

**A SUBMISSION**  
**ON THE PROPOSED DEFENCE LEGISLATION AMENDMENT BILL 2006**  
**TO THE SENATE STANDING COMMITTEE**  
**ON FOREIGN AFFAIRS, DEFENCE AND TRADE**

**Background**

On page two of *The Australian* dated 19<sup>th</sup> September 2006, I read that the *Defence Legislation Amendment Bill 2006* proposes to replace the current system of trials by Courts Martial and Defence Force magistrates and stated that it 'also intends to simplify summary procedures'.

This was supported by the Outline of the Defence Legislation Amendment Bill 2006 which states 'the subsequent changes to the DFDA will simplify summary procedures', however I was able to find only four references to summary authorities in that document. These were in paragraphs 53 (Summary Authority Rules), 54 (JAG responsibility for rules), 56 (Rules of the Australian Military Court) and 103 (new definition of 'service tribunal').

I clearly misunderstood the words 'simplify summary procedures' and so some aspects of my email to the Committee Secretary (which has been circulated to the committee members as a preliminary submission), may contain topics which the *Defence Legislation Amendment Bill 2006* is not actually going to address.

Having said that, there are still some issues which I wish to raise.

**Aim**

The aim of this submission is to bring to the Senate Standing Committee's attention issues which I believe are important enough to be considered when finalizing the wording in the subject Amendment Bill.

**References and Abbreviations**

The reference documents I have used in preparing this submission are the Discipline Law Manuals Volumes One and Two (Australian Defence Force Publication 6.1.1). The use of (E) behind an Army rank means equivalent rank in the other two services.

**The Issues**

The issues will be presented in the following sequence:

- a. members of a military jury who have never been Summary Authorities,
- b. qualifications and experience of Summary Authorities, and
- c. the training liability to qualify all Summary Authorities.

### **Members of a Military Jury who have never been Summary Authorities**

The proposed Defence Force Discipline Act section 122 will require a military jury to consist of six members with at least one holding a rank not lower than Lieutenant Colonel (E). The proposed Defence Force Discipline Act subsection 123(1) will state that in order to be eligible as a member of a military jury, a juror must be an officer of not less than 3 years service and at a higher rank than the Defendant. If the Defendant is not an officer, the proposed Defence Force Discipline Act subsection 123(2) will specify that a juror must be an officer or a Warrant Officer Class One (E) for a period not less than 3 years service and at a higher rank than the Defendant.

The Bill is specific when it comes to ranks. The Chief Military Judge is to be a Brigadier (E), the Military Judges are to be Lieutenant Colonels (E), military juries are to have at least one Lieutenant Colonel (E) and if the Defendant is not an officer, a military jury may include Warrant Officers Class One (E).

The absence of specific ranks for the other officers eligible to be members of a military jury means that in a trial by a Military Judge and Jury, there is the possibility that it could consist of a Lieutenant Colonel (E) with Captains (E) and Lieutenants (E) as the other members.

The inclusion of junior officers as part of such an important decision-making group is problematic. There are no current courses, postings, appointments or professional development considerations which have membership of a military jury as a pre-requisite and the careers of those officers who were never members would therefore not be disadvantaged because of it.

The practice could disadvantage the Defendant who effectively has his or her guilt decided by superiors who are not even sufficiently senior to have ever been appointed as Subordinate Summary Authorities. I accept that these officers would bring youth and enthusiasm to a jury; however, it is military experience and (dare I say it), credibility that a Defendant should expect from those whose responsibility it is to deliver justice. This is why only the Warrant Officers Class One (the most senior of the Other Ranks), and with three years in that rank are to be permitted to be members.

Undoubtedly at the commencement of these trials by Military Judge and Jury, the Military Judge would address members of the jury on all aspects of the decisions that have to make and the process of how they determine a Defendant's guilt or innocence. If this is the jurors' preparation for a trial, then a case exists to allow Warrant Officers Class Two (E), Sergeants (E) or even Corporals (E) to also become members of a military jury. I believe that the reason this has not been considered may well be due to their lack of an appropriate level of seniority, military experience and credibility to make decisions on military justice matters.

These reasons apply equally to Captains (E) and Lieutenants (E).

There is also the potential for these junior officers to be influenced or even dominated by the more senior officer and their votes of Guilty or Not Guilty, may be based on the views held by the Lieutenant Colonel (E).

I believe that the membership of a military jury should be limited to officers holding a rank that is not lower than Major (E) and while I would like to suggest the addition of “who are holding the appointment of, or have previously been appointed as, a Summary Authority,” the subject of competence needs to be addressed.

### **Competence of Summary Authorities (and therefore the Potential Jurors)**

The Defence Force Discipline Act was introduced to the Australian Defence Force in July 1985 and since then, those officers appointed as Summary Authorities have never been trained, assessed on an appropriate course of training and then deemed competent to conduct a service tribunal.

This has placed the officers of our defence force in the unenviable position where they have been appointed and authorised by a superior to conduct Summary Tribunals, yet have been denied the appropriate training necessary for them to carry out the responsibilities of those positions. It effectively means that, in the absence of a suitable level of assessed competence, they have had to give it their ‘best shot,’ often heavily based on advice from their warrant officers who have been trained and assessed in the application of the Defence Force Discipline Act.

Members of the public have a reasonable expectation that, when the family car is having the brake pads replaced, the person carrying out that work has been trained, assessed and deemed to be competent by a suitably qualified Subject Matter Expert and is not just giving the brake pad job his or her ‘best shot’. There would be a similar expectation that the driver of the local school bus has also received appropriate training, assessment and has been deemed competent rather than giving the trip to school his or her ‘best shot’.

No one in the Australian Defence Force would expect an unqualified member to carry out the duties of a Pay Clerk or a Medical Assistant and certainly would not accept being administered or treated by them. It is equally unacceptable for Summary Tribunals to be conducted by officers who have not been trained, assessed and deemed competent.

### **Training**

There are an estimated 800 officers in the Australian Defence Force who are presently holding Summary Authority appointments and the task of ensuring that each has the requisite Skills, Knowledge and Attitude (SKA) to conduct a Service Tribunal must be addressed.

An appropriate Summary Authority course would require duly qualified instructors holding Certificate IV in Training and Assessment (in accordance with Defence’s Registered Training Organisation status), to deliver a national program of training and later conduct assessment of the trainees. This would require classes of 10 with a total of 80 classes in order to train and assess these 800 incumbents.

## **Assessment**

The officer trainees would be assessed as either a Subordinate Summary Authority, a Commanding Officer or a Superior Summary Authority depending on their appointment. The only significant differences between the three authorities are the ranks of the Defendant and the punishments available, so the qualification would only have to be gained once. An Exercise 'Summary Proceedings' conducted with 10 trainees in each class would allow one trainee to be assessed as the appropriate Summary Authority while the other nine role play the positions of Defending Officer, Prosecuting Officer, Defendant, Orderly, Recorder, two witnesses for the prosecution and two for the defence.

There would be no easy guilty pleas or referrals to a higher authority so that each trainee would have to put all of the training into practice. Each exercise scenario would have to be different from the others used by the class so that one trainee cannot be deemed Competent by simply repeating the decisions made during a preceding Summary Tribunal in which he or she played a role. There would be a range of charges, objections, evidence, witnesses, mitigation, and Defendant's prior convictions so that all the trainees experience the real life situations which occur during these tribunals.

A trainee who, based upon the evidence presented, arrives at the incorrect finding of Not Guilty (therefore no punishment, no conviction and no opportunity for a retrial), would be deemed Not Yet Competent and would require to be retrained and then reassessed. The same would apply for an incorrect finding of Guilty when the evidence presented should have resulted in a Not Guilty result.

Every year, approximately one third of the Summary Authorities are posted and while some would move to another Summary Authority position, there would be a significant annual training liability generated by those who have recently been promoted to Major (E) as well as others who have never appointed as a Summary Authority and therefore have never been given the training.

## **Pool of Jurors**

This suggested training and assessment solution would produce 800 officers with the requisite SKA, the practical exposure to the examination, cross examination, re-examination of witnesses, objections, mitigation and result in their demonstrated competence to decide guilt or otherwise, based on the evidence provided to them. These are critical skills for a member of a military jury.

It is not suggested that the Standing Committee become involved in the training of Summary Authorities; however, the above solution has been included to indicate the amount of work required to address the lack of competence in our current Summary Authorities. It also highlights the unfairness of allowing Captains (E) and Lieutenants (E), who are not even considered sufficiently senior to hold Summary Authority positions, and most certainly have not received the appropriate level of training, to become members of a military jury.

While I believe that this level of experience, albeit training based, is the minimum that a member of a military jury should possess, the realities are that the Summary Authorities currently do not receive this type training, or anything like it. This is the reason that I have stepped back from suggesting that a member of a military jury should be, or have previously been appointed as, a Summary Authority.

### **Proposed Amendment – Juror Eligibility**

The minimum rank for members of a military jury must be Major (E), to ensure that experienced officers participate in Service Tribunals as the decision makers.

I respectfully request that the Committee amend the proposed Defence Force Discipline Act subsection 123(1) to include the additional eligibility requirement for an officer to become a member of a military jury, **to be not lower than the naval rank of lieutenant commander, or the equivalent ranks of major or squadron leader**. I leave the specific wording to those experienced in that field.

### **Conclusion**

In placing this submission before the Committee, I have provided the background to the current situation and a realistic solution to the one area of the bill which, I believe, requires an additional amendment before being placed before the Senate.

Undoubtedly by the time this reaches you, the subject of junior officers on military juries would have already been brought to your attention by others who have a commitment to the improvement of our military justice system.

If this submission requires any clarification or you consider it necessary, I am willing to fly to Canberra at my own expence to address members of the Senate Standing Committee personally.

*(Original Signed By)*

**DOUGLAS McDONALD**

29<sup>th</sup> September 2006