

LEGAL SERVICES

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MEMORANDUM

January 14, 2016

SUBJECT: Military Code of Justice
(CSHB 126 (); Work Order 29-LS0473\S)

TO: Representative Gabrielle LeDoux
Attn: Kalyssa Maile

FROM: Megan A. Wallace 
Legislative Counsel

Attached please find the draft bill you requested. I made the changes you requested, but please be aware of the following drafting issues:

1. You requested that "before" precede "the imposition of nonjudicial punishment" under AS 26.05.485, relating to the statute of limitations. It is still unclear, however, whether "not later than three years" applies to "before the imposition of nonjudicial punishment." I recommend that you revise to clarify by reversing the order of the clauses.

2. I made your requested change to AS 26.05.513 relating to classification of felonies and misdemeanors. Please be advised, however, that crimes are generally classified based on the sentence authorized, not the sentence actually imposed. This new approach makes it uncertain as to classification prior to conviction, and even after conviction, it is unclear how a court would interpret this classification system since it is so different from classification of AS 11 crimes.

3. You requested several changes to AS 26.05.611 relating to drunken or reckless operation of a vehicle, aircraft, or vessel, including changing the term "careless" to "negligent" in both (a) and (b) and adding related punishments in (a). Please be advised that I made technical changes to accommodate this change, so subsection (a) now exclusively relates to the negligent or reckless operation offenses, and subsection (b) relates to the impaired operation offenses. All other subsections were relettered accordingly. Please review this section carefully to ensure I have captured your intent.

4. In addition, while you requested that the term "careless" be changed to "negligent" in both AS 26.05.611(a) and (b), you only requested that the punishments for negligent or reckless operation be added to (a). Per my discussion with Ms. Maile in your office, it is

my understanding that you did not want punishments added to (b), so the punishments for negligent or reckless operation will be the same as for the impairment offenses in (b).¹

5. The changes made to AS 26.05.611(a) make it a crime to negligently operate a nonmilitary vehicle, even when not in active state duty. Please be advised that negligent operation of a vehicle is not a crime under AS 11 or AS 28, and is typically adjudicated civilly in district or superior court if a person negligently causes damage or injury to another person while operating a vehicle.

6. Also, the bill does not define any of the mental states used in the bill, including negligence or recklessness. You should consider defining the various mental states used in the bill so that they can be adequately described to the trier of fact. *See e.g.* AS 11.81.900(a). Also, it is usually not wise to assign two mental states to govern the same action by the defendant (for example, "knowingly" and "intentionally").

7. AS 26.05.611(e) (formerly AS 26.05.611(d)) makes it a felony if the person has been convicted under AS 26.05.611(b) two or more times. In this subsection, should "if the member of the militia is convicted under (b) of this section" read "if the member of the militia is convicted under (b) or (c) of this section", since both (b) and (c) are impairment offenses?

8. As previously mentioned in my August 10, 2015, memorandum, this draft contains criminal acts that are inconsistent with existing state law, including AS 26.05.611 and the most recent changes. This presents an issue, as the state is prosecuting the crimes under both AS 11 and under the code of military justice in AS 26.05. In one instance, the state prosecutes a civilian, and in another, the state (acting as the Alaska National Guard) prosecutes a militia member. Nevertheless, the same crime, depending on who is prosecuted, may have different elements, defenses, or levels of punishment. As a result, prosecution of these offenses may create unique and difficult double jeopardy and equal protection issues. These changes should be discussed with the Department of Law.

9. While I made the requested changes to the grand jury requirement under AS 26.05.444, as discussed in my August 10, 2015, memorandum, it is unclear how this procedure will be executed. Under Alaska law, only a prosecuting attorney may bring a case before a grand jury. *See* AS 12.40.070. AS 26.05.444(b) states that "with the consent of the attorney general, an attorney from the Department of Law *may* represent the convening authority at the grand jury." (emphasis added.) Does "represent" mean that you intend that a prosecuting attorney from the Department of Law will conduct the grand jury for the court-martial proceeding? If not, your grand jury provision requires additional changes to current law. Also, what happens if the attorney general declines consent? In that case it appears an additional change to current law is necessary. Further, the draft bill only refers to a grand jury "indicting" a member of the militia. I would recommend

¹ As a result of the technical changes discussed above, AS 26.05.611(b) is now AS 26.05.611(c) in the attached draft.

that you revise this provision to allow a grand jury to return an indictment or presentment, as both are provided for in the Constitution of the State of Alaska and in the Alaska Statutes.

In addition, as previously mentioned, this provision likely results in court rule changes. A court rule change would require a two-thirds vote in order to pass the measure under art. IV, sec. 15 of the Constitution of the State of Alaska, which reads:

Section 15. Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

(e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

Without additional information relating to how you intend the grand jury proceedings to be carried out, I cannot identify which rules might be subject to change.

10. Your request adds "bad conduct discharge" to sec. 26.05.263. Do you mean "dishonorable discharge"?

11. Finally, please be advised that the attached draft does not address the issue raised in item no. 6 of my November 5, 2015, memorandum relating to the draft bill.

If you have any questions or need further assistance, please advise.

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Attachment