# JUDGE ADVOCATE GENERAL

Australian Defence Force

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**Committee Secretary**
Senate Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

**DEFENCE LEGISLATION AMENDMENT (DISCIPLINE REFORM) BILL – JAG-ADF SUBMISSION**

1. I refer to your letter of 1 September 2021.

2. Rear Admiral His Honour Justice MJ Slattery, AM, RAN, my predecessor, expressed in the 2020 JAG Annual Report to Parliament a note of caution about one aspect of the proposals to amend the *Defence Force Discipline Act 1982* (DFDA). This cautionary note concerns s. 48A of the proposed legislation. I set out below the relevant paragraphs from his Report:

> **Cyber Bullying Offences and ADF Members**
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> 91. I express a note of caution about one aspect of forthcoming proposals to amend the DFDA as a result of the work of the SDIT. It is proposed to introduce into the DFDA a cyber bullying offence. A proposed s. 48A, would make it an offence for a defence member to use a social media service or relevant electronic service 'in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating another person'. The offence would provide a maximum punishment of imprisonment for two years and may be chargeable before summary discipline authorities.
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> 92. The closest provision to this proposal in Commonwealth legislation appears to be *Criminal Code Act 1995* (Cth) (Criminal Code) s. 474.17, which makes it an offence to use a carriage service in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive' and which provides for a penalty of up to three years imprisonment. The wording of s. 474.17 provides a more demanding test for criminal liability than the proposed s. 48A and consequently carries a higher maximum penalty. As a 'territory offence'[1] this offence is currently available for use in the discipline system.
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> 93. This proposed s. 48A offence requires no connection to the discipline of the Defence Force beyond the accused being a member of the Defence Force. This is exceptional. Other offences in the DFDA generally have either explicit connection to service in the Defence Force or have either a close civilian criminal law counterpart with equivalent penalties. But this proposed provision is not overtly connected to the performance of service in the Defence Force or to Defence property and it would more readily impose criminal liability on a Defence member for conduct in the general community than applies to other members of the general community.

[1] DFDA, s. 61

94. Most of the DFDA provisions impose criminal liability on a Defence member in the performance of Defence duties or in relation to Defence property, or in order to not to prejudice service discipline. But occasionally, the DFDA imposes on Defence member's criminal obligations without overt connection to Defence property, duties or discipline. For example, DFDA s. 33A creates an offence of assault occasioning actual bodily harm by defence members in a 'public place', without any other connection to service duty, property or discipline. But s. 33A has an exact counterpart (and with equivalent penalties) in the civilian law of the Commonwealth and of all States and Territories. DFDA s. 33A's congruence with its civilian legislative equivalents means that Defence members charged under that section are not being treated more harshly than other members of the community.

95. There may be good reason for drafting a broad cyber-bullying offence applicable to Defence members, either in their cyber communications between one another, or in a manner likely to undermine service discipline. But care should be taken before legislatively intruding into the otherwise private lives of Defence members by imposing obligations on their private behaviour stricter than those required of other Australian citizens, and then giving summary discipline authorities the power to enforce those obligations. Alternatively, a provision equivalent to Criminal Code s. 474.17 could be included in the DFDA, but it would attract a more serious penalty and be even less suitable for trial by a summary discipline authority.

3. I agree with and endorse the reasoning of my predecessor.

4. In addition I note that cyber offences often involve issues of complexity in terms of the continuing nature of the offence and duplicity in charging, i.e. particularising which act or acts actually substantiate a charge so the Defence Force member is aware of exactly what offence it is alleged the member has committed. It is proposed in this bill that such charges will be heard by a summary authority.

5. In the military discipline system summary authorities are military officers who are not legally qualified. The legal complexities referred to above can arise with any offence involving the use of the internet. The disposal of such cases, even on a plea of guilty, involves difficult legal considerations beyond the reasonable competence of lay summary authorities. These difficulties will be likely compounded as the drafting of the charges is invariably undertaken by non-lawyers in the summary discipline system.

6. Further, the potential for unfairness to members, by this amendment, is exacerbated by the intention to include the new offence on the Schedule 1A list, which means for the member there is not right of an up-front election for hearing by a Defence Force Magistrate. The reason for the existence of a List of Schedule 1A offences is to enable a summary authority to efficiently deal with charges concerning minor infractions of discipline. Section 48A is not such an offence.

**JT Rush**

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8 September 2021