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SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE: INQUIRY INTO THE DEFENCE LEGISLATION AMENDMENT (DISCIPLINE REFORM) BILL 2021

Thank you for your email dated 1 September 2021 inviting the Centre for Military and Security Law (CMSL), ANU College of Law, to make a written submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee's Inquiry into the *Defence Legislation Amendment (Discipline Reform) Bill 2021* ('the Bill'). The CMSL greatly appreciates the opportunity to provide this written submission to the Inquiry.

Events that have occurred in late 2019, 2020, and so far in 2021, have highlighted the need for the Federal Government to have the capacity to use the Australian Defence Force (ADF) to deal with a range of domestic situations which once may have been considered not suitable or appropriate for the ADF to be involved with. While undertaking these domestic operations, the parliament and citizens of Australia have a legitimate expectation that the ADF will act in a highly disciplined manner. An efficient, fair, timely and easy to understand and operate military discipline system is therefore a 'force enabler' that directly contributes to the ADF's operational outcomes. Such a discipline system is, in effect, part of ADF capability.

This submission will provide an overall assessment of the need for the proposed changes to the ADF's discipline system and will then make specific comment on aspects of each of the three Schedules contained in the Bill.

The need for changes to the ADF's discipline system

The primary purpose of the ADF's discipline system is to '… maintain the operational efficiency …' of the ADF.[1] In order to achieve this purpose, it has been necessary, on occasion, to amend the *Defence Force Discipline Act* (DFDA) since it came into force in 1985. The DFDA replaced the previous single service discipline arrangements with a modern, tri-service approach to discipline that was designed to support the ADF's need to operate in times of peace and war, inside and outside Australia, with a highly disciplined force.

[1] *R v Young (Re Nolan: Ex parte (Young))* [1991] HCA 29, per Brennan and Toohey JJ

There have been some significant amendments to the DFDA since its introduction, as well as a number of challenges to the constitutional validity of the DFDA. In the most recent challenge, the case of *Private R,*[2] the High Court was unanimous in dismissing a challenge to the jurisdiction of a Defence Force Magistrate to try a charge against a member of the ADF. The Court found that the provision of the DFDA subject to the challenge before it (s 61(3)) was a valid exercise of the defence power conferred on the Commonwealth Parliament under s 51(vi) of the *Constitution*. The High Court's decision in *Private R* has effectively put to rest, absent extraordinary circumstances, any further challenges to the constitutional validity of the DFDA for the foreseeable future.

The reason for providing the above brief assessment is to place in context the proposed amendments that are contained in the present Bill. It is considered that none of the amendments propose to substantively alter the DFDA in a way that would give rise to any further constitutional challenge regarding the DFDA's validity. On the contrary, each of the proposals in the three Schedules represents a necessary step along the evolutionary journey that the ADF's discipline system has undertaken since federation, and on that basis, the CMSL broadly supports the proposed amendments.

Comment on aspects of the proposed amendments in the Bill's three Schedules will now be provided.

Schedule 1

In relation to Schedule 1, the amendments proposed in the Bill will alter the way in which the disciplinary infringement scheme authorised by Part IXA of the DFDA currently operates. This scheme, introduced in 1995, has undoubtedly been well received by ADF command and those ADF members subject to it. Support for this statement can be gleaned from the number of ADF members who have opted to have minor discipline matters dealt with under the disciplinary infringement scheme. Statistics compiled by the Office of the Inspector General of the ADF show there have been consistently around 4000 infringements for minor discipline matters over the past few years.[3] This indicates a willingness, on the part of those members of the ADF subject to the jurisdiction of the Discipline Officer scheme, to have their conduct dealt with in a simple and expedient manner so that the ongoing impact on their military duties is minimised.

Expanding the disciplinary infringement scheme to permit a greater range of minor discipline breaches to be dealt with under that scheme, as well as the introduction of the new senior discipline officer appointment, will allow these minor breaches to be disposed of in a much timelier manner. Appropriate safeguards are contained in the Bill so that a person who wishes to contest the conduct that has been alleged can do so, using the summary tribunal system or the superior tribunal system as appropriate for that purpose. However, the statistics clearly indicate that the vast majority of ADF members are happy to have such minor infractions disposed of through the infringement scheme.

[2] *Private R v Brigadier Michael Cowen & Anor* [2020] HCA 31
[3] Inspector General of the ADF Annual Report 1 July 2019 to 30 June 2020

To assist the Committee understand the importance and value of the disciplinary infringement scheme, a comparison with the way in which infringements that occur during sporting fixtures in Australia might be helpful. It is normal practice for an incident that occurs in a major sporting fixture on the weekend to be referred to a discipline tribunal that meets early in the following week, reviews the evidence, listens to any contentions put forward by the player appearing before the tribunal, and makes a decision regarding the incident. Any penalty awarded by the tribunal will depend on a range of factors, including whether or not the person appearing before the tribunal decided to plead guilty, mitigating factors, prior appearances before the tribunal etc. Matters are disposed of in days, not weeks or months, and all involved seem to accept the outcome in the majority of cases. On the rare occasion when the ruling from the discipline tribunal is disputed, procedures are available to challenge the decision. There is no valid reason why the ADF's military discipline system cannot operate on a similar timeline, where breaches of discipline, especially minor breaches, are dealt with expeditiously and fairly so that all involved can move on with their lives.

Schedule 2

The proposal to remove the appointment of subordinate summary authority is a logical consequence of the introduction of the senior discipline officer proposed in the Bill, and part of the DFDA's evolution to ensure it remains fit for purpose in the modern ADF. Although the statistics contained in the 2020 JAG Report[4] show a significant number of subordinate summary authority trials are still being held, the overwhelming majority of these trials involve a guilty plea and can therefore be adequately dealt with under the changes to the DFDA proposed in Schedule 1. The other changes proposed in Schedule 2 are considered necessary and logical changes to the DFDA.

Schedule 3

The new service offences proposed in Schedule 3 represent further necessary reform to the military discipline system brought about by a combination of changes in behaviour by ADF members, technological advancements and experience arising out of trying to prosecute some recent offending.

Introducing specific discipline offences under the DFDA in relation to failure to performing a duty or activity that a defence member was obliged to perform (s 35A), cyberbullying (s 48A and s 48B), and receipt of a benefit or allowance in circumstances where there is no entitlement to that benefit or allowance (s 56A) are welcome changes to the DFDA. Each of these proposed amendments seeks to deal with aspects of behaviour that have occurred in the ADF reasonably regularly, and for which successful action under the DFDA has not always been achieved. Their inclusion as specific offences under the DFDA should help to enforce and maintain service discipline by making the consequences of such behaviour more readily able to be prosecuted, while adequate safeguards for a person suspected of committing one of these offences are also maintained.

[4] Judge Advocate General, *Report for the period 1 January to 31 December 2020*, ('the 2020 JAG Report') Annex B, Annex C and Annex D

The inclusion of strict liability as part of the proposed offences under s 35A and s 56A is not unusual in the DFDA as approximately 25 offences already include strict liability in one or more elements of those offences. No inherent unfairness to an accused person arises simply because of the inclusion of strict liability in these offences.

Comment should also be made about the proposed offences under s 48A and s 48B, especially as the 2020 JAG Report raised a number of issues regarding the proposal to amend the DFDA by introducing 'a cyber bullying offence'.[5] The impact of cyberbullying on its victims is the subject of regular reports, not only concerning the ADF, but also in relation to society in general. The Bill's EM notes that cyberbullying is incompatible with service in the ADF. This view is strongly supported. A member of the ADF who engages in cyberbullying, regardless of whether or not such behaviour is directed against another member of the ADF, a member of the public service working in the Defence organisation, a contractor to Defence or any other member of society, is engaging in conduct that by its very nature is likely to affect service morale and discipline.

The offences under s 48A and s 48B are stated to only apply to minor instances of cyberbullying so that command can quickly deal with such instances and take steps to prevent such behaviour being perpetrated *at all* by any member of the ADF. This objective sits well within the scope of command's responsibility for regulating the ADF so that good order and discipline of defence members is maintained at all times, and appears to be fully supported by the judgement of the plurality in *Private R*,[6] as well as the judgement of Gageler J.[7]

As noted above, the 2020 JAG Report[8] has raised a number of cautions regarding the proposed offence. This report, the last submitted by Rear Admiral Slattery prior to his term as JAG recently concluding, raises the issue that the offence proposed under s 48A '… requires no connection to the discipline of the Defence Force beyond the accused being a member of the Defence Force.'[9] At first glance, this concern may appear to have merit. However, when viewed in the specific context of the example of a member of the ADF using a social media service or relevant electronic service '… in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person' it can be easily understood why command authorities in the ADF would consider such behaviour *occurring in any circumstance* as being incompatible with good order and discipline. Put simply, there is a valid reason for considering that any member of the ADF who engages in cyberbullying of any type poses a threat to the good order and discipline of the ADF just by that fact alone. A closer connection to the Defence Force would not be needed to adversely impact service discipline; it would be enough that the perpetrator is a Defence member (as defined under the DFDA) for the risk to manifest. Further, it is difficult to comprehend any level of tolerance on the part of the Parliament or Australian society for the notion that it would be permissible for a member of the ADF to engage in cyberbullying and yet that activity would be beyond the scope of the ADF to address as a matter of service discipline.

[5] Ibid, paragraphs 91 – 96
[6] Above n2, see paragraphs 76, 77, 80 and 82
[7] Ibid, paragraph 95
[8] Above n4, paragraphs 91 – 96
[9] Ibid, paragraph 93

Finally on this topic, there is a need for Defence to be able to deal with cyberbullying at a number of different levels. At the most basic level, acceptance that the offending has occurred and accepting the jurisdiction of a discipline officer is likely to occur in a significant number of cases. Similarly, for reasonably straightforward matters, there is no reason why a summary authority should not be able to exercise jurisdiction over a cyberbullying offence; this already occurs at summary level for most DFDA offences. If there are complicating factors, then the current practice of obtaining legal advice and/or referring the matter to the Director of Military Prosecutions remains available. In some circumstances, the use of a charge under DFDA s 61(3) and the relevant criminal code would also be appropriate for a cyberbullying offence. All of these options remain available with the proposed amendment.

The reforms to the DFDA that are proposed in this Bill are a balanced and measured response to legitimate criticisms that have been made about the operation of the DFDA as the 21st Century rolls on. Each of these reforms are aimed at improving the timeliness, efficiency and effectiveness of the summary discipline system while preserving the protections and rights that exist for a defence member who is accused of breaching service discipline. The proposed amendments to the DFDA are supported.

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16 September 2021