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By email to arc.can@ag.gov.au

Dear Mr Neave

Defence thanks the Administrative Review Council for the opportunity to contribute to the Council’s Inquiry into Judicial Review in Australia.

The purpose of this submission is to assist the Council by providing a Defence perspective to the following issues which relate to the discussion questions in the Council’s Consultation Paper dated April 2011:

- the rationale for, and value to Defence of existing Defence specific statutory review schemes (discussion question 24);

- the background to why statutory decisions of the Governor-General which are fundamental to the administration of the Defence Force and the conduct of military operations should continue to be excluded from the application of the Administrative Decisions (Judicial Review) Act 1977 (discussion question 10);

- why Defence believes that decisions relating to the discipline of the Defence Force and procurement of Defence materiel are not the same as other “administrative” decisions and are therefore, categories of decision for which the continued exclusion from general statutory review schemes is justified (discussion questions 9 and 11); and

- the need for qualifications to a generalised obligation to give reasons for all administrative decisions (discussion questions 15 and 17).
The Benefits of Existing Defence Specific Statutory Review Schemes

Defence currently administers a number of Defence specific statutory merits review and appeal schemes including:

- the scheme established by Part 15 of the Defence Force Regulations 1952 for members of the Defence Force to seek redress of grievances over decisions relating to their service;

- the Defence Honours and Awards Appeals Tribunal established under Part VIIIC of the Defence Act 1903.

The right to seek redress of a grievance is a derivative of the right to petition the monarchy and has been recognised in the Defence Force Regulations since 1985. Maintaining efficient and fair, internal dispute resolution systems that operate to preserve the trust that members have in the administration and command of the Defence Force, is necessary for strong morale, good order and retention within the Defence Force. It is therefore necessary to have a means of quick, efficient and fair resolution of disputes, through command, over decisions relating to service in the Defence Force. In addition, the involvement of the command structures ensures that grievances relating to service are resolved by officers with service experience who understand the requirements of the Defence Force.

Consistent with these overarching policy objectives, an updated regime for seeking redress was inserted into the Defence Force Regulations (Part 15) in 2008 by the Defence Force Amendment Regulations 2008 (No. 1) as a response to recommendations (including recommendations addressed at broadening the scope of matters about which a member may submit a grievance, reducing delays in the resolution of grievances and enhancing procedural fairness) from:

- the Senate Foreign Affairs, Defence and Trade Reference Committee’s 2005 inquiry into the effectiveness of Australia’s military justice system; and

- the joint review initiated in 2004 by the Office of the Commonwealth Ombudsman and Defence into the Australian Defence Force Redress of Grievance System.

The other significant area of decision-making which invokes deep emotions and can, by its nature, generate demand for independent review is the granting of defence honours and awards. The fair and just recognition of courage, sacrifice and leadership in military service is not only expected by the people of Australia but also vitally important for engendering and preserving the morale and devotion to duty that is expected from the Defence Force.

The Governor-General has certain prerogative powers in relation to defence honours and awards under prerogative instruments of the Crown, for example, the power to award certain defence service medals on the recommendation of the Minister or Chief of the Defence Force or their delegates and the power to cancel the award of certain medals. Those decisions are not subject to the Administrative Decisions (Judicial Review) Act.

However, last year, the Defence Legislation Amendment Act (No. 1) 2010 inserted a new Part VIIIC in the Defence Act to formalise an avenue for members of the Defence Force, former members, next of kin or others to obtain review of ministerial, departmental and Defence Force decisions concerning eligibility for specified defence honours and awards in recognition of service from the beginning of World War II (3 September 1939) onwards.
The current constitution of the Defence Honours and Awards Appeals Tribunal ensures that the functions of the Tribunal are performed independently, but with understanding of the nature and differing types of military operations and the psychology of duty in military service.

The Defence Honours and Awards Appeals Tribunal has received six applications for the review of reviewable decisions since the commencement of Part VIIIC on 5 January 2011.

The second function of the Defence Honours and Awards Appeals Tribunal is to inquire into matters concerning honours or awards for eligible service in accordance with Division 4 of Part VIIIC. When the Minister directs the Tribunal to hold an inquiry into a matter under section 110W of the Defence Act, the Tribunal must hold an inquiry into the specified matter and produce a written report for the Minister on the outcomes of the inquiry. The report to the Minister may include any recommendation that the Tribunal considers appropriate in relation to the inquiry.

Statutory decisions of the Governor-General which are Fundamental to the Administration of the Defence Force and the Conduct of Military Operations

The Administrative Decisions (Judicial Review) Act explicitly excludes decisions of the Governor-General from judicial review under that Act. The Governor-General is empowered with specified decision-making powers under Defence legislation. Some key examples which are fundamental to the administration of the Defence Force and the conduct of military operations are listed below.

- Powers under the Defence Act to call out the Defence Force to protect the Commonwealth, States and Territories against domestic violence.

- Powers under the Defence Act to call out the Reserves in circumstances of defence emergency or other contingency as set out in section 50D.

- Powers under the Defence Act to appoint the Chief of the Defence Force, Vice Chief of the Defence Force and the Service Chiefs.


Defence submits that the Governor-General’s statutory powers under the Defence Act to call out the Defence Force (including the Reserves) are not an appropriate subject for review under the Administrative Decisions (Judicial Review) Act. The exercise of those powers is an essential duty of the Executive to take action to use the Defence Force to protect the nation and in this respect, has close parallels with other prerogatives of the Crown. The provisions in Parts III and IIIA AAA operate to provide a high level statutory recognition of what is involved in performing that duty, including the role of cooperation and communication between the Commonwealth and the self-governing States and Territories in the conduct of such operations.

Decisions of this nature require certainty and finality from the moment they are made. The application of the Administrative Decisions (Judicial Review) Act to such decisions would...
undermine Government’s ability to swiftly respond to emerging threats to stability in the interest of national security.

Similarly, the statutory powers of the Governor-General to appoint and promote officers within the Defence Force are intimately related to the prerogative powers of command. The discretion that is inherent in the exercise of those powers is essential to the operational effectiveness of the Defence Force. It recognises the imperative of maintaining leadership and discipline in the Defence Force, especially on operations which can entail hazards and stresses of kinds that are beyond the experience of civilian life in Australia. Enabling statutory avenues for judicial intervention into the appointment and promotion of officers who make up the command structure risks adversely affecting the ability of the Defence Force to command the loyalty and devotion to duty of subordinates, including in circumstances of extreme danger.

**Decisions relating to the discipline of the Defence Force**

Defence is currently working with the Attorney-General’s Department on a proposal for a new Military Court of Australia. That court is proposed to be a federal court established under Chapter III of the Constitution with original jurisdiction to try serious service offences under the Defence Force Discipline Act. It will permanently replace the interim measures in the *Military Justice (Interim Measures) Act (No. 1) 2009* and *Military Justice (Interim Measures) Act (No.2) 2009*, which re-established the pre-existing system of courts martial and Defence Force magistrates following the decision of the High Court of Australia in *Lane v Morrison* (2009) 239 CLR 230 in relation to the Australian Military Court.

As the proposed new military court will, if established by Parliament, exercise the judicial power of the Commonwealth, it would not be appropriate for the Administrative Decisions (Judicial Review) Act to apply to its decisions. The decisions of the proposed military court will be subject to appeal.

Under the proposed new military justice system, less serious service offences (which comprise the vast majority of service offences) will continue to be dealt with by summary authorities. In addition, courts martial and Defence Force magistrate will have jurisdiction in circumstances where the proposed new military court determines that it is necessary for it to hear a matter overseas but is unable to do so (for example, where the host nation refuses to consent to the deployment of the military court).

The armed forces require a degree of training, discipline and unit cohesion that has no parallel in civilian society. Its members must develop and maintain, during peacetime, character traits and standards of behaviour and performance which ensure the effective and controlled application of force on the battlefield – a battlefield which may be characterised by confusion, danger, hardship, dispersion and isolation. The military discipline system (including the role of summary authorities, courts martial and Defence Force magistrates) exists to promote these traits and standards of behaviour in members of the Defence Force.

The armed forces are disciplined forces which are hierarchically organised. Military discipline is, and always has been, an essential aspect of command of the Defence Force. The offences contained in the Defence Force Discipline Act exist only to facilitate discipline within the Defence Force and do not have broader application outside of the military environment. In this context, decisions made under the *Defence Force Discipline Act 1982*
should continue to be excluded from the application of the Administrative Decisions (Judicial Review) Act.

**Decisions Relating to the Procurement of Defence Materiel**

An example of an area of Government procurement for which enabling judicial review under the Administrative Decisions (Judicial Review) Act would have negative outcomes for Government is the procurement of Defence materiel. Enabling statutory avenues for the review of decisions relating to the procurement of Defence materiel (which includes both the tender and contract management phases of the procurement life cycle) would:

- further impact on the extent of the Government’s existing freedom to respond quickly to new capability developments and contract to achieve crucial military capability objectives, (beyond the impact caused by the important regulatory requirements of the Financial Management and Accountability legislative framework); and

- contribute further to schedule slippages and increased costs on existing projects which would affect the Defence Materiel Organisation’s ability to deliver against Defence’s capability requirements on time and on budget, thereby compromising Defence operations and the Australian Government’s ability to meet national security objectives.

The Defence Materiel Organisation equips and sustains the Defence Force through the acquisition and sustainment of equipment. In 2010-11 the Defence Materiel Organisation will spend more than $10.4 billion acquiring and sustaining military equipment and services.

Support to operations remains the highest priority for the Defence Materiel Organisation.

The Defence Materiel Organisation's Major Projects Report 2009-2010 indicates that keeping to schedule continues to be a challenge. Schedule slippages (ie delays in achieving delivery deadlines throughout the course of a project) affects the provision of timely support to operations and directly results in significant budget increases. The Defence Materiel Organisation's analysis of the relationship between schedule and cost has found that schedule slippage of 1-2 years, either in the decision to approve a project or in the delivery of the project itself, can increase the project budget by around 60% or more. This analysis indicates that any development in policy relating to judicial review that has the potential of contributing to schedule slippages would be detrimental to the Defence Materiel Organisation's ability to deliver against Defence's capability requirements on budget.

A significant component of the Defence Materiel Organisation’s workload in support of operations is comprised of “rapid acquisitions” or “urgent operational procurements”. These procurements are generally initiated at short notice to satisfy the operational requirements of deployed Defence Force elements. Schedule slippages on rapid acquisitions are unacceptable and the framework within which such Government procurements are undertaken must be able to accommodate these operational realities.

There is a well developed body of law for both tender process challenges and the enforcement of contractual rights and there does not appear to be any compelling policy reason to apply the Administrative Decisions (Judicial Review) Act to procurement matters just because one party to the procurement is the Commonwealth. In this context, Defence agrees that Government procurement decisions are not characterised as “administrative decisions” which
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attract the application of the Administrative Decisions (Judicial Review) Act. Defence would support explicit clarification of this position in the legislation. Defence notes that the existing law relating to tender process complaints was accepted by the United States as meeting our obligations under the Australia-USA Free Trade Agreement and did not require supplementation by changes to judicial review legislation.

Defence submits that private law remedies, including alternative dispute resolution mechanisms, are more appropriate for disputes relating to Government procurement. The Defence Materiel Organisation is committed to maintaining a business-like and commercial relationship with industry to deliver the acquisition and sustainment requirements of the Defence Force. A more business-like Defence Materiel Organisation will work with industry to reduce overheads throughout the entire procurement system. Given the complex nature of defence procurement (for example, the technical complexity and the number of years that projects can span), a productive relationship between the Commonwealth and its Defence contractors is essential to the achievement of delivery targets. For this reason, the Defence Materiel Organisation is committed to a more strategic approach to dispute management, including the incorporation of alternative dispute resolution mechanisms in defence related contracts.

**A Generalised Statutory Obligation to Give Reasons for All Administrative Decisions**

Defence notes recommendation 10.2 in the Report by the Attorney-General’s Department’s Access to Justice Taskforce, entitled *A Strategic Framework for Access to Justice in the Federal Civil System*, and the statements in support of that recommendation contained in the Report. Defence would support recommendation 10.2 of the Access to Justice Taskforce’s Report, subject to the proviso, that any Charter of Good Administration developed for all Commonwealth agencies would need to acknowledge the existence of circumstances where there is a need to protect information, the disclosure of which would be contrary to the public interest for reasons such as that it would prejudice the security, defence or international relations of Australia.

It is hoped that this submission assists the Administrative Review Council in its inquiry into judicial review of administrative action in Australia.

Yours sincerely

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