SUBMISSION

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SUBMISSION

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE INQUIRY

"DEFENCE LEGISLATION AMENDMENT (DISCIPLINE REFORM) BILL 2021"

Submission by:

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1. INTRODUCTION

1.1 We are delighted to make a brief submission to the Senate FADT Committee Inquiry into the Defence Legislation Amendment (Discipline Reform) Bill 2021. Defence discipline reform has been an evolving and critical element of the Government's delivery of an effective and efficient defence capability to the Australian people. Inquiries over many years have indicated the need for ongoing reform of military justice and disciplinary processes and thus disciplinary legislation. Debate on Bills of this nature is essential in order for our lawmakers to properly and validly enact laws which are fit for purpose and which meet the needs of a disciplined military service whilst ensuring the rights and responsibilities of our Defence members are maintained.

1.2 A Royal Commission is about to commence into suicide by veterans and Defence members. The terms of reference of that Royal Commission make it clear that administrative and disciplinary mechanisms will be tested in terms of what, if any, contribution such processes have made to the prevalence of suicide by serving and former Defence members. Further, institutions and organisations with Defence will be tested in the course of the Royal Commission and anecdotal evidence indicates the internal military justice oversight body – the *Inspector General of the Australian Defence Force* (IGADF) - will be scrutinised. This fact is clearly relevant to this submission and, indeed, to the Bill as it presently stands in light of the safeguards inherent in the legislative regime.

1.3 It order for our lawmakers to exercise their responsibility in an informed and detailed manner, a contribution by 'end-users' of legislation of this nature as well as the many stakeholders who are likely to be impacted by this legislation is essential. In that light, it is appropriate the authors of this submission provide some personal and company background to both provide context to this submission and lend weight to the substance of this submission.

1.3.1 *GAP Veteran & Legal Services* including its commercial legal entity, *GAP Legal Pty Ltd*, and its subsidiary human resources arm, *GAP Resource Management*, is a veteran-owned and operated, multidisciplinary firm servicing veterans and their families. *GAP* is headquartered in Canberra and has offices in Sydney and Melbourne.

1.3.2 Executive and operational staff of *GAP* are former Australian Defence Force members with a diversity of experience across the legal, logistics, intelligence, managerial, engineering, and special operations spectrum of military and police activities. *GAP* legal staff have experience in prosecutions with NSW Police and the Office of the Director of Military Prosecutions, as legal advisers in domestic and deployed locations, as defence counsel before Courts Martial and Defence Force Magistrates, as counsel on appeal before the Defence Force Discipline Appeals Tribunal, and in academia including in undertaking doctoral research in domestic and international criminal law.

2. SCOPE OF THE SUBMISSION

2.1 The *Defence Legislation Amendment (Discipline Reform) Bill 2021* (the Bill) proposes to amend the *Defence Force Discipline Act 1982* (DFDA) to, in essence: (a) expand the operation of the disciplinary infringement scheme; (b) remove the subordinate summary authority (SUBSA); and (c) introduce new offences of failure to perform duty or carry out activity, cyber-bullying, and failure to notify change in circumstances in the context of the receipt of benefit/allowance.[1]

2.2 This submission addresses, and is limited to, points (a) and (c) other than the provisions of point (c) regarding cyber-bullying.

[1] Explanatory Memorandum, Defence Legislation Amendment (Discipline Reform) Bill 2021 (Cth) 1.

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3. DISCIPLINARY INFRINGEMENT SCHEME

3.1 The Explanatory Memorandum states the IGADF has 'consistently reported that the disciplinary infringement scheme is trusted by defence members as a fair and effective means of dealing with minor breaches of military disciplinary'.[2] Whilst the reliability of the IGADF as a mechanism of oversight of and reporting on the ADF disciplinary regime is itself expected to be tested in the course of the pending Royal Commission, discussed at 1.2 above, the fairness of the disciplinary infringement scheme warrants significant attention in the course of FADT Committee analysis.

3.2 Reforming the operation of the scheme is not, of itself, accomplished by merely expanding its application such that it can be 'used in more situations'.[3] In light of the fact that, in accepting the jurisdiction of the scheme as opposed to being dealt with by a tribunal process inclusive of representation by a lay defending officer, the member is, in essence, pleading guilty to the offence, greater safeguards are required to prevent or limit abuse of the process. Defence abuse inquiries over decades have found that the chain of command is not necessarily best placed to provide such safeguards.[4] One safeguard implemented to address the identified shortfalls in military justice processes, including the disciplinary infringement scheme under whichever incarnation applied from time to time – the IGADF – has been subject of complaints, ministerial representations, appellate action, and, as stated, submissions and anticipated evidence to the Royal Commission.

3.3 The Committee may accept the experience of the authors of this submission that the scheme, in practice, has been used improperly and, on occasion, as an extension of the 'weaponised administration' employed by ineffective command chains as identified in the 'rolling inquiries into military justice'[5] over decades. By way of example, RAAF Base Wagga Wagga, a major training base, established a reputation in 2007-08 for using the discipline officer scheme to 'manage' behaviour *en masse* by the issuing of mass infringements to entire courses for purported misbehaviour where individuals could not be identified. This came to light when Army trainees at that base, many of whom had Corps-transferred following years of prior service, refused to accept the subject infringements but rather, elected to be dealt with by way of summary tribunal. Needless to say, the summary charges did not proceed. Disappointingly, the more junior RAAF trainees who were direct entrants to training programs and thus did not have the experience of the Army trainees, accepted the 'advice' of the RAAF chain of command to agree to be dealt with by way of the discipline officer scheme.

3.4 The upshot of this example, which has been repeated on too many occasions to describe in this submission, was that members who had not misbehaved and were thus not guilty of offending were pressured into accepting a determination of culpability and subsequent punishment. That outcome is entirely inconsistent with a system of military justice which is capable of being 'applied fairly and effectively in all circumstances'.[6]

3.5 Under earlier iterations of the discipline officer scheme, a 'selling point' of election to proceed under the scheme rather than being dealt with by charge and summary trial was the fact that infringement records were to be destroyed at the expiration of 12 months. This safeguard is proposed to be removed under the Bill on the basis of transparency and the need for 'command to assess the appropriateness and use of the infringement scheme'.[7] If we are to accept the findings of every military justice and Defence abuse inquiry, command oversight is not an adequate safeguard of the interests of our military personnel, especially in administering defence discipline law.[8]

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[2] Ibid.
[3] Ibid.
[4] See, eg, Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The effectiveness of Australia's military justice system* (Report, June 2005).
[5] Ibid xxvi.
[6] Commonwealth, *Parliamentary Debates,* House of Representatives, 12 August 2021, 1 (Andrew Gee, Minister for Defence Personnel and Minister for Veterans' Affairs).
[7] Explanatory Memorandum (n 1) para 22.
[8] See, eg, Senate Foreign Affairs, Defence and Trade References Committee (n 4) xxi.

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3.6 The Bill proposes to empower the Chief of the Defence Force (CDF) to make rules by legislative instrument and thus, free from the scrutiny or oversight of the Parliament, in relation to the keeping, retention, use or destruction of records of disciplinary infringements.[9] We would invite the Committee to consider this provision and the empowerment of the CDF in this regard against the following findings of the Committee in its June 2005 report on point:

> Against this background of almost ten years of rolling inquiries into the military justice system, the Chief of the Defence Force (CDF) recently expressed his view that 'The military justice system is sound, even if it has sometimes not been applied as well as we would like … I have every confidence that on the whole the military justice system is effective and serves the interests of the nation and of the Defence Force and its people'.
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> In view of the extensive evidence received, the committee cannot, with confidence, agree with this assessment.[10]

3.7 The extant problem is in the fact the system has 'not been applied as well as we would like'. It is difficult to envisage how empowering the chain of command to administer an aspect of the system as critical to ADF members as the management of disciplinary records free of legislative intervention or oversight somehow improves the 'way the system has been applied' or 'serves the interests of the ADF's people'. In order for the system to be properly applied, legislative constraints must be implemented – greater oversight not less is required.

3.8 It is respectfully submitted, it is incumbent on the Committee to satisfy itself that adequate safeguards are in place to ensure any proposed expansion of the disciplinary infringement scheme does not merely expand opportunities for abuse of the scheme. It is far from clear that any real safeguards are in place at present in this Bill or in the scheme as it presently stands.

4. FAILURE TO PERFORM DUTY

4.1 Schedule 3 of the Bill proposes to introduce an offence of 'Failure to perform duty or carry out activity'. Proposed sub-section 35A(1) provides that:

> (1) A defence member commits an offence if:
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> (a) the member's office or appointment, or the requirements of the Defence Force, require the member to perform a duty or carry out an activity; and
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> (b) the member fails to perform the duty or carry out the activity.[11]

4.2 The maximum punishment on conviction for this offence is dismissal from the Defence Force and the failure to perform the duty or carry out the activity is a matter of strict liability, that is, no mental or fault element is required to be proved in order to secure a conviction.

4.3 Offences of strict liability are relatively common throughout the Defence Force Discipline Act (the DFDA) but, in light of the fact that fault is not required to be proved either in respect of the whole offence or, as is the case here, in respect of one physical element of the offence, such offences are generally limited to the less serious end of the disciplinary spectrum. In this instance, we have strict liability applied to a significant element of the offence – the failure to perform the duty or carry out the activity – but the offence carries a maximum penalty of dismissal from the ADF. Dismissal is, of course, at the upper end of the penalty scale such is its objective seriousness.

[9] Defence Legislation Amendment (Discipline Reform) Bill 2021 (Cth) cl 9JB.
[10] Senate Foreign Affairs, Defence and Trade References Committee (4) xxvi.
[11] Defence Legislation Amendment (Discipline Reform) Bill 2021 (Cth) cl 35A(1).

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4.4 The upshot of this is that the prosecution is not required to prove that a defendant intended to fail to perform the duty or carry out the activity or was reckless as to the circumstance of the failure but merely that the defendant failed to perform the duty or carry out the activity. That provides a low threshold for the prosecution to cross in order to secure a conviction on a charge which carries dismissal as an option on punishment.

4.5 It is open to the Committee to consider whether applying a strict liability standard to an offence of this magnitude and which carries a penalty of this extent is appropriate and consistent with the stated intent of the Bill – to provide a system which is 'trusted by the Australian people and, most importantly, by those who serve in our Defence Force'.[12] In balancing that purposive statement with the further need to 'encourage the men and women of our Defence Force to be accountable for their actions', we would invite the Committee to revisit the strict liability component of this offence.

4.6 This provision carries a further risk in terms of unintended consequences insofar as it may conflict with Commonwealth criminal provisions regarding command responsibility for war crimes. A cynic may observe the timing of this aspect of the Bill with the implementation of recommendations in the Brereton Report is a little coincidental. It is abundantly clear that a failure to perform duties at command or specialist staff (legal officer) levels contributed to the alleged offending subject of Brereton.

4.7 A co-author of this submission, Glenn Kolomeitz, is presently writing up his doctoral thesis on command responsibility for war crimes under international and Australian law. Noting proposed section 35A in this Bill and section 268.115 of the Commonwealth Criminal Code both involve a failure to perform a duty, a temptation might exist to prefer charges under the former (DFDA) provisions and thus avoid charges under the latter, notwithstanding the facts may substantiate a charge under the latter. In light of the fact the Brereton Report exculpated the chain of command above patrol commander level from all but 'moral' command responsibility,[13] it is feasible section 35A could be called upon to redress any alleged failure of command in the broad context of the allegations subject of Brereton.

4.8 This unlikely yet not improbable outcome could expose the ADF and, by extension, Australia to the complementarity mechanisms of the Rome Statute of the International Criminal Court. At the very least, a clear conflict could arise between the application of section 35A and section 268.115. In our respectful submission, the Committee might consider ascertaining the genesis of this particular provision of the Bill including the rationale for its inclusion at this point in time. In the event section 35A generates from the recommendations of the Brereton Report, the Committee might like to consider whether the enactment of this provision is, or may appear to be, an attempt to circumvent the more objectively serious provisions of the Commonwealth Criminal Code or, less innocuously, is merely a lazy attempt to implement an aspect of the Brereton recommendations without due consideration of its unintended consequences.

4.9 We note the offence of 'failure to perform duty or carry out activity' is replicated at proposed section 9DF as an offence subject of the revised disciplinary infringement scheme, the difference apparently being section 35A applies to any defence member whilst proposed section 9DF applies to defence members prescribed under the legislation as being subject to the scheme. One of these provisions carries punishment at the lowest level of the spectrum whilst the other carries a penalty at the upper end. That itself may well create uncertainty in the application of the law and thus be inconsistent with the intent of the amendments in terms of fairness, effectiveness[14] and the maintenance of a disciplined force.

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[12] Comonwealth (n 6).
[13] *Inspector General of the Australian Defence Force Afghanistan Inquiry* (Final Report, November 2020) (*'IGADF Afghanistan Inquiry'*) Part 3, p. 472.
[14] See Commonwealth (n 6).

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5. FAILURE TO NOTIFY CHANGE IN CIRCUMSTANCES

5.1 Drawing on the authors' experience in prosecuting and/or defending fraud and other offences of dishonesty in the military system, this provision appears, on its face, to rectify a difficulty in securing convictions in what is a prevalent area of offending in Defence.

5.2 The offence of 'Failure to comply with requirement to notify change in circumstances' under proposed section 56A of the DFDA carries a maximum punishment on conviction of imprisonment for 6 months and the physical element of the failure to comply with the requirement is one of strict liability, that is, the prosecution is not required to prove a fault element such as intention or recklessness. Noting civil imprisonment entails dismissal from the Defence Force by necessity, this penalty is at the highest end of the spectrum.

5.3 Whilst the argument posited at paragraphs 4.3 to 4.5, above, applies to this provision in terms of the severity of the penalty balanced against the strict liability applied to an essential physical element, the defence of mistake of fact always applies to offences/elements of strict liability. In this instance, it is respectfully submitted that defence is more readily and equitably available to a defendant facing prosecution under this section than a defendant facing a charge under section 35A, above.

5.4 We would respectfully submit to the Committee that the proposed section 56A strikes a fair and equitable balance between the need to suppress a prevalent and costly offence and the proof requirements established by attachment of a strict liability standard to the failure component of the offence. The intent of the amendments proposed in section 56A are, in our submission, satisfied.

6. CONCLUSION

6.1 GAP Veteran & Legal Services appreciates the opportunity to provide submissions to the Committee on this important issue.

6.2 The authors are available to provide further information or give oral testimony as required.

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