



Inspector General – Australian Defence Force

Department of Defence, IGADF, 91 NBA-2-44 Canberra ACT 2600
Tel: 02 624 36301 Fax: 02 624 36338

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Dr Kathleen Dermody
Secretary
The Senate Standing Committee
on Defence, Foreign Affairs and Trade
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody,

DEFENCE LEGISLATION AMENDMENT BILL 2007

1. Thankyou for the opportunity to provide some brief comments on the Defence Legislation Amendment Bill 2007 (DLAB 07) as part of the inquiry being conducted by the Senate Standing Committee on Defence, Foreign Affairs and Trade.
2. The changes sought by this Bill represent some of the most important to be made arising from your Committee's 2005 review of the ADF military justice system. This is because the Bill is principally concerned with what might properly be regarded as the 'backbone' of the system, that is, the arrangements for dealing with military justice at the summary level. It is the effectiveness of arrangements and procedures at this level that will be pivotal to the maintenance of discipline in the ADF on the one hand and the most visible means by which individual members' rights are protected, on the other.
3. While the higher levels of military tribunal are clearly important, relatively few ADF members will ever find themselves involved with the military justice system at this level. On a day to day basis the administration of military justice at the summary level will routinely involve many more members. In 2006, for instance, over 2000 summary trials were conducted across the ADF whereas only 54 Defence Force Magistrate/courts-martial trials were held. The summary system must therefore not only be user friendly from an administrative point of view, but must also engender confidence in those subjected to it that they will be dealt with fairly.
4. Although the feedback from ADF members received by my office through its inquiries and audit program indicates that, generally, most ADF members believe that the present summary system is fair, there is a common concern over its apparent complexity, the time it takes for a matter to be finalised, and the heavy training burden necessary for the system to function as intended. The thrust of the DLAB 07 towards addressing these complexities and simplifying the system is therefore a most

welcome initiative that is likely to have a very positive effect not only on the administration of justice in the ADF but also on the perceptions of members that use the summary system or who become subject to it.

5. The new summary system proposed in DLAB 07 will introduce some major reforms to the present arrangements. These include simplified rules of evidence, an unlimited right of appeal from summary proceedings to the Australian Military Court (AMC), a new role for reviewing authorities, an expanded right of election for trial by a higher tribunal (the AMC) an extension of the jurisdiction of summary authorities to deal with ranks up to two star equivalent and an extension of the Discipline Officer scheme to deal with junior officers.

6. Of these proposed changes one that is particularly welcome is the simplification of the rules of evidence for summary authorities. While in the past valiant and no doubt, sincere, efforts were made by summary authorities to comply with and apply the formal rules of evidence, this was obviously always going to be a difficult task for lay persons. This change will bring a much needed improvement with the main criterion now simply being one of relevance and a relaxation of the application of strict rules. While this will clearly be of benefit to the administrators of the summary system, it is important that this simplification not be seen as diluting the rights and protections of accused persons. The new arrangements will ensure those rights are preserved by introducing an unlimited right for a member to appeal their conviction or punishment to the AMC for adjudication by a legally qualified military judge. Perhaps more indirectly, the rights of accused persons are also enhanced by simplification of the summary process in that any tendency to avoid due process in favour of rougher or work-around disciplinary solutions because of perceived complexity of the normal process is likely to be lessened.

7. Another important change both from the member's point of view and that of the ADF is the proposed right of an ADF member to elect to be tried by the AMC, rather than a summary authority. This will allow a member to choose to be tried by a military judge who is independent of the member's chain of command. The right of election is also important for complex charges as they may perhaps be more appropriately tried in a formal judicial environment and in accordance with the formal rules of evidence.

8. Were this right to be completely discretionary on the part of the 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 appropriate, in my view, 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 right to elect trial by the AMC and must be dealt with by a summary authority at first instance. This recognises the imperative that discipline must be maintained within Australia and overseas, at peace and at 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 appears to me to be a reasonable compromise which 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.

9. The requirement for all summary proceedings to be reviewed by a reviewing authority in order to identify jurisdictional errors in punishments or orders or to approve the more serious punishments or orders prior to them taking effect provides another safeguard against a summary authority acting outside of their jurisdiction. Such a review should also act as an efficiency measure by relieving the AMC of the need to have to deal with many basic jurisdictional errors.

10. The extension of summary authority jurisdiction to deal with all ranks up to two star equivalents will provide a demonstrable benefit to the overall maintenance of discipline for the ADF. Under the current regime all officers above the rank of Lieutenant Commander equivalent must appear before a Defence Force magistrate or courts martial even for minor lapses in discipline. This extension of jurisdiction for summary authorities to deal with such minor incidents will ensure that the AMC is not burdened with basic issues but rather can fulfil its role as the ADF's senior tribunal.

11. One of the most widely used and commended features of the present discipline system according to feedback provided to my office has been the application of the Discipline Officer scheme. It is well regarded because it is relatively informal, appropriate matter can be disposed of quickly and it does not create a permanent record. Calls for expansion to more senior levels have been gaining momentum since change was recommended by Mr Burchett in his 2001 review. It is therefore pleasing that the Bill makes provision to expand the application of the Discipline Officer scheme to junior officer ranks. While the intent was and remains for this scheme to apply to non-commissioned officers, additional work required to establish appropriate punishment limits for these ranks means that the application of this scheme to non-commissioned officers will now need to be effected at the first opportunity for subsequent legislative amendment. I expect that the expansion of this scheme to include all ranks up to Captain (Army) equivalent is likely to be well received by the ADF.

12. While the preceding comment has been limited to some of the more demonstrable changes, the Bill includes a range of less prominent but useful amendments which collectively should contribute to improving the summary justice system overall. One such welcome improvement is the differing reporting requirements following a conviction at summary level rather than at the AMC. With the enactment of this Bill a summary conviction will no longer be a 'reportable' conviction when a member leaves the ADF. Summary convictions will only be relevant for internal ADF purposes. This reflects the role of the both summary tribunals and that of the AMC. It is the AMC that will deal with matters of a more serious and complex nature which should rightly be noted on a members record at their discharge.

13. The summary justice system is a complex matter comprising many interlocking issues. It is a credit to those involved that a coherent scheme for amendment has been able to be produced in the relatively short time available. Inevitably there are likely to be some aspects that will need to be revisited in the light of experience gained through early application of the new system. It is not always possible to foresee what those issues may be during the process of drafting legislation for instance, the unavoidable omission of non-commissioned officers from the Discipline Officer scheme as previously mentioned. However, there is nothing in the

Bill as it stands that in my view ought to impede its passage to enactment at the first opportunity. Given the imminent commencement of the AMC and its intended role in the summary system it is in the interests of the ADF military justice system that its new summary procedures be introduced as soon as possible.

Yours sincerely



Geoff Earley, AM
Inspector General ADF

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Tel: 02 624 36303

E-mail: Geoff.Earley@defence.gov.au

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