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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**SENATE**

**MILITARY JUSTICE (INTERIM MEASURES) BILL (NO. 1) 2009**

**EXPLANATORY MEMORANDUM**

**(Circulated by the authority of the  
Minister for Defence  
Senator the Hon John Faulkner)**

## **MILITARY JUSTICE (INTERIM MEASURES) BILL (No. 1) 2009**

### **GENERAL OUTLINE**

On the 26 August 2009, the High Court declared that the provisions establishing the Australian Military Court (AMC) are invalid. The purpose of this Bill is to return to the service tribunal system that existed before the creation of the AMC. This is an interim measure until the Government can legislate for a Chapter III court. To re-establish an effective military justice system, the pre-2007 *Defence Force Discipline Act 1982* (DFDA) will be reinstated. These measures will include:

- courts martial and Defence Force magistrates;
- positions of Chief Judge Advocate, Judge Advocates and the Registrar of Military Justice;
- reviews and petitions in respect of both summary trials and trials held by Courts martial or Defence Force magistrates; and
- Reviewing Authorities.

The previous amendments to the DFDA directed to improve the Summary Authority system, will be retained. The class of offence system which determined how an offence would be dealt with by the AMC was not specifically struck down by the High Court, but this system will be repealed by the Bill.

The positions of the Judge Advocate General and Deputy Judge Advocates General will remain and assume many of the roles previously performed by the Chief Military Judge.

Transitional provisions will be inserted into the DFDA to cover all matters that have been referred on appeal to the AMC but not concluded prior to 26 August 2009. The provisions will also provide for automatic transition of AMC office holders to the relevant positions of Chief Judge Advocate, as members of the judges advocates' panel and as Registrar of Military Justice. The provisions also address the waiver of the Commonwealth's right to recover any amount from the AMC office holders. This waiver would not amount to an appropriation for the purposes of section 53 of the Constitution.

Other consequential amendments to the *Defence Force Discipline Appeals Act 1955*, the *Judges' Pensions Act 1968*, the *Migration Act 1958* and the *Defence Act 1903* will be required. These will deal with appeals to the Defence Force Discipline Appeal Tribunal (DFDAT) from the AMC and provisions relating to the AMC in these Acts and associated Regulations.

### **Financial Impact Statement**

The amendments in the Bill will have no additional impact on Commonwealth expenditure or revenue.

## NOTES ON CLAUSES

### **Clause 1: Short title**

1 This clause provides for the short title of the Act to be the *Military Justice (Interim Measures) Act (No. 1) 2009*.

### **Clause 2: Commencement**

2 This clause provides that the Act will commence on the day it receives the Royal Assent.

### **Clause 3: Schedules**

3 This clause provides that the items specified in a Schedule are amended or repealed as set out in the applicable items in the Schedule, and other items in a Schedule have effect according to its terms.

## **SCHEDULE 1 – Amendments relating to the system of military justice**

4 **Schedule 1** amends the *Defence Force Discipline Act 1982* to reinstate the military justice system as it existed before the Australian Military Court was established.

### **Part 1 – Main amendments**

#### *Defence Force Discipline Act 1982*

#### **Clause 1 – Subsection 3(1) – (definition of appropriate authority)**

5 This clause repeals the paragraph and substitutes a new paragraph to change the definition of ‘appropriate authority’.

#### **Clauses 2 and 3 – Subsection 3(1) – (definitions of Australian Military Court and Australian Military Court Rules)**

6 These clauses repeal the definitions of ‘Australian Military Court’ and the ‘Australian Military Court Rules’.

#### **Clause 4 – Subsection 3(1) – (definition of Chief Judge Advocate)**

7 This clause inserts a definition of ‘Chief Judge Advocate’.

#### **Clauses 5-8 – Subsection 3(1) – definitions**

8 These clauses repeal the definitions of ‘Chief Military Judge’, ‘class 1 offence’, ‘class 2 offence’ and ‘class 3 offence’.

**Clause 9 – Subsection 3(1) – (definitions of competent reviewing authority)**

9 This clause omits ‘subsection 150(2)’ and substitutes ‘section 150A’.

**Clauses 10-11 – Subsection 3(1) – (definition of a convicted person)**

10 Clause 10 inserts ‘reviewing authority’ after ‘tribunal’ in the definition of ‘convicted person’. Clause 11 inserts the definition of ‘Court Martial and Defence Force Magistrate Rules’.

**Clause 12 – Subsection 3(1) – definitions**

11 This clause inserts the definition of ‘Defence Force magistrate’ which means a Defence Force magistrate appointed under section 127.

**Clauses 13-14 – Subsection 3(1) – definitions**

12 These clauses insert the definition of ‘judge advocate’ which in relation to a court martial, means the judge advocate of a court martial and insert the definition of ‘judge advocates’ panel’.

**Clauses 15-16 – Subsection 3(1) - definitions**

13 These clauses repeal the definitions for ‘Military Judge’ and ‘military jury’ respectively.

**Clause 17 – Subsection 3(1) - definitions**

14 This clause inserts the definition of ‘prescribed acquittal’.

**Clauses 18 and 20 – Subsection 3(1) - definitions**

15 These clauses insert definitions for ‘President’ and ‘Registrar’ respectively.

**Clause 19 – Subsection 3(1) - (definition of Provost Marshal Australian Defence Force)**

16 This clause repeals the definition of ‘Provost Marshal Australian Defence Force’.

**Clause 21 – Subsection 3(1) - definitions**

17 This clause repeals the definition of ‘review’ and substitutes a new definition.

**Clause 22 – Subsection 3(1) – definitions**

18 This clause omits reference to ‘subsection 150(1)’ and substitutes ‘section 150’.

**Clause 23 – Subsection 3(1) – (definition of rules of procedure)**

19 This clause replaces ‘Australian Military Court Rules’ with ‘Court Martial and Defence Force Magistrate Rules’ in the definition of ‘rules of procedure’.

**Clause 24 – Subsection 3(1) – (definition of service tribunal)**

20 This clause omits the ‘Australian Military Court’ from the definition of ‘service tribunal’ and substitutes ‘a court martial, a Defence Force magistrate’.

**Clause 25 – Section 5A – Appointment of a ‘superior authority’**

21 This clause repeals Section 5A, and reinstates the 2006 definition.

**Clauses 26, 27, 28 – Paragraphs 53(4) (a) and (d), Subsections 53(5) and (6) – Contempt of service tribunal**

22 Clause 26 repeals paragraph 53(4)(a), substituting a paragraph which makes a defence member or defence civilian guilty of an offence if that person insults a member of a court martial, a judge advocate, a Defence Force magistrate or a summary authority in or in relation to the exercise of his or her powers or functions as such a member.

23 Clause 27 repeals paragraph 53(4)(d), substituting a paragraph which makes a defence member or a defence civilian guilty of an offence if that person engages in any other conduct that would, if a service tribunal were a court, constitute contempt of that court.

24 Clause 28 repeals subsections 53(5) and (6), substituting them with subsections where an offence under subsection (4) is committed against a service tribunal that is a court martial or a Defence Force magistrate, during proceedings, the tribunal may order that the person be taken into custody and call the person to show cause why the person should not be convicted of an offence. The substitute for subsection (6) provides the maximum offence under subsection (5) if a tribunal convicts a person.

**Clause 29 – Subsection 67(1) – Authorised punishments**

25 This clause repeals the subsection and substitutes that a court martial or a Defence Force magistrate must not impose a punishment in respect of a conviction except in accordance with Part IV and Schedule 2.

**Clauses 30-31 – Subsection 74(4A) and (4B) – Concurrent and cumulative punishments**

26 These clauses omit the term ‘summary authority’ and replace it with ‘service tribunal’.

**Clause 32 – Subsection 74(5) - Concurrent and cumulative punishments**

27 This clause inserts the words ‘or a reviewing authority that has revoked a suspension of a punishment on the recommendation of a service tribunal’ after ‘service tribunal’.

**Clause 33 – Subsection 74(5A) – Concurrent and cumulative punishments**

28 Omits ‘summary authority’ (wherever occurring) and substitutes ‘service tribunal’.

**Clause 34 – Section 77 – Taking other offences into consideration**

29 This clause repeals the section and substitutes a section which refers to a court martial or a Defence Force magistrate in place of references to the Australian Military Court.

**Clause 35 – Section 80 – Revocation of suspension of punishment**

30 This clause repeals the section and substitutes a new section that makes references to ‘service tribunals’.

**Clause 36 – Subsection 81(2) – Remission of suspended punishment**

31 This clause inserts ‘162(8)’ after ‘78(1)’.

**Clause 37 – Subparagraphs 87(1) (c) (ii) – Summons and order in the nature of summons**

32 This clause repeals the subparagraphs and substitutes a new sub paragraphs references to a Defence Force magistrate or a court martial rather than the Australian Military Court.

**Clause 38 – Subsection 88(1A) – Arrest, summons etc. where accused person not present at hearing before service tribunal**

33 This clause repeals the subsection and substitutes a new subsection with references to a judge advocate or Defence Force magistrate rather than the Australian Military Court.

**Clauses 39-40 – Subsections 99(1) and 100(5) (b)**

34 This clause omits reference to ‘summary authority’ and substitutes with ‘Service tribunal’.

**Clause 41 – Subsection 101F (5) (a) – Lists of Legal Officers**

35 This clause omits 172(5) and substitutes 172(3A), (4) or (5).

**Clauses 42-46 – Subsections 101J (1), 101JA (3), 101JA (4) 101JA (5), 101K (8), (9) – Investigation of Service Offences**

36 These clauses repeal the subsections and substitute new subsections which refer to ‘judge advocate of a court martial’.

**Clauses 47-56 – Subsections 101K(10), 101K(11), 101Q(13)(b), 101ZB(1), (2), (3) and (4) – Investigation of Service Offences**

37 These clauses insert references to ‘court martial’, ‘judge advocate of the court martial’, and ‘judge advocate’.

**Clause 51 – Division 6A of Part VI**

38 This clause repeals the Division.

**Clause 57 – Subsection 103(1)**

39 This clause omits reference to section 101ZAA.

**Clauses 58 and 66 – Paragraphs 103(1)(c) and 103(4)(a) – Director of Military Prosecutions**

40 This clause repeals the paragraph and substitutes new paragraphs that reflect that the Director of Military Prosecutions may request the Registrar to refer the charge to a Defence Force Magistrate or convene a court martial.

**Clauses 59-60 – Subsection 103(1) (note) and end of subsection 103(1) (after note) – Director of Military Prosecutions**

41 These clauses insert ‘1’ after ‘Note’ and add Note 2.

**Clauses 62 – Subsection 103(2A) – Director of Military Prosecutions**

42 This clause omits reference to ‘165’ and substitutes ‘166’.

**Clause 63**

43 This clause omits reference to the ‘Australian Military Court’ (first occurring) and substitutes ‘a reviewing authority’.

**Clauses 61, 64-65, 68, 70 and 71 – Subsections 103(2), 103(2A), paragraph 103(4)(a) subsection 111B(1), section 111C and Subsection 111C(6) - Director of Military Prosecutions and right of election**

44 These clauses omits references to the ‘Australian Military Court’ and substitutes ‘a court martial or Defence Force Magistrate’.

**Clauses 67 and 69 – Section 103A and subsection 111B(1) (note 3) – Right of election**

45 These clauses repeal section 103A and Note 3 to 111B(1).

**Clause 71 – Subsection 111C(6)**

46 This clause omits reference to ‘the Court’ and substitutes ‘a court martial or Defence Force magistrate’.

**Clause 72 – Divisions 3, 4 and 5 of Part VII – Courts martial and Defence Force Magistrates**

47 This clause repeals the Divisions and substitutes the following:

48 **Division 3** – Reinstates the system of Courts martial: sections 114-116 provide details on the types of courts martial, the jurisdiction of courts martial, and the eligibility requirements to be a member of court martial. Section 117 provides the eligibility to be a judge advocate. Sections 119-126 provide convening order provisions, objection on grounds of eligibility, notification of belief of bias, substitution and replacement of members, dissolution of court martial and inability to attend after plea.

49 **Division 4** – Reinstates the system of Defence Force magistrates: this Division provides for appointment, oath and affirmation, jurisdiction and powers of Defence Force magistrates, and discontinuance of proceedings before the Defence Force magistrate.

50 **Division 5** – Nomination of Defence Force magistrates and members of courts martial: this Division provides for the appointment of members of courts martial and for the nomination of Defence Force magistrates by the Judge Advocate General.

**Clause 73 – Section 129**

51 This clause renumbers section 129 as ‘section 129D’.

**Clauses 74-81 – Subsections 131(3) (including note 1 and note 3), 131AA(1), 131AA(3), 131AA(5)(a)(i), (6) and (7)**

52 These clauses omit references to the ‘Australian Military Court’ and substitute ‘a court martial or Defence Force magistrate’ and repeals note 3 to subsection 131(3).

**Clause 82 – Division 2 of Part VIII – Trial by court martial or Defence Force magistrate**

53 This clause repeals Division 2 – Trial by the Australian Military Court and substitutes a new Division 2 – Trial by court martial or Defence Force magistrate that reinstates the trial procedures for courts martial and Defence Force magistrates.



**Clause 83 – Section 137A**

54 This clause repeals the section.

**Clauses 84-86 – Subsections 138(4) and 139(2)**

55 These clauses insert references to a ‘court martial’ and ‘the President of the court martial’.

**Clause 87 – Subsection 139(2)**

56 This clause inserts subsection (2A), which requires the President of a court martial to consult the judge advocate prior to making an order.

**Clause 88 – Section 140 – Public hearings**

57 This clause repeals the section and substitutes a section which omits references to the Australian Military Court.

**Clause 89 – Subsection 141(2) – Applications and objections**

58 This clause repeals the subsection and substitute new subsection which refer to a court martial rather than military juries.

**Clauses 90-95 – Subsections 141(4), (5), (6), and paragraphs (5)(b), (6)(a) and (6)(b) – Applications and objections**

59 These clauses insert references to court martial, judge advocate and the President of a court martial.

**Clause 96 – Subsections 141(7) and (8) – Applications and objections**

60 This clause repeals the subsections and substitutes new subsections which refer to trial by a court martial and a Defence Force magistrate or judge advocate in place of a Military Judge and Australian Military Court.

**Clause 97 – Section 141A – Amendment of charges**

61 This clause repeals the section and substitutes a new section which refers to the judge advocate of a court martial and a Defence Force magistrate.

**Clause 98 – Section 144(1) (note)**

62 This clause repeals the note.

**Clause 99 – Subsection 144(2) – Previous acquittal or conviction**

63 This clause omits references to the ‘Australian Military Court’ and substitutes ‘a court martial or Defence Force Magistrate’.

**Clause 100 – Paragraph 144(4)(a) – Previous acquittal or conviction**

64 This clause omits reference to ‘133B or 132D’ and substitutes ‘132 or 135’.

**Clause 101 – Subsection 145(2) – Unsoundness of mind**

65 This clause repeals the subsection and substitutes a new subsection which omits the reference to the Australian Military Court and replaces them with court martial or Defence Force magistrate.

**Clause 102 – Subsections 145(4) and (5)**

66 This clause repeals the subsections and substitutes new subsections which omit all references to Military Judge, military jury and Australian Military Court and replaces them with court martial or Defence Force magistrate.

**Clause 103 – Section 145A – Notice of alibi**

67 This clause repeals the section and substitutes a new section which omits references to the Australian Military Court, and replaces them with court martial or Defence Force magistrate.

**Clause 104 – Subsection 146(1) – Evidence in trials**

68 This clause omits ‘the Australian Military Court’ (first occurring), and substitutes ‘a court martial or Defence Force magistrate’.

**Clause 105 – Paragraph 146(1)(a) – Evidence in trials**

69 This clause omits ‘the Australian Military Court’ and substitutes ‘a court martial or Defence Force magistrate’.

**Clause 106 – Subsection 146(2) – Evidence in trials**

70 This clause omits ‘the Australian Military Court’ and substitutes ‘a court martial or Defence Force magistrate’.

**Clause 107 – Subsection 147(1) – Judicial notice of service matters**

71 This clause repeals the subsection and substitutes a new subsection which omits ‘the Australian Military Court’ and replaces it with ‘service tribunal’.

**Clause 108 – Subsection 148(2) – Record of proceedings to be kept**

72 This clause removes reference to ‘The Australian Military Court’ and substitutes reference to ‘The President of a court martial’.

**Clauses 108-109 – Subsection 148(2) – Record of proceedings to be kept**

73 This clause removes references to ‘The Australian Military Court’ and substitutes ‘The court martial or Defence Force magistrate’.

**Clause 110 – Heading to Subdivision B of Division 3 Part VIII**

74 This clause repeals heading and substitutes ‘Subdivision B – Use of video links and audio links by the courts martial and Defence Force Magistrates’.

**Clauses 111-115– Subsection 148A(1), Paragraph 148(2)(c), Subsections 148A(3), 148A(4), Paragraph 148A(4)(b) – Testimony by video link or audio link**

75 These clauses omit references to the court and insert references to court martial or Defence Force Magistrates.

**Clause 116 – Subsection 148B(1)**

76 This clause repeals subsection and inserts new subsection that makes reference to President of a court martial or Defence Force magistrate.

**Clause 117-139 – Amendments to sections 148B-149A – Appearance of persons or submissions made by video link or audio link**

77 These clauses make changes to the video link and audio link provisions in order to remove references to the ‘court’ or ‘Australian Military Court’ and insert references to courts martial and Defence Force Magistrates. The clauses also remove references to ‘Chief Military Judge’ and inserts references to ‘Judge Advocate General’. References to ‘Australian Military Court Rules’ are also replaced by reference to ‘Court Martial and Defence Force Magistrate Rules’.

**Clauses 140 and 142 – Subparagraphs 149A(a)(iii) and 149A(a)(xa) - Appearance of persons or submissions made by video link or audio link**

78 These clauses repeal the subparagraphs.

**Clauses 141 and 143 – Subparagraphs 149A(a)(vii) – (xiii) - Appearance of persons or submissions made by video link or audio link**

79 These clauses omit references to ‘court’ and substitutes ‘court martial or Defence Force Magistrate’.

**Clause 144 – Paragraph 149A(b) - Appearance of persons or submissions made by video link or audio link**

78 This clause repeals the paragraph.

**Clause 145 – Heading to Part VIIIA**

79 This clause repeals heading and substitutes ‘Part VIIIA – Review of Proceedings of service tribunal’.

**Clause 146 – Division 1 of Part VIII (heading)**

80 This clause repeals heading and substitutes ‘Division 1 – Appointment of reviewing authorities’.

**Clause 147 – Sections 150 and 150A**

81 This clause repeals the sections and substitutes a new section that contains reference to service tribunal rather than summary authorities.

**Clause 148 – Sections 151, 152-153**

82 This clause repeals the sections and reinstates sections 152 and 153 from the DFDA as it stood on 12 June 2006 (the 2006 Act) to reinstate the former automatic review and petition provisions.

**Clause 149 – Sections 153A, 154 and 155 – Review and Petition**

83 This clause repeals these sections and substitutes sections 154, 155 and 156 from the 2006 Act to reinstate former review and petition provisions.

**Clause 150 – Division 3 of Part V111**

84 This clause repeals the Division and substitute three new Divisions that reinstate former review and petition mechanisms.

**Division 3:** Action on review of proceedings that have resulted in a conviction.

**Division 4:** Action on review of proceedings that have resulted in an acquittal on the ground of unsoundness of mind.

**Division 5:** Action on review of certain punishments and orders that are subject to approval by reviewing authority.

**Clause 151 - Part IX**

85 This clause repeals the subsection.

**Clause 152 – Subsection 171(1B)**

86 This clause repeals the section.

**Clause 153 – Sections 172, 172A and 173**

87 This clause repeals the sections and substitutes sections 172 and 173 from the 2006 Act to reinstate provisions relating to punishments and orders subject to approval, and suspension of restitution and reparation orders.

**Clause 154 – Section 176**

88 This clause repeals the section and substitutes section 176 from the 2006 Act.

**Clause 155 – Part XI(heading) and Divisions 2 and 2A of Part XI – Judge advocate General, Deputy Judge Advocates General, Chief Judge Advocate and Registrar of Military Justice**

89 This clause repeals the heading and substitutes ‘Part XI – Judge Advocate General, Deputy Judge Advocates General, Chief Judge Advocate and Registrar of Military Justice’.

**Clause 156 – Divisions 2 and 2A of Part XI**

90 This clause repeals the Division and reinstates Division 2 from the 2006 Act.

**Clauses 157-160 – Heading to Division 3 of Part XI and Division 3**

91 These clauses repeal the heading and substitutes a new heading ‘Division 3 – The Registrar of Military Justice’. These clauses also omit reference to the Australian Military Court and substitute reference to Military Justice. These clauses also repeal subsection 188FA(1) and substitutes wording for the Registrar. In relation to oath or affirmation under subsection 188FF(2), this subsection is repealed and the subsection from the 2006 Act is reinstated (reference to Judge Advocate General, Deputy Judge Advocate, or Chief Judge Advocate).

**Clauses 161-162 – Paragraph 188GA(1)(a) and section 188GB - Director of Military Prosecutions**

92 These clauses remove references to Australian Military Court and substitute references to court martial or Defence Force Magistrate, Judge Advocate, Deputy Judge Advocate and Chief Judge Advocate as necessary.

**Clause 163 Subsection 188(GJ)(2)**

93 This clause repeals the subsection and reinstates the subsection from the 2006 Act in relation to oath or affirmation.

**Clauses 164 and 166 – Paragraphs 191(1)(b) and 191(1)(e) – Evidentiary Certificates**

94 These clauses correct cross references and repeal paragraph 191(1)(e).

**Clause 165 – Paragraph 191(1)(d)**

95 This clause makes changes to punctuation within the paragraph.

**Clause 168 – Subsection 194(1)**

96 This clause inserts ‘158’ after ‘145’.

**Clauses 167 and 169 – Subsections 193(1), 195(1) and (2)**

97 These clauses correct cross references and remove references to ‘Australian Military Court’ and substitute references to ‘court martial’ or ‘Defence Force magistrate’.

**Clauses 170 – 173 – After section 195, paragraph 196A(1)(a), paragraph 196A and section 196C.**

98 These clauses insert provisions related to the Judge Advocates’ panel, inserts reference to the Court Martial and Defence Force Magistrate Rules, repeals paragraph 196A(5) and section 196C.

**Clause 174 – Schedule 2**

99 This clause repeals the schedule and reinstates schedule 2 from the 2006 Act that provides for the punishments available to courts martial and Defence Force Magistrates.

**Clause 175 – After Schedule 4**

100 This clause inserts Schedule 5, which contains the form for Oaths and Affirmations.

**Clause 176 – Schedule 7**

101 This clause repeals Schedule 7.

**Part 2 – Consequential amendments of other Acts**

***Defence Act 1903***

102 Clauses 177 and 178 repeals and substitutes paragraphs 89(1)(a) and (d) of the *Defence Act 1903* (contempt of a service tribunal), so that references to ‘Military Judge’, ‘military jury’ and ‘Australian Military Court’ are replaced with ‘court martial’, ‘a judge advocate’, ‘a Defence Force magistrate’.

103 Clause 179 repeals and substitutes subsection 89(2) to reinstate the definitions of ‘court martial’, ‘judge advocate’, ‘Defence Force magistrate’ and ‘summary authority’ as they existed prior to the amendments made in 2006.

104 Clause 180 repeals subsection 116C(2) and (2A) and substitutes subsection 116C (2) (Forces serving together) to reinstate subsection (2) as it existed prior to the amendments in 2006. The effect of the section remains the same.

105 Clause 181 saves any appointments made by the Governor-General under subsection 116C (2), as if they had been made under that section after the commencement day.

### ***Defence Force Discipline Appeals Act 1955***

106 These amendments reinstate the provisions that existed prior to the introduction of the *Defence Legislation Amendment Act 2006* and *Defence Legislation Amendment Act 2008* to reverse any references to the AMC which relate primarily to the replacement of the terms ‘court martial’, ‘Defence Force magistrate’ and ‘judge advocate’ with the new concepts of ‘Military Judge’ ‘military jury’ and ‘Australian Military Court’.

107 The amendments reflect the return to the previous system by:

- replacing references in the relevant provisions of the *Defence Force Discipline Appeals Act 1955* to ‘Australian Military Court’, ‘Military Judge’, ‘military jury’ with ‘court martial’, ‘Defence Force magistrate’;
- reinstating the provisions in respect of appeals to the Defence Force Discipline Appeal Tribunal, the recognition of reviews under Part VIIIA of the DFDA, and appeal on a question of law to the Federal Court, as they previously existed.

108 Clauses 182 to 200 amend various sections in this Act to replace references to ‘Australian Military Court’, ‘Military Judge’, ‘military jury’, ‘Director of Military Prosecutions’, ‘offender appellant’ with references to ‘court martial’, ‘Defence Force magistrate’ and so on.

109 Clauses 201 through to 248 amend various provisions in the Act in the same way as clauses 1 to 19, but they also amend other sections to give effect to reinstating the provisions in respect of appeals to the Defence Force Discipline Appeal Tribunal, the recognition of reviews under Part VIIIA of the DFDA (Act), and a reference of law to the Federal Court, as they previously existed.

### ***Judges’ Pension Act 1968***

110 In developing the *Defence Legislation Amendment Act 2006*, the *Judges’ Pensions Act 1968* was amended to avoid an unintended consequence of Military Judges of the AMC potentially being eligible for pensions and other benefits under that Act, in addition to their military pensions. Clause 249 will omit the reference to ‘Australian Military Court’ and reinstate the definition that existed prior to the 2006 amendments.

## ***Migration Act 1958***

111 Subsections 500A(14) and 501(12) of the Act were amended to include a reference to ‘the Australian Military Court or a court martial or similar military tribunal of another country’, to reflect the establishment of the AMC by the *Defence Legislation Amendment Act 2006*. Prior to this, subsections 500A (14) and 501(12) defined ‘court’ to mean ‘a court martial or similar military tribunal’. Clause 250 and 251 will reinstate the previous provisions. As before, the overall operation of the Act will remain unchanged. Importantly, an overseas military tribunal retains its necessary powers conferred on it by the Act.

## **SCHEDULE 2 – Applications and transitional provisions relating to proceedings**

### **Part 1 – Definitions and preliminary**

#### **Clause 1 - Definitions**

1 This clause inserts definitions for ‘AMC’, ‘amended Defence Force Discipline Act’, ‘commencement day’, ‘DFDAT’, ‘High Court decision date’, ‘old Defence Force Discipline Act’, ‘Registrar’ and ‘Part IV order’. These definitions apply in Schedule 2 only.

#### **Clause 2 – Application of the amendments**

2 This clause defines when the amendments in Schedule 1 apply.

### **Part 2 – Transitional provisions**

#### **Division 1 – Incomplete AMC proceedings**

##### **Clause 3 – Charges purportedly referred to the AMC other than as a result of an election – no punishment imposed**

3 This clause explains the process under the ‘amended Defence Force Discipline Act’ for charges that were referred to the AMC under the ‘old Defence Force Discipline Act’.

##### **Clause 4 – Charges purportedly referred to the AMC as a result of an election, etc. – no punishment imposed**

4 This clause explains the process under the ‘amended Defence Force Discipline Act’ for charges that were referred to the AMC as a result of an election under the ‘old Defence Force Discipline Act’.



## **Clause 5 – Part-heard purported appeals to the AMC**

5 This clause explains the process to be followed under the ‘amended Defence Force Discipline Act’ in relation to part-heard appeals made to the AMC under ‘old Defence Force Discipline Act’.

## **Division 2 – Incomplete summary authority proceedings**

### **Clause 6 – Division does not apply if an election required**

6 This clause provides that division 2 does not apply to summary authority proceedings where the person was not required to be given the opportunity to elect to have the matter tried by the AMC.

### **Clause 7 – Summary authority proceedings started but not completed before commencement**

7 This clause explains the process to be followed under the ‘amended Defence Force Discipline Act’ in relation to matters that were before a summary authority but not completed; or matters before a summary authority that were completed but not yet reviewed under the ‘old Defence Force Discipline Act’.

### **Clause 8 – Summary authority proceedings – review proceedings started but not completed before commencement.**

8 This clause explains the process to be followed under the ‘amended Defence Force Discipline Act’ where a member has been convicted by a summary authority and a review under Part VIIIA of the ‘old Defence Force Discipline Act’ has not been completed.

### **Clause 9 – Trials resulting in punishment by a summary authority – review proceedings completed before commencement day**

9 This clause explains the process to be followed under the ‘amended Defence Force Discipline Act’ where a summary authority imposed a punishment or order on a person and a review under Part VIIIA of the ‘old Defence Force Discipline Act’ has been completed.

### **Clause 10 – Stays of punishment**

10 This clause explains the process to be followed under the ‘amended Defence Force Discipline Act’ where a summary authority stayed the execution of punishment pending the determination of an appeal to the AMC and the AMC had not yet determined the appeal under the ‘old Defence Force Discipline Act’.

## **Schedule 3 - Application and transitional provisions relating to office holders**

### **Clause 1 - Definitions**

11 This clause inserts definitions for ‘AMC’, ‘amended Defence Force Discipline Act’, ‘commencement day’, ‘High Court decision date’, ‘member’, ‘old Defence Force Discipline Act’, ‘Permanent Forces’, ‘Registrar’ and ‘Remuneration Tribunal’. These definitions apply in Schedule 3 only.

### **Clause 2 - Current Chief Military Judge automatically becomes the Chief Judge Advocate**

12 This clause provides for the person that purportedly held the office of Chief Military Judge (CMJ) immediately before the High Court decision date to be appointed on the commencement day as the Chief Judge Advocate (CJA). The appointment is for the lesser of 2 years from the commencement day or the period from the commencement day until the office of CJA ceases to exist.

13 The appointment as CJA is on the same terms and conditions as to remuneration, allowances, recreation leave and other leave entitlements as purportedly applied to the person immediately before the High Court decision date. This may be otherwise prescribed, but must not be less than the value of the terms and conditions that previously applied.

14 The person must not engage in employment outside the duties of the office of CJA, but may undertake other roles in the Australian Defence Force. The person does not hold public office within the meaning of the *Remuneration Tribunal Act 1973*.

### **Clause 3 – Benefits on ceasing to hold office**

15 This clause provides the benefits which may be payable to the person who is taken to hold the office of CJA if that office ceases to exist before the end of the period of 2 years from the commencement day.

16 The benefits are based on what would have been payable had Determination 2009/07 of the Remuneration Tribunal otherwise applied immediately before the High Court decision date with some adjustment to reflect the fact that the person will have continued to receive the same terms and conditions regarding remuneration, allowances, recreation leave and other leave entitlements for up to 2 years after the High Court decision date.

17 The clause provides that for the purposes of working out the amount that the person would have been entitled to be paid the period is to be reduced by the number of months during which the person held office as CJA. The effect of this is that the period for calculating the months of service remaining is the period from the High Court decision date, less the number of months that the person has served as CJA from the commencement day, until the earlier of the person’s compulsory retirement age under the *Defence (Personnel) Regulations 2002* or what would have been the expiry date of the term of office of the purported CMJ.

18 The benefits will not be payable if the Commonwealth has offered suitable alternative employment to the CJA or, if before the office of CJA ceases to exist, the person ceases to be a member of the permanent forces.

19 Payment of the benefit will lead to the member automatically transferring to the reserves in line with regulation 64 of the *Defence (Personnel) Regulations 2002*.

**Clause 4 - Current Military Judges automatically become members of the judge advocates' panel.**

20 This clause provides for a person who purportedly held office as a Military Judge (MJ) under section 188AP of the 'old Defence Force Discipline Act' immediately before the High Court decision date to be appointed on the commencement day as a member of the judge advocates' panel, as if the person had been duly appointed by the Chief of the Defence Force under subsection 196(2) of the amended Defence Force Discipline Act. The appointment is for the lesser of 2 years from the commencement day or the period from the commencement day until the judge advocates' panel ceases to exist.

21 The appointment of the person is on the same terms and conditions as to remuneration, allowances, recreation leave and other leave entitlements as purportedly applied to the person immediately before the High Court decision date. This may be otherwise prescribed, but must not be less than the value of the terms and conditions that previously applied.

22 The person must not engage in employment outside the duties of a member of the judge advocates' panel, but may undertake other roles in the Australian Defence Force. The person does not hold public office within the meaning of the *Remuneration Tribunal Act 1973*.

**Clause 5 - Benefits on member of judge advocates' panel ceasing to hold office.**

23 This clause provides the benefits which may be payable to a person who is taken to be a member of the judge advocates' panel if that office ceases to exist before the end of the period of 2 years from the commencement day.

24 The benefits are based on what would have been payable had Determination 2009/07 of the Remuneration Tribunal otherwise applied immediately before the High Court decision date with some adjustment to reflect the fact that the person will have continued to receive the same terms and conditions regarding remuneration, allowances, recreation leave and other leave entitlements for up to 2 years after the High Court decision date.

25 The clause provides that for the purposes of working out the amount that the person would have been entitled to be paid the period is to be reduced by the number of months during which the person held office as a member of the judge advocates' panel. The effect of this is that the period for calculating the months of service remaining is the period from the High Court decision date, less the number of months that the person has served as a member of the judge advocates' panel from the

commencement day, until the earlier of the person's compulsory retirement age under the *Defence (Personnel) Regulations 2002* or what would have been the expiry date of the term of office of the person as a purported MJ.

26 The benefits will not be payable if the Commonwealth has offered suitable alternative employment to the person or, if before the judge advocates' panel ceases to exist, the person ceases to be a member of the permanent forces.

27 Payment of the benefit will lead to the member automatically transferring to the reserves in line with regulation 64 of the *Defence (Personnel) Regulations 2002*.

#### **Clause 6 – Current Registrar of the AMC automatically becomes the Registrar of Military Justice**

28 This clause applies to a person who purportedly held office as Registrar of the AMC under section 188FB of the 'old Defence Force Discipline Act' immediately before the High Court decision date. The person is taken to be appointed on the commencement day by force of this item, as the Registrar of Military Justice, as if the person had been duly appointed by the Minister under section 188FB of the amended Defence Force Discipline Act.

29 The clause also sets out the terms and conditions which will apply to the person.

#### **Clause 7 - Waiver relating to amounts paid to purported office holders**

30 This clause makes clear that the Commonwealth has waived any right to recover any amount from the persons who purportedly held the offices of CMJ, MJ and Registrar for the period of 1 October 2007 to the commencement day which might otherwise been recoverable on the basis that the offices did not exist during that period.

#### **Schedule 4 – Other matters**

##### **Clause 1 – Savings provisions relating to section 5A of the *Defence Force Discipline Act 1982***

31 This clause saves any actions of a Superior Authority under the 'old Defence Force Discipline Act' and gives effect to those actions from the commencement day.

##### **Clause 2 - Regulations**

32 This clause allows for the making of regulations by the Governor-General.