Defence Legislation (Enhancement of Military Justice) Bill 2015

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Law and Bills Digest Section

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Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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Purpose of the Bill

The purpose of the Defence Legislation (Enhancement of Military Justice) Bill 2015 (the Bill) is to amend legislation relating to the military justice system. The Bill contains amendments to the:

- Defence Act 1903[^1]
- Defence Force Discipline Act 1982[^2] (DFDA) and
- Military Justice (Interim Measures) Act (No. 1) 2009.[^3]

The key changes introduced by the Bill are:

- extending the period of appointment for another two years of the current Chief Judge Advocate and full-time Judge Advocate,[^4] thus enabling the continued operation of superior tribunals while deliberation takes place about further reforms to the military discipline system[^5]
- the creation of two new service offences[^6] being ‘assault occasioning actual bodily harm’ and ‘unauthorised use of a Commonwealth credit card’
- clarifying the character and status of service convictions as offences against the Commonwealth
- dealing with abuse of military authority by clarifying the elements of the service offence of ‘commanding or ordering a service offence to be committed’ under section 62 of the DFDA
- removing provisions regarding the trial of ‘old system offences’
- removing recognizance release orders[^7] and replacing them with a system which enables the fixing of non-parole periods so as to address the lack of capacity to enforce those orders
- the statutory recognition of the Director of Defence Counsel Services[^8] (DDCS)
- changing how maximum fines are expressed in the DFDA, to refer to the penalty units system rather than a dollar amount, for consistency with current practice under the criminal justice system[^9] and
- correcting technical errors which in certain cases currently have the effect of potentially restricting the ability of commanding officers to refer charges to the Director of Military Prosecutions (DMP).

Minister for Defence, Kevin Andrews, has described the amendments introduced by this Bill as modest, while pointing out their importance to the functioning of the military discipline system and the overarching military justice system.[^10]

[^6]: The term service offence is defined in subsection 3(1) of the DFDA as an offence against the DFDA or the Defence Force Discipline Regulations 1985 (DFD Regulations); an offence that is an ancillary offence in relation to an offence against the DFDA or the DFD Regulations and was committed by a person at a time when the person was a defence member or a defence civilian; or an old system offence. Though note that this Bill proposes to remove the ‘old system offence’.
[^7]: In simple terms, a recognizance release order involves an order that an offender be of good behaviour for a period of time. If they are of good behaviour for that period there is no further punishment. Source: Armstrong Legal, ‘Recognizance release orders’, Armstrong Legal website, accessed 25 May 2015.
[^8]: The Director of Defence Counsel Services (DCS) is a senior military legal officer who is appointed by the Chief of the Defence Force and ‘ensures provision of timely and proficient legal assistance within the military justice system, including in applicable administrative proceedings, to members of the ADF and others. In practical terms, DCS coordinates and manages access to assistance by identifying and promulgating a panel of ADF legal officers’. Source: Department of Defence (DoD), ‘Directorate of Defence Counsel Services,’ accessed 2 June 2015.
[^9]: Penalty units are used to describe the amount payable for fines under Commonwealth laws. Fines are calculated by multiplying the value of one penalty unit by the number of penalty units prescribed for the offence. For example, if one penalty unit is defined as $170 and a given offence is subject to a penalty of up to 200 units, this translates to a maximum of $34,000. The value of a penalty unit is set out at section 4AA of the Crimes Act 1914 (Cth), accessed 1 June 2015. The defined value of a penalty unit is revised periodically.
Structure of the Bill
The Bill contains three schedules:

- **Schedule 1** clarifies the legal character and status of service convictions under Commonwealth law. It creates two new service offences: ‘assault occasioning actual bodily harm’ and ‘unauthorised use of a Commonwealth credit card’

- **Schedule 2** provides for statutory recognition of the DDCS, who is responsible for providing legal representation to accused persons and

- **Schedule 3** provides for the extension by another two years of the appointment of the current Chief Judge Advocate.

Background

**Australia’s military justice system—an overview**

Robust legal systems and structures do not exist in a vacuum, rather they are anchored in the particularities and peculiarities of the contexts in which they operate. The military justice system is thus shaped and informed by particular objectives and norms that are specially and necessarily additional to those of the civilian criminal justice system.

The military justice system underpins the discipline and command structures of the Australia Defence Force (ADF). It aims to balance discipline with the rights of individuals, ensuring that ADF members and **defence civilians** work in an ‘ordered but equitable’ environment. Australia’s military justice system is considered critical to maintaining command, retaining employees and upholding the reputation of the defence forces, and to enhancing operational effectiveness.

The military justice system provides the ADF with an Australian legal framework that can be applied on operations globally. It applies to all ADF members and to **defence civilians** in times of peace and war, whether in Australia or overseas. ADF members must maintain the high level of discipline required on operations at all times.

**The disciplinary and administrative systems**

The military justice system has two distinct but interrelated streams: the discipline system and the administrative system. These streams provide the framework for disciplinary investigations and prosecution of offences committed under the DFDA, and the maintenance of professional standards in the ADF and investigation of occurrences such as accidental deaths of ADF personnel, under the administrative system. The discipline system is largely influenced and controlled by the rules and principles of the criminal law, whereas the

12. Under section 3 of the Defence Force Discipline Act 1982:
   
   “defence member” means:
   
   (a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or
   
   (b) a member of the Reserves who:
       
       (i) is rendering continuous full-time service; or
       
       (ii) is on duty or in uniform.
   
   “defence civilian” means a person (other than a defence member) who:
   
   (a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:
       
       (i) outside Australia; or
       
       (ii) on operations against the enemy; and
   
   (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.

14. Ibid.
15. Department of Defence (DoD), ‘What is the military justice system?’, DoD website, accessed 29 April 2015.
The administrative system is subject to administrative law principles, especially the fundamental principles comprising natural justice.\(^\text{17}\)

The administrative system enables the ADF to take action against members whose professional conduct falls below the requisite standard, but who have not committed an offence. The main components of the administrative system are:

- adverse administrative action
- administrative inquiries and
- a member’s right to complain.\(^\text{18}\)

The Military Discipline system

The DFDA, which took effect on 3 July 1985, was enacted to maintain and enforce military discipline, and provides the basis for the existing military discipline system. It includes offences that are uniquely military as well as other offences that occur in a military environment.\(^\text{19}\) The DFDA provides for the investigation of disciplinary offences, types of offences, available punishments, the creation of service tribunals, trial procedures before service tribunals, and rights of review and appeal.\(^\text{20}\)

Offences by ADF members are prosecuted under the DFDA, within the military justice system, when the offence substantially affects the maintenance and ability to enforce service discipline in the ADF. Otherwise, criminal offences or other illegal conduct are referred to the police and other civil authorities.\(^\text{21}\)

The DFDA created service tribunals, with the power to hear matters and try ‘charges’ of ‘service offences’.\(^\text{22}\) The DFDA established two different levels of service tribunals: Courts Martial and Defence Force Magistrates, and Summary Authorities.\(^\text{23}\)

Service offences

A service offence is an offence created by the DFDA. There are three categories of service offences: imported criminal offences; offences with civilian criminal equivalents; and unique military offences.\(^\text{24}\)

1. Imported criminal offences

This category involves offences imported from civilian criminal law, such as murder, manslaughter and theft of non-service property. The incorporation of civilian criminal offences into the military discipline system enables these offences to be dealt with should they occur when ADF members are overseas in circumstances where an adequate criminal law framework is absent (for example, in a war-torn country in which law and order has broken down) or if the application of host country law is undesirable (for example, if the death penalty were to apply).\(^\text{25}\)

For serious offences such as treason, murder, manslaughter or sexual assault, a service tribunal may hear the matter only with the prior consent of the Commonwealth Director of Public Prosecutions (DPP).\(^\text{26}\)

2. Offences with civilian criminal equivalents

This category encompasses offences that are similar or identical to civil offences, but that relate to service personnel or equipment, such as assault of a superior or subordinate,\(^\text{27}\) destruction or damage of service...
property, or dealing in narcotics on a base. Such offences are investigated by military police and may be dealt with by service tribunals.

(3) Unique military offences

This category involves offences unique to the defence forces, such as absence without leave, disobedience of a command and endangering morale. Offences in this category are investigated by military police and may be dealt with by service tribunals.

Courts Martial and Defence Force Magistrates

Serious offences with civilian criminal equivalents and unique military offences are investigated by military police and may be dealt with by either courts martial or Defence Force Magistrates. Courts Martial and Defence Force Magistrates proceedings are formal legal proceedings comprising two main phases: the trial, and, if the accused person is found guilty and convicted of an offence, sentencing action under Part IV of the DFDA. A Court Martial is heard by presiding officers of a rank that is not lower than the rank of the accused, and a judge advocate that is a member of the Judge Advocates’ panel. Judge Advocates assist Court Martial members with the application of military law. A Court Martial does not have jurisdiction to try a charge of a custodial offence.

Defence Force Magistrates provide an alternative to Courts Martial for dealing with serious offences. The Judge Advocate General appoints officers who are members of the Judge Advocates’ panel to be Defence Force Magistrates. A Defence Force Magistrate has the same jurisdiction and powers as a restricted court martial, including the powers of the Judge Advocate of a restricted Court Martial.

Judge Advocate General

The office of the Judge Advocate General (JAG) was created by Part XI of the DFDA. The holder of the office must be or have been a judge of a federal court or a state or territory supreme court. The functions of the JAG include making procedural rules for Service tribunals, providing the final legal review of proceedings within the ADF, participating in the appointment of Judge Advocates, Defence Force Magistrates, Presidents and members of Courts Martial, and reporting on the operation of laws relating to the discipline of the ADF.

A Judge Advocate sits as a Judge Advocate and Defence Force Magistrate and provides assistance to the Judge Advocate General.

Summary Authorities

A Summary Authority is the lower level of service tribunal established under the DFDA, which deals with less serious offences. Summary authority proceedings are normally closed. Summary Authorities are superior officers who have limited powers of punishment. Discipline Officers may also impose punishments for minor offences.

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28. DFDA, section 43.
29. DFDA, section 59.
31. DFDA, section 24.
32. DFDA, section 27.
33. DFDA, section 18.
36. DFDA, sections 114, 116,117.
37. DFDA, section 115 (1A).
38. DFDA, section 129.
39. DFDA, section 127.
40. DFDA, section 129.
41. DFDA, section 180.
42. See also Department of Defence, About the Judge Advocate General, accessed 9 June 2015.
44. DFDA Division 2 of Part VII.
45. See DFDA Part IXA—Special procedures relating to certain minor disciplinary infringements for provisions regarding Discipline Officers.
Summary Authorities usually do not have legal qualifications, unlike judge advocates in Courts Martial or Defence Force Magistrates. Matters handled at this level are expected to be dealt with expeditiously.  

**Military justice since 2005 – the attempt to introduce an Australian Military Court**

To assist readers to understand the context in which the Bill is being introduced, this part of the Digest provides a brief overview of the changes to the military justice system that have occurred since 2005. The key element is that, following an attempt to introduce an Australian Military Court, which was struck down by the High Court, the military justice system remains in a provisional mode. While a final framework is still being considered, **Schedule 3** of the Bill extends the operation of the interim arrangements that have now been in place for almost six years.

### 2005—Effectiveness of Australia’s military justice system

In 2005, following its lengthy inquiry into the effectiveness of Australia’s military justice system, the Senate Foreign Affairs, Defence and Trade Committee (the Committee) formed the view that military tribunals lacked the requisite independence from military command structures, as military justice was being administered by military tribunals within that chain of command. The Committee noted in particular the human rights concerns raised by those arrangements. These were identified by Justice Burnett as:

> ... the lack of structural independence of the principal pillars of the courts martial system, that is, the independence of the convening authority; the prosecutor and person who prefers the charges; the judge advocate; the courts martial panel; and the reviewing authority.

Command had input into each of these matters, exposing the system to the perception that it lacked internal structural independence and thus possibly contravened Australia’s commitment to the fundamental right of a fair and impartial trial in respect a service offence by any of its service personnel. The Senate Committee recommended significant reforms to the Australian military justice system, including the creation of a military court that would comply with the Constitutional requirements for a federal court. The then Coalition Government agreed that the independence and proper operation of Australia’s military justice system may be improved by establishing a military tribunal—the Australian Military Court—which would operate independently of the chain of command.

### 2006—Establishing the Australian Military Court


### 2009—High Court rules AMC unconstitutional

Unfortunately, the Government did not adopt the Committee’s recommendation in its entirety—that is, the AMC was not established as a court in accordance with Chapter III of the Constitution but instead was based on the defence power in section 51(vi). Concerns were expressed from the outset that the AMC might be constitutionally invalid.

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47. Details about the terms of reference for the inquiry, submissions to the Committee, the interim and final reports and the Government’s response to the Committee’s recommendations are available on the [inquiry homepage](https://www.legislation.gov.au/Details/C1197100114511), accessed 25 May 2015.
50. Ibid.
52. [The Australian Military Court](https://www.legislation.gov.au/Details/C1197100114511) replaced the system of individually convened trials by Court Martial or Defence Force Magistrate.
In its 2009 decision in *Lane v Morrison* the High Court struck down the legislation establishing the AMC. This had the effect of placing the 171 cases the AMC had tried in doubt. The essence of the High Court’s reasoning was that the AMC was operating outside the chain of command and, therefore, was impermissibly exercising judicial power as the Australian Military Court was not a proper Chapter III court for constitutional purposes.

Since the High Court ruling, the Government has found it difficult to settle on a model that addresses key outstanding issues in relation to the reform of military justice and the provision of an independent military discipline tribunal.

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

The *Military Justice (Interim Measures) Act (No. 1) 2009* (2009 Interim Act) essentially returned the service tribunal system to its format prior to the creation of the AMC. Then Parliamentary Secretary for Defence Support, Dr Mike Kelly, told Parliament:

> As an interim measure, defence is intending to broadly re-establish the service tribunal system that existed before the creation of the Australian Military Court by reinstating the *Defence Force Discipline Act 1982* prior to the amendments in 2006. This will re-establish trials by courts martial and Defence Force magistrates; reinstate the statutory position of Chief Judge Advocate, the judge advocates’ panel and the Registrar of Military Justice; reinstate the system of reviews and petitions in respect of both summary trials and trials by courts martial or Defence Force magistrates; and reinstate the powers of reviewing authorities.

#### 2010 and 2012—Establishing the Military Court of Australia

In 2010 the then Australian Labor Party (Labor) Government introduced the Military Court of Australia Bill 2010 (the 2010 Bill) into the Parliament in order to establish the Military Court of Australia. The aim of the legislation was to create a Constitutionally—valid court—the Military Court of Australia—to hear serious military offences, but to leave the less serious offences for internal military control. The 2010 Bill lapsed on 19 July 2010 when the Parliament was prorogued.

The lapsing of that Bill necessitated an extension of time for the operation of the interim measures. As a result, the *Military Justice (Interim Measures) Amendment Act 2011* (2011 Interim Act) was enacted to amend the 2009 Interim Act to extend the measures for a further two years to September 2013.

In 2012 the Labor Government introduced the Military Court of Australia Bill 2012 (the 2012 Bill) into the Parliament. The 2012 Bill was broadly similar to the 2010 Bill and dealt with the shape and structure of the Australian Military Court. A companion Bill, the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 was introduced into the Parliament on the same day. Both 2012 Bills lapsed when the Parliament was dissolved on 5 August 2013.

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57. Ibid., see, in particular, paras 9–10, 62, 98.
60. The legislation was necessary to deal with the decision of the High Court in 2009 to invalidate the creation of the Australian Military Court. Parliament of Australia, “Military Court of Australia Bill 2010 homepage”, Australian Parliament website, accessed 27 May 2015.
2013—Military Justice (Interim Measures) Amendment Bill 2013

In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 again amended the 2009 Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and Judge Advocates by an additional two years.67 The Bill received Royal Assent on 1 July 2013 (2013 Interim Act).68

When the 2009 Interim Act was enacted, it provided a fixed tenure of up to two years for both the Chief Judge Advocate (CJA) and full-time Judge Advocates.

Both the 2011 Interim Act and the 2013 Interim Act extended the periods of the appointment of the CJA and full-time Judge Advocates by two years, so that the current period of appointment is up to six years.69 The current arrangements expire in September 2015.

The Government considers that it is necessary to further extend the appointment, remuneration and entitlement arrangements for the CJA and Judge Advocate for an additional two year period: ‘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’.70

Contentious issues in military justice

Separate judicial sphere

Much attention has been paid to the consequences of a tension between the nature of military discipline and the separation of judicial and executive powers, embedded in Chapter III of the Constitution: ‘Military discipline involves the imposition of punishment ... upon a judgment that a person is guilty of an offence. This is a function which is normally the exclusive preserve of the courts’.71

The High Court of Australia has affirmed the recognition within our legal system of the ability of a military service tribunal to exercise power of a judicial nature in respect of persons subject to military law, which is separate and distinct from the judicial power of the Commonwealth under Chapter III of the Constitution.72 In a series of seminal cases on military justice73 the High Court established that:

... service tribunals can exercise jurisdiction over defence members for service offences, that may be substantially similar to civil offences, provided that the proceedings can be regarded as substantially serving the purpose of maintaining and enforcing service discipline. The service tribunals can stand outside Ch III [of the Constitution] and the disciplinary code created by the DFDA was constitutional.74 (emphasis added)

In Re Tracey; Ex parte Ryan,75 Re Nolan; Ex parte Young and Re Tyler,76 Re Tyler: Ex parte Foley,77 the High Court accepted that punishment for offences against military discipline could validly be imposed by service tribunals that were not Chapter III courts.78 From those cases, several strong streams of judicial opinion emerged.79

The Court confirmed again in 2007 in *White v Director of Military Prosecutions* that there is a sphere in which the Commonwealth may create service offences and provide for their trial and punishment by service tribunals, rather than courts operating under Chapter III of the *Constitution*.

The High Court has consistently followed the principles established in *R v Cox; Ex parte Smith* that the administration of military justice by military tribunals constitutes an exception to Chapter III. In that case, Dixon J observed:

> To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.

In the 2011 case *Haskins v Commonwealth* the majority in the High Court summarised the principle:

> It is to be borne at the forefront of consideration of the plaintiff’s arguments about the application of Ch III of the Constitution that this Court has repeatedly upheld the validity of legislation permitting the imposition by a service tribunal that is not a Ch III court of punishment on a service member for a service offence. Legislation permitting service tribunals to punish service members has been held to be valid on the footing that there is, in such a case, no exercise of the judicial power of the Commonwealth. Punishment of a member of the defence force for a service offence, even by deprivation of liberty, can be imposed without exercising the judicial power of the Commonwealth. Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force; they are not steps taken in exercise of the judicial power of the Commonwealth.

**Trial by jury**

One of the consequences of this separate judicial sphere is that there is no right to trial by jury, although serious offences may be dealt with by a Courts Martial panel.

In *White*, the plaintiff, a Chief Petty Officer in the Royal Australian Navy, was charged with offences involving indecent assault, which were offences against the ordinary criminal law, as adopted by section 61 of the *DFDA*, rather than service-related offences created by that Act. The incident had occurred in Victoria while the plaintiff was out of uniform and not on duty. However, the victims of the alleged offences were other members of the Defence Force of lower rank than the plaintiff, providing a clear connection with military duty and discipline.

The Court held that the *DFDA* was a valid exercise of the defence power in section 51(vi) of the *Constitution* and service tribunals established under that Act validly exercised judicial power standing outside Chapter III.

One of the issues raised by the plaintiff was that if the offences had been prosecuted under the applicable criminal law of Victoria, the offences of indecent assault would carry a maximum penalty of ten years imprisonment, and she would have been entitled to trial by jury. Similarly, under the criminal law of the Australian Capital Territory (as applicable in the Jervis Bay Territory) applied to the plaintiff as a defence member, the charges of indecent assault would involve offences punishable by imprisonment for five years, which would have entitled the plaintiff to trial by jury, if she was disputing the charges in either of the territories.

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83. Ibid.
85. *White v Director of Military Prosecutions* [2007] HCA 29, para 1; G Kennett, ‘*The Constitution and Military Justice after White v Director of Military Prosecutions*’, op. cit., p. 239.
88. *White v Director of Military Prosecutions* [2007] HCA 29, para 86, per Kirby, J.
Defence Legislation (Enhancement of Military Justice) Bill 2015

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(Section 61 of the DFDA enables all Commonwealth offences, and almost all ACT offences in their application to the Jervis Bay territory, to be tried as Territory offences by an appropriate Service tribunal.\(^9\))

White argued that she wished to exercise her ‘constitutional right to have the alleged indictable offences the subject of trial by jury’. Under the DFDA, the plaintiff had no entitlement to a jury trial, as envisaged by section 80 of the Constitution for indictable offences.\(^9\) (In the federal jurisdiction, indictable offences are those punishable by more than 12 months imprisonment; while it varies in other jurisdictions).\(^9\) A majority of the High Court dismissed White’s application.\(^9\)

Kirby J outlined the divergence of opinion on this issue. A majority of the High Court has maintained the view that guarantee of ‘trial by jury’ in section 80 of the Constitution was limited to cases in which the Parliament and the Executive provide for the commencement of prosecution by filing an indictment.\(^9\) However, a minority ‘has rejected this view as inconsistent with the function of section 80 as providing a guarantee of jury trial which could not so easily be circumvented’.\(^9\)

In his 2013 examination of the military justice system, Federal Circuit Court Judge Michael Burnett addressed this issue:

> Although a courts martial panel is not a jury, it exercises a similar role and also determines punishment. In a courts martial, a panel of officers, assisted by the Judge Advocate who issues binding directions on law, examines the evidence and makes findings of guilt or otherwise. For lesser offences a Judge Advocate sits alone, styled as a Defence Force Magistrate. The process largely reflects the modern criminal trial.\(^9\)\(^6\)

Justice Burnett noted that there is still debate over whether the legislative styling of an indictable offence as a service offence is sufficient to exclude an entitlement to a service member of the section 80 constitutional right to trial by a jury:

> If the worst fears were to be realised the ADF would not only have its discipline matters subject to trial by civilian judge but also by civilian jury. That is not to criticise such an outcome, as it would unquestionably provide the fairest possible process for ADF members. However, that may not produce the best outcome from a discipline perspective...

> The reality is that service discipline requires something more than the application of civilian processes to offences committed in a service environment. The existence of service tribunals simply recognises the peculiar needs of the defence environment that pertain to the maintenance of service discipline.\(^9\)

In an analysis of the proposal to introduce an Australian Military Court in 2012,\(^9\), the following summary was provided by Bar News:

> Since federation, Australia’s military forces have employed a disciplinary system which has, at its apex, the trial of serious offences by court martial. In a trial by court martial, the judge advocate and the panel of military officers perform substantially the same function as a judge and jury in a civilian criminal trial.

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90. Ibid., para 88. Section 80 of the Constitution provides: ‘The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes’: Constitution, op. cit.
91. Section 4G of the Crimes Act 1914 (Cth), accessed 1 June 2015.
92. Note also comments by S Gageler regarding Re Tracey in ‘Gnawing at a file, an analysis of Re Tracey, Ex Parte Ryan’ op. cit., p. 49: ‘The settled view of section 80 is that it requires only that proceedings actually brought on indictment be determined by a trial by jury but contains nothing to compel procedure by indictment’.
94. Ibid.
95. Ibid.
97. Ibid.
98. Discussed further under ‘History of the Australian Military Court’.

That is to say, the judge advocate decides all questions of law and gives the panel directions of law with which they must comply.

The panel is the sole judge of the facts and decides the ultimate question of whether the accused is guilty or not. If the accused is found guilty, the panel determines the appropriate punishment. This aspect of the military justice system has served the ADF well, especially since the introduction of a statutorily independent director of military prosecutions (DMP) and registrar of military justice in 2005.\(^98\)

At the time, the Government noted that there was no policy decision that it would be better to exclude military officers from their role in a court martial panel, but, rather, ‘a jury in a Chapter III court could not be restricted to Defence members and a civilian [jury] would not necessarily be familiar with the military context of service offences’.\(^99\)

Justice Burnett also discussed concerns regarding the institutional independence of the ADF courts martial system following human rights complaints made in allied jurisdictions which are signatories to the *Convention for the Protection of Human Rights and Fundamental Freedoms* and the *International Covenant on Civil and Political Rights*.\(^100\) He noted that these concerns were considered by the Canadian Court of Appeal\(^101\) and the European Court of Human Rights.\(^102\) The human rights concerns relate to the lack of structural independence of the principal pillars of the Courts Martial system: the independence of the convening authority; the prosecutor and person who prefers the charges; the Judge Advocate; the courts martial panel; and the reviewing authority.\(^103\) Justice Burnett noted that command had input into each of these matters: ‘That fact lent support to concern that the system lacked internal structural independence’.\(^104\) Hence the main concern with the current military justice system is the fundamental right to a fair and impartial trial, rather than the right to a trial by jury. A right to a jury trial does not necessarily equate to a right to a fair and impartial trial.

**Senate Standing Committee for Selection of Bills**

In its *Report No. 5 of 2015*, released on 14 May 2015, the Senate Standing Committee for Selection of Bills resolved that the Bill would not be referred to a Committee for inquiry and report.\(^105\)

**Senate Standing Committee for the Scrutiny of Bills**

In its *Alert Digest No. 5 of 2015*, released on 13 May 2015, the Senate Standing Committee for the Scrutiny of Bills made no comment on the Bill.\(^106\)

**Financial implications**

According to the Explanatory Memorandum ‘there will be no net impact on consolidated revenue’.\(^107\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^108\)

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99. Ibid.
103. These concerns are discussed further under ‘History of the Australian Military Court’.
104. M Burnett, *Does the ADF require a Chapter III military court?*, op cit.
108. The Statement of Compatibility with Human Rights can be found at pages 2–3 of the *Explanatory Memorandum* to the Bill.
Human Rights Implications

The Government considers that the DFDA and the Bill are consistent with the following rights under the International Covenant on Civil and Political Rights (ICCPR):

- the right to a fair trial, including:
  - a fair hearing by a competent, independent and impartial tribunal
  - the presumption of innocence
  - minimum guarantees in criminal proceedings (Article 14)\(^ {109}\)
- freedom from arbitrary detention (Article 9)
- the right to humane treatment whilst in detention (Article 10) and
- the right to privacy (Article 17).\(^ {110}\)

The Statement of Compatibility provides the following overview:

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...

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.\(^ {111}\)

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the Bill in the Twenty-second report of the 44th Parliament, published on 13 May 2015.\(^ {112}\)

The Human Rights Committee considered that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and Judge Advocates engages and may limit the right to a fair hearing and fair trial.\(^ {113}\) The Human Rights Committee commented that:

The statement of compatibility does not assess whether extending the operation of the military system of justice is compatible with the right to a fair trial. Rather, it has an overview statement of the human rights implications of the Bill as a whole ...\(^ {114}\)

It was also noted that the statement of compatibility did not provide information as to what steps are being taken to establish a permanent system of military justice.\(^ {115}\)

The Human Rights Committee confined its comments to the amendments in Schedule 3 of the Bill, noting that “there are other provisions in this Bill that relate to the system of military justice, however, as they do not in themselves expand the operation of the system, the committee makes no further comment in relation to them”.\(^ {116}\) The Human Rights Committee’s concerns regarding the extension of appointments are further discussed in relation to Schedule 3 of the Bill in the ‘Key issues and provisions’ section of this Digest, below.

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109. Article 14 of the ICCPR is set out at the Appendix to this Digest.
110. International Covenant on Civil and Political Rights, op. cit.
111. Explanatory Memorandum, Defence Legislation (Enhancement of Military Justice) Bill 2015, p. 3.
113. Ibid., p. 44.
114. Ibid., p. 45.
115. Ibid., p. 46.
116. Ibid., p. 44.
Key issues and provisions

Schedule 1

Schedule 1:

- creates two new service offences
- clarifies the elements of the existing service offence of ‘commanding or ordering a service offence to be committed’
- clarifies the legal character and status of service convictions under Commonwealth law
- removes references to ‘old system offences’ and
- removes the ability for service tribunals to impose recognizance release orders and instead allows them to impose non-parole periods.

New service offence of ‘assault occasioning actual bodily harm’

Item 10 of Schedule 1 of the Bill inserts proposed section 33A into the Defence Force Discipline Act 1982 (DFDA) to introduce a new service offence of ‘assault occasioning actual bodily harm’.  

Current service offences under the DFDA involving assault include:

- section 25—assaulting a superior officer
- section 30—assaulting a guard
- section 33—assaulting another person
- section 34—assaulting a subordinate and
- section 49A—assault against an arresting person.

The existing assault provisions do not include ‘aggravated’ forms of assault. Assault occasioning actual bodily harm is presently charged as a Territory offence under section 61 of the DFDA, using the Crimes Act 1900 (ACT). Section 61 of the DFDA enables all Commonwealth offences, and most ACT offences in their application to the Jervis Bay territory, to be tried as Territory offences by an appropriate service tribunal.  

The lack of a specific DFDA offence of assault occasioning actual bodily harm means that the Director of Military Prosecutions (DMP) has to include in a single charge sheet Territory offences, with lesser DFDA offences in the alternative. This is because, if, on the facts the elements of the more serious offence are not made out, the accused person can be convicted of the alternative offence. However, different criminal responsibility rules are applied to the different offences, due to the difference in ACT and Commonwealth laws and the DFDA. This means that a single set of facts is weighed against two separate standards, ‘leading to confusion, complexity and duplicated effort’.  

The new service offence is designed to address existing difficulties in laying charges, particularly the application of criminal responsibility rules in the context of the existing assault provisions under the DFDA. The proposed offence will complement the common assault provisions in existing section 33. Proposed section 33A provides that a person who is a defence member or a defence civilian is guilty of an offence if they assault another person causing 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.

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118. Section 3 of the DFDA defines a Territory offence as (a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; or (b) an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences.
Under section 10 of the DFDA, Chapter 2 of the (Commonwealth) Criminal Code, which sets out the general principles of criminal responsibility, applies to all service offences.  

Proof of criminal responsibility is addressed in Division 2 of the Criminal Code. A legal burden of proof (the burden of proving the existence of the matter) on the prosecution must be discharged beyond reasonable doubt.  

The term ‘actual bodily harm’ is not defined in the DFDA. The NSW Court of Criminal Appeal defined the term ‘actual bodily harm’ in the 2009 case of McIntyre v R. Justice Johnson explained:

... 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.

Australian courts have generally taken ‘harm’ to mean physical or serious psychological injury, and the injury might be external or internal.

The Explanatory Memorandum notes that a charge for assault occasioning actual bodily harm would not be warranted unless there was 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—normally a visible injury needs to be present to show that bodily harm occurred, which would include a bruise or a scratch.

Including the offence of assault occasioning actual bodily harm as a service offence in the DFDA enables the application of military-specific aggravating factors, such as a person’s rank, which has implications for the sentencing of offenders.

Section 70 of the DFDA sets out the sentencing principles for Service tribunals. Under subsection 70(1), Service tribunals must have regard to the principles of sentencing applied by the civil courts and the need to maintain discipline in the ADF.

Mitigating or aggravating circumstances to be taken into account in sentencing a convicted person include:

- the person’s rank, age and maturity
- the person’s physical and mental condition
- the person’s personal history
- the absence or existence of previous convictions for service offences, civil court offences and overseas offences
- the person’s relationship with any victim(s)
- the person’s behaviour before, during and after the commission of the service offence and
- any consequential effects of the person’s conviction or proposed punishment.

Proposed section 33A does not include a penalty for aggravated offences. Rather, it sets a maximum penalty of five years imprisonment for the offence of assault occasioning actual bodily harm. By comparison, section 24 of the Crimes Act 1900 (ACT), which presently governs the offence, sets the maximum penalty for assault occasioning actual bodily harm as five years, while the maximum penalty for an aggravated offence against this section is imprisonment for seven years. In addition, section 48A of the Crimes Act applies to section 24, which

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123. Criminal Code, section 13.2.
125. ibid., para 44.
126. For example, subsection 16(1) of the Crimes Act 1914 (Cth) provides that harm includes: (a) physical, psychological and emotional suffering; and (b) economic and other loss; and (c) damage.
128. DFDA, subsection 70(2).
provides that an assault against a pregnant woman which causes the loss of, or serious harm to, the pregnancy, or the death of, or serious harm to, a child born alive as a result of the pregnancy, is guilty of an aggravated offence.

This service offence falls within the ADF discipline system, hence the offences would be tried by an appropriate Service tribunal. If an accused is tried under the DFDA rather than in the ordinary civilian criminal jurisdiction, they do not have a trial by jury.

A charge for assault occasioning actual bodily harm under the DFDA rather than the Crimes Act 1900 (ACT) will also have implications for potential appeals. The DFDA provides for rights of review and appeal. Section 152 of the DFDA provides for automatic review by a reviewing authority of a conviction for a service offence by a service tribunal (Court Martial, Defence Force Magistrate or Summary Authority).

Under section 20 of the Defence Force Discipline Appeals Act 1955, a convicted person, meaning a person who has been convicted by a Court Martial or a Defence Force Magistrate, may appeal to the Defence Force Appeals Tribunal against his or her conviction, but an appeal on a ground that is not a question of law may not be brought except by leave of the Tribunal.

**New service offence of ‘unauthorised use of a Commonwealth credit card’**

**Item 12** inserts proposed 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.

The amendment is due to the repeal of the Financial Management and Accountability Act 1997 (FMAA), which had provided for the offence of the misuse of a Commonwealth credit card in section 60. The FMAA was repealed by the Public Governance, Performance and Accountability Act 2013 (PGPA), which commenced on 1 July 2014. From that date, credit card misuse cases have been prosecuted under the fraud provisions of the Criminal Code Act 1995 or the Crimes Act 1914. However, some legal and evidentiary problems have arisen under that legislation. The new service offence is adapted to be consistent with the DFDA and military law.

**Definition**

A **Commonwealth credit card** is defined in proposed subsection 47Q(3), as a credit card issued to, or made available for use by, the Commonwealth to obtain cash, goods or services on credit.

The inclusion of the phrase ‘made available for use by’ in the definition is intended to cover situations where a credit card has been provided to a Defence member or a Defence civilian for use by the Commonwealth. This includes situations where the ADF 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 allegedly misuses it. Where a Status of Forces Agreement or arrangement enables the ADF to exercise primary discipline jurisdiction where the alleged foreign state offence has an Australian equivalent, Australian authorities can argue that the accused Defence member or Defence civilian may be prosecuted under this provision. It also extends 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 ADF provides aid or assistance to the civil authorities or the community, and the Defence member is alleged to have misused the card.

**Statutory defence**

The Bill includes a statutory defence of ‘lawful authority’. Under proposed subsection 47Q(2), an offence will not have been committed if the defendant has ‘lawful authority’ to use the credit card in the manner in which it...
was used. The defendant will bear the evidential burden, in accordance with subsection 13.3(3) of the *Criminal Code*. An evidential burden requires the defendant to adduce or point to ‘evidence that suggests a reasonable possibility that the matter exists or does not exist’.\(^\text{136}\) If the defendant meets the evidential burden, the prosecution will then be required to disprove the defence beyond reasonable doubt. ‘Lawful authority’ includes authority derived from a Commonwealth law and military command authority or authority derived from the power of military command.\(^\text{137}\)

**Reduced penalty**

The maximum penalty under the former FMAA provision for unauthorised use of a credit card was seven years imprisonment. The new service offence under the DFDA will have a maximum penalty of five years imprisonment.\(^\text{138}\)

**Prescribed offence regime**

Division 2 of Part VII of the DFDA deals with Summary Authorities. As mentioned above, a Summary Authority is the lower level of service tribunal established under the DFDA, which deals with less serious offences. A summary authority has jurisdiction to hear a charge against specified personnel for breach of a service offence that is not a ‘prescribed offence’.\(^\text{139}\) Section 104 sets out a definition of ‘prescribed offence’ to include offences such as murder and treason. The definition also allows other ‘prescribed offences’ to be set out in the Defence Force Discipline Regulations 1985 (DFDR). These additional ‘prescribed offences’ appear in regulation 44 of the DFDR, which provides (as currently relevant) that a service offence punishable by more than two years imprisonment is a ‘prescribed offence’ and therefore not eligible to be tried by a summary authority. However, it goes on to expressly provide that this does not include the now-repealed offence under section 60 of the FMAA. This means that the FMAA offence was able to be tried by a summary authority, even though it had a maximum penalty of more than two years imprisonment. A consequential amendment to the DFDR will be necessary 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.\(^\text{140}\)

Courts Martial and Defence Force Magistrates will deal with the more complex and serious charges of credit card misuse.\(^\text{141}\) As the offences will be tried by service tribunals rather than under the ordinary criminal law system, persons charged with offences under this provision will not have access to a trial by jury. Persons convicted by a Court Martial or Defence Force Magistrate will automatically have their convictions reviewed by a reviewing authority.\(^\text{142}\) They may also appeal to the Defence Force Appeals Tribunal against a conviction on a question of law and, if the appeal is not a question of law, they may seek leave of the Tribunal to appeal.\(^\text{143}\)

**Service offence of ‘commanding or ordering a service offence to be committed’**

The Bill clarifies the elements of the existing service offence of ‘commanding or ordering a service offence to be committed’ under section 62 of the DFDA.

Section 62 provides that:

1. A defence member is guilty of an offence if:
   1. the member commands or orders a person to engage in conduct; and
   2. the conduct would constitute the commission of a service offence.

2. Strict liability applies to paragraph (1)(b).

The Judge Advocate General raised concerns with the operation of section 62 in the 2009 and 2010 Annual Reports, stating in 2010 that:

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\(^{138}\) Ibid.


\(^{141}\) Ibid.

\(^{142}\) *Defence Force Discipline Act*, section 152.

\(^{143}\) *Defence Force Discipline Appeals Act*, section 20.
S. 62 makes no specific provision for the attribution of any fault elements required to constitute the ordered conduct a service offence. Similarly, it is unclear as to the way in which any statutory defence applicable to the ordered conduct might apply to an offence against DFDA s.62.  

The Judge Advocate General also noted that Defence Legal had raised these issues with the Office of Parliamentary Counsel, with a view to recommending legislative amendments.  

The Explanatory Memorandum notes that ‘the current wording of section 62 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’. It also agrees with the Judge Advocate General that ‘it has been unclear which statutory defences are available to a person charged with this offence’.  

**Item 14** of Schedule 1 of the Bill repeals and replaces section 62. **Proposed section 62** adds several new elements.  

**Recklessness**  

**Proposed subsection 62(2)** of the *DFDA* provides that for the defence member to be guilty, they must be **reckless** as to the commission of the offence.  

The Explanatory Memorandum notes that:  

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.  

**Service offence does not need to be committed**  

Under **proposed section 62**, an offence is committed when the command or order that a service offence be committed is given—that is, it is not necessary that a service offence actually be committed. Under **proposed subsection 62(4)** a defence member may be found guilty of the offence even if the relevant service offence has not been committed (including if it was attempted or commenced, but not completed) or it was impossible to commit the relevant service offence. This is because 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 partly based on the offence of incitement under section 11.4 of the *Criminal Code*.  

**Limitations and defences**  

**Proposed subsection 62(5)** of the *DFDA* provides that any defences, procedures, limitations or qualifying provisions that apply to the relevant service offence apply also to the offence of commanding or ordering a person to commit that service offence.  

Under **proposed subsection 62(6)** any special liability provisions (within the meaning of the *Criminal Code*) that apply to the relevant service offence apply also to the offence of commanding or ordering a person to commit that service offence.  

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145. Ibid.  
147. Ibid.  
148. Ibid.  
149. Ibid.  
151. Ibid., p. 7.  
152. *Criminal Code*, section 11.4  
153. *Special liability provision* is defined in the Dictionary of the *Criminal Code* as a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or which provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing.
Under proposed subsection 62(7) it is not an offence to command or order a person to commit an offence against any of the provisions of the Criminal Code relating to attempt, incitement and conspiracy. This is in line with the offence of incitement under the Criminal Code, on which this provision is based.

The penalty for this offence will remain in its current form: if the service offence is punishable by a fixed punishment, the person who commanded or ordered the offence to be committed will receive that fixed punishment or a punishment that is not more severe than the maximum punishment for the offence in question.

Under the ADF discipline system, convictions for the service offence of commanding or ordering a service offence to be committed will be subject to the rights of review and appeal accorded by the DFDA.

Character and status of service convictions under Commonwealth laws

The current legal character and status of convictions imposed by service tribunals is considered by the Government to be ‘somewhat uncertain’. The Bill is intended to clarify the character and status of a conviction regarding a service offence by a Court Martial, a Defence Force magistrate, and a summary authority.

Item 7 of Schedule 1 of the Bill inserts proposed section 3A into the DFDA, which provides that ‘for the purposes of any law of the Commonwealth other than this Act or the regulations, a service offence is an offence against a law of the Commonwealth’. The purpose of the new section is to invoke the application of Commonwealth Acts that apply to Commonwealth offences, such as the Crimes Act 1914 and the National Security Information (Criminal and Civil Proceedings) Act 2004.

Conversions for service offences by a Court Martial or Defence Force Magistrate

Item 30 of Schedule 1 of the Bill insert proposed sections 190A and 190B into the DFDA.

Proposed section 190A applies to:

• convictions for a service offence by a Court Martial or Defence Force Magistrate—other than a Schedule 1A offence and

• convictions for a Schedule 1A offence by a Court Martial or Defence Force Magistrate where the punishment imposed is imprisonment.

In that case, a service chief or an authorised officer may disclose information about the person’s 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.

Where the disclosure is made for the purpose of complying with a requirement or authorisation to disclose, proposed subsection 190A(3) provides that it must expressly refer to the offence as a service offence.

Conversions for service offences by a Summary Authority

Proposed section 190B applies to conversions for service offences by a Summary Authority and to conversions by a court martial or a Defence Force Magistrate for Schedule 1A offences where a punishment of imprisonment is not imposed. Those convictions have effect for service purposes only. Proposed subsection 190B(3) puts beyond doubt that a convicted person is not required to disclose such a conviction to any person, for any purpose other than a service purpose.

Removal of references to ‘old system offences’

Items 1 to 4 and 8 to 9 of Schedule 1 of the Bill amend sections 3, 10 and 11 of the DFDA to remove references to old system offences and previous service law. Old system offences were contained in previous single service acts.

155. Criminal Code, section 11.5.
159. Service offences under Schedule 1A of the Defence Force Discipline Act include absence from duty (section 23), insubordinate conduct (section 26), being intoxicated while on duty (section 37) and prejudicial conduct (section 60). They have no civilian criminal equivalent.
(that is, army, navy or airforce) discipline legislation, which was repealed when the DFDA commenced in 1985. The old system offences provisions were included in the DFDA as a transitional measure and are now considered to be obsolete.

Replacement of recognizance release orders with fixed non-parole periods

A recognizance release order involves an order that an offender be of good behaviour for a period of time. If they are of good behaviour for that period there is no further punishment.

Section 72 of the DFDA applies specified provisions of the Crimes Act 1914 (Cth) to a service tribunal that imposes a sentence of imprisonment on a convicted person. The applied provisions relate to federal offenders sentenced to imprisonment, including how sentences are to be structured (including when it is necessary to impose a non-parole period), release on parole, revocation of parole and conditional release (including on a recognizance release order). Item 17 of Schedule 1 of the Bill removes the references to conditional release provisions of the Crimes Act (that is, sections 20, 20A and 20AA) from section 72 of the DFDA.160

The Explanatory Memorandum notes that the inability to enforce recognizance 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. As a result, the references in the Crimes Act to actions to enforce the order by the ‘court by which the order was made’ are problematic, as an ad hoc tribunal that makes an order will cease to exist when it is disbanded. This creates difficulties in taking action against a person who has breached the terms of their order.161

Item 18 inserts proposed subsection 72(1A) into the DFDA so that a service tribunal must not make a recognizance release order but may impose a non-parole period in respect of sentences of imprisonment, even where the sentence does not exceed three years. This provision is needed as otherwise subsection 72(1) of the DFDA would apply section 19AC of the Crimes Act, which provides that a court must impose a recognizance release order, and must not impose a non-parole period, when imposing a sentence that does not exceed three years.

Division 5 of Part IB of the Crimes Act concerns release on parole or licence, including revocation of parole. Item 20 adds proposed subsection 72(3) into the DFDA, which will apply the provisions of Division 5 of Part IB of the Crimes Act in respect of sentences of imprisonment of three years or less, which have a non-parole period, as well as for sentences over three years but not more than ten years. (As set out above, as sentences of imprisonment of three years or less imposed under the Crimes Act would not be eligible to have a non-parole period set, the provisions relating to release on parole would not otherwise apply to sentences of this duration.)

Schedule 2

Statutory recognition of the Director of Defence Counsel Services

Schedule 2 of the Bill provides statutory recognition of the position of the Director of Defence Counsel Services (DDCS) in the Defence Act. The Explanatory Memorandum states that this is intended to:

- 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.162

Item 6 of Schedule 2 of the Bill inserts proposed Part VIIIID—Director of Defence Counsel Services into the Defence Act. Within Part VIIIID, proposed section 110ZB outlines the functions and powers of the office, which primarily include:

- managing the provision of legal representation and advice to persons who have been charged with a service offence163 or
- managing the provision of legal representation and advice to persons who are entitled to representation before a service inquiry, such as a board of inquiry, under the Defence (Inquiry) Regulations 1985164

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162. Ibid., p. 9.
• establishing and maintaining a list of legal officers available to assist persons in custody for an alleged service offence and
• arranging the attendance of witnesses on behalf of the accused.

Schedule 3

Appointments of the Chief Judge Advocate and full-time Judge Advocate

The items in Schedule 3 of the Bill amend items 2–8 of Schedule 3 of the Military Justice (Interim Measures) Act (No. 1) 2009 (2009 Interim Act) to extend the appointment, remuneration, and entitlement arrangements provided for in the 2009 Interim Act for an additional two years, so that the fixed tenure for the Chief Judge Advocate and current full-time Judge Advocate would be up to eight years, or until the Minister for Defence declares, by legislative instrument, a specified day to be a termination day (whichever is sooner).

It is important to note that the proposed amendments address the possibility that the statutory time limits of five and ten years on the CJA’s appointment provided for in subsections 188A(2) and 188A(3) of the DFDA may be exceeded. The Bill amends Schedule 3 of the 2009 Interim Act to provide that these statutory time limitations do not apply to the current CJA, in order to ‘better ensure the continuity of the superior tribunal system during the interim period.’

Right to a fair hearing and fair trial

The Human Rights Committee canvassed the issue of the right to a fair trial and fair hearing, which is protected by Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to criminal and civil proceedings, and to cases before courts and tribunals. The right is concerned with procedural fairness, encompassing notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

The right to a fair trial in the determination of a criminal charge includes the presumption of innocence (Article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (Article 14(3)(g)) and a guarantee against retrospective criminal laws (Article 15(1)).

Compatibility of the amendments with the right to fair hearing and fair trial

The Human Rights Committee determined that the trial of members of the armed services for serious service offences by service tribunals, including Courts Martial, gives rise to issues of compatibility with the right to a fair hearing in the determination of a criminal charge, stating:

The question is whether a person who is a member of a military with a hierarchical chain of command and who serves as a judge or member of a military tribunal, can be said to constitute an independent tribunal in light of the person’s position as part of a military hierarchy.

One of the factors to be considered when examining this question is whether the members of the court or tribunal are independent of the executive:

In addition to the relationship of members of a tribunal to a military chain of command, the term of appointment of members may also be relevant. In particular, the fact that the term of appointment of a member of a court or

References:

165. Proposed paragraph 110ZB(1)(c) of the Defence Act.
166. Proposed paragraph 110ZB(1)(b) of the Defence Act.
170. Article 14 of the ICCPR is set out at the Appendix to this Digest.
172. Ibid., p. 44.
tribunal is terminable at the discretion of a member of the executive, would appear to be incompatible with the requirement that tribunals be independent. 173

The Committee emphasised that the requirement of the independence and impartiality of a tribunal under Article 14 was an absolute right and not subject to any exceptions. 174

The Committee noted that concerns about the impartiality of the disciplinary structure, the need to ensure Defence personnel were able to access fair and independent tribunals, judicial independence and independence from the chain of command were key drivers behind the creation of the AMC in 2006. 175

As a result of the High Court’s decision in 2009, the system of military justice has reverted to the previous system which had raised questions about independence and impartiality. The Committee notes that it has been six years since the Interim Act was introduced.

The Committee therefore considers that extending the appointments of the Chief Judge Advocate and full-time Judge Advocate, and thereby extending the current system of military justice, may limit the right to a fair hearing... the statement of compatibility does not address this issue. The Committee therefore seeks the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial. 176

At the time of publication of this Digest, the Government had not yet responded to the Committee.

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173. Ibid., p. 45.
174. Ibid.
175. Ibid., p. 46.
176. Ibid.
Appendix

International Covenant on Civil and Political Rights

**Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   
   (c) To be tried without undue delay;
   
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   
   (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.\footnote{International Covenant on Civil and Political Rights, done in New York on 16 December 1966, [1980] ATS 23 (entered into force for Australia (except art. 41) on 13 November 1980; art. 41 came into force for Australia on 28 January 1994).}