Appendix 4

Department of Defence:
Responses to written questions

Australian Government
Department of Defence

MINUTE

Military Justice Implementation Team

MJIT Out: 213/2007

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

I am writing in response to the committee's correspondence seeking clarification on a number of minor drafting and other matters in the Defence Legislation Amendment Bill 2007 (DLAB 07). The clarification sought by the committee includes matters related to the election for trial by the Australian Military Court and appeals to the Australian Military Court.

The attached clarification addresses the sections and subsections of the Bill in the order referred to by the committee, for ease of reference. I trust that it meets the requirements of the committee. In drafting the Bill, priority was given to those provisions that were related directly to the recommendations of the 2005 Senate Inquiry into *the effectiveness of Australia's military justice system.* Some of these changes, in particular those relating to the rights of appeal and election from summary trials to the Australian Military Court were quite complex and meant that other provisions unrelated to the Senate Report could not be completed in time for inclusion in DLAB 07. These provisions, including those referring to mental impairment and the Discipline Officer scheme are being progressed for inclusion in legislation proposed for 2008.

Should you require any further clarifying information, please do not hesitate to contact me.

Yours sincerely

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4 September 2007

Attachment
Defence response to questions from the Senate Standing Committee on Foreign Affairs, Defence and Trade seeking clarification on the Defence Legislation Amendment Bill 2007

DEFENCE RESPONSE TO QUESTIONS FROM THE SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE SEEKING CLARIFICATION ON THE DEFENCE LEGISLATION AMENDMENT BILL 2006

SCHEDULE 1 – Election for trial by the Australian Military Court

1. New subsection 111B(1)

The term 'dealing' is currently used in the *Defence Force Discipline Act 1982* (DFDA) and the distinction between dealing with and trying a charge at the summary level is covered in the Discipline Law Manual (DLM). Its meaning in respect of the treatment of a charge at the summary level has been in wide use in the ADF for over 20 years.

The term 'dealing' has been used specifically in this section of the Bill, on the basis of a suggestion from the Acting Judge Advocate General of the Australian Defence Force (A/JAG-ADF). In commenting on an initial draft of section 111B of the *Defence Legislation Amendment Bill 2007* (DLAB07), the A/JAG-ADF stated:

"..currently before DFDA proceedings there are two phases, the first is the 'dealing' phase and the second is the 'trying' phase. Together they are often referred to as a hearing. If the intent is that the accused be ordered to appear before the summary authority and when he so appears he makes the election, rather than introducing another phase of the procedures it would be appropriate for this to occur in the 'dealing' phase."

The A/JAG-ADF then went on to point out that this could be achieved by amending the subsection with words such as "*at the commencement of dealing with the charge*" or words to that effect.

Given its current usage there is no identifiable need to clarify this commonly used term in the DFDA. However, should such a need be identified in the future, then as it is a part of the process and procedures for a hearing, the Chief Military Judge (CMJ) will have the authority under the DFDA (following the commencement of the DLAB 06 and the proposed DLAB07) to make rules as necessary for the purposes of clarification. The process, and the relevant phases of summary hearings as they are proposed in the Bill, will also be explained further in a plain English chapter of the Defence Law Manual specifically intended for summary proceedings.

2. New subsections 111B(3) and 131(4)

The term 'reasonably available' in respect of legal advice in these sections of the Bill means what would be sound judgement in the circumstances of a particular case when determining the availability of legal advice. The term is in the *Defence Force Discipline Rules 1985*, and has been in use by the ADF for over 20 years.

The meaning of the term 'reasonably available' as used in the *Defence Force Discipline Rules* has also been considered by the Federal Court. In Stuart v Sanderson (2000) 100 FCR 150 Justice Madgwick made the following comment:

'Whether the services of a member of the Defence Force which have been requested by an accused person are "reasonably available" is, in my view, to be determined practically and having regard to all the circumstances, which may vary greatly. The request may be in time of war or of peace, in Australia or abroad, in circumstances of isolation of the various persons concerned, or otherwise.

Cases may be attended by various degrees of urgency. The potential seriousness of the consequences of a conviction will have its influence. Questions of cost and convenience cannot be set aside. No doubt there are many other factors that may, in particular cases, be relevant'.

The intent of using this term in these subsections of the Bill is to avoid being unnecessarily prescriptive. This allows the particular circumstances of the accused to be taken into consideration, in conjunction with the operational environment and its potential impact on the availability of legal advice at the time. Given the unpredictability of such circumstances, it is in the interests of the accused to ensure that any arguments he or she advances are given due consideration in the rare circumstances when access to legal advice might not be immediately available. The summary authority then has the maximum flexibility in providing an additional period (up to 14 days) in which the accused may make their election (see paragraph 3 below).

Given modern communications and that legal officers are deployed in most operational theatres, it is envisaged that there would be very few occasions when legal advice would not be reasonably available. However, should this arise, the accused may not only be provided with the provision for an additional period in which to make an election, but by the following additional safeguards which apply in every case:

- The requirement for the automatic review of every summary conviction.
- The requirements for more serious punishments to be approved by a reviewing authority before they can take effect.
- The right of a member convicted by a summary authority to appeal to the Australian Military Court (AMC) against conviction and punishment.

In combination, these are very significant safeguards for the protection of the member.

3. New paragraph 111C(1)(b)

The term 'exigencies of the service' is currently used in the DFDA, and has been widely used by the ADF for over 20 years.

The purpose of this provision is to give an accused an additional period (up to 14 days) within which to decide if he or she wishes to elect to be tried by the AMC rather than a summary authority. Rather than have a definitive list of circumstances which might work to the disadvantage of the accused, the preference is to ensure that any reasonable arguments advanced by an accused are able to be properly considered. One such circumstance might be that the geographic or operational situation means that legal advice is not reasonably available to the accused person to allow them to make an informed election. The exigencies of the service may also be considerations taken into account by a summary authority when making an informed decision whether to grant an additional period in which the accused can make an election, or to try the case as quickly as is required for the maintenance of discipline and operational effectiveness. This may be particularly relevant where the operational circumstances demand immediate disciplinary action to make clear the standards necessary to ensure the safety of all the other ADF members in the force or the unit.

Notwithstanding the advantages of modern communications and the availability of legal officers in most operational theatres that would normally facilitate a timely election, this provision allows for an additional period where circumstances permit. The accused is further protected by the following additional safeguards which apply in every case:

- The requirement for the automatic review of every summary conviction.

- The requirements for more serious punishments to be approved by a reviewing authority before they can take effect.
- The right of a member convicted at the summary level to appeal to the AMC against conviction and punishment.

In combination, these are very significant safeguards introduced to protect the member.

4. New subsections 111C(6) and 131AA(6)

The term 'hearing' in these subsections refers to a hearing before the AMC. Whilst the term is not defined in the DFDA, Butterworths [sic] Australian Legal Dictionary defines a 'hearing' as any proceeding where argument is heard to render a decision. This specifically refers to a proceeding in which oral evidence may be taken and documentary and real evidence tendered.

In the interests of the accused, it is beneficial to use the term 'hearing' to avoid the unintentional inclusion of processes dealing with interlocutory or procedural matters (which may take place at a time prior to fixing the date for the hearing of the substantive issues surrounding the charge), as this could reduce the period of time that is available in which an accused may withdraw his or her election. As these are matters pertaining to the process and procedure of hearings and trials, further clarification of the definition could be provided for in the Rules, if the CMJ considers it appropriate to do so. It could also be expanded upon in the DLM, if necessary.

5. New subsections 131AA (3) and (4)

The term 'first charge' in these subsections is a drafting tool used by the drafters. Its purpose is to identify any charge which attracts an initial right of election. It refers to cases where the charges are linked and some of the charges draw an initial right of election, whilst others may not. [The 'first charge' is any charge that attracts the initial right of election].

The effect of this provision is explained at paragraph 34 of the Explanatory Memorandum. It is a safeguard to the accused because it allows for charges to be dealt with in the one forum. It will avoid subjecting an accused person to separate trials at both the summary and AMC level for offences which stem from the same circumstances and are linked. As a further safeguard, any decision to refer a charge back to a summary authority, where it is appropriate, is now to be made by the statutory Director of Military Prosecutions (DMP) and not within the command chain.

SCHEDULE 2 – Appeals to the Military Court

6. New paragraph 164(1) (c)

The currency of the existing provisions for dealing with mental impairment became apparent during drafting of the Bill. As a result, Defence looked to bringing the provisions up to contemporary standards in this legislation, if it was feasible. However, it became evident during the course of drafting that there were a number of significant practical and policy matters to be resolved to avoid disadvantaging ADF members. A particular matter requiring further detailed consideration is whether a person would be able to appeal to the Defence Force Discipline Appeal Tribunal against a finding that he or she was unfit to stand trial. This right of appeal, and a number of other complex matters requiring further policy consideration, precluded drafting being completed for inclusion in this Bill.

In the interests of giving effect to the Government agreed recommendations flowing from the 2005 Senate Report, which took drafting priority, and to allow the necessary time to ensure that any amendment to the provisions for dealing with mental impairment would not disadvantage ADF members, it was determined that these amendments would be best effected in legislation to be proposed for 2008. The best options for amending these provisions are being developed in consultation with the Attorney General's Department.

7. New subsections 150(2) and 151(2)

Commanders use the summary discipline system on a daily basis. The system is integral to their ability to lead the people for whom they are responsible in order to ensure their welfare and safety. As described in a British military context, '*discipline is inseparable from command and at the centre of the summary discipline system is the commanding officer*'. This tenet is also inherent in all other allied military organisations including the United States, Canada and New Zealand, from which the Australian system has drawn.

The Senate Committee in its 2005 Report recognised that the vast majority of offences prosecuted under the DFDA are tried at the Summary Authority level, and acknowledged the need for speedy and efficiently administered summary justice and further recognised its role in supporting commanding officers and maintaining Service discipline. These are some of the reasons why it is not practical to remove the command chain from the summary system. However, the provisions in DLAB 07 relating to review powers, have been drafted with due regard to the requirement to guard against undue command influence. Indeed, the reviewing authority cannot take any action that would impose additional punishments on a person convicted at a summary trial.

As proposed in the Bill, the existing quasi judicial command based petition and review regime is to be discontinued and will be replaced by a system of appeals to the AMC. However, it is intended to retain a form of review by a 'reviewing authority' (a superior authority) as an additional safeguard for the accused.

The reviewing authority has no part in the summary trial process as the review function does not take place until after a summary conviction has been recorded. Further, and as detailed below, the reviewing authority's powers operate to protect the rights of individuals and provide essential command oversight of the system to guard against its inappropriate use.

Specifically, the powers of a reviewing authority are limited to:

- Approving or not approving certain more severe punishments or orders. In the case where the reviewing authority does not approve a punishment or order, it must quash the punishment or revoke the order and impose a lesser punishment or order. A more severe punishment cannot be imposed. The proposed system of appeals to the AMC will then apply from the time the punishment is approved.

- Referring a matter back to the summary authority for the purpose of it reopening the matter and correcting a punishment or order that was imposed incorrectly (i.e., beyond authority to impose). The summary authority will only be able to impose a lesser punishment or order than that originally awarded.

- If it considers that there may have been a more serious defect in the summary proceedings, recommending to the convicted person that an appeal to the AMC may be appropriate.

Other than for approving certain more severe punishments and orders, a reviewing authority will not have the wider quasi-appeal powers currently available to reviewing authorities under the DFDA (for example, quashing a conviction or punishment on review by petition). These powers will now more appropriately reside with statutorily independent Military Judges, under the new appeals regime.

The intention of this review process is to provide additional safeguards for members by providing another avenue by which to correct inappropriately awarded punishments or orders that may not otherwise have been the subject of an appeal to the AMC. A mechanism for correcting these types of errors, where there is no dispute that an error has occurred will help reduce the appellate workload of the AMC. It will also improve command oversight of the summary trial system which is important to the maintenance of discipline. However, in circumstances of excessive but otherwise lawful punishment, an appeal may always be lodged with the AMC.

8. The Discipline Officer Scheme

Defence intends to include warrant officers and non-commissioned officers in the Discipline Officer scheme. However, before these amendments can be completed there are a number of complex practical and policy issues that need further development to ensure that the command authority of these ranks is not inadvertently subordinated.

Warrant officers and non-commissioned officers exercise important levels of command authority, and in the case of warrant officers, can also be appointed as discipline officers. Given this, it is very important that the potential effects of including them in the coverage of the Discipline Officer scheme, in particular the relative punishments, are given detailed consideration.

With the currently proposed provisions for the Discipline Officer scheme in the Bill, Defence has provided parity of the officer ranks with other ranks. That is, the scheme will now cover recruits and ranks below non commissioned rank, and officer cadets and the most junior officer ranks. This will be particularly important in the training environment, where the Discipline Officer scheme can help support the maintenance of discipline amongst the more junior and inexperienced members of the ADF.

It is intended to include warrant officers and non-commissioned officers in the coverage of the Discipline Officer scheme in legislation proposed for 2008.

9. Limitations on the right to elect trial

As discussed in the Explanatory Memorandum and more specifically the submission from the IGADF, if the right of election was completely discretionary on the part of an individual member, it is not difficult to imagine circumstances in which the exercise of that right could have the potential to affect the operational effectiveness of a unit.

It is therefore necessary for some limitation to be placed on the circumstances in which such a right can normally be exercised. This has been done by listing in Schedule 1A a number of offences, essentially 'disciplinary' in nature, in relation to which a member has no initial right to elect trial by the AMC and which must be dealt with by a summary authority in the first instance. For example it would be anomalous if an absence of two hours could not be dealt with by a commanding officer on the spot. This recognises the imperative that discipline must be maintained within Australia and overseas, in peace and in war, and that relatively minor matters of a disciplinary nature ought to be dealt with as speedily as possible.

The list of offences to which this provision will apply was finalised after extensive consultation with the Services and recognises that summary discipline by its nature, has to be quick and as simple as possible while at the same time providing the safeguard of an unlimited right of appeal should a member convicted under this arrangement wish to exercise it. As indicated above, it would be anomalous if a case of absence without leave of two hours could not be dealt with by a commanding officer immediately.

Additional safeguards have been included for these offences, including limited punishments and a requirement for summary authorities to offer a right of election if, prior to making a finding of guilt, they determine that the more severe punishments that are available to them, might apply. These additional safeguards for the accused will be further supported by the right of a convicted member to appeal a conviction or punishment to the AMC and the automatic review of all summary trials.