Appendix 1

Correspondence

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The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-001598

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter of 13 May 2015 requesting clarification of a matter in relation to the Defence Legislation (Enhancement of Military Justice) Bill 2015 (the Bill).

The purpose of the proposed amendments to the *Military Justice (Interim Measures) Amendment Act (No. 1) 2009* (Interim Measures Act) by the Bill is to continue the appointment arrangements made in the Interim Measures Act, by extending the appointment of the current Chief Judge Advocate (CJA) and full-time Judge Advocate (JA) for a further two year period and, as such, the Bill does not have an adverse impact on human rights.

The Committee is concerned that the effect of the proposed amendments to the Interim Measures Act will be to limit the right to a fair hearing and fair trial and that the Statement of Compatibility in the Explanatory Memorandum does not address this issue. In fact, the Statement of Compatibility states that 'The Bill operates ...to extend the appointments of the current CJA and full-time Judge Advocate who contribute to the effective operation of the military justice system and the dispensation of military discipline...' (emphasis added). As discussed below, this statement reflects a commitment to the consistent conduct of fair trials and hearings.

As you point out, the Interim Measures Act reinstated the service tribunal system that existed before the creation of the Australian Military Court to sustain that system until such time as the Parliament decided how to permanently address the issue of the trial of serious service offences in the Australian Defence Force. The current arrangements provided for in the *Defence Force Discipline Act 1982* (DFDA) have enabled the continuation of the delivery of military discipline via a system of trials by service tribunal (post the High Court decision in *Lane v Morrison* [2009] HCA 29), which operates in an independent and impartial manner. The amendments in the Bill, which extend the appointments of the CJA and JA, are required to continue to support that system.

The Judge Advocate General, who must be a serving or former superior court judge, together with other Offices and appointments under the DFDA, combine to support the independence of the military justice system and the conduct of fair trials. For example, the establishment of the statutorily independent positions of the Director of Military Prosecutions, the Inspector General of the Australian Defence Force and the Registrar of Military Justice, together with the creation of (and statutory recognition that the Bill will give to) the position of the Director Defence Counsel Services and the abolition of convening authorities, have all ensured that military discipline is dispensed in a manner separate to, and independent of, the military chain of command.

Of note, in 2003 and 2005, legislative amendments were made to the procedure for the Judge Advocate General to appoint officers to act as JAs for courts martial and for nominating officers as DFMs, as opposed to these members being appointed by the chain of command. These amendments removed the involvement of convening authorities and substituted the Registrar of Military Justice in the appointment of JAs. This was to ensure that any actual or perceived influence by the chain of command in the appointment process was avoided and to facilitate fair and independent service tribunal trials. JAs are, therefore, appointed by the Chief of the Defence Force or a Service Chief on the nomination of the Judge Advocate General. Defence Force magistrates are also appointed on the nomination of the Judge Advocate General (currently Rear Admiral, the Honourable Justice Michael Slattery QC, RANR of the Supreme Court of New South Wales).

Importantly, all courts martial and Defence Force magistrates trials are conducted in accordance with rules of evidence, accused members are provided with independent legal representation at Commonwealth expense and convicted members have their convictions and punishments automatically reviewed to ensure they are in accordance with the law. A convicted person may also lodge a petition against their conviction or punishment and, in addition, can appeal their conviction to the Defence Force Discipline Appeal Tribunal (consisting of a panel of superior court judges), the Federal Court of Australia and, if leave is granted, to the High Court of Australia.

The presence and application of all these elements in the military justice system is an indication of the delivery of fair trials and hearings.

Moreover, the High Court of Australia has consistently found the system of trials by Service tribunal to be constitutionally sound.

As noted in the 2009 Report on the *Independent Review on the Health of the Reformed Military Justice System* (Sir Laurence Street AC, KCMG, QC and Air Marshal Les Fisher (Rtd)):

> *'The military justice system is delivering and should continue to deliver impartial, rigorous and fair outcomes; has a greater transparency and enhanced oversight; is substantially more independent from the chain of command; and is effective in maintaining a high standard of discipline both domestically and in the operational theatre'* (emphasis added).

These findings reinforce Defence's ongoing commitment to delivering impartial, rigorous and fair military justice outcomes and it is continuing its commitment in this regard.

The proposed amendments to the Interim Measures Act are consistent with, and ensure the right to a fair hearing and fair trial (supporting the military justice system). They are also consistent with the criteria of an independent and impartial tribunal as required by article 14(1) of the International Covenant on Civil and Political Rights (competence, independence and impartiality of a tribunal).

I trust that the above clarification addresses the Committee's concerns.

Yours sincerely

KEVIN ANDREWS MP

10 JUN 2015

The Hon Kevin Andrews MP
Minister for Defence

Reference: MC15-002255

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 18 June 2015 drawing to my attention the *Twenty-third Report of the 44th Parliament* of the Parliamentary Joint Committee on Human Rights, regarding the Defence Trade Controls Amendment Bill 2015.

For the new exceptions that have been included in the Bill, as the Committee notes, there are key elements of the exceptions that are solely within a defendant's knowledge. For the other elements of the exceptions listed in paragraphs 1.36 and 1.37 of the Report, although I concede that these elements may sometimes be within the Government's knowledge, they would definitely be within a defendant's knowledge after the defendant has ascertained, through their own compliance checks, whether the exception applies to their activity. Given the defendant's lower evidentiary burden of only needing to produce evidence that suggests a reasonable possibility that the exception applies, it would not be burdensome or unreasonable for the defendant to prove these elements with the information collected from their compliance checks.

These reversals are warranted and proportionate, considering the importance of the Bill's objective to strengthen national security by stopping proliferation-sensitive goods and technologies being used in conventional, chemical, biological or nuclear weapons programs. Suppliers, publishers and brokers of these goods and technologies must ensure that their activity falls within the relevant offence exception if they decide to proceed without a permit under the legislation. It is reasonable to expect that if the defendant has not undertaken appropriate compliance checks to establish whether the exception applies and does not possess the evidence to establish the exception, they may not be able to rely on the exception.

Although I consider that it is reasonable to reverse the burden for all elements of the relevant exceptions listed in paragraphs 1.36 and 1.37 of the Committee's Report, I have noted its concerns and, accordingly, will ensure that they are considered during the first review of the legislation conducted pursuant to section 74B.

Yours sincerely

KEVIN ANDREWS MP

30 JUL 2015

ATTORNEY-GENERAL

CANBERRA

MC15-000413

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 13 May 2015 regarding comments of the Parliamentary Joint Committee on Human Rights in the *Twenty-second Report of the 44th Parliament* concerning the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the Instrument).

Power of the Federal Circuit Court (the Court) to order vacation of premises
The Committee has sought further advice regarding the Court's ability to determine dates for tenants to vacate premises in relation to Commonwealth tenancy disputes in New South Wales (NSW). This engages the right to an adequate standard of living.

As the Committee points out, the Instrument applies the *Residential Tenancies Act 2010* (NSW), with some modifications, so that the Court can exercise jurisdiction in these matters. In particular, subsection 94(4) of the Residential Tenancies Act is modified in relation to long-term tenants to remove the minimum guaranteed 90 days to vacate premises after a termination order is made.

Unlike other residential tenancies in NSW, a long term tenant is provided greater rights, whereby the landlord may not issue a termination notice alone to effect termination of the leasing arrangement. A landlord must seek a termination order from the Court instead. In this way, it ensures that due process is required to be followed through the Court with the opportunity for a tenant to be heard.

The Court has been given the discretion to take all factors into account in determining a matter. Enabling the Court to take into account all relevant factors provides equity to both parties. The Committee has pointed out that this could result in an order being made for less than 90 days. Equally, the Court could order 90 days or more for vacant possession to occur. Ultimately, the Court has the discretion to decide what is reasonable and proportionate on a case by case basis in relation to an application to seek vacant possession of land.

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For example, tenants may be informed on an ongoing basis, months in advance, that termination of their tenancy will occur and vacant possession sought by a certain date. Other relevant factors that could be taken into account may include length of tenancy, size of the property, ability to relocate in a given timeframe, reason for vacant possession being sought or similar reasons.

Powers when executing orders made by the Court

The Committee has also sought further advice about the proportionality of powers granted to the Sheriff and Deputy Sheriff of the Court to execute orders made by the Court in relation to Commonwealth tenancy disputes. This engages the right to security of the person.

The object of the measures in section 10 of the Instrument is to enable the lawful execution of a warrant for possession as is permitted under NSW tenancy law. A number of safeguards have been built into the Instrument which clarifies the extent of a proportional response, should circumstances require it, on top of the basic powers set out in section 7A of the *Sheriff Act 2005* (NSW). The Committee has noted that despite these requirements, further safeguards should be put in place.

Sheriffs are responsible for the service and execution of all process of the Federal Circuit Court of Australia, as directed by the Sheriff (section 106, *Federal Circuit Court of Australia Act 1999*). While the Federal Circuit Court of Australia Act provides for Federal Circuit Court Sheriff's to execute Enforcement Orders, I understand that in practice Enforcement Orders would be executed by NSW Sheriff's Officers. NSW Sheriff's Officers are trained in use of force and must comply with NSW law including the Sheriff Act. Sheriff's Officers are subject to probation, internal and external training, on the job training and completion of a Certificate IV in Government (Court Compliance).

The Sheriff Act empowers a Sheriff's Officer to use such force as is reasonably necessary to enforce the writ or warrant for possession of land. Reasonable force is a well-established concept of law, with the principles set out in *Fontin v Katapodis* (1962) 108 CLR 177. Reasonable force is to mean that degree of force which is fair, proper, and reasonably necessary in the circumstances. Reasonableness generally means that the action taken was not excessive or disproportionate in the circumstances while necessity generally indicates a lack of any practicable alternatives to the action taken. At common law, a person is entitled to use reasonable force in self-defence or to protect another person where there is actual danger or a reasonable apprehension of immediate danger; to protect land or goods from unjustified interference; to remove a trespasser from land; and to recover goods from someone who has wrongfully taken and detained them. The safeguards in the Instrument essentially set out the common law.

In addition to the Instrument, Part 6 of the Residential Tenancies Act sets out various limitations as to the recovery of possession of premises. For example, section 120 makes it an offence to enter premises unless it is abandoned or given vacant possession, or unless the person is acting in accordance with a warrant, while subsection 121(4) of the Residential Tenancies Act provides that a warrant should be in the approved form and must authorise a Sheriff to enter specified residential premises and to give possession to the person in the warrant. This provides sufficient procedural checks prior to any warrant for possession being executed.

The requirements in section 10 of the Instrument broadly encompass the Committee's suggestions, listed in 1.488 of the Committee's *Twenty-second Report of the 44th Parliament*. In particular, where the Committee suggests that infliction of injury is to be avoided if possible, this would fall within the safeguard that the Sheriff or Deputy Sheriff must not use more force than necessary and reasonable to execute the warrant. There is nothing in the provisions that would remove liability for any unnecessary infliction of injury.

The combination of these various requirements ensures that the least rights restrictive approach will be taken by Sheriffs and Deputy Sheriffs in executing warrants for possession of land.

I trust that this information is of assistance to the Committee.

Yours faithfully

(George Brandis)

24 JUN 2015