an election at the commencement of a trial under subsection (1) is not available for a Schedule 1A offence, except in respect of an officer of or below Rear Admiral (E) but above the rank of Lieutenant Commander (E)). However, an election for a Schedule 1A offence will be available, in the circumstances discussed in section 131 ('election during a trial where elective punishment is considered appropriate') below. This reflects what was previously the case, where the more senior officers were automatically dealt with by a Court martial or Defence Force magistrate (now the AMC) rather than a summary authority. Allowing a senior officer a right to elect an AMC trial (even in respect of Schedule 1A offences) will preserve their existing entitlement.

32. New section 111C will outline when an election by an accused person is to be made. The accused must make a decision to elect (in writing) within a 24 hour period or, if the exigencies of service do not permit that time, a period (determined by the summary authority) not exceeding 14 days.

33. New subsection 111C(3) will also ensure that all the relevant participants in the trial disposal process be kept informed, ensuring an open and transparent system. This will be effected by requiring charges to be referred to the DMP and the Registrar to be informed of that referral. It will also provide for situations where there is more than one charge against an accused person. Where an election to be tried by the AMC has been made by an accused person, the summary authority must refer that charge to the DMP and any other charge that is linked to that charge. Charges are 'linked' for the purposes of this section if the charges have the same facts or circumstances. The purpose of this provision is to provide an accused person with the additional safeguard of having all charges considered by the DMP and dealt with at the same time, where the charges are linked. From a practical perspective, this will avoid having similar offences being dealt with separately, which can delay the expeditious conclusion of a trial.

34. If the accused decides not to elect an AMC trial or the time allowed to make a decision whether or not to elect has expired, the summary authority must try the charge, noting that the accused always retains the right to subsequently appeal to the AMC. The accused may also decide to withdraw the election at any time before an AMC hearing date is fixed, in which case, the summary authority must try the charge.

35. Item 3 repeals and substitutes section 131. New section 131 provides for the circumstances where an accused has been charged with one of the Schedule 1A offences and an election was not given to the accused before the summary trial, but it becomes necessary during the trial for the summary authority (that is, a commanding officer or superior summary authority) to stop proceedings and offer the accused an election. An election must be offered, before the summary authority makes a finding in relation to the charge, if during the summary trial for one of the Schedule 1A offences the summary authority decides in the circumstances that a punishment from the elective scale of punishments would be appropriate if the accused were to be found guilty. This section does not apply to an officer referred to in section 111B, as an election regime is provided for those officers in that section.

36. As mentioned above, the list of Schedule 1A offences is made up of offences that are minor infractions of discipline but are of such a nature that they must be tried summarily to ensure the timely maintenance of discipline and morale. However, in fairness to the accused person, where the circumstances surrounding the commission of such an offence reveal (in the opinion of the summary authority) that a more severe punishment may be warranted, the accused is provided with an option to elect to have the offence dealt with by the AMC.

37. Item 3 also inserts new section 131AA that outlines what an accused person must do in relation to his or her decision to elect trial by the AMC. It is in the same terms as section 111C discussed above. However, if the accused has declined an offer of an election or has withdrawn his or her election or does not make a decision in the time allowed the summary authority must proceed with the trial. If the summary authority convicts the accused person, it may then impose a more severe 'elective punishment'.

38. New subsection 131AA(3) is also expressed in the same terms as subsection 111B(3) discussed above in respect of 'linked offences'.

39. Item 4 amends subsection 132A (3) to make it clear that where the accused has elected a trial by the AMC under section 111C or 131AA, the charge must be dealt with by a Military Judge alone. This ensures that the trial of an offence that would otherwise have been dealt with by a summary authority as one of a range of more minor offences is tried by the AMC by a Military Judge alone.

40. Item 5 inserts new Schedule 1A which lists the proposed *Schedule 1A offences* – proposed offences in respect of which (except in the circumstances discussed in section 131AA above) an election for trial by the AMC is not possible, in the first instance. These offences go to the very core of the requirement for quick yet fair summary discipline and are of a character that would not normally warrant a trial by the AMC. Offences include: absence from duty, absence without leave, failing to comply with a general order, prejudicial behaviour and custodial offences.

41. Underpinning the new system of electing trial by the AMC from summary procedures is the overarching protection that an appeal to the AMC will always be available to an accused.

42. Item 6 repeals and substitutes Schedule 3 which outlines in table form the maximum punishments that may be imposed by the three levels of summary authority. New Schedule 3 also reflects the proposal to standardise punishments across all 3 Services by removing the separate and more severe Navy scale of punishments. This gives effect to a recommendation from a previous inquiry into military justice procedures. Currently, for example, a punishment applicable to a Navy defence member below non-commissioned rank available to a commanding officer includes up to 42 days detention or a fine not exceeding the members pay for 28 days, in respect of an offence committed on non-active service compared to Army and Air Force which allow for 7 days detention and 7 days fine in the case of non-elective punishments and a maximum of 28 days detention and 28 days maximum fine in the case of an elective punishment. While these separate scales of punishment were previously relevant due to the isolation of long periods at sea, modern communications and the prevalence of joint units and operations no longer justify the imposition of these more severe punishments on Navy personnel for the same offences compared to other members of the Australian Defence Force. New Schedule 3 will also be simpler to reference through the use of item numbers and the removal of the Navy scales of punishment.

43. Furthermore, to reflect the amendments in sections 111B and 131AA, new Schedule 3 will also separate certain ranks for the purposes of standardising punishments.

44. Consistent with the proposed amendment to section 106 to expand the jurisdiction of a superior summary authority to deal with the rank of or below Rear Admiral (E) but above the rank of lieutenant commander (E), the Schedule will make it clear that the scale of punishments for these higher ranks will be a fine up to a maximum of 7 days pay, a severe reprimand or a reprimand.

45. Items 7 to 14 make consequential amendments to the DFDA as a result of the new election regime.

Schedule 2 – Appeals to the Australian Military Court

46. Item 1 makes consequential amendments as a result of the new appeals regime (by making reference to new sections).

47. Items 2 to 4 amend various provisions in the DFDA (sections 115, 116 and 118) to establish the AMC's jurisdiction to hear and determine appeals from a decision of a summary authority (for example, a decision to convict or impose a punishment or order). Similar to the existing provision for trying a charge, it also requires that the Chief Military Judge must nominate the Military Judge who is to hear and determine an appeal to the AMC. This reinforces that the determination of appeals is independent of the chain of command.

48. Items 5 to 7 insert new section 132 so that Division 2 of Part VIII (trials by the AMC) does not apply to an appeal to the AMC. In particular, items 6 and 7 make it clear that the general provisions relating to trials by the AMC are separate to those relating to appeals the AMC. These are dealt with in Part IX – 'General provisions relating to appeals (discussed below).

49. Item 8 inserts new paragraph 149(xa) to enable rules of procedure (made by the Chief Military Judge) to be made in respect of matters relating to appeals to the AMC. This will ensure consistency with the rules of procedure for trials in the AMC and for summary procedures which are also to be made by the Chief Military Judge.

50. Item 9 repeals and substitutes Part IX (Review of proceedings of service tribunals). As discussed above, the existing petition and command review regime will be modified by the new system of review and appeals.

51. New section 160 defines certain terms for the purposes of the Part, including 'appeal' and 'appellant' and 'Part IV order'.

52. New section 161 outlines by whom, in what circumstances, on what grounds and the time within which an appeal to the AMC may be made. Any person convicted of a service offence by a summary authority may appeal to the AMC against the conviction, punishment or Part IV order made by the summary authority. The appeal must be lodged within 14 days of conviction or 14 days from when the punishment or order takes effect.

53. New section 161 also allows the summary authority to complete the reopened proceedings before the convicted person exercises their right to appeal. If the convicted person has not already exercised their right of appeal, he or she is then provided with the full 14 day period in which to lodge an appeal, maintaining the safeguards inherent in the new appeal system.

54. New sections 162 to 164 outline what the AMC may do following the determination of an appeal on a *conviction* (see new section 167 for the AMC's powers in respect of an appeal against a *punishment*). These allow the quashing of a

conviction where it is found to be unreasonable, where new evidence is available which suggests that the conviction cannot be supported or where there is evidence of the accused suffering from a mental impairment.

55. New section 165 enables the AMC to order a new trial if it considers that it is in the interests of justice to do so. It may also make an order as to custody of the person pending the new trial.

56. New section 165A provides that where a conviction is quashed and no new trial has been ordered by the AMC, the convicted person will be taken to have been acquitted of the offence.

57. New section 166 enables the AMC, on appeal, to substitute a quashed (original) conviction for a conviction of an 'alternative offence'. In effect, this replicates the existing position in respect of an 'original' trial for an appeal to the AMC. An alternative offence is defined in current section 142 of the DFDA which in effect provides that where a service tribunal acquits a person of a service offence, it may convict that person of an alternative offence provided that it is satisfied beyond reasonable doubt that the person is guilty of that offence. However, where the AMC does substitute the conviction and takes action under Part IV (punishments and orders), it is limited by what the summary authority could have imposed if it had convicted the person of the alternative offence (new subsection 166(2)).

58. Consistent with subsection 166(3), there are certain things that the AMC is not able to do under section 166. This will make it clear that, in respect of a conviction for an alternative offence, a person will not be subject to a more severe punishment or a reparation order of a higher amount than the summary authority had the power to impose in respect of the original offence. This will protect a convicted person from the imposition of a more severe punishment in respect of the alternative offence, which is similar in nature to the original offence and which should not therefore attract a higher punishment.

59. As foreshadowed above, new section 167 outlines the powers of the AMC in respect of an appeal by a convicted person against *punishment*. That is, it may confirm, quash or vary the punishment. If it quashes the punishment, it does not take effect and the AMC may take action under Part IV (punishments and orders) that the summary authority could have taken. If the AMC varies a punishment, it takes effect as varied. However, any variation in punishment is limited to what the summary authority could have imposed under Part IV (punishments and orders).

60. New section 167A outlines the AMC's power to revoke Part IV (restitution [section 83] or reparation [section 82]) orders. This proposed section is in the same terms as section 167 in what the AMC can do, that is, it may confirm, revoke or vary but in this case, in respect of an order rather than a punishment.

61. New section 167B outlines what the AMC may do in respect of a frivolous and vexatious appeal. In such a case, the AMC may dismiss the appeal and it may order that any punishment of detention that was imposed in the first instance will commence on the day that the appeal was dismissed (noting that the punishment of

detention would have been subject to an order of a stay of proceedings). This provision reflects similar provisions applicable in civilian jurisdictions.

62. New sections 168 to 168E outline the general provisions relating to appeals. These provisions will apply existing sections in the DFDA relating to trials by the AMC to an appeal to the AMC from a summary authority. For example, new section 168 relates to representation of parties in an appeal. This section will apply existing sections 136 and 137 in the DFDA (which relate to the representation of parties before an AMC trial) to an appeal to the AMC from a summary authority. Also, the new provisions pertaining to the evidence framework in a summary trial (proposed section 146A) will apply to an appeal before the AMC (new section 168B) including the revised provisions relating to judicial notice (discussed below in paragraph 64). This provision ensures that an appeal is based on the same evidentiary basis that was used at a summary trial. The AMC may deal with an appeal on its merits by way of a hearing or on the basis of the documents provided to the Court, that is, a 'paper review' of the evidence (however, if it appears that the issues cannot be adequately determined on the papers, a hearing must be held). The rationale for not applying the evidentiary framework applicable for an AMC trial in an appeal from a summary authority is that it would create a complexity in relation to the appeal, particularly an appeal 'on the papers'. This is contrary to the intent of the Bill to simplify summary proceedings and trial disposition generally. An appeal must necessarily be based on the evidence heard by the summary authority, that is, the simplified evidentiary principles. However, it is intended that if a fresh trial by the AMC is ordered, then the formal rules of evidence will apply for that trial. This is an additional safeguard for the accused. Provisions relating to the use of video and audio links will also apply (new section 168E).

63. New sections 168A will reflect that the AMC may deal with an appeal on its merits by way of a hearing or on the basis of the documents provided to the Court, that is, a 'paper review' of the evidence. As foreshadowed above, the ability of the AMC to deal with an appeal 'on the papers' avoids the requirement for evidence to be reheard where the statutorily independent AMC is of the opinion that such a course is unnecessary. The availability of an appeal to be considered 'on the papers' will not unnecessarily increase the appellate workload of the AMC; it will facilitate more timely proceedings of those matters that do proceed to trial. It will also help reduce disruptions to normal command function and the conduct of operations. A very important protection exists for an accused – that is, if it appears that the issues cannot be adequately determined on the papers, a hearing must be held (and the appeal must be held in the presence of the accused).

64. New sections 168C and 168D outline that the AMC must take judicial notice of general service matters and that it must keep a record of its proceedings. To protect the privacy of the appellant and the subject of the appeal, the record of proceedings is not to be made publicly available and may only be published for service purposes. This is consistent with current practice at the summary level, where records of proceedings are not publicly available.

65. Items 10 to 12 make minor consequential amendments to provisions in the DFDA to reflect the new provisions relating to appeals.

66. Part 2 of Schedule 2 makes consequential amendments to the DFDA to reflect the new appeals system. For example, item 19 repeals and substitutes subsection 176(1) which relates to stays in proceedings. Amended subsection 176(1) will ensure that where a punishment imposed by a summary authority is the subject of an appeal, the execution of that punishment must be stayed (in whole or in part) pending the determination of the appeal. The intent of this provision is to ensure that a person is not disadvantaged by having to serve any punishment pending the determination of his or her appeal, which may find the original conviction and punishment unwarranted.

67. Items 13 and 14 make minor consequential technical amendments.

68. Items 15, 16, 17, 19 and 20 also make consequential amendments to the DFDA in respect of the new appeal regime. For example, item 15 provides that if a new trial has been ordered by the AMC following an appeal by a convicted person, the DMP may request the Registrar to refer the charge (the subject of the appeal) to the AMC for trial. This will ensure that the new trial is treated as a fresh trial. It will also ensure that all those involved in the trial or appeal disposition process have full visibility of its status.

69. Item 18 inserts new section 172A which provides for the suspension of the operation of a restitution or reparation order made by a summary authority pending an appeal to the AMC. A restitution order under section 83 is a remedy whereby property is repaid or restored to its true owner. A reparation order under section 84 is an order that requires a person to pay reparation to a person who has suffered loss or damage by virtue of the commission of a service offence.

70. New section 172A reflects the creation of the opportunity to appeal from a summary authority to the AMC in respect of the imposition of one of these orders by a summary authority (in addition to a conviction or punishment).

71. The effect of this section will be that the operation of a reparation or restitution order is suspended until the lodgement date for an appeal to the AMC has expired and, if an appeal has been lodged, when that appeal has been determined or abandoned. Two important safeguards are provided for in respect of the operation of this section –

- where the title to the property the subject of the restitution order is not disputed, a summary authority may decide not to suspend the operation of the order;
- if an order is suspended, it will not take effect if the conviction attached to the order was quashed by the AMC on appeal.

72. Items 21 to 26 make consequential amendments to the *Defence Force Discipline Appeals Act 1955* (DFDAA) to facilitate the availability of an appeal by a convicted person from a summary trial to the Australian Military Court. Certain definitions in section 4 of the DFDAA will be amended (for example, ‘conviction’, ‘convicted person’, ‘punishment’, ‘prescribed acquittal’). The proposed amendments will make it clear that appeals from summary trials under new Part IX (appeals from

summary trials) are to the AMC not the DFDAT, and that there is no provision to appeal a summary matter beyond the AMC, consistent with current practice.

Schedule 3 – Evidence in summary proceedings

73. Consistent with advice from the Australian Government Solicitor (AGS), the DFDA will be amended to allow for simplified rules of evidence applicable in summary trials. These amendments are based on the successful Canadian Forces summary discipline system and have parallels in the evidentiary framework contained in other Australian legislation and civilian jurisdictions.

74. Given the nature of summary proceedings and allowing for the fact that very few summary authorities are legally qualified, complex rules of evidence at this level are inappropriate and can unnecessarily delay and complicate a trial. It is intended to exclude the operation of more complex evidence provisions, such as the *Evidence Act 1995* (Cth) and to allow summary trials to occur on a less formal basis while nonetheless ensuring appropriate safeguards for a fair trial. The requirements in the *Criminal Code 1995* (Cth) (as applied by section 10 of the DFDA) dealing with the principles of criminal responsibility, including the burden and onus of proof will remain applicable in summary trials. The very important protection against self incrimination will also be enshrined in the DFDA to avoid any doubt of its continued application, notwithstanding the exclusion of the rules of evidence. Advice received from the Australian Government Solicitor is that it would apply in any event. Its articulation in the DFDA will put the matter beyond doubt.

75. The trial process must be fair and be seen to be fair. Although summary authorities are not courts in the ordinary sense, it is important that the principles of natural justice/procedural fairness are adhered to. These include the absence of bias and the ability for a person to know and be able to answer a case made against them. While this is an inherent essential element of any trial process, it will be expressly stated in the Bill to put it beyond doubt.

76. The proposed amendments in new section 146A (item 8) will ensure that-

- A summary authority must comply with the Summary Authority Rules and in doing so act with as little legal formality and legal technicality as possible, thereby ensuring fairness;
- A summary authority is not bound by the rules of evidence either statutory or common law;
- A summary authority must give weight to any evidence it considers appropriate, including its probative value; and
- A summary authority must admit any documents or witnesses it considers to be of assistance and relevance;
- A summary authority must comply with the rules of natural justice and basic principles of the rules of evidence relating to relevance, reliability weight and probative value.

77. The application of the simplified rules of evidence for summary procedures will reflect that *relevance* is determined by looking at the substance or contents of the evidence put forward and how it is related to a fact in issue. The *reliability* of the

evidence refers to its trustworthiness and the amount of confidence a summary authority can have in its accuracy (for example, the truthfulness of a witness, the type of evidence being called). The *weight* of the evidence refers to the amount of consideration that a summary authority will give to a particular piece of evidence to assist it in reaching a decision on guilt or innocence. The reliability of the evidence will affect the weight it is given by the summary authority. Based on its reliability, the summary authority may give a piece of evidence a lot of weight; some weight; or none at all.

78. The summary authority must consider the evidence received and the representations of the accused before determining whether a charge has been proved beyond a reasonable doubt. The first consideration in this analysis is to decide how reliable the evidence is and how much weight it will be given. The summary authority must also assess each witness individually and not simply apply a standard set of rules to measure credibility. Where evidence is contradicted by other evidence, an assessment will have to be made regarding the relative weight given to all the evidence on that issue.

79. Items 10 to 12 make consequential amendments to section 149 (discussed below). Existing section 149 provides for the making of the Summary Authority Rules by the Judge Advocate General which are to be followed by summary authorities. The rules may include such matters as the attendance of witnesses, the production of documents, the forms to be used in relation to summary proceedings.

80. As mentioned above, new section 146A will be supported by the Summary Authority Rules, which will be 'legislative instruments' as defined in the *Legislative Instruments Act 2003* and will be subject to Parliamentary scrutiny via the registration and disallowance provisions in that Act.

81. Items 1 to 7 make consequential amendments to section 146. This section deals with the evidence applicable in trials by service tribunals generally. As it is now intended that the rules of evidence that apply to the AMC will not apply to a summary authority trial, section 146 will be expressed to apply to the AMC and section 146A applies to a summary authority.

82. Item 8 inserts new section 146A of the Bill, which provides for the rules of evidence applicable in a summary trial. It reflects existing evidentiary provisions in the Canadian *Queens Regulations and Ordinances* (pursuant to the *Canadian National Defence Act*) and evidentiary provisions existing in Australian Commonwealth legislation. The intent of these provisions is to make summary trials as informal and expeditious as possible, but without compromising procedural fairness or the right of an accused to a fair trial. This approach also reflects the fact that proceedings at the summary level are disciplinary in nature.

83. As mentioned above, new section 146A makes it clear that a summary authority is not bound by the formal rules of evidence (subject to the summary authority adhering to the requirements outlined in the section). However, following the Senate Standing Committee on Foreign Affairs, Defence and Trade recommendation (2007) to strengthen the recognition of the rules of evidence, but not to mandate their application, section 146A states that a summary authority must

comply with the rules of natural justice and basic principles of the rules of evidence relating to relevance, reliability, weight and probative value in proceedings before a summary authority. This will further reinforce the application of the principles of the rules of evidence (specified above) in summary proceedings. The Note to subsection 146A(2) provides that Summary Authority Rules may provide for the giving of testimony and other evidence.

84. Natural justice includes the notion of procedural fairness and may incorporate the following principles:

- A person accused of a crime, or at risk of some form of loss, should be given adequate notice about the proceedings (including any charges);
- A person who makes a decision should be unbiased and act in good faith;
- Proceedings should be conducted so they are fair to all the parties;
- Each party to a proceeding is entitled to ask questions and contradict the evidence of the opposing party;
- A decision-maker should take into account relevant considerations and extenuating circumstances, and ignore irrelevant considerations;
- Justice should be seen to be done.

Therefore, the purpose behind natural justice is to ensure that decision making is fair and reasonable and that a fair and proper procedure was followed in making the decision. This will be achieved in a summary trial by the application of the existing provisions in the DFDA, the Summary Authority Rules and the proposed amendments.

85. Item 9 repeals and substitutes section 147 which relates to judicial notice of service matters. Judicial notice is a rule of evidence that allows a fact to be introduced into evidence if it is well known, uncontentious or of common knowledge, such as scientific or medical facts. In the context of the DFDA, a service tribunal must take judicial notice of service matters.

86. Amended section 147 will make it clear that the AMC must take judicial notice of the general service knowledge of the Court and, if applicable, a military jury. It must take judicial notice of these matters, in addition to those matters under the rules of evidence in section 146. In the case of proceedings before a summary authority, it must take judicial notice of matters within its general service knowledge.

87. Item 10 replaces the reference to the ‘Judge Advocate General’ with the ‘Chief Military Judge’ in section 149, as being responsible for making the Summary Authority Rules (similar to the Australian Military Court Rules (under section 149A)). This will ensure consistency in the way in which the AMC deals with appeals and elections from summary procedures and provide further oversight of the summary system by the statutorily independent Military Judges of the AMC.

88. Items 11 and 12 amend paragraph 149(a) and inserts new paragraph 149(aa) respectively. The amended and new paragraphs extend the rule making power to enable procedural rules to be made in respect of the attendance and compellability of witnesses and the giving of testimony and other evidence. Plain language guidelines

for summary authorities will be based on the new evidence provisions in the DFDA and the Summary Authority Rules.

Schedule 4 – Review of summary proceedings

89. The modified system of review of all levels of summary proceedings will not only protect the rights of defence members who are tried and convicted by a summary authority, it will also give commanders an oversight of disciplinary issues within their commands. This extra layer of oversight is an important safeguard in the Bill, particularly where a member may not exercise his or her right of appeal to the AMC and an error in a summary trial (that is, action taken by the summary authority that is beyond its power) has been detected.

90. Item 1 adds new paragraph 149(i) which will enable the Chief Military Judge to make rules of procedure in respect of the reopening of a summary authority proceeding on the request of a reviewing authority (discussed below). The intent of this provision is to ensure complementary operation of the review and appeal functions, and ensure that the system of appeal to the AMC has precedence as the primary safeguard for members who have been convicted at a summary trial.

91. Item 2 inserts new Part VIIIA which introduces the regime for the automatic review of proceedings of a summary authority.

92. New section 150 re-states the existing definitions and appointment requirements in section 150A but reflects the new system of reviewing authorities. It also defines 'competent reviewing authority' in the same way in which it is currently defined.

93. New section 150A applies the Part to a summary authority proceeding that resulted in a conviction. This ensures that all summary convictions are subject to this additional oversight and safeguard.

94. New section 151 outlines the review regime in respect of a subordinate summary authority (SUBSA). Section 152 provides for superior summary authorities (SUPSA) and commanding officer (CO) proceedings. Whilst they are substantially similar, the review of a SUBSA proceeding has been structured to ensure that the commanding officer forwards the results of the review to a legal officer because a legal officer may not always be available or have been involved in the review by a commanding officer.

<u>Subordinate summary authority – section 151</u>

- As soon as practicable after a conviction, the SUBSA must give a record of the proceedings to his or her CO.
- The CO must review the proceedings, and may obtain legal advice before doing so.
- The review by the CO must be completed within 30 days from when the CO received the record of proceedings or, if the exigencies of service do not permit that time, as soon as practicable after 30 days.

- After completing the review, the CO must give both the original record of proceedings and his or her report of the review to a legal officer.
- The legal officer must consider the review and CO report and may then give them to a competent reviewing authority if appropriate. If that occurs, the competent reviewing authority must review the proceedings and give a written notice of the results of the review to the CO and the convicted person.
- The CO must give a notice of the results of the review to the SUBSA.
- Where a legal officer has not given the record of proceedings and the results of the review to a reviewing authority (because it is not considered appropriate), the CO must give notice of the results of its review to the SUBSA and the convicted person.

95. The primary purpose of this provision is to ensure that commanding officers are obliged to continually review the operation of their subordinate summary authorities and provide an additional safeguard for members.

Superior summary authority or commanding officer – section 152

- As soon as practicable after a SUPSA or CO convicts, they must give a record of the proceedings to a competent reviewing authority.
- The reviewing authority must review the proceedings after obtaining legal advice.
- The review must be completed within 30 days from when the record of proceedings was received or, if the exigencies of service do not permit that time, as soon as practicable after 30 days.
- The reviewing authority must give a written notice of the review to the SUPSA or CO and the convicted person.
- A review of a SUPSA proceeding is not available where that SUPSA does not have a reviewing authority of a higher rank. For example, where the Chief of the Defence Force is a SUPSA, he or she would not have such a reviewing authority. The note to section 152 makes it clear that an appeal to the AMC is available to that person in all cases.

96. New section 153 outlines the action that is to be taken following the review process in respect of all levels of summary authority. Fundamentally, where the reviewing authority considers that the action taken by the summary authority under Part IV (punishments and orders) is beyond its power, the reviewing authority may request the summary authority to reopen the proceedings. The summary authority must reopen the proceedings.

97. New section 153A outlines the procedures for dealing with re-opened proceedings. At the outset, the summary authority must notify the convicted person in writing that the proceedings are to be reopened.

98. As foreshadowed above, the summary authority's powers in a reopened proceeding are as follows -

- As the circumstances surrounding the review relate to a summary authority imposing a punishment or making an order that is beyond its power to impose,

a summary authority may impose a less severe punishment or reparation order that is less than the amount of the original order;

- When the summary authority has completed dealing with the re-opened proceedings, it must give a record of those proceedings to the reviewing authority that requested it to reopen.

99. In all cases, an appeal to the AMC is available (subject to subsection 161(4) discussed above in the context of appeals to the AMC). The appeal period commences after the reopened proceedings have been finalised. This ensures that convicted members have the benefit of all the review and appeal avenues that are available to them under the Bill and facilitates the complementary operation of the appeal and review process.

100. New section 154 discusses the effect of an appeal to the AMC on a review. Where an appeal has been lodged by a convicted person before the reviewing authority has completed its review, the reviewing authority must not request the summary authority to reopen the proceedings. This will prevent a review, appeal and reopened proceedings occurring concurrently and will ensure that the appeal system has primacy.

101. New section 155 outlines the circumstances where, if a reviewing authority considers any of the following have occurred, it must recommend to the convicted person that an appeal to the AMC is warranted, given the nature of the conviction or the manner of the proceedings –

- the conviction is unreasonable or cannot be supported having regard to the evidence;
- the conviction is wrong in law or a substantial miscarriage of justice has occurred;
- action taken by a summary authority under Part IV (punishments and orders) is excessive or unreasonable;
- a material irregularity has occurred in the course of the proceedings; and
- the conviction is unsafe or unsatisfactory.

102. It is incumbent on the reviewing authority to inform the convicted person's CO of its recommendation. The convicted person must then have the opportunity to obtain legal advice.

103. New sections 156 to 159 provide for the review of certain punishments that are subject to approval by a reviewing authority (because of their more severe character). If a summary authority imposes a punishment specified in subsection 172(2) (for example, detention, reduction in rank, forfeiture of seniority) or it has imposed a Part IV (restitution or reparation) order, the reviewing authority must approve or not approve the punishment or order. The reviewing authority must determine when the approved punishment or order takes effect. These provisions reflect the existing approval framework in the DFDA.

104. Section 158 requires the reviewing authority, if it has approved the punishment or restitution or reparation order, to determine they are to take effect.

105. New section 159 outlines what a reviewing authority must do in respect of a punishment or order that has not been approved; that is, it must quash the punishment or revoke the Part IV (restitution or reparation) order. In that case, the reviewing authority is limited to action that could have been taken by the summary authority that convicted the person. This is expanded in the section by outlining the punishment/Part IV (restitution or reparation) order options available to a reviewing authority. The combined effect of these provisions will ensure that a convicted person is not subject to a punishment or order that is more severe than that initially imposed by the summary authority.

106. Items 3 to 20 make consequential amendments to various provisions in the DFDA as a result of the modified review system, in particular, to reflect when action may be taken or the effect of certain punishments taking place pending the a review of a summary authority proceeding. Furthermore, the identified provisions reflect new definitions and phrases, for example, *'reviewing authority'* and *'review'*. Also, the amendments to the identified sections, which pertain to the revocation of a suspended punishment and the operation of cumulative and concurrent punishments, reflect the new review framework. This is achieved by incorporating references to 'summary authority', 'reviewing authority' or a 'competent reviewing authority' as the case requires.

107. Item 21 repeals and substitutes subsection 103(2) which relates to what the DMP may do in the event of a reviewing authority, the DFDAT or the Federal Court ordering a new trial of a person. Under the new review framework, a reviewing authority will no longer be able to order a new trial. Therefore, new subsection 103(2) will provide that where the DFDAT or the Federal Court has ordered a new trial, the DMP may request the Registrar to refer the charge to the AMC for trial.

Schedule 5 – Offences and punishments

108. This schedule amends various offence and punishment provisions in the DFDA.

109. Items 1 to 11 amend section 59 of the DFDA.

110. The ADF policy on the use of illegal drugs is that involvement with illegal drugs by any ADF member is not condoned and disciplinary and/or administrative action that may result in the member's termination may be initiated in the event of an allegation of illegal drug use. The rationale for this position is also expressed in the ADF prosecution policy, that is, the need for the ADF to establish and maintain the high standard of discipline necessary to conduct successful operations.

111. Currently, section 59 of the DFDA outlines the offences relating to the use and possession *in Australia* of cannabis (expressly excluding cannabis resin and cannabis fibre) of an amount limited to 25 grams and for the selling, etc of narcotic goods *outside Australia.* 'Narcotic goods' is defined to have the same meaning as in the *Customs Act 1901*. As currently drafted, section 59 no longer reflects contemporary illicit drugs use. In particular, the present limited quantity and range of drugs is insufficient to support enforcement and application of the ADF's 'no drug' policy. Existing limitations in respect of cannabis, in particular the limit in Australia of 25

grams and the limited definition of cannabis, has made it difficult for the ADF to take action under the DFDA. In many cases the alternative of civilian prosecution is not possible because thresholds for civilian prosecution may not have been reached.

112. Consistent with the Attorney General's Department broad policy approval, the proposed amendments will expand a service tribunal's ability to deal with charges in respect of certain amounts of certain illegal drugs for offences committed both in and outside Australia by a defence member or a defence civilian. These amendments will broaden the range of category of drug offences that may be tried, including any form of cannabis (other than cannabis fibre) and a narcotic substance within the meaning of the *Customs Act 1901* or an anabolic steroid within the meaning of the *Poisons and Drugs Act 1978* (ACT). The quantity of drug that will be able to be dealt with under the DFDA within Australia will also be increased via a new definition of 'prescribed quantity' which, for a narcotic substance will be up to the trafficable amount so specified for that substance, or for any other prohibited drug, 50 grams. Whilst the quantity and range of prohibited drug has been increased and noting that the penalty provisions have been redesigned, the existing penalties attached to these offences remain unchanged.

113. Section 59 (subsections (5) and (6) will also be amended to make it an offence for a person to administer or cause to be administered to himself or herself a prohibited drug.

114. A defence of 'lawful authority' has been included in respect of subsections 59(5) and (6) so that a defendant is required to establish, on the balance of probabilities, that he or she had lawful authority for the conduct mentioned in those subsections, that is, to self administer or cause or permit to be administered to him or herself a prohibited drug (for example, to deal with a drug (for instance, morphine) which may be prescribed for medical reasons).

115. Expansion of subsections 59(5) and (6) to include self administration and administration by another person has necessitated the inclusion of appropriate defence provisions. The lawful authority defence provisions intended for subsections 59(5) and (6) reflect the DFDA as it currently stands. The DFDA generally and section 59 contains many defence provisions similar to those that are being proposed. Furthermore, because of the ADF's no drugs policy and an expectation of a higher standard of behaviour than the general community, a high burden of proof is considered appropriate (again, consistent with existing provisions in the DFDA). If a member is taking drugs or is having them administered to him or her, and has lawful authority for doing so, then the burden of proving that lawful use, as reflected in the defence provisions that have been included, is appropriate.

116. Re-designed section 59 has been organised accordingly to reflect-

- whether the offence was committed inside or outside Australia;
- whether the offence is in respect of a defence member or defence civilian;
- whether the offence is in respect of possession, selling, dealing or trafficking or administering a prohibited drug.

117. By the use of headings in the various subsections, these amendments will make section 59 easier to read and will clearly identify the offence and corresponding penalties that apply.

118. Of particular note are the new definitions of *cannabis*, *prescribed quantity* and *prohibited drug*. The definition of *cannabis* remains largely the same, but with the exclusion of cannabis fibre, as this is not able to be used as a prohibited drug. *Prescribed quantity* not only reflects amounts specified in the *Criminal Code 1995* for controlled drugs or a controlled plant (up to a trafficable quantity), it supports the enforcement and application of the ADF's 'no drug' policy.

119. Items 12 to 17 amend section 60 by adding that the offence can also be committed by omitting to do something. Because of the nature of their activities, members of the ADF subject themselves to constraints and standards over and above those pertaining to civilian society. Part of the reason for this is that the omission of an act in an armed force may have serious consequences, just as much as the commission of an act. For this reason, it is proposed to amend section 60 by adding that the offence can also be committed by omitting to do something.

120. Subsection 60(1) currently provides that, *A defence member is guilty of an offence if the member engages in conduct that this likely to prejudice the discipline of, or bring discredit upon, the Defence Force*. While the traditional position and intention of the DFDA is that section 60 includes both acts and omissions, the interpretation of the *Criminal Code 1995* has led to a difference of legal opinion on this issue. The proposed amendment will insert new subsection 60 (1A) to put beyond doubt that the offence can be committed by omitting to perform an act, where that omission is likely to prejudice the discipline of, or brings discredit on, the Defence Force. This will give specific legislative effect to the original intention.

121. Item 17 introduces a defence of 'reasonable excuse' for omitting to perform an act. Although the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states that the defence of reasonable excuse should not be used in the context of Commonwealth offences, similar statutory defences are included in various existing DFDA offence provisions. Furthermore, a trade off for a strict liability offence (such as section 60) would normally be to reduce the maximum punishment for the offence (the current punishment is 3 months imprisonment). Criminal law policy considerations provide that for a strict liability offence, the maximum punishment should, subject to other considerations, be limited to a substantial fine. However, given that the purpose and jurisdiction of the offence is limited to ADF members, the retention of the existing maximum punishment of 3 months imprisonment is appropriate.

122. Item 18 adds sections 36A (*unauthorised discharge of a weapon*) and 36B (*negligent discharge of weapon*) to Schedule 6, as mutual alternatives, to the list of alternative offences in Schedule 6. Although these sections are similar offences, it is currently not possible to find an accused guilty of, say section 36A, if only section 36B is written on the charge sheet, but at the trial the facts prove that section 36A had occurred instead.

123. If sections 36A and 36B are mutual statutory alternatives, then when an accused is charged with section 36A, a service tribunal can find an accused guilty of the other offence, even though it is not written on the charge sheet. It will no longer be necessary for both charges to be written on the charge sheet, which will simplify the charging and trial processes. This is important, as it will allow the ADF to maintain and enforce the high standard of discipline required for the use of weapons in a disciplined armed force. This amendment will aid simplicity by ensuring that these alternative offences are dealt with in the same way as other statutory alternative offences under the DFDA.

124. Items 19 to 38 amend various provisions in the DFDA (specifically sections 74, 78, 80, 81 and 82) to enable a service tribunal to suspend *part* of a punishment (in addition to full suspension). Under the current system, sentences of detention must either be served or suspended in full. It is intended to enable the part suspension of a sentence of detention for the purposes of fairness. This is also consistent with the options available to civilian courts and with section 79 of the DFDA, which already allows for part suspension of fines. This amendment will give the AMC and a summary authority a degree of flexibility in sentencing which will improve the fairness of the system, by allowing for a part suspension of detention where the circumstances of a case, or mitigation, establish that it is appropriate.

Schedule 6 - Minor disciplinary infringements

125. It is proposed to amend Part IXA of the DFDA to expand the jurisdiction of discipline officers to deal with a matter in respect of junior officers (up to and including a Lieutenant in the Navy, Captain in the Army and Flight Lieutenant in the Air Force), warrant officers and non commissioned officers. This will be in addition to the existing ranks of officer cadet and member below non commissioned rank. The benefit is that the most minor infringements by these members can be dealt with in a way that will not appear permanently on their service record. The practical effect of this change is that one mistake will not have the potential to adversely affect them throughout the remainder of their career.

126. The same offences ("disciplinary infringements" under section 169A), will continue to apply, that is –

- section 23 - Absence from duty
- section 24 - Absence without leave (not exceeding three hours)
- section 27 - Disobeying a lawful command
- section 29 - Failure to comply with a general order
- subsection 32(1) - Person on guard or watch
- section 35 - Negligent performance of a duty
- section 60 - Prejudicial conduct

127. The punishments of a fine of up to one day's pay and/or a reprimand will apply to these extended ranks. The other punishments of restriction of privileges, stoppage of leave, extra duties, and extra drill are not appropriate punishments under the discipline officer scheme for these ranks as they may have subordinate command responsibilities in the hierarchical command structure of an armed force.

128. Item 1 introduces a revised definition of *discipline officer* for the purposes of the amended Part IXA.

129. Item 2 introduces a definition of *junior officer* as meaning an officer of or below the rank of lieutenant in the Navy, captain in the Army or flight lieutenant in the Air Force.

130. Item 3 will amend section 169A to insert a definition of *prescribed defence member*. This will have the effect of increasing the jurisdiction of a discipline officer to deal with a matter in respect of a an officer of or below the naval rank of Lieutenant, Captain in the Army and Flight Lieutenant in the Air Force, warrant officer or non commissioned officer. This will be in addition to the existing rank of officer cadet and member below non commissioned rank. It will however not extend to a warrant officer covered by a determination under section 169BA (discussed below). Expansion of jurisdiction in this way will allow minor disciplinary infringements by these members (especially in a training environment) to be dealt with more quickly and at a level that is more appropriate given the nature of the infringement. This will enhance the maintenance of ADF discipline and provide these defence members with an alternative to having their minor disciplinary infringements dealt with by more formal proceedings before a service tribunal.

131. Item 4 adds into new section 169A a definition of *relevant discipline officer*, which will have the same meaning as in section 169BB. A relevant discipline officer will be the person who deals with a prescribed defence member in respect of a disciplinary infringement under Part IXA.

132. Item 5 inserts new section 169BA that allows a Service Chief to determine, in writing, that certain categories of warrant officer (for example, a Regimental Sergeant Major) are not prescribed defence members for the purposes of Part IXA and therefore not subject to the discipline officer scheme. This will reflect the experience, maturity and responsibilities of certain warrant officers. A determination under proposed section 169BA is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003*. It is included to avoid any doubt and to assist readers.

133. Item 5 also adds new section 169BB which sets out who a relevant discipline officer is in relation to a prescribed defence member. This is done via a table and specifies the rank of a discipline officer who may deal with a prescribed defence member as follows –

- Where the prescribed defence member is a junior officer (lieutenant, captain or flight lieutenant) the discipline officer must be at least one rank senior;
- Where the prescribed defence member is an officer cadet, any discipline officer may deal with that member;
- Where the prescribed defence member is a warrant officer or a non commissioned officer, the discipline officer must be not lower than lieutenant commander, major or squadron leader rank;
- Where the prescribed defence member is a member below non-commissioned rank, any discipline officer may deal with that member.

134. Item 6 amends section 169C in respect of the jurisdiction of discipline officers. It reflects the new definition of a relevant discipline officer in relation to certain ranks (as per the definition of prescribed defence member). Apart from the minor amendment to paragraph 169C(a) discussed below, the remainder of section 169C is unchanged.

135. Item 7 removes the reference to 'defence' in paragraph 169C (a) to reflect the new definition of prescribed defence member.

136. Items 8 to 12 make consequential amendments to various provisions in Part IXA to reflect the new definition of prescribed defence member.

137. Item 13 introduces a table that clearly sets out the punishments that are applicable to junior officers, warrant officers and non commissioned officers in respect of disciplinary infringements under Part IXA. A fine of one day's pay or a reprimand applies to these ranks (Column 1). The punishments listed in Column 2 are not considered to be appropriate punishments for these ranks (as they could be exercising subordinate command positions). They are only expressed to apply to an officer cadet or a member below non-commissioned rank. For example, restriction of privileges, extra drill or stoppage of leave will apply to these ranks (in addition to the reprimand and the fine of one day's pay).

138. Currently subsection 68(2) of the DFDA provides that the CDF or a Service chief may make rules with respect to the consequences that are to flow from the imposition by a service tribunal on a member in respect of certain offences (for example, reduction in rank, extra drill etc.) The *Defence Force Discipline (Consequences of Punishment) Rules 1986* gives effect to subsection 68(2). These Rules do not apply to punishments imposed by a discipline officer, as section 68 only refers to 'service tribunal' and a discipline officer is not a service tribunal as defined in the DFDA.

139. Item 14 inserts new section 169FB to allow CDF or a service chief to make rules that apply to the punishments imposed by a discipline officer under the discipline officer scheme under section 169F. These Rules are legislative instruments under the *Legislative Instruments Act 2003* (LIA). This proposed amendment will allow standardisation of the consequences for DFDA punishments under subsection 68(2) and section 169F in the interests of fairness and transparency. That said, a commanding officer may moderate the consequences of a punishment if he or she considers it is appropriate in the circumstances and having regard to any directions by CDF or a Service chief, consistent with the Rules. The provision under subsection 169FB(2), that such directions are not legislative instruments within the meaning of section 5 of the LIA, has been included for the avoidance of doubt and the benefit of the reader.

140. Items 15, 17 and 18 make minor consequential amendments to give effect to amendments in Schedule 6 (to reflect the new definition of 'prescribed defence member'.

141. Item 16 inserts new section 169GA to require a discipline officer to provide a report to his or her commanding officer (as soon as practicable after the end of each month) which includes the following information –

- the name of each prescribed defence member dealt with;
- the nature of the disciplinary infringement; and
- the punishment imposed.

142. The intention of this amendment is to provide a safeguard through legislated oversight of the discipline officer scheme. It will also provide statistical information to commanding officers of the nature and frequency of disciplinary infringements within their command. This will facilitate the maintenance of discipline and transparency of the discipline officer scheme.

143. The note to section 169GA makes it clear that a report by a discipline officer is a 'relevant record' as defined by section 169H of the DFDA and therefore must be destroyed after 12 months.

Schedule 7 – other amendments

144. Item 1 repeals and substitutes subsection 87(1A) to clarify the powers of the DMP under section 87. Current DFDA subsection 87(1A) is unclear as to whether it fully provides for the intended extent of the DMP's powers. These include charging a

member with a service offence, summoning a member to appear before a summary authority, referring a charge to a summary authority or requesting the Registrar of Australian Military Court to refer a matter for trial by the AMC. In the interests of ensuring the DMP can perform his or her role in supporting the ADF discipline system, it is intended to amend the DFDA to clarify the DMP's powers under section 87 and to make it clear that he or she has the full range of options that are required by the position. It is not intended to add to or diminish the existing options under this provision.

145. Item 2 inserts new section 103A which will enable the DMP to require, in appropriate circumstances, that a trial of a class 3 offence is to be by a Military Judge alone (notwithstanding current subsection 132A(3) which offers an accused person an election to be tried by a Military Judge and a military jury for a class 3 offence). This amendment gives effect to an undertaking following the Senate Standing Committee for Foreign Affairs, Defence and Trade consideration of the provisions of the *Defence Legislation Amendment Act 2006*, in October 2006. This amendment also reflects civilian criminal and overseas military systems which enable a prosecutor to require that a charge be dealt with by judge alone for a more minor range of offences.

146. Providing the DMP with the a power to specify trial by Military Judge alone for Class 3 offences is consistent with the existing approach in the *Crimes Act 1914* (Cth) which allows for the summary disposal of certain offences without an accused's consent. More often than not these offences do not warrant a jury trial (with the associated administrative issues, expense and possible delays). Minimising, where possible, the number of jury trials, will be of significant benefit to the ADF, given the potential for AMC trials in respect of minor offences to impact adversely and disproportionately upon ADF operations.

147. New section 103A will benefit the accused person as there will be limited punishment options should the DMP make a decision under this section. The maximum powers of punishment will be limited to 6 months imprisonment (which reflects what has been available for a DFM in the same circumstances).

148. Item 3 repeals and substitutes subsection 132A (3). This subsection outlines how a class 3 offence is to be tried to reflect the inclusion of new section 103A to enable the DMP to require a trial of a class 3 offence to be by a Military Judge alone (current subsection 132A(3) enables an accused person to elect to be tried by a Military Judge and a military jury for a class 3 offence). Providing the DMP with an election for trial by Military Judge alone is consistent with the approach in the *Crimes Act 1914* (Cth) which allows for summary disposal of certain offences without the accused's consent and also gives effect to a recommendation by the Senate Standing Committee on Foreign Affairs, Defence and Trade, in its report of October 2006.

149. The maximum powers of punishment will be limited to 6 months imprisonment. As an additional safeguard, this is considerably less than that allowed for in the civilian system. In comparison, the Commonwealth Constitution provides that indictable offences shall be tried by jury and the Commonwealth *Crimes Act 1914* section 4G defines an indictable offence as offence against a law of the Commonwealth punishable by a period of imprisonment exceeding 12months.

150. The combined effect of these amended and new subsections will make it clear that the availability to an accused person of a military jury trial will be subject to the DMP's decision to require a trial by a Military Judge alone. The accused person is protected in that where the DMP has decided on a trial by Military Judge alone, the AMC will have limited powers of punishment (maximum of 6 months imprisonment).

151. Item 4 inserts a new clause into Schedule 2. Current Schedule 2 outlines the punishments that may be imposed by the AMC. As amended, Schedule 2 will reflect that the AMC cannot impose a punishment of greater than 6 months imprisonment in respect of an offence that was tried by a Military Judge alone where the DMP has so directed under subsection 132A (4) (discussed above).

152. Items 5 and 6 amend the *Defence Force Discipline Appeals Act 1955* consequential on a new provision which will enable the DMP to seek a determination from the Defence Force Discipline Appeal Tribunal (DFDAT) on a question of law (discussed below). Sections 15 and 16 (which relate to the exercise of powers and constitution of the DFDAT), will be amended to include references to proposed section 19A (which enables the DFDAT to consider the reference). The amendments do not affect their substantive content.

153. Items 7 to 12 will insert new Division 1A in Part III ('References and appeals to the Tribunal') to enable the DMP to seek a determination from the DFDAT on a question of law that arose in an AMC trial, at the conclusion of that trial. This amendment gives the DFDAT the jurisdiction to hear and determine the question of law. These items also make the necessary consequential amendments to provisions in the DFDAA to give effect to this amendment.

154. The rationale for this proposal has been explained by the High Court in *Mellifont v. Attorney-General (QLD)(1991)173 CLR 289* the emphasis being that there should be a procedure to obtain a correct statement of the law for future cases (that is, precedent) -

... the purpose of seeking and obtaining a review of the trial judge's ruling was to secure a correct statement of the law so that it would be applied correctly in future cases. ... The statutory procedure, which has counterparts in other Australian jurisdictions, is a standard procedure for correcting an error of law in criminal proceedings....

155. The ability of the DMP to obtain such rulings will serve to improve the efficiency and accuracy of future trials conducted under the DFDA.

156. Items 13 and 14 amend section 60 of the DFDAA (by adding new paragraph (ga)) which will enable Regulations to be made for the purposes of furnishing certain documents (record of proceedings and documents in the AMC trial) to the DFDAT in respect of a referral.

157. Items 15, 16 and 17 statutorily recognise the recently created 'Provost Marshal Australian Defence Force', by including a definition of that position and outlining that he or she may refer a serious service offence to the DMP in appropriate circumstances (discussed in the general outline). Consistent with the

Government response to the Senate report, the Provost Marshal Australian Defence Force (PMADF) was appointed on 14 May 2006 to head the newly established ADF Investigative Service (ADFIS). Among other things, the PMADF (and ADFIS) is to investigate or refer all complex service offences for investigation within Defence and to 'work closely with the Director of Military Prosecutions...to achieve oversight of ADF criminal investigations'.

158. It is proposed to amend the DFDA to enable the PMADF to refer serious service offences to the DMP where he or she considers it appropriate to do so. Such a referral will take place after the completion of an investigation and after a charge or charges have been laid. Currently, for an offence to be referred to the DMP, it has to be referred by, among others, a summary authority. Now that a PMADF and a statutorily independent DMP have been established, this need not be the case in all circumstances.

159. Adoption of this provision will improve efficiency by streamlining military justice procedures by allowing more serious matters to be referred directly to the DMP and trial before the AMC, without necessarily being referred by a summary authority.

160. Items 18 to 21 relate to the intended expansion of the jurisdiction of superior summary authorities. The jurisdiction of superior summary authorities will be expanded to cover ranks up to Rear Admiral in the Navy, Major General in the Army and Air Vice Marshal in the Air Force. Currently, only ranks up to Lieutenant Commander, Major and Squadron Leader may be tried at a summary trial. This change will allow simple and minor offences committed by more senior officers to be dealt with expeditiously at the summary level, rather than awaiting (the currently mandatory) trial by the AMC. This change will enhance the efficient maintenance of discipline in operational circumstances where it is important that matters be dealt with expeditiously. The scale of punishments for these higher ranks will be a fine up to a maximum of 7 days pay, a severe reprimand or a reprimand. However, in order to preserve their existing entitlement, these officers will be provided with the right to elect to have these matters dealt with before the AMC.

161. Item 22 inserts new section 108A to disqualify a summary authority from trying a service offence where that summary authority has been involved in the investigation of that service offence, the issuing of a warrant (other than a warrant under section 88 of the DFDA) or charging the person with that offence. This will not only avoid any conflict of interest situations, it will also reinforce current practices, legal policy requirements and improve impartiality and transparency, by removing doubts for commanders and reducing perceptions about the possible bias of a commander.

162. New section 108A will disqualify a summary authority from trying a charge in the circumstances outlined above and requires the summary authority to refer the charge to another summary authority who has jurisdiction to try the charge and who is not similarly disqualified.

163. Item 23 adds a new paragraph to subsection 141(1)(b) to make the disqualification of a summary authority a ground upon which a member may object.

This amendment has been included in section 141, which deals with applications and objections on the grounds of bias and other grounds (including the jurisdiction of a summary authority or a charge being wrong in law). The proposed amendment will protect a member by allowing them to object in the event that a summary authority does not comply with the automatic disqualification provision. This in turn will improve impartiality and transparency in the summary trial process.

164. Item 25 inserts section 129. Currently section 96 of the DFDA provides a time limit on charges being laid against a person of 5 years from date of the offence to the date of the charge (subject to exceptions for certain serious offences). However, there is currently no time limit from the time of the charge to the time of a trial.

165. For offences tried by a summary authority, a lengthy time between charging and trial is inconsistent with the intent of summary proceedings, which in turn can be seen as reducing the disciplinary value of a charge under DFDA. A short time between charging and trial will improve the timeliness of processes and promote operational effectiveness by ensuring that summary proceedings are dealt with quickly. Delays in the conduct of the proceedings can have an adverse effect on the enforcement and maintenance of discipline, and on the morale of defence members.

166. Therefore, in addition to the time limit imposed by section 96, this amendment will require a summary trial to be commenced as soon as practicable within a 3 month period and be completed as soon as practicable. However, if this time limit cannot be met, due to the exigencies of service, within a longer period that the summary authority allows. If these time limits are not met, then the charge must be referred to the DMP.

167. Item 26 repeals and substitutes paragraph 130(1)(a) which is required as a consequence of the new right of election from summary trials to the AMC. It is necessary to amend section 130 that currently requires an accused to be convicted immediately they plead guilty, to preserve the right of election in respect of a guilty plea to a Schedule 1A offence.

168. To enable a right of election (to be tried by the AMC) to be offered to an accused where a summary authority considers that the circumstances of a case warrants a more severe punishment, it is necessary to enable the facts of the case to be heard before conviction. This will only apply to Schedule 1A offences, being service offences within the jurisdiction of a summary authority in respect of which the summary authority does not offer an election prior to the summary authority dealing with the matter. This proposal will increase the fairness of the system by ensuring a right of election in all cases where a more severe punishment is warranted and will enhance the maintenance of discipline by not restricting the punishments that may be awarded.

169. Item 27 will repeal section 130A of the DFDA which provides for an ‘examining officer’ scheme. In relation to a CO proceeding, the CO may, at any time, appoint an officer (a legal officer) to ‘hear’ evidence in relation to a charge. However, the examining officer scheme is only available to a CO

hearing (not subordinate summary authority or superior summary authority) and is rarely used.

170. It is therefore intended to remove this scheme to improve the timeliness and simplicity of the summary system by removing an extra layer of process. Where matters have complex evidentiary requirements, the matter may be referred to the Director of Military Prosecutions.

171. Item 28 will add new section 131B in respect of the status of a summary conviction.

172. To address concerns expressed in the 2005 Senate report following the inquiry by the Senate Foreign Affairs, Defence and Trade References Committee into *The effectiveness of Australia's military justice system*, that -

all charges can potentially lead to a criminal record which could have a significant impact on the lives of Service personnel long after they leave the military

it is intended to make it clear that a conviction by a summary authority will be for service purposes only. This is intended to ameliorate any disadvantage to an ex-member after leaving the ADF in respect of, in many cases, minor disciplinary offences. This is consistent with the purpose of the DFDA where jurisdiction is only exercised where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. This proposal is also consistent with advice from the Australian Government Solicitor.

173. Item 30 amends section 139 of the DFDA to allow an accused the right to request no personal appearance, subject to approval, in a summary proceeding. The personal appearance of the accused will remain the norm, noting that the consequence of a summary proceeding may be a conviction for a service offence. However, in exceptional circumstances where the accused intends to plead guilty, the member may apply to not personally appear at a summary proceeding and to have the matter heard in his or her absence subject to the approval of the summary authority. The member will have the right to be represented at such a hearing, consistent with the existing right to be defended pursuant to the *Summary Authority Rules 2007*. This new provision will, for example, allow the expeditious completion of proceedings where there may be operational imperatives for an officer of appropriate rank in Australia to deal with a simple, uncontested service offence, where it is necessary for the accused to remain deployed on operations. The timeliness of summary proceedings will be improved whilst also maintaining operational effectiveness.

174. Items 31 to 34 make consequential amendments to the DFDA to better reflect the functions of the Registrar of the Australian Military Court. Specifically, the Registrar will be re-included in the definition of 'appropriate authority' The *Defence Legislation Amendment Act 2006* amended the definition of 'appropriate authority' (formerly a part of the command chain) to reflect the new system of trials by the AMC rather than by courts martial or Defence Force magistrates. To clarify the responsibilities of the Registrar in fulfilling the 'appropriate authority' powers, it is necessary to re-insert the Registrar in this definition as it is not envisaged that the AMC would exercise all the functions of an 'appropriate authority.' An 'appropriate

authority' has certain statutory functions (under the Act and the Rules) including, facilitating the appearance of a person in custody as a prisoner to appear before the AMC, requesting the CDF or DMP to pay witness expenses, arranging for court recording or interpreter services, summonsing an accused person or a witness to appear before the AMC or produce documents. These functions are ones that the Registrar would routinely exercise as part of his or her role in providing administrative and management services to the AMC. The proposal will also make it clear that an 'appropriate authority' includes the Chief Military Judge or a Military Judge rather than the AMC.

175. Item 35 amends subparagraph 149A(a)(iii) to clarify that rules of the Australian Military Court may be made in respect of the manner and timing of elections made by an accused person for trial by a Military Judge alone (in respect of a class 2 offence) or by Military Judge and military jury (in respect of a class 3 offence). This amendment does not alter the right of an accused person to elect to be tried by a military jury.

176. Item 36 inserts new subsections 171(1B) and (1C). As a consequence of the *Defence Legislation Amendment Act 2006*, an unintended administrative consequence has been identified that may affect the management of the imposition of a punishment of dismissal. Previously, all punishments imposed by a Court martial or Defence Force magistrate took effect immediately, but subject, in some cases, to approval by a reviewing authority. The affect of this was to allow a period of administration by the ADF. The review process is no longer applicable in the context of the Australian Military Court and pursuant to section 171 of the DFDA, all punishments imposed by the AMC under the DFDA take effect immediately. As a consequence of this, a punishment of dismissal, for example, will immediately result in the status of the convicted person changing from a service member to a civilian. As mentioned above, this in turn may have administrative complications in terms of the subsequent management of the convicted person, particularly if the conviction occurred in an operational theatre. It is therefore proposed to amend section 171 to allow the AMC to order that a punishment of dismissal is effective on a day no later than 30 days after the punishment is imposed.

177. Item 37 amends the *Defence Act 1903* to provide for the rights and duties of legal officers. Concerns have been raised that current ADF structures could give rise to a perception that ADF legal officers may not always exercise their legal duties independently of command influence. New section 122B will provide that a legal officer in the Australian Defence Force shall discharge their professional rights, duties and obligations in accordance with generally accepted rights, duties and obligations applying to legal practitioners. The purpose of this new section is to ensure that ADF legal officers are not subject to inappropriate command direction in the exercise of their professional capacity as ADF legal officers. It is not intended to prevent an ADF legal officer who is superior in rank or appointment from issuing technical directions to subordinate ADF legal officers in relation to matters they are responsible for. It also does not exempt ADF legal officers from compliance with lawful orders in the performance of their military duties.

178. For consistency and to avoid any confusion, ‘legal officer’ and ‘legal practitioner’ are defined as having the same meaning as in the *Defence Force Discipline Act 1982*.

179. Items 39 to 43 amend Schedule 6 of the DFDA. The minor consequential amendments to Schedule 6 remove the reference to section 40B (negligent conduct in driving) which was repealed in 2004. After harmonising the DFDA offences with the Commonwealth Criminal Code in 2001, it was subsequently determined that section 40B was superfluous and section 40D (driving without due care and attention) covered the conduct that section 40B dealt with.

180. Item 44 makes a minor technical amendment to subsection 26(2) of the *Defence Force Discipline Appeals Act 1955* to correct a punctuation error. This is required as a result of the *Defence Legislation Amendment Act 2006*.

Schedule 8 - Application, saving and transitional provisions

181. Items 1 to 7 of this Schedule broadly reflect that –

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

will be dealt with under the 'old law' (the DFDA or the DFDAA in force prior to the commencement date) or under the new system ('the main amendments made by this Act'), depending on their status.

182. Item 1 defines expressions used in the Schedule including, 'commencement date', main amendments made by this Act' 'old law' and 'old DFDA'.

183. Item 2 explains the transitional arrangements in respect of service offences committed on, before or after the commencement date. The main amendments (the new system) will apply in relation to a service offence committed on or after the commencement day (which reflects the policy above). They will also apply before the commencement day if the person has not been charged under the old DFDA or he or she had been charged but no action had been taken to deal with that charge.

184. Item 3 applies the amendments contained in Part 1 of Schedule 5 (offences) and Schedule 6 (minor disciplinary infringements) to acts or omissions that have taken place on or after the commencement date. Where an act or omission has taken place both before and after the commencement date, subitem (2) makes it clear that they will be taken to have been committed before the commencement date and therefore the old law will apply.

185. Item 4 lists those matters that will be dealt with under the old law despite the main amendments made by the Bill. The effect of this item is to continue the application of the old law to proceedings commenced before the commencement day and will apply to proceedings and reviews commenced under the old law. Subitem 4(3) also makes it clear that a review by the CDF or service chief under section 155 must not be commenced after 31 December 2008. This item reinforces the policy expressed above.

186. Item 5 continues the operation of Rules made by the Judge Advocate General under section 149 of the DFDA (the *Summary Authority Rules*) as if they had been made by the Chief Military Judge. This will reflect the proposed amendment to section 149 to enable the Chief Military Judge to make rules of procedure in respect of summary authority trials.

187. Item 6 reflects the repeal of section 130A (examining officers). If an examining officer has started but not finished hearing evidence he or she must complete hearing the evidence as if the repeal had not occurred. If a commanding

officer has directed an examining officer to hear evidence, but this has not commenced before the repeal, the direction will be taken not to have been made.

186. Item 7 continues the appointments of ‘reviewing authorities’ and ‘competent reviewing authorities’ made under section 150 of the DFDA that were in force immediately before the commencement day, as if the appointments were made under subsection 150(1), as inserted by item 2 of Schedule 4 of the Bill.

187. Item 8 is a standard provision which allows regulations to be made in respect of any transitional, saving or application matters that have not been specifically provided for in the Bill.