

**Senate Foreign Affairs, Defence and Trade
References Committee**

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: P16G

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THE HON FRAN BAILEY MP
MINISTER FOR EMPLOYMENT SERVICES
MINISTER ASSISTING THE MINISTER FOR DEFENCE

27 JUL 2004

Senator Steve Hutchins
Chair
Senate Foreign Affairs, Defence and
Trade References Committee
Parliament House
CANBERRA ACT 2600

Dear Chair

During the evidence given by Mr Clark to the Inquiry into the Military Justice System on 9 June 2004, he tendered *DGTDLS Directive 1/2003* concerning the appointment of legal officer support to Boards of Inquiry. Mr Clark indicated that the Directive stated that the 'interests of the Service' were the most important factor to be taken into account when approving a legal officer to represent an affected person, with the interests of the affected person being of secondary consideration.

Shortly after Directive 1/2003 was issued, a review of the factors to be considered when approving legal officer support was conducted and the Directive was changed in August 2003. The enclosed Additional Submission from the Director General Defence Legal Service clarifies the current policy for the Committee. I would request that you accept this Submission for the public record.

Yours sincerely

Fran Bailey



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Senator S Hutchins
Chair
Senate Foreign Affairs, Defence and References Committee
S156
Parliament House
CANBERRA ACT 2600

Inquiry into the effectiveness of Australia's Military Justice System – Additional Submission

During the course of his testimony before the Committee on 9 June 2004, Mr Grant Clark referred to DGTDLs Directive No 1/2003, which concerns legal officer appointments for Boards of Inquiry (BOI). Mr Clark tendered a copy of the Directive, dated 16 July 2003.

The Directive was the subject of much criticism. Paragraph 5 of the Directive outlines a series of factors to be taken into account for approvals for legal officer appointments for Counsel Assisting and Counsel Representing duties. Mr Clark referred to paragraph 7 of this Directive, which stated that the most important factor is the interests of the service.

DGTDLs Directive NO 2/2003

DGTDLs Directive No 1/2003 was replaced one month after it was issued, in August 2003. In order to assist the Committee in obtaining a more complete understanding of Mr Clark's submission, I have attached a copy of the current version of DGTDLs Directive No 2/2003, dated 18 August 2003, and signed by the then DGTDLs, CDRE M. Smith.

Legal Representation of Members

DGTDLs Directive 2/2003 identifies three factors as being relevant to the representation issue; these factors being the interests of the affected person, the availability of the legal officer, and the exigencies or interests of the service.

It is clear on its face that DGTDLs Directive No 2/2003 does not have the effect of denying access to legal representation.

Mr Clark also indicated that the DGTDLs Directive enables TDLs to regulate and mandate the employment of legal officers at the expense of procedural fairness and natural justice requirements that must be afforded to potentially affected persons, whose careers and reputations are inexorably linked to the quality of counsel representing their interests.

In support of his testimony, Mr Clark also referred to the Federal Court case of *Stuart v Sanderson*, dated 28 June 2000, as authority for the proposition that a member of the ADF is entitled at trial to representation by any person that they nominate. This is not disagreed with as a general proposition in criminal proceedings. A proper understanding of the decision is required.

In this case a private with the Australian Regular Army was charged with a number of offences under the *Defence Force Discipline Act 1982* (Cth) relating to the alleged theft of ammunition from the Australian Army Rifle Association. The applicant requested that she be represented before the summary authority convened to hear these charges. The Army Reserve Legal Officer located in the applicant's area was unable to represent her because he knew one of the witnesses involved. The applicant then sought to be represented by LTCOL Beckwith, a reserve legal officer who was

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located in Melbourne. It appears that the view was taken that the charges were not sufficiently serious to warrant the provision of legal counsel, particularly given that LTCOL Beckwith would need to travel from Melbourne to Wodonga to attend the hearing.

The hearing proceeded without LTCOL Beckwith's assistance, and the applicant was assigned an officer in the chain of command, who did not have legal qualifications.

The applicant was subsequently convicted of a number of counts relating to the theft charge.

Before the Federal Court the Army sought to argue that the various costs that would have been imposed on the Army by engaging LTCOL Beckwith were unreasonably high, and that the charges were not sufficiently serious to justify them. They also sought to confine "reasonable availability" to the services of a member from within the accused's own unit, on the basis that for the purposes of efficiency and effective discipline of the armed services, disciplinary matters should be dealt with intra-murally.

Madgwick J of the Federal Court considered Rule 24 of the *Defence Force Discipline Rules* (Cth), made pursuant to the DFDA, which at the time of the proceedings provided that:

"(1) An accused person may request the services of a specified member of the Defence Force to defend the accused person at the hearing of a proceeding before a summary authority;

(2) Where an accused person makes a request under subrule (1), the person whose services are requested shall be permitted to defend the accused person unless the services of the person are not reasonably available.

(3) Where the services of a person which have been requested by an accused person under subrule (1) are not reasonably available, the summary authority shall, with the consent of the accused person, direct a defence member to defend the accused person."

Madgwick J then considered whether LTCOL Beckwith was "reasonably available" and concluded that "reasonable availability" was to be determined practically and in the circumstances of the hearing. The relevant factors to be considered include the seriousness of the charges, the seriousness of the consequence of conviction, and the cost of making the requested services of the chosen member available.

Madgwick J noted that the considerations raised by the Army may be relevant to a determination of what may constitute reasonable availability in some circumstances. He said "the availability of services of a Melbourne based member may be considered not to be reasonable when an accused is serving abroad, to say nothing of serving in a unit engaged in combat in a remote location where the charge demands a prompt hearing."

His Honour noted, however, that Rule 24 accorded members of the Defence Force a right of broad application, and that in this particular case the applicant was accused of theft and the potential consequences of convictions were serious, as were the actual consequences, and that an error as to the meaning of Rule 24 could therefore be inferred. In the circumstance, the failure to have the accused's chosen counsel available to defend the applicant was a material irregularity in the proceedings before the summary authority.

It should be noted that *Stuart v Sanderson* is confined to a consideration of the *Defence Force Discipline Rules* (Cth). It is not strictly referable to BOI. There is no comparable provision in the *Defence (Inquiry) Regulations* 1985 entitling potentially affected persons to representation of their choice at Commonwealth expense before a BOI. Regulation 33(3) provides that a person

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Authorised to appear before a BOI shall not appoint a legal practitioner to represent them except with the approval of the President or the Appointing Authority, as the case may be. As a matter of interpretation, that approval could not be unreasonably withheld. Once approval is granted, it is then a matter for the potentially affected person to appoint their legal representative. There is no statutory requirement for the person to be represented at Commonwealth expense.

As a matter of policy ADFP 06.1.4 *Administrative Inquiries Manual* provides that a potentially affected person will be provided with legal representation by a service legal officer at Commonwealth expense. It is my responsibility as DGTDLs to settle the terms and conditions on which legal representation at Commonwealth expense is provided. That discretion has to be exercised responsibly and according to justice and reason. The guidelines in Directive 2/2003 are a framework within which I exercise that discretion. They are only guidelines, and the relative weight to be given to the criteria will necessarily vary with the circumstances of each case. There is no provision that the legal representative should be someone chosen by the person concerned. As a matter of practice, however, consideration is given to the wishes of the potentially affected person. It must be presumed that I will exercise that discretion reasonably, and any member aggrieved has the right to redress my decision.

Lawfulness – Role of the Appointing Authority

Mr Clark also suggested that DGTDLs Directive 1/2003 was wrong in law in that it conflicted with the role and authority of Appointing Authorities under the *Defence (Inquiry) Regulations 1985*. It is assumed that Mr Clark would claim that this contention applies equally in relation to the present Directive.

TDLS rejects this claim, on the basis that it misconceives both the effect of the DGTDLs Directive, and the *Defence (Inquiry) Regulations*. It is clear that DGTDLs Directive 2/2003 does not conflict with or otherwise impinge upon the role of Appointing Authorities under the *Defence (Inquiry) Regulations*.

Regulations 26 and 27 of the *Defence (Inquiry) Regulations* provide for the Appointing Authority to appoint the President and members of a BOI. Regulation 33 provides for the President or the Appointing Authority, in specified circumstances, to grant approval to a potentially affected person to appoint a legal representative before a BOI. It does not provide for the President or the Appointing Authority to appoint a legal representative or to set the terms and conditions for that appointment. It is only an approval for the potentially affected person to be legally represented.

I am directed to manage the resources for TDLS throughout Australia. I have the relevant financial delegation to deal with administrative and financial arrangements for BOI. Accordingly DGTDLs Directive No 2/2003 is directed toward these issues as follows:

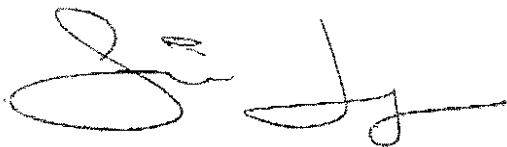
- approval for duty and rates of pay for reserve legal officers in accordance with financial delegations and determinations issued under s. 58B of the *Defence Act*;
- providing general guidance on factors to be taken into account for the approval of legal officer appointments to Boards of Inquiry; and
- reinforcing the legislative function of the President and Appointing Authority in respect of legal representation at Boards of Inquiry.

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Further Defence Submissions

Mr Clark, and the other witnesses who gave testimony on 9 June 2004, raised a number of other issues which Defence will also seek to address in due course by way of further submissions.

Thank you for your attention to this matter.

**S. J. HARVEY**

Air Commodore

Director General The Defence Legal Service

Enclosure:

1. DGTDLs Directive No 2/2003

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DGTDLS Directive No 2/2003**Legal Officer Appointments for Boards of Inquiry (BOI)**

1. The following directive applies to the appointment of Permanent Legal Officers (PLOs), Reserve Legal Officers (RLOs) and civilian TDLS legal officers to BOIs.

Board Member

2. Legal officers are not normally appointed as a Board member. DGTDLS will approve RLO appointments as a Board member in accordance with existing R1/R2 procedures.

Counsel Assisting

3. DGTDLS will approve RLO appointments as counsel assisting a BOI in accordance with existing R1/R2 procedures.

Counsel Representing

4. Although a person may be authorised to appear before a BOI, there is no right to legal representation without approval of the President of the Board or the Appointing Authority. An ADF member or other person, who is an affected person and has approval to have legal representation, has no right to representation by a particular legal officer. DGTDLS is to approve RLO appointments for counsel representing affected persons in accordance with existing R1/R2 procedures.

Factors To Be Taken into Account for Approvals for Legal Officer Appointments for Counsel Assisting and Counsel Representing Duties

5. Counsel representing. There are several important factors to be taken into account when approving a legal officer to represent an affected person, they are:

- a. the interests of the affected person,
- b. the availability of the legal officer, and
- c. the exigencies or interests of the service.

6. Counsel assisting. Factors in sub-paragraphs 5 b. and c. are relevant to the appointment of a legal officer as counsel assisting. A further factor is the ability of the legal officer to manage the

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conduct of the BOI in accordance with its terms of reference and in a timely and cost efficient manner.

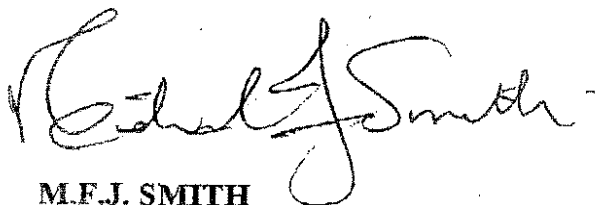
7. The exigencies or interests of the service includes the following factors:

- a. equitable distribution of opportunities to undertake BOI duties,
- b. potential impact on the timeliness and conduct of the BOI,
- c. complexity of issues before the BOI,
- d. professional development,
- e. career progression,
- f. experience, and
- g. operational implications.

Sessional Fees for RLO

8. If the duty for a RLO in a BOI exceeds 5 days, then DGTDLs will set the rate of the sessional fee in accordance with the Legal Officer Sessional Fee Determination.

9. This Directive takes immediate effect and any previous TDLS instruction which is inconsistent with this instruction, is of no effect to the extent it is inconsistent.



M.F.J. SMITH
CDRE, RAN
DGTDLs

RGC-3-117

18 Aug 03