

Appendix 3

Department of Defence: Written questions

The committee is seeking clarification on a number of minor drafting and other matters in the Bill. They include:

SCHEDULE 1—Election for trial by the Australian Military Court

New subsection 111B (1)

The term 'at the commencement of dealing with a charge' is used—is this term clearly defined in the legislation? Would it be helpful to clarify its precise meaning?

New sub sections 111B(3) and s131(4)

The term 'if a legal officer is reasonably available to give such advice'—is it clear as to what constitutes 'reasonably available'. Would it be helpful to provide some statutory guidance on this matter? Should there be additional safeguards in cases where legal advice is not reasonably available?

New paragraph 111C(1)(b)

The provision reads 'if the exigencies of the service do not permit the person to make that decision within that time [24 hours]—within such longer period (not exceeding 14 days) as the summary authority allows. Would it be helpful to provide some statutory guidance on this matter? Should there be additional safeguards in cases where legal advice is not reasonably available?

New sub sections 111C(6) and 131AA(6)

The term 'at any time before a date is fixed for hearing by the Court' —is there any need to be more specific to take account of, for example, direction hearings?

New sub sections 131AA(3) and (4)

The term 'the first charge' is used—is the meaning of this term clear, is it different from the primary or initial charge?

SCHEDULE 2—Appeals to the Military Court

New paragraph 164(1)(c)

This section deals with mental impairment and is consistent with other provisions in the DFDA referring to mental impairment. It uses the term 'that the appellant be kept in strict custody until the pleasure of the Governor-General is known'. Is there adequate statutory guidance or requirements in place, for example periodic court or

tribunal review procedures, to protect the rights of such a person. Does this provision reflect current approaches taken by other Australian jurisdictions, for example Victoria, to the detention and release of people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment?

New sub section 150(2)

Reads 'A reviewing authority is a **competent reviewing authority** for the purposes of reviewing the proceedings of a summary authority only if the reviewing authority did not exercise any of the powers or perform any of the functions of a superior authority in relation to the charge that is the subject of the proceedings'.

AND

New sub section 151 (2)

Reads 'The commanding officer must review the proceedings in accordance with this Part and, for that purpose, the commanding officer is taken to be a reviewing officer.'

The committee on a number of occasions has raised concerns about the real or perceived inappropriate influence of chain of command in legal proceedings. Do these provisions provide adequate protection against real or perceived conflicts of interest?

The Discipline Officer scheme

In his submission, the Inspector General Australian Defence Force referred to the Discipline Officer scheme and providing for the application of this scheme to extend to junior officer ranks. The IGADF noted that 'while the intent was and remains for this scheme to apply to non-commissioned officers, additional work required to establish appropriate punishment limits for these ranks means that the application of this scheme to non-commissioned officers will now need to be effected at the first opportunity...!'

In her submission, the Director of Military Prosecutions regarded the omission of junior non-commissioned officers and senior non-commissioned Officers as unfortunate but noted that she had been informed that the omission was unavoidable.

Could Defence provide the committee with the reasons for the omission and why it could not be remedied by amendment to the proposed legislation?

Limitations on the right to elect trial

In her submission, the Director of Military Prosecutions supported the right of an accused person to elect trial. She noted, however, that the scope of the election appears to be limited; and depending on how it operates in practice might require further subsequent amendment. Could you explain the limitations and the reasons for those limitations on the right to elect trial?