

Defence Portfolio

COMMITTEE INQUIRY QUESTION

(Question No. 1)

Senator the Hon Eric Abetz asked the Department of Defence, upon notice, on 01 October 2021:

Inquiry into Defence Legislation Amendment (Discipline Reform) Bill 2021 - written question on notice

The Senate Foreign Affairs, Defence and Trade Legislation Committee has received a submission to its inquiry into the Defence Legislation Amendment (Discipline Reform) Bill 2021 from GAP Veteran & Legal Services (attached) which raised concerns with some of the proposed new sections in the Bill.

The Chair of the committee, Senator the Hon Eric Abetz, requests that the Department of Defence respond to the concerns raised by this submission by 7 October 2021.

Senator the Hon Eric Abetz – The Department of Defence has provided the following answer to the Honourable Senator’s question:

DEFENCE RESPONSE TO GAP LEGAL SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE INQUIRY

Defence provides the responses (detailed below) to the matters raised in the submission of GAP Legal Pty Ltd (‘GAP Legal’), dated 30 September 2021, to the Senate Foreign Affairs, Defence and Trade Legislation Committee inquiry (‘Committee inquiry’) into the Defence Legislation Amendment (Discipline Reform) Bill 2021 (‘the Bill’).

The specific issues Defence identifies in the submission of GAP Legal are broadly summarised:

1. Reliability of the Inspector-General of the Australian Defence Force (IGADF) as an oversight mechanism of military justice, in particular the expanded disciplinary infringement scheme.
2. Expansion of the disciplinary infringement scheme – concerns regarding safeguards; that the scheme is abused and that command of the Australian Defence Force cannot be trusted to administer discipline.

3. New service offence of Failure to perform a duty or carry out an activity (s.35A) – concerns regarding the application of strict liability as the fault element to the conduct of failing to perform a duty or carry out an activity, the punishment of Dismissal from the Defence Force, the introduction of this service offence being linked to the findings of the Brereton ‘Afghanistan’ Report, and its inclusion as a disciplinary infringement is inconsistent with the intent of the Bill to improve the ‘fairness and effectiveness’ of discipline.

This submission is in addition to the Defence submission (dated 17 September 2021), to the Committee inquiry.

DEFENCE RESPONSES TO SPECIFIC ISSUES

IGADF oversight function

The GAP Legal submission (paragraph 3.2) identifies ‘One safeguard implemented to address the identified shortfalls in military justice processes, including the disciplinary infringement scheme...[is] the IGADF’.

Defence response: This part of the GAP Legal submission correctly identifies the IGADF as being a safeguard to address shortfalls in military justice processes. This is consistent with the statutory role of the IGADF (see: *Defence Act 1903* s.110B). An additional safeguard is the chain of command.

The role and purpose of the IGADF is to provide the Chief of the Defence Force with:

- an internal audit and review of the military justice system independent of the ordinary chain of command; and
- an avenue independent of the ordinary chain of command, by which failures and flaws in the military justice system can be examined so that the cause of any injustice (whether systemic or otherwise) may be remedied (see: *Defence Act 1903* s.110B).
- Additionally, the IGADF inquires into the deaths of ADF members where the death appears to have arisen out of or occurred in the course of a member’s ADF service. The IGADF also reviews all complaints lodged under the statutory Redress of Grievance scheme. The IGADF provides an annual report to the Minister for Defence for tabling in Parliament.

GAP Legal (paragraph 3.2) asserts that the IGADF has been ‘...the subject of complaints, ministerial representations, appellate action, and...submissions and anticipated evidence to the Royal Commission.’

Defence response: Defence has not been provided any information or detail relevant to GAP Legal’s submission, and in particular, the statement’s relevance to the IGADF’s oversight function concerning military justice processes.

The IGADF is unaware of any IGADF finding ever having been the subject of successful legal challenge.

It would be speculative to predict what the Royal Commission may decide to examine. The IGADF is not specifically mentioned in the Royal Commission’s terms of reference.

The Committee should be reassured that there are a wide range of mechanisms used by the IGADF to monitor and report on the fairness of the discipline system. In an ordinary year, on average, the IGADF conducts around 60 military justice performance audits of ADF units. These audits include focus groups and military justice surveys which involve around 3000 ADF members of all ranks each year. This is in addition to conducting inquiries and dealing with redresses of grievance. IGADF produces comprehensive military justice statistics and trends annually and alerts CDF to any specific issues.

The IGADF's military justice performance audit program is conducted in line with the relevant Australian Standard on Assurance Engagements 3100 – *Compliance Engagements*. Further information about the IGADF military justice performance audit program may be found in the IGADF's annual reports, available at: [IGADF Annual Reports: Military Justice: Department of Defence](#)

Expanded Disciplinary Infringement Scheme

The Bill proposes expansion of the disciplinary infringement scheme to include the most commonly occurring breaches of military discipline dealt with by the Subordinate Summary Authority service tribunal. This will enable a Defence member alleged to have committed a disciplinary infringement, the opportunity to have the matter dealt with, quickly and fairly, at the lowest possible level of discipline action available under the DFDA by way of a discipline officer procedure.

Safeguards and fairness. (GAP Legal paragraph 3.2 and 3.8). GAP Legal submits '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'.

Defence response: The Committee can be confident there are more than adequate safeguards and fairness provisions in place and additionally provided for in the Bill. Importantly, the requirement that the infringed member make a positive election (in writing) to be dealt with by a Discipline Officer under the disciplinary infringement scheme and that such an election is taken as an admission by the infringed member to having committed the disciplinary infringement continues in Part IA. The member's election can be withdrawn only by the infringed member at any stage prior to a decision being made by a Discipline Officer. After being issued an infringement, infringed members are encouraged to seek advice, which includes the availability of free legal advice, before making their election. At a Discipline Officer proceeding the infringed member may call witnesses or present any evidence in support of their matter.

Additional safeguards (from the current discipline officer scheme under Part IXA) for the operation of the expanded disciplinary infringement scheme in the Bill include:

- The requirement for any reasonable excuse to be considered before issuing a disciplinary infringement notice. The Infringement Notice will require the Infringement Officer to specify if a reasonable excuse was offered and the outcome of its consideration.

- The ability of a Discipline Officer/Senior Discipline Officer to dismiss an infringement if the officer considers the infringed member has a reasonable excuse for committing the infringement.
- Punishments imposed by a Senior Discipline Officer must be reviewed by a commanding officer. On review, a commanding officer will have the power to confirm a punishment decision, substitute a punishment decision with a reduced punishment, decide that no punishment be imposed, or that the discipline infringement be dismissed and no punishment imposed.
- A broader mandatory reporting obligation for discipline officers to their commanding officer is included within Part IA. This will ensure an increased command oversight function of the disciplinary infringement scheme particularly concerning the use of the scheme, types of infringements, suitability of punishment decisions, and the performance of Infringement Officers, Discipline Officers and Senior Discipline Officers. The enhanced commanding officer oversight function will result in commanding officers having a greater role to play.
- S.9E(3) specifies additional information to be included in a disciplinary infringement notice, in addition to the Part IA detail.
- Where a member has been dealt with under the infringement scheme in relation to the disciplinary infringement (see: s.9C(2) and (3)), the member is not liable to be tried by a service tribunal for an offence arising out of the infringement. This provision was not included within Part IXA (current scheme), and has been revised and included within Part IA.
- The Disciplinary Infringement Scheme is independently overseen by the Inspector-General Australian Defence Force.

GAP Legal (at paragraph 3.3) asserts alleged abuse of the disciplinary infringement scheme by way of an example concerning the use of infringements ‘*en masse*’ at RAAF Base Wagga Wagga; and former Army members at RAAF Wagga ‘refus[ing] to accept the subject infringements’, ‘elect[ing] to be dealt with by a summary service tribunal’ and ‘the summary charges did not proceed’.

Defence response: A class at RAAF Wagga were infringed for not forming up in the correct carpark prior to physical training as required by Standing Instructions. Forty of the class elected to appear before a Discipline Officer, with the remainder not electing. It was determined that the Standing Instruction did not constitute a General Order so no punishment was imposed on any member. Similarly those that did not elect to be dealt with by a Discipline Officer were not charged.

GAP Legal’s example is an illustration of the application of the disciplinary infringement scheme comprising the election process and appropriate command oversight of discipline at a unit level. By not electing to be dealt with by a Discipline Officer, the members concerned chose not to admit to the alleged breach of discipline. Under such circumstances the DFDA provides that the matters may be referred to an ‘authorised member’ to determine whether there are ‘reasonable grounds to believe that the member may have committed a service offence’ (see DFDA s.87). In the example provided by GAP Legal it appears that the disciplinary infringement scheme and the inherent

safeguards of the scheme (and other provisions within the DFDA) operated as intended, which is evidenced by the claim that the members in question were not charged with a service offence and that no punishments were imposed on the infringed members.

However, this process would have benefitted from the proposed legislative change to allow a Discipline Officer, Senior Discipline Officer or Commanding Officer to dismiss the infringement.

Since IGADF assumed responsibility for the Redress of Grievance system in 2016, there have been no Redress of Grievance complaints about the use of the Discipline Officer scheme. The IGADF is unaware of there having been any Redress of Grievance complaints about the Discipline Officer scheme before 2016.

Infringement records (s.9JB). In respect to the use of a legislative instrument to regulate discipline infringement records, GAP Legal (at paragraph 3.6) states that a legislative instrument would be ‘free from the scrutiny or oversight of Parliament’ (see paragraph 3.6).

Defence response: The Bill provides that the Chief of the Defence Force may, by legislative instrument, make rules for, or in relation to the keeping of disciplinary infringement records and the retention, use or destruction of disciplinary records (currently DFDA s.169H requires the destruction of disciplinary infringement records after 12 months). The legislative instrument as proposed in the Bill would be a disallowable instrument presented for Parliamentary scrutiny and accompanied by an Explanatory Memorandum registered on the Federal Register of Legislative Instruments.

New service offence of Failure to perform a duty or carry out an activity (s.35A)

Application of strict liability. GAP Legal (at paragraph 4.3) noted concerns about the application of strict liability to s.35A. S.35A of the Bill will create a service offence of failure to perform duty or carry out an activity. Strict liability applies to the fault element of ‘failing to perform the duty or carry out the activity’.

Defence response: The construction of strict liability to an offence is provided for in the *Criminal Code* s.6.1. S.35A(1)(b) provides that strict liability applies to the physical element, meaning there is no fault element applying.

All existing *Criminal Code* defences will be available for the charged member, including the defence of mistake of fact under s.9.2 of the *Code* in relation to the physical element of failing to perform a duty or carry out an activity. Additionally, an offence-specific defence of *reasonable excuse* (of which there are many uses for offence provisions throughout the DFDA) for the relevant conduct will be available, with the charged member bearing an evidential burden for the defence that is consistent with the requirements of the *Criminal Code* s.13.3(3).

Where the *Criminal Code* defences are insufficient, offence-specific defences adapted to the particular circumstances should be applied. This is consistent with the AGD Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide). S.35A(3) of the Bill provides an offence-specific defence, as opposed to being specified as an element of the offence, because circumstances that a charged member would likely raise for failing to perform a

duty or carry out an activity contrary to s.35A, would in most cases, be peculiarly within the knowledge of the charged member.

Equally, it would be more difficult for the prosecution to disprove than for the charged member to establish the matter. For example, circumstances peculiarly within the knowledge of the charged member might include the non-performance of duty or carrying out of an activity where the member claimed not being confident to perform the duty etc. as the reason for non-performance. This explanation would be peculiarly within the knowledge of the charged member and does not directly fit within any of the *Criminal Code* defences.

The reasonable excuse defence provides an additional protection for a charged member in addition to, and not as a substitute for the *Criminal Code* defences. DFDA discipline tribunals are presided over by military personnel comprising military officers who invariably are not legally trained. The application of a reasonable excuse defence where it arises, will be considered by the service tribunal having regard to the circumstances of the alleged offence and the military context of the conduct. A service tribunal is well able to have regard to an excuse raised, and to determine the reasonableness of that excuse, having regard to the evidence and the military context. Recognising also the availability of a reasonable excuse statutory defence, applies to a substantial number of offences already within the DFDA (and will extend to disciplinary infringement processes); it is a concept well understood by the lay commanders and non-commissioned officers who apply the DFDA.¹

Additional factors that support the inclusion of a reasonable excuse defence include: the wide variety of duties and activities that defence members may be called upon to perform with the correlating exculpatory circumstances or explanation for non-performance which can be raised and considered with a reasonable excuse defence, supplementary to *Criminal Code* defences.

Evidential burden. S.35A(3) provides an evidential burden on the charged member, consistent with the *Criminal Code* (ss.13.3(3)) together with the note to the section, which is consistent with the *Guide to Framing Commonwealth Offences*.

Where the law imposes a burden of proof on the defendant (charged member), it is an evidential burden, unless the law expresses otherwise (see *Criminal Code* ss.13.3 and 13.4).

- a. An evidential burden of proof requires the defendant (charged member) to adduce or point to evidence that suggests a reasonable possibility that a matter exists or does not exist (*Criminal Code* s.13.3).
- b. A legal burden of proof on the defendant must be discharged on the balance of probabilities (*Criminal Code* s.13.5).

An evidential burden is easier for a defendant (charged member) to discharge, and does not completely displace the prosecutor's burden (*Criminal Code* ss.13.1 and 13.2) and only defers that burden. Accordingly, as a general rule, the default position in s.13.3 of the *Criminal Code* (as outlined above), should apply and the defendant (charged member) should bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this position.

¹ See: DFDA ss.15; 15A-G; 16; 16A; 17; 23;28; 32; 40C; 43; 45; 46; 48; 50; 53; 54A; 60; and 100QA and Part 1A of the Bill

The Bill correctly and fairly casts the evidential burden on the charged member in respect of the offence specific defences at ss.35A and is appropriate and consistent with the broad range of discipline matters similarly provided for in the DFDA.

Maximum Punishment Available. GAP Legal raises concerns regarding the punishment of Dismissal from the Defence Force being at the upper end of the penalty scale (see paragraph 4.3).

The DFDA provides for a range of punishments (14 in total) ranging from a reprimand to imprisonment for life. The majority of the service offences in the DFDA carry a maximum punishment of a term of imprisonment. However, only a superior service tribunal (courts martial or Defence Force magistrate) may impose a punishment of imprisonment, or following conviction for a s.35A offence, Dismissal from the Defence Force, after having regard to the comprehensive sentencing principles within s.70 of the DFDA.

While the punishment of Dismissal from the Defence Force is substantial and reflects the broad range of matters that may fall within this proposed service offence, it is at the lowest end of maximum punishments available under the DFDA.

Linkage to the Brereton ‘Afghanistan’ Inquiry. The submission of GAP Legal (at paragraph 4.6) postulates that s.35A may have been generated from recommendations made in the Brereton Report

Defence response: The discipline reforms proposed in the Bill have no relationship to the inquiry undertaken the IGADF – Brereton Report.

Concerns over the operation of the Summary Discipline System were formally raised in March 2016, with the Chief of the Defence Force directing a review of the summary discipline system in November 2016. The *Review of the Summary Discipline System 2017*, which recommended the introduction of the proposed s.35A service offence, was presented to the Chief of the Defence Force in November 2017, three years before the Brereton Report was finalised.

Service offence v disciplinary infringement. The submission of GAP Legal (paragraph 4.9) asserts the inclusion of the proposed s.35A service offence as a disciplinary infringement at s.9DF within the expanded disciplinary infringement scheme may ‘...create uncertainty in the application of the law and thus be inconsistent with the intent of the amendments in terms of fairness, effectiveness and the maintenance of a disciplined force.’

Defence response. The DFDA creates three levels of discipline authorities, for dealing with breaches of discipline; being Discipline Officer, Summary Authority and Superior service tribunals. A key reform of the disciplinary infringement scheme is that there is no nexus between a disciplinary infringement and a service offence (see: s.9D(4)).

The Bill proposes the inclusion of additional breaches of discipline, in addition to those currently prescribed in Part IXA, which may be dealt with as a disciplinary infringement (including the disciplinary infringement of Failure to perform a duty or carry out an activity). For clarity the proposed Part 1A Disciplinary Infringement Scheme includes a simplified outline of the scheme (see Bill, Schedule 1 – s.9A) and provides for specific disciplinary infringement provisions (see Bill, Schedule 1 – Division 3).

The changes to the disciplinary infringement scheme proposed in the Bill will remove the uncertainty that currently exists with the disciplinary infringement scheme within Part IXA. Furthermore, the additional safeguards (see above) for the operation of the proposed expanded disciplinary infringement scheme included in the Bill have been included for the specific purpose of promoting the fairness and effectiveness of military discipline.

Rome Statute – Complementarity GAP Legal (paragraph 4.8) There is no tension between the proposed S.35A offence and complementarity under the Rome Statute in relation to offences alleged to have been committed by Australian Defence Force personnel in Afghanistan. The offence has no retrospective application.