

LEGAL SERVICES

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MEMORANDUM

September 21, 2015

SUBJECT: Code of Military Justice: Primary jurisdiction issues
(CSHB 126 (); Work Order No. 29-LS0473\I)

TO: Representative Gabrielle LeDoux
Attn: Lisa Vaught

FROM: Megan A. Wallace
Legislative Counsel

You have asked for an opinion related to primary jurisdiction over offenses under the above-referenced bill. At your request, I am providing this opinion on an expedited basis.

As previously discussed and addressed in my August 10, 2015 memorandum, the above-referenced bill contains criminal acts that are duplicative and, in some instances, inconsistent with existing state law, namely AS 26.05.611, AS 26.05.614, AS 26.05.620, AS 26.05.621, AS 26.05.622, AS 26.05.623, AS 26.05.624, AS 26.05.625, and AS 26.05.631. Accordingly, criminal acts that fall under these offenses may be punishable by the state under both the Code of Military Justice ("the code") and AS 11. In the bill, AS 26.05.400 provides that "[a] proper civilian court has primary jurisdiction of an offense not defined by this chapter when an act or omission violates both this chapter and local criminal law, foreign or domestic." Despite providing that the civilian court has primary jurisdiction when an act or omission violates both the code and local criminal law, the provision remains ambiguous as it only gives the civilian court primary jurisdiction over offenses "not defined by this chapter." Therefore, it may be difficult to determine who has primary jurisdiction as provided under AS 26.05.400 in the bill.

The ambiguity created by the added overlapping military offenses and state crimes should be clarified, especially given that the bill now makes the code applicable to members of the militia at all times. Accordingly, even when acts are committed outside of state military service, the conduct of the members of the militia is subject to the code. While I would encourage you to discuss these issues with the Department of Law, as they will need to make the determination of primary jurisdiction on a case-by-case basis, the following are a few revision options to help clarify the jurisdictional issue:¹

¹ It is my understanding that you would like the bill drafted so that the state is given primary jurisdiction over certain offenses currently included under the code, including sexual assault cases. As such, the options are presented accordingly.

1. The offenses noted above that are inconsistent with existing state law may be removed from the bill. If these offenses are removed from the bill, the state will unquestionably retain primary jurisdiction over these offenses, as defined under existing state law.
2. AS 26.05.400 may be revised to state that a civilian court has primary jurisdiction over any criminal act that violates both the code and local criminal law. Because certain sexual assaults and drug offenses are defined by the bill as "military offenses" it is unclear who has primary jurisdiction of a military offense defined by the bill that also violates local or state criminal law. As drafted, the inconsistencies between the bill and AS 11 compound the issue and will likely make the determination as to primary jurisdiction difficult. Removal of the phrase "not defined by this chapter" would help clarify the issue related to primary jurisdiction, but it would not resolve the overlying issues caused by the inconsistencies between the bill and AS 11, including unique and difficult double jeopardy and equal protection issues.
3. The bill may also be revised to mandate that the adjutant general refer specified crimes (such as sexual assault or drug offenses, for example) to the Department of Law for prosecution. If the Department of Law declines to prosecute or dismiss the charge after referral of the offense, then the offense could be prosecuted under the code.

If you have any questions, or if I can be of further assistance, please advise.

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