



JUDGE ADVOCATE GENERAL

Australian Defence Force

Department of Defence, RGC-2-28, CANBERRA ACT 2600

2005-1057298
JAG 213/06

The Secretary

Senate Foreign Affairs Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Secretary

SUBMISSION ON THE PROVISIONS OF THE DEFENCE LEGISLATION AMENDMENT BILL 2006

1. Thank you for your letter of 22 September 2006.

Chief of Defence Force commissions of inquiry

2. As I noted in my Submission to the Senate Foreign Affairs Defence and Trade References Committee Inquiry into the Effectiveness of Australia's Military Justice System (MJJ), the legislative provisions for the Judge Advocate General's (JAG) report to Parliament is limited to the operation of the *Defence Force Discipline Act 1982* (DFDA) and related legislation.¹ The JAG has no responsibility for the military inquiry system nor the administrative action system. I did raise for the Committee's consideration whether, consonantly with the principle of civilian judicial oversight over the military discipline system, the JAG might exercise some general supervisory oversight of the military justice system as a whole by way of an annual report to Parliament through the Minister.² This suggestion has not been taken up.

3. In the absence of a statutory responsibility for oversighting or reporting on the administrative inquiry system, I do not consider it appropriate that I comment extensively in connection with the provisions to establish the Chief of Defence Force commissions of inquiry. The observations contained in my Annual Report for 2005³ were designed principally to address the issue of the undesirability of members of the judge advocates panel and the Deputy Judge Advocates General performing those tasks. In that context, however, I did refer more generally to the difficulties of using serving judicial officers to conduct administrative inquiries.

Classes of offence provisions

4. Further to my submission of 19 September 2006, I do, however, also wish to comment on the operation of the classes of offence provisions in the Bill. The scheme of the Bill is to create three classes of offence. The most serious are prescribed as class 1 which can only be tried by military judge and jury. Class 2 offences, comprising those offences so prescribed, together with offences that do not fall within class 1 or class 3, are to be tried by military judge and jury unless the accused elects trial by military judge alone. Class 3 offences, comprising offences so prescribed, together with those offences with a maximum punishment

¹ DFDA s.196A(1).

² Paragraph 33 of my Submission to the MJJ.

³ Paragraph 59 et seq.

of not greater than five years imprisonment (and not prescribed to fall within class 1 or class 2) are to be tried by military judge alone unless the accused elects trial by military judge and jury.

5. The explanatory memorandum⁴ suggests that minor territory offences will fall into class 3. The Bill does not achieve this, given that the proposed Schedule 7 effectively places all territory offences into either class 1⁵ or class 2⁶.

6. I am concerned that the operation of proposed section 132A(3) is such that:

- a. There is no option for the Director of Military Prosecutions (DMP) to refer class 3 offences for trial by military judge and jury; and
- b. While the default position under the section is one of trial by military judge alone, there is no limitation on the maximum sentence that may be imposed.

7. One might have expected that if the default position was one of trial by military judge alone, this would be accompanied by a corresponding limitation on the maximum sentence available on conviction. This would be analogous to the situation in the civil courts where an indictable matter is referred for summary trial. Such an arrangement would offer some incentive for the accused to opt for the more administratively convenient trial by military judge alone (in that the sentencing powers would be less than on trial by military judge and jury). If the DMP were given a corresponding right to require that the matter proceed before military judge and jury (analogous to proceeding in the civil courts on indictment), then serious class 3 offences could be referred for trial by military judge and jury such that the maximum punishment would appropriately be available on conviction.

8. In my view these provisions should be reconsidered.

Yours sincerely



THE HON JUSTICE L.W. ROBERTS-SMITH
Major General
Judge Advocate General - Australian Defence Force
RGC-2-28

Tel: (02) 6266 8813; Fax: (02) 6266 8969

22 September 2006

⁴ Paragraphs 32 and 36.

⁵ Items 96, 98 and 100.

⁶ Items 97 and 99.