

2019-2020-2021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DEFENCE LEGISLATION AMENDMENT
(DISCIPLINE REFORM)
BILL 2021**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Defence Personnel,
the Honourable Andrew Gee MP)**

**DEFENCE LEGISLATION AMENDMENT
(DISCIPLINE REFORM) BILL 2021**

GENERAL OUTLINE

1. The purpose of the proposed Bill is to amend the *Defence Force Discipline Act 1982* (the Act) to:
 - a. expand the operation of the disciplinary infringement scheme to enhance its effectiveness in dealing with minor breaches of military discipline;
 - b. remove the subordinate summary authority, to reduce the number of summary authority levels and therefore simplify the manner in which minor disciplinary issues are enforced; and
 - c. introduce several new service offences relating to failure to perform duty or carry out activity; cyber-bullying; and failure to notify change in circumstances (concerning the receipt of a benefit or allowance).
2. The military discipline system is essential to enable the Australian Defence Force (ADF) to maintain good order and discipline, and to enable commanders to deal with matters that pertain directly to ADF discipline, morale, efficiency, effectiveness and operational readiness. Breaches of military discipline must be dealt with quickly and, sometimes, more severely than would be the case if a civilian engaged in the same conduct.
3. Military discipline under the Act is currently enforced, in ascending order of severity of punishments available, through: the discipline infringement scheme; a summary authority (also described as the summary discipline system) comprising a subordinate summary authority, a commanding officer or a superior summary authority; and superior tribunals comprising a Defence Force magistrate, restricted court martial and general court martial.
4. Defence conducted a review of the summary discipline system: the *Review of the Summary Discipline System 2017* (the Review), to consider the administration of military discipline by summary authorities. The Review found that the current summary discipline system is overly complex, difficult to use, unresponsive and, because of its complexity, results in excessive delay.
5. The Review made recommendations for the reform of the discipline infringement scheme and summary discipline system. The amendments to the Act proposed by this Bill give effect to the substantive recommendations of the Review.

Schedule 1: Disciplinary infringements

6. The disciplinary infringement scheme was introduced in 1995, within Part IXA of the Act. Since its inception, it has been highly effective in dealing with minor breaches of discipline. The Inspector-General of the ADF (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 discipline. The Bill will reform and expand the operation of the disciplinary infringement scheme so that it can be used in more situations.

Schedule 2: Summary authorities

7. The lowest level of summary authority, the subordinate summary authority, will be removed. Instead, there will be only two levels of summary authority: a commanding officer, and a superior summary authority. Together with the changes to the disciplinary infringement scheme, this will result in a reformed, and far simpler approach to minor disciplinary matters.

8. There are also a number of anomalies in the Act with regard to the respective jurisdiction of discipline officers and summary authorities, and between the different types of summary authority, in terms of the type of breach of military discipline, the rank of defence members with which each can deal, and the powers and punishments available to each level of authority. The proposed Bill is intended to remedy these issues.

Schedule 3: Service offences

9. The Bill also introduces several new service offences: failure to perform duty or carry out activity; cyber-bullying; and failure to notify change in circumstances (concerning the receipt of a benefit or allowance). The Bill will also enable a service tribunal to make a removal order, requiring a defence member to remove material on social media that constitutes cyber-bullying. Failure to comply with such an order will itself be a service offence.

Financial Impact Statement

10. There will be no financial impact as a consequence of the Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence Legislation Amendment (Discipline Reform) Bill 2021

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

1. The purpose of the proposed Bill is to amend the Act to:
 - a. expand the operation of the disciplinary infringement scheme to enhance its effectiveness in dealing with minor breaches of military discipline;
 - b. remove the subordinate summary authority, to reduce the number of summary authority levels and therefore simplify the manner in which minor disciplinary issues are enforced;
 - c. introduce several new service offences relating to failure to perform duty or carry out an activity; cyber-bullying; and failure to notify change in circumstances (concerning the receipt of a benefit or allowance).

Schedule 1: Disciplinary Infringements and Schedule 2: Summary authorities

Overview and background to the measures

2. The amendments in Schedule 1 of the Bill reform the disciplinary infringements regime, and extend its application, to provide a means of dealing with minor discipline matters which is fair and efficient, and meets the disciplinary needs of the ADF.
3. Historically, the disciplinary infringements scheme has been regarded as efficient and effective in the enforcement of minor disciplinary issues which do not merit the severity of enforcing a more punitive service offence.
4. The expansion of the disciplinary infringements regime is therefore intended to negate the requirement for a subordinate summary authority in the military discipline system – thus streamlining the operation and application of the Act and attendant military discipline enforcement requirements.
5. The amendments in Schedule 1 will establish a stand-alone system of disciplinary infringements that commonly occur within the ADF, completely separate from the service offences described elsewhere in the Act. Schedule 1 will create a two-tier infringement scheme through the introduction of a senior discipline officer along with the existing discipline officer. The senior discipline officer will replace much of the jurisdiction and punishment powers of a subordinate summary authority, which is removed in Schedule 2.

6. For the avoidance of doubt, the Bill clearly states that a disciplinary infringement is not a service offence. Similarly, discipline officers are not service tribunals.

7. ADF members must choose to be dealt with under the infringement scheme, and operation of the scheme will not result in conviction for a service offence. The adversarial procedures, simplified rules of evidence, and *Criminal Code Act 1995* (Criminal Code) provisions that apply to summary authority proceedings will not apply to the new disciplinary infringement scheme, as is appropriate for an infringement scheme.

8. Schedule 2 also corrects a number of anomalies in the Act with respect to the respective jurisdiction of discipline officers and summary authorities, and between the different types of summary authority, in terms of the type of breach of military discipline, the rank of ADF members with which each can deal with, and the powers and punishments available to each level of authority.

Human rights implications

9. These measures engage the following human rights:

- a. The right to a fair hearing (Article 14 of the International Covenant on Civil and Political Rights (ICCPR))
- b. The right to freedom of opinion and expression (Article 19(2) of the ICCPR)
- c. The right to privacy (Article 17 of the ICCPR).

The right to a fair hearing

10. The new disciplinary infringement regime is an alternative, and less punitive means to address low-level and relatively minor discipline issues which do not require or warrant the severity of enforcing a service offence. The infringement scheme outlined in Schedule 1 is consistent with, and supports, the right to a fair hearing, noting that:

- a. an ADF member must elect to be dealt with under the scheme
- b. any reasonable excuse must be considered before an infringement is issued
- c. an ADF member has an opportunity to present evidence about the circumstances of an infringement before an appropriate punishment is decided, and the discipline officer may dismiss the matter without punishment if appropriate
- d. the punishments available under the infringement scheme do not include imprisonment or dismissal from the ADF (available punishments include a severe reprimand, restriction of privileges, or a fine).

The right to freedom of expression

11. Schedule 1 of the Bill engages the right to freedom of opinion and expression contained in Article 19(2) of the ICCPR, because it creates new discipline infringements for insubordinate conduct (including insubordinate language about a superior officer that is threatening, insubordinate or insulting to or about the superior officer), and for the use of insulting or provocative words towards another person. These infringements reflect existing

service offences. To the extent that these infringements limit the right to freedom of expression, they are reasonable, necessary and proportionate to achieve the legitimate objective of supporting service discipline and effective command and control within the ADF, which enhances the operational effectiveness and readiness of the ADF to respond to its strategic objectives and to protect the national interests of Australia.

The right to privacy

12. Schedule 1 engages the right to privacy, as new sections 9JA and 9JB involve the collection, use, disclosure or publication of personal information concerning disciplinary infringement records.

13. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy. The right to privacy includes respect for informational privacy, including in respect of storing, using and sharing personal information and the right to control the dissemination of this information.

14. Proposed section 9JA of the Bill details a requirement for each discipline officer and senior discipline officer respectively to give a report in writing to the officer's commanding officer after the end of each month. The report must detail the name of the respective defence member; the nature of the disciplinary infringement and the decision made by the discipline officer or senior officer in respect of the infringement. The reporting process will provide commanding officer oversight of the use of the infringement scheme by infringement officers, discipline officers and persons infringed.

15. The monthly report by discipline officers and senior discipline officers within section 9JA will fall within the meaning of a Part IA record for the purposes of section 9JB (addressed below).

16. New Section 9JA requires information concerning the decision made by the discipline officer or senior discipline officer in dealing with the disciplinary infringement. A similar provision under Part IXA of the Act (to be repealed by this Bill and replaced with Part IA), only required information to be reported to the commanding officer where a punishment was imposed. New section 9JA will provide greater transparency to the commanding officer of the use of the discipline infringement scheme by infringement officers, discipline officers and senior discipline officers, concerning infringed defence members.

17. The reporting of discipline infringements to commanding officers (together with the retention of disciplinary infringement records for defined purposes and periods – further addressed below), will enable commanders to initiate early intervention strategies in appropriate cases, to better support members to continue as a positive contributor to the Defence Force.

18. This requirement is a reasonable and proportionate requirement to collect, use and disclose personal information, enabling a commanding officer to take appropriate management action in relation to ADF members within their command.

19. New section 9JB outlines the requirements for the keeping, retention, use and destruction of disciplinary infringement records which will be governed by a legislative instrument issued by the Chief the Defence Force.

20. The Defence Force as a national institution is accountable and transparent, while reflecting contemporary community standards and attitudes. This includes the requirement for the Defence Force to maintain appropriate records relating to the service history and management of its personnel. Consistent with these principles, the retention of discipline officer records was a recommendation of the Review of the summary discipline system (2017).

21. The existing requirement in section 169H of the Act that relevant discipline officer infringement records be destroyed at the expiration of 12 months does not meet the needs of the Defence Force, nor community expectations, and is to be repealed by this Bill. Instead, this Bill makes provision for the retention, use and management of discipline officer infringement records to be governed by a legislative instrument that may be issued by the Chief of the Defence Force.

22. The retention of infringement records will promote transparency of the disciplinary process and additionally enable command to assess the appropriateness, and use of the infringement scheme.

23. The Chief of the Defence Force legislative instrument that allows for the use, dissemination, storage and protection of personal information of discipline infringement records, will have regard to the necessity, reasonableness and proportionality of those measures and the implementation of appropriate safeguards to ensure the instrument constitute a permissible limitation on the right to privacy. An instrument that may be made by the Chief of the Defence Force will specify: how the personal information of a defence member is collected and stored; the persons to whom it can be disclosed; and the conditions that need to be satisfied before any disclosure occurs, in a way that reflects the sensitive nature of the information.

Conclusion

24. This Schedule is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to a legitimate aim.

Schedule 3: Service offences

Overview and background to the measure

25. Schedule 3 of the proposed Bill will establish the following new service offences:

- a. failure to perform duty or carry out an activity;
- b. cyber-bullying;
- c. failure to comply with removal order (in relation to material on social media that constitutes cyber bullying); and

- d. failure to comply with requirement to notify change in circumstances (in relation to the receipt a benefit or allowance).

26. These new service offences provide assurance that ADF members comply with the duties and service obligations attended to their appointment or to the requirements of the ADF, which in turn supports the operational effectiveness of the ADF.

27. In particular, cyber-bullying related conduct is becoming increasingly prevalent in the ADF. Cyber-bullying conduct is fundamentally at odds with the requirement that ADF members value others and treat them with dignity.

28. Cyber-bullying conduct by an ADF member in any form, is conduct that is corrosive to good order and discipline. It is contrary to the Defence Value of respect towards others and has a negative impact on the morale, operational effectiveness and reputation of the ADF.

Human rights implications

29. Schedule 3 engages the following human rights:

- a. The presumption of innocence (Article 14 of the ICCPR)
- b. The right to freedom of opinion and expression (Article 19(2) of the ICCPR).

Presumption of innocence

30. Schedule 3 engages the presumption of innocence (Article 14 of the ICCPR), as two of the proposed new service offences have a strict liability provision, namely: (1) failure to perform a duty or an activity (section 35A); and (2) failure to comply with requirement to notify change in circumstances (section 56A).

31. Strict liability removes a fault element that would otherwise attach to a physical element. In other words, where strict liability applies to an element of an offence, that element will be made out if it is shown that the physical elements were engaged in or existed (i.e. the prosecution is not required to prove fault).

32. The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (i.e. recklessness).

33. Consequently, strict liability should only be used in limited circumstances, and where there is adequate justification for doing so.

34. In respect of the offence at new section 35A, the operational effectiveness of the Defence Force is dependent upon the performance of duties and the carrying out of activities by defence members. The application of strict liability for the conduct of failing to perform a duty etc, is ameliorated with a reasonable excuse defence together with a lower evidential burden on the accused. This defence is in addition to mistake of fact under section 9.2 of the Criminal Code including the availability of other defences in the Criminal Code.¹

¹ Senate Standing Committee for the Scrutiny of Bills – Sixth Report (2002) – Application of Absolute and Strict Liability Offences in Commonwealth Legislation (26 June 2002) – pg 264, 267

35. Strict liability will apply to the conduct within paragraph 56A(1)(c). This will mean all Criminal Code defences will be available, together with the defence of mistake of fact under section 9.2 of the Code in relation to the respective physical element.

36. For both offences at section 35A and 56A, it is difficult for the prosecution to prove the fault element of a defence member who fails to perform a duty or carry out an activity, or where the recipient in receipt of a benefit fails to notify a person of a change in circumstances relating to the recipient's entitlement to the benefit. In both cases, the matter would be peculiarly within the knowledge of the charged member and it is appropriate that strict liability apply.

37. Requiring proof of fault in respect of the proposed service offences of failure to perform duty etc and failure by a recipient of a benefit (as defined) to comply with the requirement to notify of a change of circumstances relating to the recipient's entitlement to the benefit, would undermine the deterrence aspect in respect of both offences.

38. The service offence at section 35A carries a maximum punishment of dismissal from the Defence Force following conviction, being less than a term of imprisonment (section 68 scale of punishments). The section 56A offence has a maximum punishment of six months' imprisonment and attracts an automatic right of election by a superior tribunal. The maximum punishments available for both offences are considered proportionate and appropriate for the maintenance and enforcement of discipline within the Australian Defence Force.

The right to freedom of expression and opinion

39. The new cyber-bullying service offence will cover circumstances where a member uses a social media service or relevant electronic service (as defined), and does so in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person. This limits an ADF member's right to express their opinions on social media. However, the service offence fits within the permissible limitation in article 19(3) of the ICCPR which relates to respect of the rights or reputations of others.

40. The proposed cyber-bullying offence is necessary, reasonable and proportionate for the maintenance or enforcement of service discipline of Australian Defence Force personnel.

Conclusion

41. This Schedule is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to a legitimate aim.

DEFENCE LEGISLATION AMENDMENT (DISCIPLINE REFORM) BILL 2021

1. Short title

This clause provides for the short title of the Act to be the *Defence Legislation Amendment (Discipline Reform) Act 2021*.

2. Commencement

This clause provides for the amendments in the Schedules to commence as follows:

- a. Sections 1 to 3 will commence on the day after the Act receives Royal Assent.
- b. Schedules 1 to 3 will commence on a day to be fixed by proclamation, or otherwise 12 months after the Act receives Royal Assent if no day is fixed in that period. This will enable the development of relevant policy, procedural guidance, and instruments to be drafted, together with appropriate training to be delivered to ADF personnel prior to the commencement of the substantive changes to the Act.
- c. Schedule 4, which includes amendments contingent on the introduction of the *Online Safety Act 2021*, will commence on the later of the day Schedules 1 to 3 commence, or immediately after the commencement of the *Online Safety Act 2021*. If the *Online Safety Act 2021* never commences, the amendments in Schedule 4 will also not commence.

3. Schedules

This clause provides that the legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

SCHEDULE 1 – DISCIPLINARY INFRINGEMENTS

Part 1 – Main amendments

This part inserts a new disciplinary infringement framework into the Act.

Item 1

This item inserts a new Part IA titled Disciplinary infringements, which replaces Part IXA (Special procedures relating to certain minor disciplinary infringements). Breaches of military discipline by way of disciplinary infringement are generally described as the ‘infringement scheme’.

Placing Part IA towards the beginning of the Act clearly distinguishes the infringement scheme and disciplinary infringements dealt with by a discipline officer² from service offences dealt with by service tribunals.

Part IA includes the new senior discipline officer, who has the authority to deal with a broader range of disciplinary infringements and has the authority to impose a higher level of punishment than a discipline officer. The senior discipline officer replaces the subordinate summary authority position and creates a two-tier infringement scheme.

Section 9A Simplified outline of this Part

Section 9A provides a simplified outline of Part IA that broadly describes the operation of the infringement scheme.

Section 9B Object of this Part

Section 9B describes the object of Part IA to provide a means of dealing with minor breaches of discipline in a manner which is fair and efficient while meeting the disciplinary needs of the Defence Force.

Division 2 – Key provisions

Section 9C Election to be dealt with under the infringement scheme

Section 9C provides for the operation of the infringement scheme, including the manner in which a defence member can elect to be dealt with under the infringement scheme in relation to a disciplinary infringement. Under subsection 9C(1) a defence member can elect to be dealt with under the infringement scheme where they have been given an infringement notice and the election is made within the period specified within the notice.

Subsection 9C(2) provides for double jeopardy protection, in that where a defence member is dealt with under the infringement scheme they are not liable to be tried by a service tribunal for a service offence arising out of the infringement (see also the note for inclusion within section 144).

Subsection 9C(3) provides that a defence member has been dealt with under the infringement scheme by a discipline officer where a decision is made to impose a punishment, not to impose a punishment, or to dismiss the infringement. However, if a discipline officer declines to deal with a disciplinary infringement, such as where it is considered by the discipline officer to be too serious, the matter may be referred to an authorised member (under section 87 of the Act). After a service investigation, the defence member may be charged and tried by a service tribunal for a service offence.

Section 9CA Prescribed defence member

² A reference to ‘discipline officer’ includes a reference to both a discipline officer and a senior discipline officer unless stated otherwise. A reference to ‘senior discipline officer’ is a reference to a senior discipline officer only.

Section 9CA details which defence members are subject to the infringement scheme. Section 9CA also provides that a service chief may make a determination by legislative instrument exempting a member or members holding the rank of warrant officer, chief petty officer, and flight sergeant, from the operation of the infringement scheme. A defence civilian as defined under the Act, is not subject to the discipline officer scheme; this will not change following the amendments made to the Act by the inclusion of the new discipline infringement scheme within Part IA.

Division 3 – Disciplinary infringement provisions

Subdivision A – Key concepts

Section 9D When a disciplinary infringement is committed

Section 9D specifies a disciplinary infringement is committed when there is a contravention of a disciplinary infringement provision, that a discipline officer can only deal with a minor disciplinary infringement (within Subdivision B), and that a senior discipline officer can deal with any disciplinary infringement (within Subdivision B or C). For clarity, section 9D provides that a disciplinary infringement is not a service offence.

Subdivision B – Minor disciplinary infringement provisions

Subdivision B details minor disciplinary infringements. With the exception of section 9DF, these disciplinary infringements are the same as those previously detailed in Part IXA which is to be repealed.

Section 9DA Disciplinary infringement provision – absent from duty

Section 9DA provides that a defence member contravenes this section where they do not attend for duty when required, or cease to perform a duty when required before they are permitted to do so.

Section 9DB Disciplinary infringement provision – absent without leave not exceeding 3 hours

Section 9DB provides that a defence member is in contravention of the section when absent without leave for a period not exceeding 3 hours.

Section 9DC Disciplinary infringement provision – disobeying a lawful command

Section 9DC provides that a defence members contravenes the section where they disobey a lawful command given by a superior officer.

Section 9DD Disciplinary infringement provision – failing to comply with a general order

Section 9DD provides that a defence member contravenes the section where a member does not comply with a lawful general order that applies to the member.

Section 9DE Disciplinary infringement provision – member on guard or on watch

Section 9DE provides that a defence member contravenes the section where they are on guard duty or watch and the member sleeps at their post or watch; is not on duty but sleeps when required to be awake; is intoxicated; or leaves the member's post before being regularly relieved or otherwise absents themselves from a place where it is the member's duty to be.

Section 9DF Disciplinary infringement provision – failure to perform a duty or an activity

Section 9DF introduces a new disciplinary infringement replacing '*Negligence in performance of a duty*' (see section 35 of the Act), for the purpose of available infringements under the infringement scheme.

Section 9DF provides that a defence member is in contravention of the section if the member's office or appointment, or the requirements of the Defence Force, require them to perform a duty or carry out an activity, and the member fails to do so.

Section 9DG Disciplinary infringement provision – prejudicial conduct

Section 9DG provides that a defence member is in contravention of the section where they do or omit to do an act which is likely to prejudice or bring discredit on the Defence Force.

Subdivision C – Disciplinary infringement provisions only within jurisdiction of senior discipline officers

This subdivision details new disciplinary infringements that can only be dealt with by a senior discipline officer.

Section 9DH Disciplinary infringement provision – absent without leave not exceeding 24 hours

Section 9DH creates a disciplinary infringement for being absent without leave for a period not exceeding 24 hours. Absences for a period not exceeding three hours are ordinarily dealt with by a discipline officer. There will however be situations in which action by a senior discipline officer may be warranted, despite the absence being for a period of less than three hours. Such situations may include where the absence has a critical impact on the operational capability of the Defence Force, including where the infringed member has been repeatedly late when attending for duty, or is in a senior position.

Section 9DI Disciplinary infringement provision – insubordinate conduct

Section 9DI creates a disciplinary infringement for threatening, insubordinate, or insulting conduct or language concerning a superior officer.

Section 9DJ Disciplinary infringement provisions – creating a disturbance etc.

Section 9DJ creates a disciplinary infringement for taking part in, creating, or continuing a disturbance.

Section 9DK Disciplinary infringement provision – insulting or provocative words

Section 9DK creates a disciplinary infringement for using insulting or provocative words to another person, including a person who is not a defence member.

Section 9DL Disciplinary infringement provision – unauthorised discharge of a weapon

Section 9DL creates a new disciplinary infringement for conduct which causes or contributes to the unauthorised discharge of weapon.

Section 9DM Disciplinary infringement provision – negligent discharge of a weapon

Section 9DM creates a disciplinary infringement for negligent conduct which causes or contributes to the discharge of a weapon. For the purpose of the infringement scheme in Part IA, being negligent in the discharge of a weapon is given specific meaning at subsection 9DM(2). Subsection 9DM(2) gives regard to the standard of care that would have been exercised by a reasonable person who was a defence member with the same training and experience in the ADF or other armed force as the infringed member, and who was engaged in the course of the member's duty or in accordance with the requirements of the Defence Force; as the case may be. The relative assessment of the reasonable person's training and experience as compared with the infringed member would consider for example, the infringed member's proficiency on the use of the particular weapon, and the circumstances of the discharge of the weapon. For the purposes of the infringement scheme, the application of the meaning of negligence within subsection 9DM(2) will substantially reduce the complexity of the Criminal Code meaning of negligence that would apply where a service offence of negligent discharge of weapon was charged under section 36B of the Act.

Matters relating to weapon handling or misuse are viewed seriously by the ADF which expects all members to exercise high standards of discipline when handling weapons. The inclusion of unauthorised and negligent discharge of a weapon as disciplinary infringements, provides command with the flexibility of dealing with disciplinary breaches of this nature within the infringement scheme, by having regard to the circumstances of the conduct together with the training and experience of the member. A breach of weapon handling the circumstances of which are considered serious or may involve defence members of higher rank, may be tried as a service offence before a service tribunal.

Section 9DN Disciplinary infringement provision – intoxicated while on duty etc.

Section 9DN creates a new disciplinary infringement where a member is intoxicated while on duty, including where a member reports or should report for duty and the member is intoxicated. The meaning of 'intoxicated' is included in the Act at section 3(1).

Section 9DO Disciplinary infringement provision – driving a service vehicle for unauthorised purpose

Section 9DO creates a new disciplinary infringement where a defence member drives a service vehicle when they are not authorised to do so, or otherwise uses a service vehicle for an unauthorised purpose.

Section 9DP Disciplinary infringement provision – driving without due care or attention etc.

Section 9DP creates a disciplinary infringement where a defence member drives a service vehicle without due care or attention, or without reasonable consideration for another person.

Division 4 – Election to be dealt with under the infringement scheme

Section 9E – Infringement officer may give infringement notice

Subsection 9E(1) details the considerations an infringement officer must take into account prior to issuing a disciplinary infringement (including whether there are reasonable grounds to believe the defence member has committed a disciplinary infringement, and whether the infringement officer believes on reasonable grounds that the defence member does not have a reasonable excuse for committing the infringement).

Subsection 9E(2) specifies that a disciplinary infringement notice must be given as soon as reasonably practicable after the infringement officer first has reasonable grounds for believing the member has committed the infringement.

Subsection 9E(3) requires the infringement officer to specify certain details in the disciplinary infringement notice, including the particulars of the infringement; and to inform the member of their right of election to be dealt with under the infringement scheme, the period within which the election must be made, whether the infringement will be dealt with by a discipline officer or senior discipline officer, and the penalties that may be imposed by that officer. The infringement notice must inform the member that if the disciplinary infringement has been dealt with under the infringement scheme, the member is not liable to be tried by a service tribunal for an offence arising out of the infringement; and if the member makes no election, the infringement officer may refer the infringement to an authorised member of the ADF for the purpose of section 87, so that the authorised member may determine whether there are reasonable grounds to believe that the member has committed a service offence.

Subsection 9E(4) provides that the infringement notice must be in a form approved by the Chief of the Defence Force.

Section 9EA – Election may be withdrawn

Section 9EA provides that an infringed defence member may at any time before a decision is made by a discipline officer, withdraw their election to be dealt with under the infringement scheme in relation to the disciplinary infringement.

Section 9EB – Member is taken to have admitted the infringement only for the purpose of being dealt with under the infringement scheme

Section 9EB clarifies that by electing to be dealt with by a discipline officer an infringed member is taken to have admitted committing the infringement for the purpose of being dealt with under the infringement scheme, but for no other purpose.

Section 9EC – Consequence of no election or withdrawing election

Section 9EC provides that where an infringed member makes no election decision within the period specified within the infringement notice, or withdraws their election before a decision is made by a discipline officer, an infringement officer may refer the infringement to an authorised defence member for the purposes of section 87 of the Act to consider whether there are reasonable grounds to believe that the member has committed a service offence.

Division 5 – Dealing with disciplinary infringements

9F – Jurisdiction to deal with a disciplinary infringement

Section 9F details the jurisdiction of a discipline officer and a senior discipline officer to deal with defence members (described within the Act as a ‘prescribed defence member’) subject to the infringement scheme. This section outlines that a defence member may be dealt with under Part IA where the member has not been charged under the Act with an offence arising out of the infringement, has elected to be dealt with under the infringement scheme in relation to the infringement, has not withdrawn the election, and where the member is of a kind specified in the officer’s instrument of appointment. Additionally, rank limitations apply in respect of the infringed member and whether the infringement can be dealt with by a discipline officer or senior discipline officer. The jurisdiction of discipline officers may be limited as specified in the instrument authorised by a commanding officer appointing them as a discipline officer or senior discipline officer.

Subsection 9F(3) makes clear that discipline officers are not service tribunals as defined within section 3(1) of the Act.

9FA – Jurisdiction to deal with a disciplinary infringement

Section 9FA outlines the procedure to be followed when dealing with disciplinary infringements. In particular, the procedure to be followed by a discipline officer is to be in accordance with any requirements specified by the Chief of the Defence Force by legislative instrument. Section 9FA further provides that an infringed member is not to be represented before a discipline officer (which is no change from Part IXA), but is authorised to call witnesses and present any evidence relevant to the disciplinary infringement. The discipline officer is required to take into account any evidence or witness information presented by the infringed member when deciding what action to take in dealing with the disciplinary infringement.

9FB – Decisions that may be made by discipline officers or senior discipline officers in dealing with disciplinary infringements

Subsection 9FB(1) details what decisions a discipline officer may make in dealing with a disciplinary infringement. This includes the discipline officer's ability to impose punishment, dismiss the infringement or decline to deal with the infringement where it is of a particularly serious nature. Importantly, an infringed member is protected from being subject to double jeopardy by not being liable to be charged with or tried by a service tribunal for a service offence arising out of the disciplinary infringement.

Subsection 9FB(2) details in respective tables the range of punishments available to a discipline officer (at item 1) and a senior discipline officer (at item 2).

Subsection 9B(3) outlines that no punishment may be imposed where a discipline officer decides to dismiss the disciplinary infringement.

Subsection 9B(4) provides that if a discipline officer declines to deal with a disciplinary infringement, the discipline officer can refer the infringement to an authorised member under section 87 of the Act, so that the authorised member may determine whether there are reasonable grounds to believe the member has committed a service offence. As a consequence, the infringed member may be charged with a service offence and tried by a service tribunal for a service offence arising out of the infringement.

9FC – Commencement of punishments

Section 9FC details when a punishment imposed by a discipline officer or senior discipline officer is to commence. If the punishment is for a period of time, the punishment will commence from the start of the period specified in the decision, which must be a period starting on a day not later than 14 days after the decision is made, or in any other case, at the time the decision is made.

A delay in the commencement of a punishment will take into account the operational requirements of the Defence Force.

Where a punishment decision made by a senior discipline officer is substituted by a decision of a commanding officer (under subsection 9G(2)), the punishment imposed by the senior discipline officer ceases to have effect at the time the substituted decision is made. The substituted decision takes effect at the time specified in the substituted decision by the commanding officer.

The effect of section 9FC is subject to subsection 9J(4), which provides that a commanding officer may grant leave, where appropriate to do so, to an infringed member who is subject to a punishment of stoppage of leave.

Division 6 – Command review of decisions of senior discipline officers

9G – Command review of decisions of senior discipline officers

Subsections 9G(1) and (2) detail that a commanding officer must review a decision made by a senior discipline officer to impose a punishment (under paragraph 9FB(1)(a)) on a prescribed defence member in relation to a disciplinary infringement. The commanding

officer's review is to occur as soon as practicable after the decision is made by the senior discipline officer. In undertaking the review, the commanding officer must decide whether to confirm the senior discipline officer's decision to impose the punishment, or to substitute the senior discipline officer's decision with a decision reducing the punishment imposed, not imposing a punishment, or dismissing the infringement.

Regardless of whether the decision is confirmed or substituted by the commanding officer, the prescribed defence member has been dealt with under the infringement scheme (see: subsection 9C(3)).

Subsection 9G(3) defines the term reduced punishment for the purposes of the infringement scheme.

Subsection 9G(4) provides that a substituted punishment decision takes effect at the time specified in the commanding officer's decision, which may be a time before the substituted decision is made. This will avoid the unintended consequence of a substituted punishment imposed following a command review taking effect after the commencement of the punishment imposed by a senior discipline officer, which results in a more severe punishment than that which is authorised under the infringement scheme.

The purpose of the command review of disciplinary infringements dealt with by a senior discipline officer is consistent with the object of Part IA (see section 9B) and will provide a procedural safeguard by ensuring fairness, and command oversight of the more severe punishments imposed by a senior discipline officer.

Division 7 – Discipline officers, senior discipline officers and infringement officers

9H – Appointment of discipline officers and senior discipline officers

Subsections 9H(1), (2) and (3) detail the appointment and minimum rank requirements for discipline officers, and provides that the commanding officer appointing such officers must specify any limitations on the kinds of defence members and disciplinary infringements that the discipline officer may deal with.

Subsection 9H(1) provides for the appointment of senior discipline officers. Ordinarily a senior discipline officer is to be appointed at the minimum rank of major in the Army (and equivalent ranks in the other Services) or higher rank.

Paragraph 9H(4)(b) provides for the appointment of a senior discipline officer at the rank of captain in the Army (and equivalent ranks in the other Services), to cater for smaller units. In such circumstances the lower rank senior discipline officer will have jurisdiction to deal with an infringed member who is at least one rank junior (see: paragraph 9F(2)(e)).

9HA – Appointment of infringement officers

Section 9HA details the requirements for the appointment of an infringement officer to be of or above a non-commissioned officer (defined in subsection 3(1) of the Act).

Division 8 – Miscellaneous

9J – Consequences of punishments

Section 9J details the consequences for infringed members that are to flow on from punishments imposed by a discipline officer under Part 1.

Subsection 9J(1) provides that the Chief of the Defence Force or a service chief may make rules concerning the consequences of certain punishments. Any rules made by the Chief of the Defence Force or a service chief under subsection 9J(1) are a legislative instrument for the purposes of the *Legislation Act 2003*.

Subsection 9J(2) provides that the commanding officer of a defence member subject to a punishment of restriction of privileges or extra duties imposed by a discipline officer, may moderate the effect of that punishment having regard to any rules made by the Chief of the Defence Force or a service chief.

Subsection 9J(3) makes it clear that a direction by a commanding officer to moderate a punishment of restriction of privileges or extra duties is not a legislative instrument. Any such direction by a commanding officer will be made, as circumstances dictate, on a case by case basis.

Subsection 9J(4) provides that where a member is subject to a punishment of stoppage of leave, the commanding officer of the member may, if satisfied that it is appropriate to do so, grant leave of absence to the member.

9JA – Monthly report by discipline officers and senior discipline officers

Section 9JA outlines the requirement for discipline officers and senior discipline officers to submit a monthly report to the commanding officer by whom they were appointed encompassing disciplinary infringements dealt with by them; including detail of the name of the prescribed defence member, the nature of the disciplinary infringement, and the decision made in respect of the disciplinary infringement.

Section 9JA requires information concerning the decision made by the discipline officer in dealing with the disciplinary infringement. A similar provision under the repealed Part IXA only required such information where a punishment was imposed.

9JB – Records relating to disciplinary infringements

Section 9JB outlines the requirements for the keeping, retention, use, and destruction of disciplinary infringement records; governed by a legislative instrument that may be issued by the Chief of the Defence Force.

Part 2 – Consequential amendments

Item 2

This item includes new definitions to be inserted into subsection 3(1) of the Act and provides for other consequential amendments to various sections of the Act, including the repeal of Part IXA.

Item 3

This item provides for the omission of the words “(see subsection (5))” from paragraph 32(1)(c) of the Act.

Item 4

This item provides for the word “Note” to be omitted from subsection 32(2) and replaced with the words “Note 1”.

Item 5

This item provides for the words “Note 2: For the meaning of *intoxicated*, see subsection 3(1)” to be inserted at the end of subsection 32(2).

Item 6

This item provides for subsection 32(5) to be repealed.

Item 7

This item provides for the words “(see subsection (3))” to be omitted from paragraph 37(1)(b).

Item 8

This item provides for the word “Note” to be omitted from subsection 37(2) and substituted with the words “Note 1”.

Item 9

This item provides for the words “Note 2: For the meaning of *intoxicated*, see subsection 3(1)” to be inserted at the end of subsection 37(2).

Item 10

This item provides for subsection 37(3) to be repealed.

Item 11

This item provides for the words “subsection 9C (2) or”, to be inserted before the words “section 144” within subparagraph 141(1)(b)(i).

Item 12

This item provides for the repeal of subsections 144(3A) and (3B).

Item 13

This item provides for the words “Note: If a defence member has been dealt with under the infringement scheme in relation to a disciplinary infringement (see subsection 9C(3), the member is not liable to be tried by a service tribunal for an offence arising out of the infringement: see subsection 9C(2).”, to be added at the end of section 144.

Item 14

This item provides for the repeal of Part IXA of the Act.

Item 15

Item 15 defines the terms “*commencement time*”, “*new infringement scheme*”, and “*old infringement scheme*”, for the purposes of Part 3.

Item 16

Item 16 provides that the new infringement scheme applies to a contravention of a disciplinary infringement provision that occurs, or is alleged to have occurred, at or after the commencement time.

Item 17

Item 17 details that the old infringement scheme continues to apply to disciplinary infringements committed before the commencement time.

Item 18

Item 18 provides for the continuation and effect of commanding officer appointments made pursuant to subsections 5(1) or (3) of the Act, in force immediately before the commencement time. This allows such appointments to continue to have effect and application to the new infringement scheme.

SCHEDULE 2 – SUMMARY AUTHORITIES

Part 1 - Repeal of the subordinate summary authority

Items 1 to 4 amend various provisions of the Act dealing with subordinate summary authorities, including definitions within subsection 3(1) and related provisions for summary authorities within Part VII, to give effect to the removal of the subordinate summary authority appointment.

Items 5-14 include consequential amendments concerning subordinate summary authorities and superior summary authorities.

Item 1

This item repeals the definition of “subordinate summary authority” from subsection 3(1) of the Act.

Item 2

This item inserts the word “or” after the word “authority” within paragraph (a) of the definition of “summary authority” in subsection 3(1) of the Act.

Item 3

This item provides for the omission of the word “officer” from paragraph (b) of the definition of “summary authority” within subsection 3(1) of the Act, and the substitution of the word “officer”.

Item 4

This item provides for the repeal of paragraph (c) of the definition of “summary authority” found within subsection 3(1) of the Act.

Item 5

This item provides for the omission of the words “subsection 105(1)” and substitution of the words “section 105”, into the definition of “superior summary authority” found within subsection 3(1) of the Act.

Item 6

This item provides for the omission of the words “or 111” from subparagraph 87(1)(a)(iii).

Item 7

This item provides for the repeal of section 105 of the Act, and substitution of a new section 105 titled ‘*Appointment of superior authorities*’. This item allows the Chief of the Defence Force or a service chief to, by instrument in writing, appointment an officer to be a superior summary authority (a commanding officer may also be a summary authority).

Item 8

This item omits the words “,110 or 111” from, and substitutes the words “or 110”, into section 105A.

Item 9

This item omits the words “,110 or 111” from, and substitutes the words “or 110”, into paragraph 105A(1)(b) of the Act.

Item 10

This item repeals section 108 of the Act.

Item 11

This item repeals section 111 of the Act.

Item 12

This item omits the words “,110 or 111” from, and substitutes the words “or 110”, into subsection 111A(1) of the Act.

Item 13

This item omits the words “or 111(2)(c)” from paragraph 112(a) of the Act.

Item 14

This item omits the words “110 or 111” from, and substituted the words “or 110”, into paragraph 144(4)(c) of the Act.

Part 2 – Jurisdiction and punishments

Item 15

This item omits the words “member of the Defence Force” from, and substitutes the words “defence member”, into the definition of “active service” found within subsection 3(1) of the Act.

Item 16

This item repeals the definition of “elective punishment” found within subsection 3(1) of the Act, and substitutes it with the words “*elective punishment* means a punishment set out in column 3 of an item in the table in subsection 69B(2) or 69C(2) of the Act”.

Item 17

This item repeals the definition of “member below non-commissioner rank” found within subsection 3(1) of the Act, and substitutes it with the words “*member below non-commissioned rank* means a defence member who is not an officer, an officer cadet, a warrant officer or a non-commissioned officer.”

Item 18

This item omits the words “members of the Defence Force” from paragraph 4(1)(b) of the Act, and substitutes it with the words “defence force members.”

Item 19

This item repeals section 67 of the Act.

Item 20

This item omits the words “member of the Defence Force- the amount of his or her”, and substitutes the words “defence member - the amount of the member’s”, into subparagraph 68(1)(h)(i) of the Act.

Item 21

This item omits the words “member of the ADF from subsection 68(2) of the Act, and substitutes it with the words “defence member”.

Item 22

This item adds the words “Note: Court martial and ADF magistrates do not have jurisdiction to try custodial offences: see sections 115 and 129”, to the end of section 68A of the Act.

Item 23

Section 69A – Punishments that may be imposed by a court martial or Defence Force magistrate

Section 69A inserts a table of punishments that may be imposed by a court martial or Defence Force magistrate for an offence.

The table of punishments in section 69A includes notes which clarify (but do not change) the powers of punishment available to a court martial and a Defence Force magistrate, together with the limitations on punishments that may be imposed by a restricted court martial or a Defence Force magistrate.

Section 69B – Punishments that may be imposed by a superior summary authority

Section 69B inserts a table of punishments that may be imposed by a superior summary authority which replaces Tables A and B in Schedule 3 of the Act to be repealed on commencement of the amended Act. Along with the inclusion of an increased rank range of personnel that a superior summary authority has jurisdiction to try, additional punishments are available for the superior summary authority. Where the rank ranges for a superior summary authority and commanding officer coincide for a non-commissioned officer and below, including whether on active service, the punishment tables for the summary authorities are aligned (see: table of punishments at section 69C for a commanding officer).

The table of punishments in section 69B includes notes which clarify the imposition of elective and custodial punishments by a superior summary authority.

Section 69C– Punishments that may be imposed by a commanding officer

Section 69C inserts a table of punishments that may be imposed by a commanding officer which replaces Table C in Schedule 3 of the Act repealed on commencement of the amended Act. The punishments available to a commanding officer for various ranks have been re-aligned to provide equity in the application of punishments across the ranks that a commanding officer has jurisdiction to try.

The table of punishments in section 69C includes notes which clarify the imposition of elective and custodial punishments by a commanding officer.

Item 24

This item omits the words “member of the Defence Force” from subsections 71(1), (2) and (3) of the Act, and substitutes the words “defence member”.

Item 25

This item omits the words “member of the Defence Force” from subsections 79(1) and (2) of the Act, and substitutes the words “defence member”.

Item 26

This item omits the words “member of the Defence Force” from paragraph 81(1)(a) of the Act, and substitutes the words “defence member”.

Item 27

This item omits the words “member of the Defence Force” from paragraph 84(2)(a) of the Act, and substitutes the words “defence member”.

Item 28

This item omits the words “summary authority” from paragraph 87(1)(a)(iii) of the Act, and substitutes the words “commanding officer”.

Item 29

This item clarifies the powers of the Director of Military Prosecutions when exercising authority as an authorised member under section 87 to charge a defence member (or issue a summons to a person whether or not a defence member) with a service offence. This item makes it clear that the Director of Military Prosecutions may refer the charge (or summons) to be dealt with by either a commanding officer (see existing section 87(1)(b)), or to a superior summary authority, as determined by the Director of Military Prosecutions.

Item 30

This item repeals subparagraph 87(1)(c)(i) from the Act.

Item 31

This item inserts the word “,(ba)” after the word “(b)” in paragraph 87(1A)(a) of the Act.

Item 32

This item omits the words “and (b)” and substitutes the words “,(b) and (ba)” into paragraph 87(1A)(b) of the Act.

Item 33

This item omits the word “shall”, and substitutes the words “or subparagraph (1)(a)(ii) must” into subsection 87(2) of the Act.

Item 34

This item omits “109(b)” and substitutes “109(1)(c)” into subsection 103(1) of the Act.

Item 35

This item omits the words “proceeded with;” and substitutes the words “proceeded with; or” into subsection 103(1)(a) of the Act.

Item 36

This item, which amends paragraph 103(1)(b), makes it clear that in the exercise of the powers for charges referred to the Director of Military Prosecutions pursuant to the provisions contained within subsection 103(1) of the Act, the Director of Military Prosecutions may refer the charge, with the exception of charges referred pursuant to subsection 145(1) or (3), to either a commanding officer or a superior summary authority to be dealt with.

This section further makes it clear that when a matter is referred to a summary authority by the Director of Military Prosecutions, the summary authority is not restricted to trying the matter and may deal with the matter pursuant to section 109 or section 110 respectively.

Item 37

This item omits the words “paragraph 87(1)(c)” from subsection 103(1) (note 1) of the Act, and substitutes the words “subsection 87(1)”.

Item 38

This item repeals subsection 105A(3) (including the note) and substitutes it with the words “(3) If a charge is referred to the Director of Military Prosecutions under this section, the charge may only be dealt with by a summary authority under section 109 or 110 in accordance with paragraph 103(1)(b).”

Item 39

This item repeals section 106 of the Act and replaces it with a new section 106 which details the jurisdiction of a superior summary authority to deal with any charge against any person and to try a charge of a service offence (other than a prescribed offence), against a defence member who holds a rank of, or below, major-general in the Army (or equivalent ranks in the other Services) and who is one or more ranks junior to the superior summary authority if the member is on active service, or in any other case, two or more ranks junior to the superior summary authority, and a person who is not a defence member.

Item 40

This item repeals subsection 107(2) of the Act and replaces it with a new subsection 107(2) which details the jurisdiction of a commanding officer to try a charge against a defence member of or below the rank of captain in the Army (or equivalent ranks in the other Services); and if the charge is tried while the member is on active service, where the member

is one or more ranks junior to the commanding officer, or in any other case, two or more ranks junior to the commanding officer.

Item 41

This item repeals section 109 of the Act and replaces it with a new section 109 detailing the powers of a superior summary authority to deal with a charge. This will substantially align with the dealing powers of a commanding officer, and gives the ability to refer a charge to the Director of Military Prosecutions. A note is included in section 109 to clarify the referral powers of the Director of Military Prosecutions and the referral of a charge to a superior summary authority by a commanding officer or another superior summary authority. A similar note is included for the related provision for a commanding officer.

Item 42

This item inserts the words “in any case-.” before the word “refer” in paragraph 110(1)(d) of the Act.

Item 43

This item inserts a note at the end of subsection 110(1) outlining when a charge may be referred to the commanding officer by an authorised member of the Defence Force, the Director of Military Prosecutions under paragraph 103(1)(b), or another commanding officer under paragraph (e) of subsection 110(1) of the Act.

Item 44

This item inserts “109(1)(d) or” before “110(1)(c)” of paragraph 112(a) of the Act.

Item 45

This item omits the words “superior summary authority, or a commanding officer,” and substitutes the words “summary authority” into subsection 131(1) of the Act.

Item 46

This item repeals note 4 of subsection 131(1) of the Act and substitutes a new note 3 relating to elective punishments that may be imposed by a summary authority for a Schedule 1A offence.

Item 47

This item omits the words “superior summary authority or commanding officer” (first occurring), in section 131A of the Act, and substitutes it with the words “summary authority.”

Item 48

This item omits the words “superior summary authority or commanding officer, as the case may be, shall” from section 131A of the Act, and substitutes it with the words “summary authority must.”

Item 49

This item inserts “109” after “103” in section 144(4)(c) of the Act.

Item 50

This item omits the words “member of the ADF that exceeds the amount of his or her” from paragraph 172(2)(d) of the Act, and substitutes it with the words “defence member that exceeds the amount of the defence members.”

Item 51

This item omits the words “member of the Defence Force” from paragraph 197(2)(a) of the Act, and substitutes the words “defence member”.

Item 52

This item repeals Schedules 2, 3 and 3A of the Act.

Part 3 – Transitional provisions

Item 53

Item 53 provides for definitions of “*commencement time*” and the “*new law*” relating to the amendment of the Act.

Item 54

Item 54 provides that the new law summary authority provisions apply in respect of service offences committed or alleged to have been committed at or after the commencement time of the amendments to the Act.

Item 55

Item 55 provides for the insertion of section 55 which details the circumstances where the new law applies to a charge of a service offence if the offence was committed, or alleged to have been committed, by a person before the commencement time, where the person had not been charged with the offence under the Act before the commencement time. This item is subject to certain exceptions as detailed within subsections (2) and (3) of section 55. As a result of this item, the new punishments will not have retrospective effect.

Item 56

Item 56 ensures that the Act continues to apply, as if the amendments made to the Act, had not been made in relation to a service offence if the offence was committed, or alleged to have been committed, by a person before the commencement time; and the person had been

charged with the offence under the *Defence Force Discipline Act 1982* before the commencement time.

Item 57

Item 57 provides that certain instruments made prior to the commencement of the amendments to the Act continue to have effect at and after the commencement time as if the instrument had been made under the new law.

Savings provisions are also included for regulations made pursuant to subsection 197(2) which relate to certain punishments.

SCHEDULE 3 – NEW SERVICE OFFENCES

Part 1 – New service offences

Item 1

Item 1 inserts section 35A which creates a new service offence for *failure to perform duty or carry out activity*. The offence will be committed where the defence member's office or appointment, or the requirements of the ADF, require the member to perform a duty or carry out an activity, and the member fails to perform the duty or activity (subsection 35A(1)). The offence will apply to defence members only.

The failure to perform duty or carry out activity offence is intended to deal with low level non-performance of duty offences that do not meet the higher standard of criminal negligence which might warrant prosecution by a charge of negligence.

The fault element of recklessness will apply to the physical element at paragraph 35A(1)(a) pursuant to the Criminal Code, and strict liability will apply to the conduct within paragraph 35A(1)(b). This will mean all Criminal Code defences will be available, together with the defence of mistake of fact under section 9.2 of the Criminal Code in relation to the respective physical element.

Additionally, the offence provision within subsection 35A(1) does not apply if the charged member has a reasonable excuse – with the charged member bearing an evidential burden consistent with the Criminal Code (see subsection 13.3(3)).

Having regard to the unique nature of military service together with the breadth of duties and activities and including the requirements of the ADF for the performance of a duty, the application of strict liability for the conduct together with all Criminal Code defences including mistake of fact and additionally, a reasonable excuse statutory defence are appropriate and proportionate. The maximum punishment of dismissal from the ADF is proportionate and appropriate. For more serious performance of duty offences, a charge under section 35 for negligent performance of duty, which carries a maximum punishment of three months' imprisonment remains available.

Item 2

Section 48A Cyber-bullying

This item inserts section 48A which establishes a new service offence for cyber-bullying. Paragraph 48A(1)(a) provides that a defence member will commit an offence if the member uses a social media service or relevant electronic service in a way that a reasonable person would regard as offensive or threatening, intimidating, harassing or humiliating another person (including Defence and non-Defence persons). The maximum punishment for this offence is imprisonment for 2 years.

Paragraph 48A(1)(b) defines the terms “*social media service*” and “*relevant electronic service*” for the purposes of this service offence.

The unique nature of military service means that defence members from all walks of life are often co-located, eating, sleeping, and working alongside each other for extended periods, particularly while deployed on operations, exercises, and in ships. Bullying conduct using social media services and electronic mediums is commonplace within the Defence Force, just as it is in broader society, and can have far more serious and intrusive effects than bullying conduct that may occur in person.

Instances of cyber-bullying can occur to a virtually limitless audience, at any time, day or night, while at work in any location, or at home by the alleged offender; through a wide variety of means and in a manner that is repeatable. In many cases the risks of emotional, mental, and physical harm are high where such offending occurs, and in severe cases, can result in tragic consequences for persons affected by cyber-bullying.

Cyber-bullying by a member in any form, is conduct that is corrosive to good order and discipline; it is contrary to the Defence Value of respect towards others and has a negative impact on the morale, operational effectiveness, and reputation of the ADF.

Cyber-bullying conduct is fundamentally at odds with the requirement that members value others and treat them with dignity.

Section 48A differs from similar civilian criminal legislation in that there is no requirement for the cyber-bullying conduct to be ‘serious’. Section 48A provides for the objective test that a reasonable person would regard the conduct as offensive, or as threatening, intimidating, harassing or humiliating another person. The threshold distinction is important as the availability of this service offence supports the maintenance and enforcement of discipline through deterrence of such conduct by members, which is distinct from the civilian criminal law provisions dealing with criminal behaviour.

Unlike civilian employment, commanders in the ADF are responsible for ensuring the discipline of members under their command. Additionally, commanders are responsible for the safety, health and well-being of people under their command, 24 hours a day, seven days a week. Instances of cyber-bullying within the ADF need to be dealt with quickly by commanders to minimise the impact not only on individuals, but also to the morale and operational effectiveness of the ADF more generally.

The creation of a cyber-bullying service offence will contemporise offences of this nature within the ADF, and will enable less serious disciplinary breaches of cyber-bullying to be dealt with expeditiously by a summary authority, and for more serious breaches, by court martial or Defence Force magistrate. Referral to civilian authorities will remain an option for matters that may constitute a criminal offence.

For the purposes of the cyber-bullying service offence, “*social media service*” and “*relevant electronic service*” will have the same meaning as in the *Enhancing Online Safety Act 2015*, or with contingent amendments to the *Online Safety Act 2021*.

A service tribunal will be able to make a removal order for the offending material following the conviction of a member of a cyber-bullying offence where the offence involved providing material on a social media service or relevant electronic service. The service tribunal may order the convicted person to take reasonable action to remove, retract, recover, delete or destroy the offending material relating to the cyber-bullying offence. A removal order provision within the Act is appropriate given that offensive, threatening, intimidating, harassing or humiliating material of another person can exist within social media or an electronic service and be accessible by others on an on-going basis, thereby aggravating the harm caused by the cyber-bullying.

Section 48B Failure to comply with removal order

Section 48B provides for an offence of failing to comply with a removal order (made following a conviction of a cyber-bullying offence at section 48A), which has a maximum punishment of two years imprisonment. This means the offence may, depending upon its seriousness, be prosecuted before a summary authority, court martial or Defence Force magistrate. A defence is provided for in section 48B for circumstances where it is not reasonably practicable for the defence member to comply with the removal order.

Item 3

Item 3 inserts a new section 56A into the Act to create a new service offence for failure to comply with a requirement to notify a person of a change in circumstances where such circumstances relate to a recipient’s entitlement to a benefit (and the term benefit is subsequently defined to include a grant, payment, allotment of money, allowance, leave of absence, or any other benefit or advantage that is not limited to property). The service offence established under the new section 56A is necessarily a strict liability offence, because the offence would otherwise be too onerous to enforce and would thus not operate sufficiently as a deterrent for such conduct.

The fault element of recklessness will apply to the elements at subparagraphs (1)(a) and (b) of section 56A. Strict liability will apply to the failure to comply with the requirement to notify the change in circumstances relating to the recipient’s entitlement to the benefit at paragraph 56A (1)(c).

Item 4

This item amends subparagraph 68(2)(a)(i) of the Act, so that the term ‘cyber-bullying’ is inserted.

Item 5

This item inserts section 84A into the Act, providing that a service tribunal will be able to make an order against a person convicted by a service tribunal for a cyber-bullying offence, requiring that they remove, retract, recover, delete or destroy identified material on a social media service or relevant electronic service. A removal order may be made instead of, or in addition to, imposing a punishment.

Item 6

This item amends the table which provides for Schedule 1A offences (within the meaning of subsection 3(1) of the Act) to include the new service offence of failure to perform duty or carry out activity.

Item 7

This item amends the table which provides for Schedule 1A offences (within the meaning of subsection 3(1) of the Act) to include the new service offences of cyber-bullying and failure to comply with removal order.

Part 2 – Consequential amendments

Item 8

This item amends subsection 3(1) of the Act to provide for the inclusion of ‘removal orders’ within the meaning of ‘order’ under subsection 84A(2) of the *Defence Force Discipline Appeals Act 1955*.

Item 9

This item amends subsection 66(2) of the Act to insert the term ‘reparation order’ after the term ‘removal order’.

Item 10

This item amends subsection 172(3) of the Act to omit the phrase ‘or a reparation order’ and substitute the phrase ‘, a reparation order or a removal order’.

Item 11

This item amends section 38 of the *Defence Force Discipline Appeals Act 1955* to replace the heading with ‘Restitution orders, reparation orders and removal orders’.

Item 12

This item amends section 38 of the *Defence Force Discipline Appeals Act 1955* to omit the phrase ‘or reparation order’ and substitute the phrase ‘, a reparation order or a removal order’.

Part 3 – Transitional provisions

Item 13

This item inserts the following definition for the term *commencement time*: ‘*commencement time* means the time this item commences’.

Item 14

This item relates to the application of the new service offences.

Section 35A of the Act as inserted by Schedule 3 applies in relation to a failure that occurs on or after the commencement time.

Division 5B of Part IIIA of the Act as inserted by Schedule 3 applies in relation to a conduct engaged in at or after the commencement time.

Section 56A of the Act as inserted by Schedule 3 applies in relation to a failure that occurs at or after the commencement time including in relation to: (a) a benefit received at or after the commencement time; and (b) a condition of receiving a benefit that existed before, at or after the commencement time.

SCHEDULE 4 – CONTINGENT AMENDMENTS

Item 1

Item 1 omits the words “section 9 of the *Enhancing Online Safety Act 2015*” from paragraph 48A(2)(A) of the Act, and substitutes it with the words “section 13 of the *Online Safety Act 2021*.”

Item 2

Item 2 repeals paragraph 48A(2)(b) of the Act and substitutes the paragraph with a new definition of “relevant electronic service.”

Item 3

Item 3 omits the words “section 6 of the *Enhancing Online Safety Act 2015*” from paragraph 84A(1)(b) of the Act and substitutes it with the words “section 10 of the *Online Safety Act 2021*.”