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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DEFENCE LEGISLATION (ENHANCEMENT OF MILITARY JUSTICE)
BILL 2015**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Defence,
the Hon Kevin Andrews MP)

DEFENCE LEGISLATION (ENHANCEMENT OF MILITARY JUSTICE) BILL 2015

GENERAL OUTLINE

The Bill contains a number of important military justice and military discipline related amendments to the *Defence Force Discipline Act 1982* (DFDA) and the *Defence Act 1903*, which implement certain recommendations from Defence Reviews and Reports, re-activates outstanding legislative proposals, and which deal with other issues identified in the routine use of these Acts. The Bill also contains amendments to the *Military Justice (Interim Measures) Act (No. 1) 2009* relating to the extension of the period of appointment of the Chief Judge Advocate (CJA) and full-time Judge Advocate.

In summary, these measures will:

- clarify the character and status of service convictions for Commonwealth purposes;
- remove the provisions in respect of the trial of 'old system offences' (offences under the law prior to the DFDA);
- create a service offence of 'assault occasioning actual bodily harm';
- create a service offence of 'unauthorised use of a Commonwealth credit card'
- clarify the elements of the service offence of 'commanding or ordering a service offence to be committed' under section 62 of the DFDA;
- enable the fixing of non-parole periods by service tribunals to overcome the problems associated with recognisance release orders;
- correct a technical error in the charge referral process;
- correct a technical error in the Discipline Officer scheme;
- replace dollar amounts as maximum fines in the DFDA with the more contemporary penalty units system;
- statutorily recognise the Director of Defence Counsel Services (DDCS); and
- extend the period of appointment of the current CJA and full-time Judge Advocate.

FINANCIAL IMPACT STATEMENT

There will be no net impact on consolidated revenue.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence Legislation (Enhancement of Military Justice) Bill 2015

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* namely, the *International Covenant on Civil and Political Rights* (ICCPR).

Human Rights Implications

The DFDA and the proposed *Defence Legislation (Enhancement of Military Justice) Bill 2015* are mindful of, and consistent with, the following rights:

- the right to a fair trial under Article 14 of the ICCPR. This includes the principles of:

- a fair hearing by a competent, independent and impartial tribunal,
- the presumption of innocence (with the application of appropriate burdens of proof and legal defences), and
- minimum guarantees in criminal proceedings (such as appropriate charges, qualified legal representation, appropriate penalties);
- freedom from arbitrary detention under Article 9 of the ICCPR;
- the right to humane treatment whilst in detention under Article 10 of the ICCPR; and
- the right to privacy under Article 17 of the ICCPR.

The purpose of Australia's military discipline system is to support military commanders in maintaining and enforcing service discipline to enhance operational effectiveness. A military discipline system that supports the authority and effectiveness of commanders is of vital importance in the efficient, effective, and proper operation of the ADF.

This Bill makes amendments to the *Defence Act 1903*, *Defence Force Discipline Act 1982*, and Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

The Bill operates to make military justice enhancements to the existing military discipline system and to extend the appointments of the current CJA and full-time Judge Advocate, who contribute to the effective operation of the military justice system and the dispensation of military discipline.

The Bill reflects a positive human rights milieu. It is, therefore, compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Detailed outline of the proposed amendments (see also 'notes on clauses')

The character and status of service convictions under Commonwealth law

Currently, in the military discipline system, the legal character and status of convictions imposed by service tribunals has become somewhat uncertain. The Bill will clarify the character and status of a conviction in respect of a service offence by a court martial, a Defence Force magistrate, and a summary authority.

The Bill amends the DFDA to clarify the character and status of service offences as an offence against a law of the Commonwealth. Convictions for service offences by a summary authority continue to be for service purposes only. However, convictions for service offences by a court martial or Defence Force magistrate must be disclosed as an offence against a law of the Commonwealth, if required under legislation. As a result, a person will be required to disclose convictions for service offences by a court martial or Defence Force magistrate when a law requires disclosure of convictions against a law of the Commonwealth. In these instances, they will disclose that the conviction was for a service offence. A service chief or an authorised officer may also disclose the fact that person has been convicted of a service offence, and information relating to the conviction, to a Commonwealth, State or Territory authority for purposes connected with investigating, prosecuting or keeping records in relation to offences against laws of the Commonwealth, the State or the Territory. The exception to this is offences under Schedule 1A, which are purely service in nature and have no civilian criminal equivalents. Convictions for these offences will be reportable for service purposes only, unless a punishment of imprisonment has been imposed by a Service tribunal.

The Commonwealth spent convictions regime will continue to apply to a conviction of a service offence by a service tribunal, subject to the applicable exemptions.

Removal of references to ‘old system offences’

The DFDA currently refers to ‘old system offences’. This term refers to offences contained in previous single service discipline legislation, which was repealed when the DFDA commenced in 1985. The ‘old system offences’ provisions were included in the DFDA at that time as a transitional measure.

The Bill will remove references to ‘old system offences’ and its associated term ‘previous service law’ in the DFDA because the only acts or omissions which might constitute an *old system offence* are those which can now only be tried under the DFDA if:

- they occurred between 3 July 1982 and 2 July 1985; and
- they were alleged to have been committed by a current ADF member, or an ex-member within six months of the date of the charge; and
- they constitute mutiny or desertion; or
- for enlisted Army and Air Force personnel, the offence was that of a fraudulent enlistment; or
- the offence was an indictable *Defence Act 1903* offence.

It is assessed that these provisions are now obsolete given the effluxion of time, and so should be repealed.

New service offence of ‘assault occasioning actual bodily harm’

The Bill will create a new service offence of ‘assault occasioning actual bodily harm’. This offence is intended to remove the problems and complexity that arise during service trials from the application of different criminal responsibility principles due to the way that charges for such an offence are laid and prosecuted under service law.

The existing assault provisions do not contemplate ‘aggravated’ forms of assault, which reflect the civilian criminal law concept. As a result, this form of assault is usually charged as a ‘Territory offence’ pursuant to section 61 of the DFDA, using the *Crimes Act 1900* (ACT) and, when charging a member in this way, it is common practice to include on the charge sheet as an alternative the service offence of assault. Therefore, if the evidence at trial proves the fact of an assault, but is equivocal as to the physical harm it has caused, the accused will be acquitted of the more serious Territory offence, but may still be convicted of the lesser service offence.

The DFDA currently contains a number of service offences involving assault, specifically:

- section 25 (assaulting a superior officer)
- section 30 (assaulting a guard)
- section 33 (assaulting another person)
- section 34 (assaulting a subordinate)
- section 49 (assault against an arresting person)

The seriousness of an assault ranges from common assault (section 33), which may involve a mere touching (or even ‘assault’ without physical contact), to more serious forms of assault, which cause, for example, actual bodily harm or grievous bodily harm. In the ADF, additional factors that ‘aggravate’ the offence include whether the victim is subordinate or superior to the accused, whether the victim is on guard duty, whether the accused is on operations against the enemy at the time, or whether the victim is carrying out an arrest at the relevant time.

The new service offence will overcome some of the difficulties in laying charges and, in particular, the difficulties with the application of criminal responsibility rules in the context of the existing assault provisions. The absence of a specific DFDA offence of assault occasioning actual bodily harm compels the Director of Military Prosecutions (DMP) to include in a single charge sheet Territory offences, with (lesser) DFDA offences in the alternative, which activates different criminal responsibility rules. This requires a single set of facts to be weighed against two separate standards, leading to confusion, complexity and duplicated effort. For example, the principles applicable under the ACT *Criminal Code 2002* will apply to the trial of Territory offences, but a service tribunal also needs to consider the slightly different principles under the Commonwealth *Criminal Code 1995* applicable to DFDA offences.

This offence will complement section 33 (the ‘common’ assault provision), with the same elements as those in section 33, so that a person who is a defence member or a defence civilian is guilty of an offence of assaulting another person occasioning actual bodily harm where the offence was committed by the person on service land, in a service ship, service aircraft or service vehicle, or in a public place.

According to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, the creation of an offence is appropriate where conduct has the potential to cause serious harm to other people (paragraph 2.1.1). In relation to the fixing of a commensurate maximum penalty, it should, among other things, be adequate and appropriate to act as a deterrent to the commission of an offence. The seriousness of the offence within the legislative scheme can also be taken into consideration. The existing, more ‘serious’ assault provisions in the DFDA, section 25 – assaulting a superior officer, section 30 – assaulting a guard and section 34 – assaulting a subordinate, contain the penalties of two, five and two years imprisonment respectively. Therefore, consistent with these provisions, a five year term of imprisonment will attach to this new offence. This maximum penalty would also align the new service offence with the ‘Territory offence’ on which it was modelled in the *Crimes Act 1900* (ACT).

New service offence of unauthorised use of Commonwealth credit card

The Bill will amend the DFDA as a consequence of the repeal of the *Financial Management and Accountability Act 1997* (FMAA), in particular section 60, which provided for the offence of the misuse of a Commonwealth credit card (which included by definition Defence related credit cards).

The FMAA was been repealed by the *Public Governance, Performance and Accountability Act 2013* (PGPA) and its complementary transitional and consequential legislation, administered by the Department of Finance. The PGPA commenced on 1 July 2014. As a consequence, from 1 July 2014, it has been necessary to prosecute Defence related credit card misuse under the fraud provisions of the Commonwealth *Criminal Code Act 1995* or the Commonwealth *Crimes Act 1914*, which have legal and evidentiary issues that did not arise in a prosecution under section 60 of the FMAA.

Minor instances of Commonwealth credit card misuse were prosecuted at the summary level, however this largely ceased from 1 July 2014 as summary authorities are not well equipped to deal with the legal and evidentiary complexities imposed by the *Criminal Code Act 1995* or the *Crimes Act 1914*.

The Bill will substantively replicate section 60 of the FMAA as a new service offence, appropriately adapted to be consistent in a DFDA and military context. It will also facilitate the continued operation of the ‘prescribed offence’ regime pursuant to paragraph 104(b) of the DFDA and regulation 44 of the *Defence Force Discipline Regulations 1985* (DFDR), when the Regulations are subsequently amended.

The prescribed offence regime enables a summary authority (the lower level of service tribunal established under the DFDA) to have the jurisdiction to try those offences that carry a penalty of two or more years imprisonment (which, under regulation 44 of the DFDR, included the now repealed section 60 of the FMAA). A consequential amendment to the DFDR will, therefore, be required to remove the reference to the FMAA provision and include a reference to the new DFDA provision to permit a summary authority to try minor instances of the offence. Courts martial and Defence Force magistrates will deal with the more complex and serious charges of credit card misuse.

A definition of ‘Commonwealth credit card’ is included in the Bill as a credit card issued, or made available for use, to obtain cash, goods or services on credit for the purposes of official Defence business. A defence of ‘lawful authority’ in its military sense is also included.

Although a maximum penalty of seven years imprisonment currently applies to section 60 of the FMAA, a maximum punishment of five years imprisonment in the DFDA will attach to this offence. In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the penalty is consistent with penalties for existing offences in the DFDA. It will also provide an effective deterrent and reflect the seriousness of the offence. It is also considered to be an appropriate penalty, relative to the service tribunal trying the offence.

Clarification of the service offence of commanding or ordering a service offence be committed

The current wording of section 62 of the DFDA has caused some confusion with respect to which fault elements are required to constitute the offence of ‘commanding or ordering a service offence to be committed’. Similarly, it has been unclear which statutory defences are available to a person charged with this offence. The clarification of section 62 was a recommendation in the Judge Advocate General’s 2010 Annual Report.

The amendments clarify the fault elements attributable to a Defence member charged under section 62 and the defences applicable to the offence. A defence member must be reckless as to the commission of the offence. Of particular note, a defence member may be prosecuted for the offence even if the associated service offence has not been committed (including that it was attempted or commenced, but not completed) or it was in fact impossible to commit the associated service offence.

The default fault element of recklessness is considered necessary to deal with situations where the person does not necessarily intend that a service offence be committed by their command or order, but the person is aware of the substantial risk of it and gives the command or order

regardless. It would also deal with the related situation where a person does not explicitly command or order a service offence be committed, but it is clear from the person's language and/or actions, that he or she anticipates or expects that the offence will be committed.

The offence is committed when the command or order that a service offence be committed is given. Similarly with 'impossibility', it is not necessary that a service offence actually be committed. The essence of the offence is the abuse of military authority by a person superior by rank, office, or appointment, not the subsequent commission of an offence or the commission of an offence by proxy.

The amendments to section 62 are intended to provide greater clarity and certainty, and are based in part on the offence of incitement under section 11.4 of the *Criminal Code 1995*.

Replacement of recognisance release orders with fixed non-parole periods

The situation of service tribunals being unable to issue recognisance release orders because of any effective capacity to enforce those orders has been problematic. The inability to enforce these orders is due to the ad hoc nature of service tribunals and the jurisdictional problem of defence members who are sentenced to imprisonment being automatically discharged from the Defence Force under subsection 71(1) of the DFDA.

The Bill will remove the power to issue recognisance release orders and instead make provision for a service tribunal to impose a non-parole period in respect of a punishment of imprisonment for a period of less than 3 years (see section 72 of the DFDA – application of the *Crimes Act 1914*).

Correct a technical error in the charge referral process

Section 105A of the DFDA relates to the referral of a charge to the DMP where that charge has not been dealt with by a summary authority. The amendment is intended to correct a technical error in the operation of this provision as a result of an amendment contained in the *Defence Legislation Amendment Act 2005*. The provision may currently limit the ability of commanding officers in some circumstances to refer charges to the DMP.

In 2005, the DFDA was amended to abolish the role of a Convening Authority and create the new roles of the DMP and Registrar of Military Justice (RMJ). At the same time, new section 105A was introduced to enable the person's commanding officer, or a superior officer in relation to the person's commanding officer, to directly refer a charge to the DMP without the requirement for the charge to be first dealt with by a summary authority. Its purpose was to provide for a more efficient process in the referral of a charge to the DMP in circumstances where there would be little or no benefit from a summary hearing dealing with the charge, such as where the charge was highly complex or where it involved a senior officer who could not be tried by a summary authority.

Section 105A refers to 'the' person's commanding officer. This requirement has been problematic in circumstances where the person's chain of command is not clear or, for example, where the person's commanding officer may be affected by bias and must ask another commanding officer to consider the charge. As such, the prescriptive form of section 105A has not met the needs of the Defence Force in some circumstances.

The peculiarity of section 105A is the reference to ‘the’ person’s commanding officer. This expression does not appear elsewhere in the DFDA and it is now unclear why the provision was expressed as it is in its current form. In practice, a person may be charged by a person outside of the person’s normal chain of command and proceedings also conducted before a summary authority from outside the person’s chain of command.

The Bill will amend section 105A by referring to ‘a’ commanding officer, rather than ‘the’ person’s commanding officer and provide that a commanding officer and an officer superior to a commanding officer may refer a charge to the DMP. This will facilitate a more efficient charging process and reflect the current practice.

Correct a technical error in the Discipline Officer scheme

The Discipline Officer scheme allows certain minor disciplinary offences to be dealt with by designated Discipline Officers instead of having the matter tried by a summary authority. Where the person would have ordinarily entered a guilty plea he or she can instead elect to have a minor punishment awarded, in which case there is no conviction and no permanent record is kept in relation to it.

The *Defence Legislation Amendment Act (No. 1) 2010* amended Part IXA of the DFDA in relation to, among other things, the rank differential between the Discipline Officer and the person being disciplined. A technical error that arose in this amendment was that a chief petty officer in the Navy, a warrant officer in the Army, and a flight sergeant in the Air Force were precluded from being a Discipline Officer in respect of a prescribed defence member at the rank of midshipman or officer cadet.

The Bill will restore the ability of chief petty officers, warrant officers, and flight sergeants to act as Discipline Officers in relation to midshipmen and officer cadets. This will allow Defence training institutions to again effectively use the Discipline Officer scheme as an important element of its discipline framework. Despite the legal superiority in rank of midshipmen and officer cadets to their warrant officers and equivalent instructors, the instructors have an important responsibility with respect to the implementation and administration of discipline in Defence training environments.

Replacement of monetary fines for the penalty units system

The Bill will introduce the system of penalty units into the DFDA within the meaning of section 4A of the *Crimes Act 1914*, so that it is not necessary to amend the maximum fine for a conviction of a person for an offence to accommodate changes in the Consumer Price Index, which is subject to triennial review under the *Crimes Act 1914*.

Offences that currently have a penalty of \$100 will have three penalty units, those penalties set at ‘exceeding \$100 but not exceeding \$250’ will have a penalty that does not exceed seven penalty units, and those offences with an amount ‘not exceeding \$500’ will have a penalty that does not exceed 15 penalty units. One penalty unit is currently equivalent to \$170.

Statutory recognition of the Director of Defence Counsel Services

The Bill will provide statutory recognition of the position of the DDCS in the *Defence Act 1903*. The DDCS will be appointed in writing by the CDF. The amendment will outline the functions and responsibilities of the office, which primarily include the provision of legal

representation and advice to persons who have been charged with a service offence or who are entitled to representation before a service inquiry, such as a board of inquiry, under the *Defence (Inquiry) Regulations 1985*. Another responsibility of the DDCS will be to maintain a list of legal officers available to assist persons in custody for an alleged service offence.

The amendments will enhance the actual and perceived independence of DDCS, which in turn will promote confidence within the Defence Force and broader community in the fairness and impartiality of the discipline system.

Extension of the appointments of the Chief Judge Advocate and full-time Judge Advocate

The interim superior tribunal system was reintroduced by the *Military Justice (Interim Measures) Act (No. 1) 2009*. This was in response to the High Court's decision in *Lane v Morrison [2009] HCA 29*, which declared certain provisions in the DFDA that established the then Australian Military Court to be invalid.

In 2011 and 2013, the periods of the appointment of the CJA and full-time Judge Advocates were extended (*Military Justice (Interim Measures) Amendment Act 2011* and *Military Justice (Interim Measures) Amendment Act 2013*). It is necessary to further extend the statutory appointment arrangements for the CJA and Judge Advocate under items 2 to 8 of Schedule 3 of *Military Justice (Interim Measures) Act (No. 1) 2009* for an additional two year period, to support the current arrangements, which expire in September 2015. The preservation of the appointment arrangements is necessary to continue the effective operation of the superior tribunal system pending a decision in respect of a permanent system to try serious service offences.

This Bill amends Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* to extend the appointment, remuneration and entitlement arrangements provided for in that Act for an additional two years. However, the proposed amendments contemplate the possibility, noting the current appointment arrangements, that the statutory time limits of five and 10 years on the CJA's appointment provided for in subsections 188A(2) and 188A(3) of the DFDA may be exceeded. Accordingly, the Bill amends the Schedule to effectively provide that these statutory time limitations do not apply to the current CJA. This will better ensure the continuity of the superior tribunal system during the interim period.

NOTES ON CLAUSES

Clause 1 – Short title

This clause cites the Act as the *Defence Legislation (Enhancement of Military Justice) Act 2015*.

Clause 2 – Commencement

This clause provides that the Act will commence on the day after it has received Royal Assent.

Clause 3 – Schedules

This clause provides for how the Act will operate to make the necessary amendments and repeals.

Schedule 1 – Main amendments

Defence Force Discipline Act 1982

Items 1 to 4 – Removal of references to ‘old system offences’

These items make definitional repeals and amendments to subsection 3(1) of the DFDA to remove references to ‘old system offences’ and its associated references to ‘previous service law’. The system of ‘old system offences’ will be removed altogether from the DFDA.

Item 5 – Definition of ‘service offence’

This item inserts a note in section 3(1) of the DFDA to the definition of ‘service offence’ to make reference to new section 3A in the DFDA, which provides that a service offence is an offence against a law of the Commonwealth.

Item 6 – Status of service convictions

This item repeals subsection 3(15) of the DFDA. This subsection effectively provides that an offence against the DFDA or the regulations is not necessarily an offence against a law of the Commonwealth. This amendment is required because of the insertion of new section 3A into the DFDA (see Item 7 below).

Item 7 – Character and status of service convictions

This item inserts new section 3A into the DFDA, which states that for the purposes of any law of the Commonwealth, other than the DFDA or the regulations, a service offence is an offence against a law of the Commonwealth. The purpose of new section 3A is to invoke the application of Commonwealth Acts that are expressed to apply to an offence against the law of the Commonwealth, for example the *Crimes Act 1914* and the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Items 8 and 9 – Removal of references to ‘old system offences’

Item 8 amends section 10 of the DFDA and item 9 repeals section 11(4) of the DFDA to remove references to ‘old system offences’.

Item 10 – New service offence of ‘assault occasion actual bodily harm’

This item inserts a new section 33A to introduce an offence of assault occasioning actual bodily harm. This offence will complement section 33 (the ‘common’ assault provision), with the same elements as those in section 33, so that a person who is a defence member or a defence civilian is guilty of an offence of assault where the offence was committed by the person on service land, in a service ship, service aircraft or service vehicle or in a public place. The additional element, which distinguishes this offence from the common assault provision, is the degree of harm caused (that is resulting from, or occasioned) by the assault of the victim.

While the slightest physical contact might constitute an ‘assault’ in the basic sense of the word, a charge for assault occasioning actual bodily harm is not warranted unless there is a significant degree of force applied that resulted in injury to the victim. It must be established that the assault directly caused actual bodily harm to the person. This normally means that a visible injury needs to be present to show that bodily harm in fact occurred. For example, a bruise or a scratch would be sufficient in meeting this element of the offence. There is also case law that defines the term ‘actual bodily harm’, which indicates that it includes an injury that interferes with the victim’s physical or mental health (*McIntyre v R [2009] NSWCCA 305*) –

...it is something less than “grievous bodily harm”, which requires really serious physical injury, and “wounding”, which requires breaking of the skin... The distinction between grievous bodily harm and actual bodily harm involves an assessment of the degree of harm done, with one being more serious than the other... Bruises and scratches to a victim are typical examples of injuries that are capable of amounting to actual bodily harm... If a victim has been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind, that would likely amount to actual bodily harm.

A penalty of 5 years imprisonment applies to this offence. This is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the penalty for the civil offence that the service offence was modelled on, and the overall levels of penalties in the DFDA and the *Crimes Act 1914*.

Item 11 – Replacement of monetary fines for penalty units

This item amends paragraphs 40D(1)(d) and (2)(d) of the DFDA to replace the references to ‘\$100’ with ‘3 penalty units’. This amendment, together with a number of other amendments contained in this Bill (see items 13, 16, 21, and 34 to 38 below), will introduce the system of penalty units into the DFDA within the meaning of section 4A of the *Crimes Act 1914*, so that it is not necessary to amend the maximum fine for a conviction for a service offence to account for, for example, inflation. The penalty unit system is used in civil criminal jurisdictions and elsewhere in Commonwealth legislation. One penalty unit is currently equivalent to \$170.

Offences in the DFDA which currently have a penalty of ‘\$100’ will have three penalty units, those penalties set at ‘exceeding \$100 but not exceeding \$250’ will have a penalty that does not

exceed seven penalty units, and those offences with an amount ‘not exceeding \$500’ will have a penalty that does not exceed 15 penalty units.

Item 12– New service offence of ‘unauthorised use of a Commonwealth credit card’

This item inserts a new section 47Q into the DFDA to provide that a person who is defence member or a defence civilian is guilty of an offence if the person uses a Commonwealth credit card, or a Commonwealth credit card number, to obtain cash, goods or services otherwise than for the Commonwealth. A maximum punishment of five years imprisonment applies to the offence.

An offence will not be committed where a Commonwealth credit card or Commonwealth credit card number has been used by a person who has lawful authority for its use. In his or her defence, a person who has been prosecuted for the unauthorised use of the credit card bears an evidential burden, which if met, requires the prosecution to then disprove the defence beyond reasonable doubt. The evidential burden of proof imposed on the accused is contained in subsection 13.3(3) of the Criminal Code 1995. The section provides that the ‘evidential burden’ means, in relation to a matter, the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The phrase ‘lawful authority’ is used in a particular way in the DFDA, for example, subsection 54A(1) (in relation to custodial offences). It encompasses not only authority derived from a Commonwealth law, but also military command authority or authority derived from the power of military command. The statutory defence of ‘lawful authority’ would cover situations, for example, where a superior authorised a subordinate to use a Commonwealth credit card, but the superior in fact lacked the authority to authorise the use of the card in the circumstances. In a disciplined, hierarchical service, where a subordinate is required to follow orders, he or she could raise the defence that regardless of the superior’s lack of actual legal authority to authorise him or her to use their card, he or she is entitled to rely upon their superior’s apparent authority to avoid disciplinary sanction.

A ‘Commonwealth credit card’ is defined as meaning a credit card issued to, or made available for use by, the Commonwealth to enable the Commonwealth to obtain cash, goods or services on credit.

The definition of ‘Commonwealth credit card’ in subsection 47Q(3), by including the words, ‘made available for use by’, is intended to deal with situations where a credit card (including a credit number) has been provided to a Defence member or a Defence civilian for use by the Commonwealth, as opposed to having been issued to the Commonwealth for use, to obtain cash, goods, or services on credit. This will mean, for example, that the Defence Force has jurisdiction over a defence member who, while on exchange, secondment or attachment, or defence member or defence civilian who while on deployment, is provided with a foreign government credit card for use in the course of their duties, and is alleged to have misused it. In the event that a status of forces agreement or arrangement enables the Defence Force to exercise primary discipline jurisdiction where there was a comparable offence to the foreign state offence alleged to have been committed, the extended definition would allow the relevant Australian authorities to maintain that the accused defence member or defence civilian may be prosecuted under this provision. It will also extend the provision to situations where a State or Territory government authority or body, or a corporate entity, has provided a defence member with a credit card for use by the Commonwealth, such as when the Defence Force provides aid

or assistance to the civil authorities or the community, and the defence member is alleged to have misused the card.

Item 13 – Replacement of monetary fines for penalty units

This item amends paragraphs 59(3)(f), (5)(e) and (6)(e) of the DFDA to replace the references to ‘\$100’ with ‘3 penalty units’.

Item 14 – Clarification of the service offence of commanding or ordering a service to be committed’

This item repeals and substitutes section 62 of the DFDA. Existing section 62 has caused some confusion in relation to which fault elements are required to constitute the service offence of ‘commanding or ordering a service offence to be committed’. Similarly, it has been unclear which statutory defences are available to a person charged with this offence. The clarification of section 62 was recommended by the Judge Advocate General in his 2010 Annual Report.

The amendment clarifies the default fault elements attributable to a defence member charged under section 62 and the defences applicable to the offence. It is intended that a defence member must at least be reckless as to the commission of the offence, noting that proof of intent or knowledge satisfies proof of recklessness under section 5.4(4) of the *Criminal Code 1995*. Of particular note, a person may be prosecuted for the offence even if the offence commanded or order to be committed is not committed (including that it was attempted or commenced but not completed) or it was in fact impossible to commit the associated (‘relevant service offence’).

The default fault element of recklessness is considered necessary to deal with situations where the person does not necessarily intend that a service offence be committed by their command or order, but the person is aware of the substantial risk of it and gives the command or order regardless. It would also deal with the related situation where a person does not explicitly command or order a service offence be committed, but it is clear from the person’s language and/or actions, that he or she anticipates or expects that the offence will be committed.

The offence is committed when the command or order that a service offence be committed is given. Similarly with ‘impossibility’, it is not necessary that a service offence actually be committed. The essence of the offence is the abuse of military authority by a person superior by rank, office, or appointment, not the subsequent commission of an offence or the commission of an offence by proxy.

The amendments to section 62 are intended to provide greater clarity and certainty, and are based in part on the offence of incitement under section 11.4 of the *Criminal Code 1995*.

Item 15 – Removal of references to ‘old system offences’

This item repeals section 65 of the DFDA to remove references to ‘old system offences’.

Item 16 – Replacement of monetary fines for penalty units

This item amends subparagraph 68(1)(h)(ii) of the DFDA to replace the reference to ‘\$100’ with ‘3 penalty units’.

Items 17 to 20 – Replacement of recognisance release orders with fixed non-parole periods

These items amend section 72 of the DFDA to facilitate the broader amendments in the Bill that address the existing situation of service tribunals being able to issue recognisance release orders without an effective capacity to enforce those orders. The inability to enforce recognisance release orders is due to the ad hoc nature of service tribunals and the jurisdictional problem of defence members who are sentenced to imprisonment being automatically discharged from the Defence Force under subsection 71(1) of the DFDA.

Accordingly, the Bill will remove the power to issue recognisance release orders and instead make provision for a service tribunal to impose a non-parole period in respect of a punishment of imprisonment for a period of less than 3 years as provided for by Division 5 of Part 1B of the *Crimes Act 1914*.

Specifically, item 17 removes reference to certain conditional release provisions of the *Crimes Act 1914* and replace them with references to the fixed non-parole provisions in the *Crimes Act 1914* ('applied Crimes Act provisions'). Item 18 inserts a new subsection 72(1A) into the DFDA, which effectively precludes a service tribunal from imposing a recognisance release order and instead enables it to set a non-parole period in respect of sentences of imprisonment for less than 3 years. Item 19 amends subsection 72(2) of the DFDA to reflect the amendment to subsection 72(1), which applies the relevant 'applied Crimes Act provisions'. Finally, item 20 adds a new subsection 72(3) into the DFDA, which will apply the provisions of the *Crimes Act 1914* in respect of sentences with non-parole periods of 3 years or less, in the same way as they do for a sentence exceeding 3 years but not more than 10 years.

Item 21– Replacement of monetary fines for penalty units

This item amends subsection 79(2) of the DFDA to replace the reference to '\$100' with '3 penalty units'.

Item 22 – Removal of references to 'old system offences'

This item repeals subsection 96(5) of the DFDA to remove references to 'old system offences'.

Item 23 – Charge referral process

This item repeals and substitutes subsection 105A(2) of the DFDA by referring to 'a' commanding officer, rather than 'the' person's commanding officer, and to 'an' officer who is superior to 'a' commanding officer. Section 105A of the DFDA relates to the referral of a charge to the DMP where that charge has not been dealt with by a summary authority. The amendments are intended to correct a technical error in this provision as a result of an amendment contained in the *Defence Legislation Amendment Act 2005*. The provision may currently limit the ability of commanding officers in some circumstances to refer charges to the DMP. The amendments make it clear that a commanding officer in relation to the person, or an officer who is superior to a commanding officer, may refer a charge under subsection 105A(2) to the DMP. These amendments will facilitate a more efficient charging process and reflect the current practice.

Item 24 – Status of service convictions

This item repeals section 131B of the DFDA, which relates to the status of service convictions.

Items 25 to 28 – Removal of references to ‘old system offences’

Item 25 amends paragraphs 142(1)(a), (b), (ba) and (c) of the DFDA, item 26 amends paragraph 142(1)(d) of the DFDA, item 27 repeals 142(1)(e) of the DFDA, and item 28 repeals paragraph 144(4)(b) of the DFDA to remove references to ‘old system offences’.

Item 29 – Discipline Officer scheme

This item repeals and substitutes item 2 in the table contained in section 169BB of the DFDA. The amendment is intended to correct a technical error in this provision as a result of an amendment contained in the *Defence Legislation Amendment Act (No. 1) 2010*. The provision currently precludes a chief petty officer in the Navy, a warrant officer in the Army, and a flight sergeant in the Air Force from being a Discipline Officer in respect of a prescribed defence member at the rank of midshipman or officer cadet. By referring to ‘any discipline officer’, the amendment will restore the ability of chief petty officers, warrant officers, and flight sergeants to act as Discipline Officers in relation to midshipmen and officer cadets.

Item 30 – Disclosure of service convictions

This item inserts new sections 190A and 190B into the DFDA. Section 190A will reflect the substance of current section 131B of the DFDA. These sections set out the situations where service convictions may be disclosed under the DFDA.

Subsection 190A(1) provides that the section applies where a court martial or a Defence Force magistrate convicts a person of a service offence, other than a conviction for a Schedule 1A offence, or convicts a person of a Schedule 1A service offence and imposes a punishment of imprisonment on the person.

Schedule 1A contains certain disciplinary offences that are of a purely service nature, that is the offences have no criminal offence equivalent. A conviction for a Schedule 1A offence, which resulted in the imposition of a punishment of imprisonment, is treated differently in section 190A on the basis that if the impugned conduct that was so serious as to warrant a term of imprisonment, the conviction should be treated like a conviction for an offence which has a civilian equivalent, rather than merely as a conviction of a purely disciplinary nature.

Subsection 190A(2) provides that a Service Chief or an authorized officer may disclose the fact that a person has been convicted of a service offence, and any information relating to the conviction (including the punishment), to a Commonwealth, State, or Territory authority, for purposes connected with investigating, prosecuting, or keeping records in relation to offences against Commonwealth, State, or Territory laws.

Subsection 190A(3) provides that for the purpose of complying with a lawful requirement or authorisation to disclose that a person was convicted with an offence against a law of the Commonwealth that is a service offence, the disclosure must expressly state that the offence is a service offence. The note to this subsection makes reference to Part VIIC of the *Crimes Act 1914*, which exempts a person from having to disclose a spent conviction in certain situations.

Section 190A applies in relation to a conviction for a service offence regardless of whether the conviction occurred before or occurs after the commencement of this section.

Subsection 190B(1) provides that the section applies where a summary authority convicts a person of a service offence or a court martial or Defence Force magistrate convicts a person of a Schedule 1A service offence and does not impose a punishment of imprisonment on the person.

Subsection 190B(2) provides that a conviction under the section has effect for service purposes only.

Subsection 190B(3) provides that a person is not required to disclose to any person, for any purpose (other than a service purpose), the fact that the person has been convicted of an offence to which the section applies. The exception under the DFDA is that the person will continue to be required to disclose the conviction for a 'service purpose' in its ordinary meaning in the Defence Force. The note to this subsection makes reference to Part VIIC of the *Crimes Act 1914*, which exempts a person from having to disclose a spent conviction in certain situations.

Subsection 190B(4) provides, to place it beyond doubt, that subsections 190B(2) and (3) have effect notwithstanding the new section 3A of the DFDA.

Section 190B applies in relation to a conviction for a service offence regardless of whether the conviction occurred before or occurs after the commencement of this section.

Items 31 and 32 – Removal of references to 'old system offences'

Item 31 repeals paragraph 191(1)(c) of the DFDA and item 32 repeals Schedule 1 of the DFDA to remove references to 'old system offences'.

Item 33 to 37 – Replacement of monetary fines for penalty units

These items make amendments to Schedules 2 and 3 of the DFDA to replace the references in these schedules of '\$100' with '3 penalty units', 'exceeding \$100 but not exceeding \$250' with 'not exceeding 7 penalty units', and 'of an amount not exceeding \$500' with 'not exceeding 15 penalty units'. One penalty unit is currently equivalent to \$170.

Schedule 2 – Director of Defence Counsel Services

Part 1 – Amendments

Defence Act 1903

Item 1 – Definitions

This item inserts certain terms and associated meanings into subsection 4(1) of the *Defence Act 1903* to support the statutory establishment of the DDCCS. The terms have their same meaning as in the DFDA. In addition, for consistency and clarity, 'lawyer' is substituted with 'legal practitioner' throughout the *Defence Act 1903*, the latter of which has its same meaning as in the DFDA.

Items 2 – Substitution of ‘lawyer’ with ‘legal practitioner’

This item substitutes the reference to ‘lawyer’ with ‘legal practitioner’ in subsection 61CU(5) of the *Defence Act 1903*.

Item 3 – Further definitions

This item repeals and substitutes subsection 89(2) of the *Defence Act 1903* to define ‘judge advocate’ and ‘summary authority’ as having the same meaning as that contained in the DFDA. These terms are defined in this subsection rather than in subsection 4(1) of the *Defence Act 1903* because they are only used in section 89.

Items 4 and 5 – Substitution of ‘lawyer’ with ‘legal practitioner’

Item 4 repeals the definition of ‘lawyer’ in 110T of the *Defence Act 1903* and item 5 substitutes the reference to ‘lawyer’ with ‘legal practitioner’ in section 110XH.

Item 6 – Statutory recognition of the Director of Defence Counsel Services

This item inserts new Part VIIID into the *Defence Act 1903*, which statutorily establishes the office of the DDCS, including its functions and powers.

New section 110ZA establishes the office of DDCS. The appointment must be in writing, made by the CDF. He or she must be a legal practitioner of at least five years enrolment, a member of the Permanent Forces or a member of the Reserve Forces on continuous full time service at the rank of Captain in the Navy, Colonel in the Army or Group Captain in the Air Force.

New section 110ZB outlines the functions and powers of the DDCS. Statutorily establishing this office and the powers and functions reflects the serious commitment that ADF command places on the representational interests and rights of defence members involved in the military justice process.

Subsection 110ZB(1) details the functions of DDCS. These include, but are not limited to:

- managing the provision of legal representation and advice of a person accused of a service offence;
- arranging the attendance of witnesses on behalf of the accused;
- establishing and maintaining a list of legal officers, as required by subsection 101F(2) of the DFDA who are able to assist persons in custody;
- managing the provision of legal representation and advice by legal officers to eligible persons for the purposes of a court of inquiry, a board of inquiry or a CDF commission of inquiry conducted under regulations made under paragraph 124(1)(gc) of the *Defence Act 1903*;
- other functions as CDF directs in writing;
- anything incidental or conducive to the performance of any of the preceding functions;

Subsection 110ZB(2) provides the DDCS with a general power to do all things necessary or convenient in connection with the performance of his or her functions.

Subsection 110ZB(3) is included to clarify that a direction given by CDF under paragraph 110ZB(1)(e) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. Proposed subsection 110ZB(3) is included to assist readers; this provision is merely declaratory of the law rather than an actual exemption from the *Legislative Instruments Act 2003*.

Proposed section 110ZC provides the DDCS with the power to delegate all or any of his or her functions to either a defence member holding a rank not lower than lieutenant commander, major or squadron leader, or to a person whose classification level appears in Group 7 (ie Executive Level 1) or a higher Group of Schedule 1 to the Classification Rules under the *Public Service Act 1999* (or to a person who is acting in a position usually occupied by a person with such a classification level).

Subsection 110ZD provides the DDCS (or a person assisting the DDCS) with protection against an action, suit or proceeding, in relation to an act done or omitted to be done in good faith in the performance or purported performance of a function, or the exercise or purported exercise of a power, conferred on DDCS by the *Defence Act 1903* or any other law of the Commonwealth. This provision is consistent with the protection given to the DMP and the Registrar of Military Justice contained in subsection 193(4) of the DFDA.

An instrument of appointment made under subsection 110ZA(2) and an instrument of delegation made under 110ZC are not legislative instruments as provided for by the combined operation of item 24 of the table in subsection 7(1) of the *Legislative Instruments Act 2003* and paragraphs 1 (in respect of delegations) and 9 (in respect of appointments) of Part 1 of Schedule 1 and regulation 7 of the *Legislative Instruments Regulations 2004*.

Items 7 and 8 – Substitution of ‘lawyer’ with ‘legal practitioner’

Item 7 amends subsection 122B(1) and item 8 repeals subsection 122B(2) of the *Defence Act 1903*. These amendments relate to the replacement of ‘legal officer’ with ‘legal practitioner’.

Defence Force Discipline Act 1982

Items 9 to 12 – List of legal officers

Item 9 inserts a new definition into subsection 3(1) of the DFDA to the effect that DDCS has the same meaning as in the *Defence Act 1903*. Items 10 and 11 amend subsection 101F(2) of the DFDA to transfer the obligation imposed on the CDF under the subsection to the DDCS to establish and maintain a list of legal officers who are willing to assist persons in military custody under the DFDA. And item 12 repeals subsection 101F(2A).

Part 2 – Savings

Item 13 – Saving of current list of legal officers

This item is a saving provision. It preserves the current list of legal officers required to be kept under subsection 101F(2) of the DFDA, which was in force before the commencement of the Bill.

Schedule 3 – Amendments relating to certain office holders

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

Chief Judge Advocate

Item 1 – Extension of appointment

This item amends subparagraph 2(3)(a)(i) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting ‘6 years’ for ‘8 years’.

This item and subsequent items under this heading amend various provisions in Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*. The Act restored the superior tribunal system that operated immediately prior to the creation of the military court system, which was necessary following the High Court’s decision in *Lane v Morrison* [2009] HCA 29, where it declared the provisions that established the Australian Military Court to be invalid. Schedule 3 of the Act contains application and transitional provisions relating to certain office holders in the discipline system, notably for present purposes the CJA and Judge Advocates.

Subitems 2(1) and (2) of the Schedule effectively provide that the person who was the Chief Military Judge immediately before the date of the High Court’s decision (26 August 2009) is deemed to have been appointed under section 188A of the DFDA on the ‘commencement day’ (22 September 2009) as the CJA. Initially, the term of the CJA’s appointment under item 2 of the Schedule was for a period of two years beginning on the commencement day. The CJA’s term was extended by two years by the *Military Justice (Interim Measures) Amendment Act 2011* and by a further two years by the *Military Justice (Interim Measures) Amendment Act 2013*.

This item and subsequent items under this heading extend the CJA’s appointment by a further two years, totalling eight years, from the commencement day. The extension of the CJA’s appointment, which would otherwise expire on 21 September 2015, is necessary to continue the effective operation of the superior tribunal system pending a decision in respect of a permanent system to try serious service offences. With the exception of the removal of the time limitation on the CJA’s appointment, none of the items under this heading are intended to otherwise alter the legal situation, including their conditions of appointment, in respect of the remaining full-time Judge Advocate.

Item 2 – Extension of appointment

This item amends subparagraph 2(3)(a)(ii) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting ‘6 years’ for ‘8 years’.

Items 3 and 4 – Removal of time limitation on appointment

Item 3 amends subitem 2(7A) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting the initial words in the subitem with the words ‘Subsections 188A(2) and (3) of the amended Defence Force Discipline Act do’. Item 4 amends subitem 2(8) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by omitting the words ‘subsection 188A(3) and’ from the subitem.

The purpose and effect of these items is to remove the time limitation on the appointment of the CJA that is contained in subsections 188A(2) and (3) of the DFDA from applying to the current CJA. Subsection 188A(2) provides that the appointment of a CJA is not to exceed five years and subsection 188A(3) provides that a CJA may be reappointed for a further period or periods, but must not hold office for a total of more than ten years. Owing to the unique situation relating to the appointment of the current CJA, there is some uncertainty as to the correct interpretation of the relevant provisions, and so how to correctly calculate the time limitations on their appointment. To avoid doubt, the items effectively remove the time limitations on the CJA's appointment, such that the further extension to their appointment can be given effect without uncertainty attached to it.

Item 5 – Extension of appointment

This item amends paragraph 3(1)(a) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting '6 years' for '8 years'.

Full-time Judge Advocate

Item 6 – Extension of appointment

This item amends subparagraph 4(3)(a)(i) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting '6 years' for '8 years'.

This item and subsequent items under this heading amend various provisions in Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*. The Act restored the superior tribunal system that operated immediately prior to the creation of the military court system, which was necessary following the High Court's decision in *Lane v Morrison* [2009] HCA 29, where it declared the provisions that established the Australian Military Court to be invalid. Schedule 3 of the Act contains application and transitional provisions relating to certain officer holders in the discipline system, notably for present purposes the CJA and Judge Advocates.

Subitems 4(1) and (2) of the Schedule effectively provide that the person who was a Military Judge immediately before the date of the High Court's decisions (26 August 2009) is deemed to have been appointed under section 196(2) of the DFDA on the 'commencement day' (22 September 2009) as Judge Advocate. Initially, the term of these full-time Judge Advocates' appointments under item 4 of the Schedule was for a period of two years beginning on the commencement day. The Judge Advocates' terms were extended by two years by the *Military Justice (Interim Measures) Amendment Act 2011* and the remaining full-time Judge Advocate's term was extended by a further two years by the *Military Justice (Interim Measures) Amendment Act 2013*.

This item and subsequent items under this heading extend the remaining full-time Judge Advocate's appointment by a further two years, totalling eight years, from the commencement day. The extension of the remaining full-time Judge Advocate's appointment, which would otherwise expire on 21 September 2015, is necessary to continue the effective operation of the superior tribunal system pending a decision in respect of a permanent system to try serious service offences. None of the items under this heading are intended to otherwise alter the legal situation, including their conditions of appointment, in respect of the remaining full-time Judge Advocate.

Item 7 – Extension of appointment

This item amends subparagraph 4(3)(a)(ii) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting ‘6 years’ for ‘8 years’.

Item 8 – Extension of appointment

This item amends paragraph 5(1)(a) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting ‘6 years’ for ‘8 years’.

Item 9 – Extension of appointment

This item amends subitem 8(1) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* by substituting ‘6 years’ for ‘8 years’.