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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**DEFENCE LEGISLATION AMENDMENT BILL 2006**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister Assisting the Minister for Defence, the Hon  
Bruce Billson MP)

## **DEFENCE LEGISLATION AMENDMENT BILL 2006**

### **OUTLINE**

This Bill will amend Defence administered legislation, in particular the *Defence Force Discipline Act 1982* to establish an 'Australian Military Court' which is intended to replace the current system of trials by Courts Martial (CM) and Defence Force magistrates (DFM) under the *Defence Force Discipline Act 1982* (DFDA). Subsequent changes to the DFDA will simplify summary procedures, and introduce a right of appeal and right to elect trial from summary procedures to the new Australian Military Court.

The purpose of this Bill is to give effect to the Government response to certain recommendations of the 2005 Senate report into the effectiveness of Australia's military justice system by the Senate Foreign Affairs, Defence and Trade References Committee (the Senate Report). The changes are intended to provide for the maintenance of effective discipline and the protection of individuals and their rights. At recommendations 18 and 19, the Senate Report proposed that the Government amend the DFDA to create a permanent military court to replace offences tried by CM and DFM.

The Bill will make consequential amendments to Defence and other portfolio legislation, the latter being the *Migration Act 1958* and the *Defence Force Discipline Appeals Act 1955* to give effect to the intended regime.

The Bill will also amend the regulation making power in the *Defence Act 1903*, to facilitate the creation of a 'Chief of Defence Force Commission of Inquiry'. The Government agreed in its response to the Senate Report that the Australian Defence Force (ADF) conduct independent and impartial inquiries into notifiable incidents including suicide, accidental death or serious injury. The appointment, procedures and powers, dealt with by Regulation, of courts of inquiry, boards of inquiry, inquiry officers and inquiry assistants are facilitated by paragraph 124(1)(gc). A reference to 'CDF Commission of Inquiry' will be included in this paragraph that will enable such a Commission to be established under the *Defence (Inquiry) Regulations 1985*. It is intended that such a Commission consist of one or more persons, including a civilian person with judicial experience, who is to be the President. This form of inquiry will be in addition to the existing arrangements for appointment of Inquiry Officers and Boards of Inquiry.

### **FINANCIAL IMPACT STATEMENT**

The initial funding for these amendments has been identified and will be provided from current allocations.

## DEFENCE LEGISLATION AMENDMENT BILL 2006

### NOTES ON INDIVIDUAL CLAUSES

1. As mentioned in the outline, this Bill will give effect to the Government response to certain recommendations of the 2005 Senate report into the effectiveness of Australia's military justice system by the Senate Foreign Affairs, Defence and Trade References Committee (the Senate Report) designed to make significant enhancements to the military justice system.

2. A number of submissions to the inquiry concerned the structure of disciplinary tribunals and appeals processes available to Service personnel, in particular, courts martial (CM) and Defence Force magistrate (DFM) trials, under the *Defence Force Discipline Act 1982* (DFDA). The concerns stemmed from the location of judge advocates and DFMs within the military chain of command and the implications for their (actual and perceived) independence.

3. The Government Response agreed to create a permanent military court known as the *Australian Military Court* (AMC) to:

- a. be established under appropriate Defence legislation;
- b. satisfy the principles of impartiality and judicial independence, and independence from the chain of command, through:
  - (i) statutory appointment of judge advocates by the Minister;
  - (ii) security of tenure (five year fixed terms with a possible renewal of five years);
  - (iii) remuneration set by the Remuneration Tribunal;
  - (iv) no eligibility for promotion during tenure as a judge;
- c. comprise judge advocates, who are to be selected from any of the available qualified full or part time legal officers and includes:
  - (i) one permanent Chief Judge Advocate (to be retitled Chief Military Judge (CMJ));
  - (ii) two permanent Judge Advocates (to be retitled Military Judge (MJ));
  - (iii) a part-time Reserve panel of judges, selected from any of the available qualified Reserve ADF legal officers; and
- d. appropriate para legal staff sufficient for the AMC to function independently from the chain of command;
- e. provide for MJ's to sit alone or with a military jury;

- f. provide for a mandatory military jury for certain serious military offences.

4. To give effect to the Government Response, the following philosophies and characteristics of the AMC are reflected in the Bill-

- The AMC is not an exercise of the ordinary criminal jurisdiction. More is required than the ability to understand specialist evidence at a trial. A knowledge and background into the military environment and culture is required;
- The AMC is a 'service tribunal' under the DFDA and therefore is part of the military justice system, the object of which is to maintain military discipline within the ADF;
- The AMC must be deployable and be able to sit in theatre and on operations. A principal factor of the AMC that is peculiar to the Defence Force is the military preparedness requirements and physical demands of sitting in an operational environment;
- A knowledge and understanding of the military culture and context is essential. This includes an understanding of the military operational and administrative environment, the unique needs for the maintenance of discipline of a military force in Australia and on operations and exercises overseas. The AMC must have credibility with, and acceptance of, the Defence Force;
- Military judges, as serving members of the Australian Defence Force, will still be subject to the provisions of the DFDA and ordinary discipline in the performance of their non-judicial duties, such as training;

5. There have been several jurisdictional challenges to the DFDA since it commenced in 1985. The most recent challenge was dealt with by the High Court in *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004)).

6. Notwithstanding these constitutional challenges, the High Court, by various majorities, has consistently supported the constitutional validity of the current system under the DFDA provided that jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purposes of maintaining or enforcing service discipline. The constitutional status and jurisdiction of the AMC will be the same jurisdiction that applies to the current system of trials by CM and DFM - there is no intention to increase its jurisdiction. The AMC will deal with the same offences as those dealt with under the current system of trial by CM and DFM.

7. The Bill is consistent with legal advice provided to the Government.

8. Item 1 cites the Act as the *Defence Legislation Amendment Act 2006*.
9. Item 2 contains a table which outlines the commencement regime for the various provisions of the Bill. Sections 1 to 3, containing formal aspects of the Bill, commence on Royal Assent. Schedule 1, which contains the provisions establishing the AMC, will commence on the earlier of 1 October 2007 and a day to be fixed by Proclamation. This longer period is required, as the 6 month period normally allowed for commencement by Proclamation may not be sufficient time for the administrative matters associated with the AMC to be settled prior to the formal commencement of the legislation on Royal Assent. The proposed commencement dates to establish the AMC will therefore allow for those matters to be completed.
10. Schedules 2 and 3 commence on Royal Assent.
11. Item 3 outlines how the Acts identified in the various Schedules to the Act will be amended or repealed.
12. Schedule 1 (items 1 to 10) introduces the AMC. Part 1 includes amendments to the definition section, section 3 of the DFDA, to incorporate new terms and concepts consequential on the establishment of the AMC.
13. Item 11 repeals Divisions 3, 4 and 5 of Part VII of the DFDA that deal with trials by Court martial, Defence Force magistrates and the nomination procedures for members of a Court martial and Defence Force magistrates, respectively.
14. Item 11 also substitutes new Division 3 which establishes the AMC.
15. Proposed section 114 creates the Court and explains its membership. It provides that the AMC will consist of the Chief Military Judge and such other military judges, all of whom hold office in accordance with the Act. The notes to this clause make it clear that the AMC is not a court established under Chapter III of the Constitution (with all the features of such a court) and that it is a service tribunal (as defined in section 3 of the DFDA). Akin to its predecessors (CMs and DFM) it is therefore part of the military justice system, the object of which is to maintain military discipline within the Australian Defence Force.
16. Proposed section 115 is almost identical to sections 115 and 129 of the DFDA which provided for the jurisdiction of CM and DFM trials. There is no intention to increase the jurisdiction of the AMC; it will deal with the same offences as those dealt with previously in a trial by CM or DFM. Proposed subsection 115(1) therefore provides that the jurisdiction of the AMC will be to try any charge against any person (i.e., a charge of any offence under the DFDA against any member of the ADF or an authorised Defence civilian). That said, it does not have jurisdiction to try a charge of a custodial offence (similar to repealed subsection 115(1A)). It will also have jurisdiction to take action under Part IV (Punishments and orders) in relation to a convicted person where that case has been referred to it under subsection 103(6) (election of punishment).
17. Proposed section 116 provides that for the purposes of the exercise of its jurisdiction, the AMC is to be constituted by a single MJ. Furthermore, proposed

subsection 116(2) also allows, in effect, more than one military judge to sit and exercise jurisdiction concurrently. This will cater for situations where a trial may be required both domestically and overseas. This provision is similar to section 11 of the *Federal Magistrates Court Act 1999*.

18. Proposed section 117 provides that the AMC may sit at any place in or outside Australia and also that it may order that a proceeding or part of the proceeding can be conducted or continued at another place that is specified in the order. This provision will ensure that the court is deployable to any overseas operational areas.

19. Proposed section 118 relates to the referral of charges and convictions to the AMC and the nomination of military judges. Section 129C of the DFDA required the Registrar of Military Justice to refer a charge to a Defence Force magistrate only when the Judge Advocate General nominated a Defence Force magistrate. Under the new system of trials by the AMC, the Registrar of the AMC (the Registrar) must refer a charge to the AMC and the CMJ (rather than the Judge Advocate General) must nominate a military judge to try the charge. Furthermore, the Registrar must refer a conviction to the AMC to take action under Part IV (punishments and orders) where the DMP has requested the Registrar to do this.

20. Proposed section 119 provides that the AMC will be required to have a seal which must be affixed to documents produced under the DFDA or the Rules of Court. The design is to be determined by the Minister. It is not intended that such a determination of the design of the seal of the court will be a legislative instrument for the purposes of section 5 of the *Legislative Instruments Act 2001* and therefore will not be subject to the registration and tabling requirements required by that Act.

21. Proposed section 120 provides that the Court is to have an *Australian Military Court stamp* which has the same design as the seal. The purpose of the stamp will be to mark any document or copy of a document as valid, as if it had been sealed.

22. Proposed section 121 provides that the AMC will be staffed by defence members made available by a Service chief or persons engaged under the *Public Service Act 1999* and made available by the Secretary of the Department, to provide administrative and management services in connection with trials and charges under the DFDA. This is similar to current section 188GQ of the DFDA in respect of the Director of Military Prosecutions.

23. New Division 4 provides for a Military Jury. The concept of a military jury is a new one, but it is based on provisions relating to membership of a court martial in section 116 of the DFDA.

24. Proposed section 122 provides for the constitution of a military jury. That is, there will be 6 members with at least one holding a rank that is not lower than the naval rank of commander, or the equivalent ranks of lieutenant-colonel or wing commander. However, the rank requirement in this section and proposed section 122 is contingent on the exigencies of the service. Decisions are to be by two thirds majority.

25. Proposed section 123 outlines the eligibility requirements for a membership of a military jury. Eligibility will depend on whether the accused is a commissioned

or non-commissioned member and also his or her rank. If the accused is an officer or a defence member (as defined in the DFDA), then a juror must also be an officer of not less than 3 years service and at a higher rank than the accused (proposed subsection 123(1)).

26. If the accused is non-commissioned, the juror must be an officer or a warrant officer (Navy), warrant officer class 1 in the Army or warrant officer in the Air Force, for a period not less than 3 years service and at a higher rank than the accused (proposed subsection 123(2)).

27. The introduction of non-commissioned officers (NCOs) to be eligible to serve on a military jury is new; it reflects the responsibilities and status of senior NCOs and a desire to broaden the eligibility of potential military jurors in deference to the rank of an accused. It also alleviates previous difficulties experienced in securing only officers to serve on court martial panels.

28. Proposed section 124 provides for the determination of questions by a military jury. Where a service offence is to be tried by a military judge and jury, the jury will be responsible for determining the guilt, innocence or unsoundness of mind of the accused. When a jury is deciding these matters, it must sit without any other person present. Decisions are to be made by a clear two thirds majority.

29. Item 12 repeals and substitutes the heading to Division 2 of Part VIII. The Division will be headed 'Trial by the Australian Military Court' (previously 'Trial by Court martial or Defence Force magistrate').

30. Item 13 repeals sections 132 to 135 (which relate to the procedures of trials by Courts martial and Defence Force magistrates trials) and substitutes proposed sections 132A to 132F.

31. Proposed section 132A provides for the trial of 'Class 1, 2 and 3' offences and how they are to be dealt with, that is, by a military judge or a military judge and jury. The characteristics of the offence determine which class an offence falls within.

32. It is intended that offences will be dealt with either by military judge alone or by military judge and military jury. In some cases, the latter will be mandatory (Class 1 offences). Trial by military judge and jury may also occur in respect of Class 2 offences, except where the accused elects to be tried by military judge alone. A class 3 offence, the accused may opt for trial by military judge and jury (see below) where the maximum punishment is no greater than 5 years imprisonment, the offence is prescribed or, if the offence is able to be tried under section 61 of the DFDA (Territory offences), the offence could be tried summarily in a civilian court. Notwithstanding the mode of trial, it is intended that the military judge will determine the sentence.

33. A trial by military judge and jury will be akin to a trial by court martial and a trial by military judge alone will be akin to a trial by a DFM.

### Class 1 offences

34. These offences are the more serious military offences, comparable to civilian indictable offences, for which waiver of trial by jury is not possible. The Government response to the Senate report specifically identified some offences that require trial by a military judge and jury. These include, mutiny, desertion, commanding a service offence and offences committed with the intent of assisting the enemy. As these offences have a particular Service flavour, in that they go to the very core of maintaining discipline and morale, commission of any of these offences would result in a lessening of that discipline and morale. Trial by military judge and jury will therefore be mandatory.

### Class 2 offences

35. An offence that is specified as a class 2 offence in Schedule 7, or one that is not a Class 1 or 3 offence, is a Class 2 offence. For Class 2 offences, trial will be by military judge and jury, except where the accused elects to be tried by military judge alone through the Registrar of the Australian Military Court.

### Class 3 offences

36. Class 3 offences are those that are listed in Schedule 7 as a class 3 offence and:

- (a) attract a maximum punishment of not greater than 5 years imprisonment;
- (b) as reflects the existing arrangements, if the offence is able to be tried under section 61 of the DFDA, the offence could be tried summarily in a civilian court.

37. For a Class 3 offence, while the default position for trial will be by military judge alone, the accused may elect to be tried by a military judge and jury.

38. All class 1, 2 and 3 offences are outlined in new Schedule 7, contained in item 21.

39. Proposed section 132B is based on section 132 of the DFDA and outlines the procedures that a military judge and military jury must comply with in respect of a charge for a service offence. For example, the hearing of a guilty or not guilty plea, the determination of the sufficiency or otherwise of the evidence against the accused, the conviction or acquittal of the accused by the military judge on a finding of guilty or not guilty by the military jury.

40. Proposed section 132C is based on section 134 of the DFDA and outlines the powers of a military judge in a trial by a military judge and jury. These relate primarily to the giving of rulings or the exercise of any discretion by a military judge in a trial for a service offence and what he or she must do apropos a military jury.

41. Proposed section 132D is based on section 135 which provided for the procedures to be followed in a trial by a DFM. This proposed section outlines the procedures to be followed by a military judge sitting alone. For example, the hearing



of a guilty or not guilty plea, determination of the sufficiency or otherwise of the evidence against the accused, and the conviction or acquittal of the accused following a guilty or not guilty finding.

42. Proposed section 132E outlines additional matters about trials by a military judge alone or with a military jury. These include dealing with a guilty or not guilty plea by the accused and the giving of rulings in certain circumstances. This proposed section has also been adapted from section 135 of the DFDA in respect of trials by a DFM.

43. Proposed section 132F is also based on section 135 of the DFDA and outlines what action the AMC must take if an accused person is convicted under proposed sections 132B or 132D, which is to take action under Part IV (Punishments and orders). However, the AMC must hear all the relevant evidence before taking action.

44. Item 14 inserts new Subdivision B, sections 148A to 148F that will provide for the use of video and audio links in the AMC in respect of proceedings and evidence. Proceedings before the AMC are intended to reflect the unique culture and traditions of the Australian Defence Force, whilst not being unduly formal or protracted. The basic model of the evidentiary provisions of the DFDA will be retained. However, it is intended to extend these provisions by providing for evidence by affidavit, video link, telephone or other appropriate means similar to sections 47A to 47E of the *Federal Court of Australia Act 1976*. The intention of these provisions is to facilitate the most effective and efficient collection of evidence that will enable a fair outcome for the accused and minimal inconvenience to witnesses or parties to the proceedings.

45. Clause 148A provides for the AMC to direct or allow testimony to be given by video or audio link. The power of the AMC to allow evidence to be collected in this manner may be exercised either on application by the accused, the Director of Military Prosecutions or on the AMC's own initiative. The section applies whether the person is giving testimony in or outside Australia, but not in New Zealand as the *Evidence and Procedure (New Zealand) Act 1994* applies. This Act facilitates a reciprocal arrangement which allows for the collection of evidence by Australian courts from New Zealand and New Zealand courts to take evidence from Australia.

46. Proposed section 148B provides for the appearance of persons or submissions to be made by video or audio link. The AMC may direct or allow a person to appear in this manner either on application by the accused, the Director of Military Prosecutions or on its own initiative.

47. Proposed section 148C outlines the conditions associated with this type of evidence collection. The concept of a *remote person* has been introduced, meaning the person who is not physically present, but who may give testimony, appear or make a submission by video or audio link. The concept of an *eligible person* has also been included to mean a person that the AMC considers eligible, that is, appropriate to hear and/or see the evidence for the purposes of the proceedings.

48. The conditions in section 148C include -

- Appropriate AMC courtroom facilities are in place (for example television monitors or loudspeakers) so that the court may see and/or hear the *remote person*;
- Appropriate facilities are in place (for example television monitors or loudspeakers) at the remote person's location to allow *eligible persons* present in the courtroom to see and/or hear the remote person;
- Conditions that are prescribed by the AMC rules of procedure (which are outlined in proposed subsection 148C(2)) or any other conditions imposed by the AMC.

49. Proposed section 148D outlines how documents may be put to a remote person in circumstances where the document is either present in the courtroom or at the remote person's location. If the document is in the courtroom and needs to be put to the remote person at another location, it can be transmitted (for example, via fax or electronically) and then put to him or her. If the document is present in the remote person's location, the opposite applies - the document will be physically put to him or her and then transmitted to the courtroom where the proceedings are taking place.

50. Proposed section 148E provides for the administration of oaths and affirmations via video or audio link. They should be administered in a manner that is as close as possible to the way it would normally be done if the person were physically present in the courtroom. Alternatively, the AMC may allow a person at the remote person's location to administer the oath or affirmation.

51. New section 148F ensures that the operation of the *Evidence and Procedure (New Zealand) Act 1994* is not affected by the new subdivision.

52. Item 15 inserts new Subdivision C – 'Rules of Procedure for service tribunals'

53. Item 16 repeals and substitutes section 149 of the DFDA. This section previously provided for the rules of procedure to be followed by service tribunals (CM, DFM, summary authority). The purpose of item 16 is to introduce the concept of 'Summary Authority Rules' which are separately established to the rules of procedure applicable to the AMC.

54. Proposed section 149 replicates (with minor exceptions) section 149. Consistent with the current practice, the rules are legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The rules include such matters as the attendance of witnesses, production of documents, charge sheets, records of proceedings. The Judge Advocate General will continue to be responsible for making these rules as they apply to summary proceedings under the DFDA, pending future changes to that regime.

55. Proposed section 149A outlines the rules of procedure pertaining to the AMC, to be known as the 'Rules of the Australian Military Court'. Consistent with the current practice, the rules are legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The rules are substantially the same as those for a summary authority but reflect the nature and proceedings of the AMC. In particular, the rules, to be made by the Chief Military Judge, are to provide for –

- the record of proceedings of the court;
- service of process of the court;
- matters concerning a military jury;
- pre-trial hearings and directions;
- attendance of witnesses;
- giving of testimony; and
- the maintenance of the customs and traditions of the Defence Force in proceedings before the Court;

56. Item 17 repeals and substitutes Division 2 of Part XI (Judge Advocate General, Deputy Judge Advocates General, Chief Judge Advocate, and Registrar of Military Justice).

57. New Division 2 is headed 'Chief Military Judge' (CMJ).

58. Proposed section 188AA establishes the position of the Chief Military Judge.

59. Proposed section 188AB outlines the role of the CMJ. He or she will be responsible for –

- ensuring the orderly and expeditious discharge of the business of the AMC;
- managing the administrative affairs of the AMC;
- other matters conferred on him or her under the Act.

60. Proposed section 188AC outlines the appointment regime for the CMJ. The Minister will appoint the CMJ by written instrument and the CMJ holds office on a full time basis for a period specified in the instrument of appointment, but for a period not exceeding 5 years.

61. The CMJ position is a terminal one, that is, there will be no opportunity for reappointment (proposed subsection 188AC(3)). The appointment will provide security of tenure and judicial independence. Legal advice has indicated that there are three essential requirements of judicial independence, namely, security of tenure, financial security (that is the independent determination of remuneration, discussed in proposed section 188AG below) and institutional independence, all of which are catered for in this Bill. Furthermore, a term appointment for the CMJ is based on factors peculiar to the Defence Force, that is, the hardship of the job, particularly in operational environments.

62. Proposed section 188AD outlines the necessary qualifications for the position of CMJ. These are that –

- the person must be enrolled as a legal practitioner for not less than 5 years;
- the person be a member of the Permanent Forces or a Reserve member rendering continuous full time service at the naval rank of Commodore, or the rank of Brigadier or Air Commodore;
- the person meets his or her individual service deployment requirements. This will ensure that the requirements of operational readiness, military skills and training and medical and physical fitness are complied with to be eligible for

appointment as CMJ. This is essential as it is intended that the AMC will be a fully deployable court.

63. Proposed section 188AE provides for the selection process for the CMJ, namely-

- The Minister may request the Chief of the Defence Force (CDF) to establish an independent selection committee to give to the Minister the name(s) of persons which the Committee considers suitable for appointment, together with all the applications made for the position. The Minister may also request any other information;
- The Committee is to invite persons to apply who satisfy or who are capable of satisfying the qualification requirements. This will allow persons to apply for the CMJ position who may not have the necessary qualifications at the time a vacancy occurs, but who are capable of satisfying those qualifications at a time when the vacancy is to be filled;
- CDF must establish the Committee once he or she has received a notice from the Minister;
- Any defect or irregularity in this process will not invalidate an appointment.

64. Although it is not legally required, the statutory recognition of such a Committee and the process required for the appointment of the CMJ is desirable to demonstrate the independence of the selection process and its transparency.

65. Proposed section 188AF requires the CMJ to make an oath or affirmation before discharging his or her duties under the DFDA. For the inaugural CMJ, an oath or affirmation is to be made before the Judge Advocate General; thereafter, by a military judge.

66. Proposed section 188AG provides for the remuneration of the CMJ to be determined by the Remuneration Tribunal pursuant to the *Remuneration Tribunal Act 1973*. Otherwise, if no determination is in place then the remuneration (including allowances) will be as prescribed.

67. Proposed section 188AH provides for the recreation leave entitlements of the CMJ which is to be determined by the Remuneration Tribunal. Any other leave is to be granted and on the terms and conditions determined by the Minister.

68. Proposed section 188AI prohibits the CMJ engaging in employment outside the duties of his or her office. As the CMJ appointment is for a Permanent member and on a full time basis, it would be inappropriate (and not realistically possible) to engage in other employment (this will also avoid any possible conflict of interest).

69. Proposed 188AJ reinforces the theme of independence from the chain of command, to provide that a CMJ is not eligible for promotion in rank over the period that he or she is the CMJ.

70. Proposed section 188AK allows the CMJ to resign his or her appointment, by writing to the Minister.

71. Proposed section 188AL outlines the circumstances when the appointment of the CMJ may be terminated. These are based on standard termination provisions contained in Commonwealth legislation and they refer to circumstances to which the proper evidentiary and natural justice principles will be required to be applied.

72. Proposed subsection 188AL(1) provides the Minister with the discretion to terminate the CMJ's appointment in the circumstances including misbehaviour, physical or mental incapacity or failure to meet service deployment requirements.

73. Proposed subsection 188AL(2) provides for the automatic termination of the appointment of the CMJ in the circumstances outlined. These include where the CMJ ceases to be enrolled as a legal practitioner, becomes bankrupt, ceases to be a member of the Permanent Forces or a Reserve member on continuous full time service or is absent from duty for a period.

74. Proposed section 188AM provides that a person ceases to be a member of the Defence Force when he or she has ceased to hold office as the Chief Military Judge. This provision is intended to overcome any perception of executive preferment that may influence decision making, specifically in the context of possible subsequent employment following a term as CMJ.

75. Proposed section 188AN provides for an acting CMJ. Only a full time military judge may be appointed to act as the CMJ where there is a vacancy in the office or where the CMJ is absent from duty or where he or she is unable to perform his or her functions. The provision is a standard acting provision used for similar statutory positions.

76. Division 2A outlines the provisions for Military Judges.

77. Proposed section 188AO states that there are to be Military Judges of the Australian Military Court

78. Proposed section 188AP outlines the appointment process for a military judge. An appointment of a military judge must be made in writing by the Minister, on either a full or part time basis. There must be two full time military judges and no more than eight part time military judges. However, it is not necessary for all of the part time positions to be filled at any one time. As discussed above, an independent merit selection process is to be undertaken. An appointment of a military judge will be for a period not exceeding 5 years (see proposed section 188AQ which discusses the reappointment of a military judge in certain circumstances).

79. Proposed section 188AQ discusses the possibility of the reappointment of a military judge in exceptional circumstances. The Government undertook that military judges would be appointed for a fixed 5 year term with a possible renewal of 5 years. Advice received by the Government is to the effect that there is nothing incompatible with judicial independence in allowing a reappointment of a military judge beyond an initial term, provided the existence of the power cannot reasonably be seen to cause the person seeking reappointment to be beholden to the executive in discharging their judicial duties. Furthermore, a term appointment with the opportunity for

reappointment is not incompatible with the necessary independence required of a military tribunal.

80. Therefore, the intent of proposed section 188AQ is that the reappointment of a military judge will only be possible where the Minister considers that the level of experience on the Court would be reduced to an extent that may be detrimental to the effective operation of the Court if a particular military judge were not reappointed, taking into account the Court's existing and future demands.

81. In considering a reappointment, the Minister must receive and consider a report by the CMJ on the workload and the level of experience of the AMC in light of existing or likely vacancies. The Minister must be satisfied that a military judge satisfies the necessary qualification requirements for appointment. Once a military judge has been reappointed for a period, he or she will not be eligible for any further reappointment. The reappointment of a military judge is to be for a minimum period of 3 years, but not more than 5 years. It is not intended that a military judge serve for an overall period of more than 10 years.

82. Therefore, the intent of proposed section 188AQ is to reflect that the reappointment of a military judge may be made only in exceptional circumstances, minimising any perception of executive preferment in a reappointment process, with the reappointment subject only to the Minister being satisfied that the operational requirements of the court justify the reappointment.

83. Proposed section 188AR outlines the qualifications required of a military judge. A full time Military Judge (subsection 188AR(1)) must be -

- enrolled as a legal practitioner for not less than 5 years;
- a member of the Permanent Navy, Army or Air Force or a Reserve member rendering continuous full time service;
- at a rank not less than the Navy rank of commander, or the equivalent ranks of lieutenant colonel or wing commander;
- deployable, in the sense of meeting operational readiness, military skills and training, medical and physical fitness requirements, to be complied with to be eligible for appointment as a military judge.

84. Proposed subsection 188AR(2) outlines the qualifications for a part time Military Judge. These are identical to a full time member except the person would be a member of the Reserve, not rendering continuous full time service.

85. Proposed section 188AS outlines the selection process for a Military Judge. This provision is identical in terms to section 188AE discussed above in respect of the Chief Military Judge.

86. Proposed section 188AT requires a military judge to make an oath or affirmation in accordance with the form in Schedule 4 of the DFDA before discharging his or her duties under the DFDA. This is to be made before the CMJ or a military judge.

87. Proposed section 188AU outlines the remuneration arrangements for a Military Judge. This provision is identical to section 188AG discussed above in respect of the CMJ.
88. Proposed section 188AV provides for the recreation leave entitlements of a Military Judge, which is to be determined by the Remuneration Tribunal. Any other leave will be on terms and conditions that are determined by the Minister.
89. Proposed section 188AW prohibits a Military Judge from engaging in outside employment. Subsection 188AW(1) applies to a full time Military Judge, who may not engage in employment outside the duties of his or her office.
90. Proposed subsection 188AW(2) applies to a part time Military Judge, who would be a Reserve member not rendering continuous full time service. It would be unrealistic to prohibit a part time judge from engaging in outside employment, as their private legal practice is their livelihood, however, a part time military judge must not engage in employment that would conflict with his or her duties as a military judge, for example, legal work in a Defence context.
91. Proposed section 188AX reinforces the theme of independence from the chain of command, to provide that a Military Judge is not eligible for promotion in rank over the period that he or she is a Military Judge unless the promotion is for the person to be appointed as the CMJ.
92. Proposed section 188AY provides for the resignation of a Military Judge, which is identical to that of the CMJ, that is, to provide the Minister with a written resignation.
93. Proposed section 188AZ provides for the termination of the appointment of a Military Judge. This is identical to that of the CMJ, discussed above in respect of section 188AL, however it also discusses the automatic termination of full time or part time military judges. If full time, a military judge is automatically terminated if he or she ceases to be a Permanent member or a Reserve member on continuous full time service. In the case of a part time military judge, if he or she is not a member of the Reserves who is not rendering continuous full time service, then their appointment will be automatically terminated (the bankruptcy and absence from duty grounds are also included in this proposed section).
94. Proposed section 188BA is similar to section 188AM in respect of the CMJ, in that a person will cease to be a member of the Australian Defence Force when they cease to hold office as a Military Judge. The difference between the clauses is a provision allowing a Military Judge to be subsequently appointed as CMJ.
95. Item 18 inserts new section 196C into the DFDA which is similar in terms to section 196B in respect of the Director of Military Prosecutions. This proposed section will require the CMJ to prepare an annual report as soon as practicable after each 31 December. The report will relate to the operation of the AMC and the Rules of the AMC and any related statistical information. This is consistent with paragraph 196A(1)(a) of the DFDA, which provides for the Judge Advocate General to report on the DFDA, the Regulations or the rules of procedure.

96. Item 19 adds new Schedule 7 at the end of the DFDA which lists the offences which constitute Class 1, 2 or 3 offences. The rationale for this new categorisation is explained in paragraphs 32 to 37 above.

97. Items 20 to 31 contain amendments to the *Defence Force Discipline Appeals Act 1955* consequential to the establishment of the AMC. The amendments reflect the availability of a right to appeal from the AMC to the Defence Force Discipline Appeals Tribunal (the Tribunal) by allowing –

- an offender appellant to appeal a conviction and/or punishment; and
- the Director of Military Prosecutions to appeal against punishment.

98. These amendments substantially replicate the current availability of appeals from Court martial or Defence Force magistrate decisions to the Tribunal (however the addition of the Director of Military Prosecutions in certain circumstances is a new initiative).

99. It is also proposed to enable the Director of Military Prosecutions, in addition to an offender appellant, to be able to refer a question of law to the Federal Court (amended subsection 51(1)) or appeal from the Tribunal to the Federal Court on a question of law (amended subsection 52(1)).

100. The amendments make various amendments to the *Defence Force Discipline Appeals Act 1955* to reflect the new regime. For example, section 21 of the *Defence Force Discipline Appeals Act 1955* will be amended to provide for the time for lodging appeals. It will allow a period of 60 days within which a person may lodge an appeal, which commences from the date of the imposition of conviction, prescribed acquittal or punishment. Previously, subsection 21(2) was equivocal, so that the time within which to appeal commenced 30 days after a period of 30 days from the date of the conviction, punishment or the prescribed acquittal. The proposed amendment will make the provision easier to understand.

101. Furthermore, in addition to the existing provisions pertaining to the determination of appeals, the Tribunal has certain options open to it following an appeal against a punishment or court order. For example, it may confirm, quash or vary the punishment or court order. Also, where the Tribunal has dismissed an appeal by the DMP, it may order that the Commonwealth pay the costs incurred by the offender appellant. This provision is consistent with legal advice to the effect that as the Tribunal exercises judicial power, there is no constitutional impediment to it awarding costs in a matter.

102. Part 2 contains further consequential amendments to Defence and other portfolio legislation, including the *Migration Act 1958*. These amendments reflect the new arrangements, in particular, removing references to CM and DFM and replacing, where appropriate, references to the ‘AMC’, ‘military judge’ and ‘military jury’.

103. Rather than individually identify each consequential amendment in Part 2, the following points reflect the intent of items 36 to 125, which are required to establish the new AMC regime in the DFDA. Where necessary, a more detailed explanation of an amendment or addition is provided.



- The definitions of *Chief Judge Advocate, Defence Force magistrate, judge advocates' panel, President, Registrar of Military Justice, service tribunal* will all be repealed. These amendments are necessary as, as discussed above, the AMC will replace the current system of trials by Courts martial or Defence Force magistrate;
- The definition of *service tribunal* will be repealed and substituted where appropriate in the context of the provision. The new definition will be that a service tribunal means 'the Australian Military Court or a summary authority';
- The definition of '*Registrar of Military Justice*' (RMJ) (and any reference to that position throughout the DFDA) will be replaced with *Registrar of the Australian Military Court*. The previous title was considered to be too restrictive in light of the new regime and does not sit well with the intended functions and structure of the AMC. The new reference aligns more appropriately with the role and functions of the position and to the requirements of the AMC;
- References to '*Court martial*' or '*Defence Force magistrate*' will where appropriate in the context, be replaced with a reference to '*Australian Military Court*', '*military Judge*' or '*Military judge and military jury*';
- Items 134 to 169 provides for an amended Part IX of the DFDA which provides for the review of proceedings of service tribunals. As it is not appropriate for the review regime contained in this Part to apply to the AMC, Part IX has been amended to make it clear that it only applies to review of proceedings of summary authorities;
- New Part XI (items 170 to 197) reflects, among other things) the new appointments of the 'Chief Military Judge' and the 'Registrar of the Australian Military Court'. The functions of the Registrar will be to assist the Chief Military Judge by providing administrative and management services in connection with proceedings before the AMC. As mentioned above, the reference to 'Registrar of Military Justice' has been replaced with this new title;
- Items 198 to 202 make further consequential amendments to various schedules in the DFDA and other legislation to reflect the new nomenclature;
- Items 203 to 252 amend the *Defence Force Discipline Appeals Act 1955* which will reflect the new arrangements, by replacing, where appropriate, references to 'court martial' and 'Defence Force magistrate' with 'Australian Military Court and other consequential matters';
- Items 253 to 254 amend the *Migration Act 1958* to include a reference to the 'Australian Military Court or a court martial or similar military tribunal of another country'. Subsections 500A(14) and 501(12) of this Act define "court" to mean "a court martial or similar military tribunal". As trials by Court martial and Defence Force magistrates will be replaced with trials before the Australian Military Court, the proposed amendments include a reference to the AMC but will maintain the status quo. Therefore, based on the context of the

Act, it will not limit subsections 500A(14) and 501(12) to the Australian Military Court; an overseas military tribunal retains the powers. The proposed amendments do not affect the overall operation of the Act;

- Amendments to the DFDA (substituted section 140) has the same effect as the previous section 140 and makes it clear that the proceedings of the AMC must be in public, although in some circumstances, the public may be excluded and furthermore, the court may order that no report of the proceedings are to be published. This will ensure that the privacy of individuals are appropriately protected;
- New section 147 reflects that judicial notice is taken of matters within the knowledge of a service tribunal, but also a military jury (rather than 'the members' as was previously the case);

104. Part 3 (items 255 to 264) contains the necessary application, transitional and savings provisions. The rationale behind the transitional arrangements for implementing the AMC trial system is that if a process has commenced under the old system of Court martial or Defence Force magistrate trial, it should be completed in accordance with that system. In this way, an accused may be dealt with in a manner that does not disadvantage him or her and conversely, does not confer any advantage that they may not have otherwise enjoyed. The provisions are based on when a service offence was committed and how the offence is treated. How an offence is treated will depend on whether the service offence was committed before or after the commencement of the legislation and what action the Director of Military Prosecutions has initiated in respect of that offence.

105. Provisions which save the appointments of the Registrar of Military Justice and the Director of Military Prosecutions made before the commencement day and which validate their oath or affirmation have also been included.

106. A regulation making provision has also been included which will ensure that any matters that may not have been covered in the substantive provisions can be covered in regulations.

107. Schedule 2, Part 1, provides for Defence Counsel Services which will continue the requirement in the DFDA to produce of a list of legal officers and to arrange legal representation for an accused. However, item 1 amends subsection 101F(2) to replace the reference to 'Judge Advocate General' with 'Chief of the Defence Force', so that it will now be the responsibility of the CDF to maintain this list rather than the Judge Advocate General.

108. Item 2 saves the list of legal officers existing and in force immediately before the commencement day.

109. Item 3 inserts proposed subsection 101F(2A) which allows the CDF to delegate the function under clause 101F to a military position, that has been organisationally staffed through the establishment of the new Director of Defence Counsel Services. The delegation will be at the rank of Navy captain or equivalent. Items 2 to 3 link with items 4 and 5 which will amend section 137 of the DFDA that requires legal representation to be afforded to a person.

110. Item 4 amends section 137(1) to substitute the responsibility for organising legal representation from a superior authority to CDF (proposed subsection 137(4)). However, it is intended that CDF will delegate the function to the military position that has been organisationally staffed.

111. Schedule 2, Part 2 will amend paragraph 124(1)(gc) of the *Defence Act 1903* which enables regulations to be made in respect of the appointment, procedures and powers of courts of inquiry, boards of inquiry, inquiry officers and inquiry assistants. A reference to 'Chief of Defence Force Commission of Inquiry' will be included in this paragraph, which will enable such a Commission to be established under the *Defence (Inquiry) Regulations 1985*.

112. Subsection 124(2A) will also be extended to include a reference to the 'Chief of Defence Force Commission of Inquiry', requiring a person appearing as a witness before it to answer a question, notwithstanding that the answer to the question may tend to incriminate the person. This currently applies to courts of inquiry, boards of inquiry, inquiry officers and inquiry assistants.

113. Subsection 124(2C) provides that a statement or disclosure made by a witness in the course of giving evidence before a court of inquiry, a board of inquiry, an inquiry officer or an inquiry assistant is not admissible in evidence against that witness in any civil or criminal proceedings in any federal court or court of a State or Territory or proceedings before a service tribunal, except in proceedings by way of a prosecution for giving false testimony at the hearing before the court of inquiry, the board of inquiry, the inquiry officer or the inquiry assistant. Subsection 124(2A) has been amended to include evidence given before a 'Chief of Defence Force Commission of Inquiry'.

114. Schedule 3 contains various technical amendments to provisions of the DFDA relating to gender specific language; for example, 'she' has been included after the word 'he', and 'he' has been substituted with the 'person'. These provisions were identified in the development of the consequential amendments.