

Report on the inquiry into the provisions of the Defence Legislation Amendment Bill 2006

Referral of the bill

1.1 On 14 September 2006, the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, presented the Defence Legislation Amendment Bill 2006 (the bill) to the House of Representatives. On the same day, the Senate referred the provisions of the bill to the Senate Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report by 10 October 2006. On 10 October, the Senate granted an extension of the reporting date to 12 October 2006. In light of anticipated government amendments to the bill, the committee sought and was granted a further extension to its reporting date to 27 October 2006.

Background to the bill

1.2 In 2004 and 2005, the Foreign Affairs, Defence and Trade References Committee inquired into and reported on Australia's military justice system. During this inquiry, the committee examined the Australian Defence Force's (ADF) disciplinary tribunals. It cast considerable doubt over the impartiality of current structures and argued that Service personnel's right to access fair and independent tribunals was under threat. It found:

Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the detriment of both.¹

1.3 The committee recommended that the government establish an independent permanent military court, staffed by independently appointed judges possessing extensive civilian and military experience that would extend and protect a Service member's inherent rights and freedoms, leading to impartial, rigorous and fair outcomes.²

1.4 The government supported the committee's main recommendation to create a permanent military court. It was aware of the criticism directed at the current system that 'stemmed from the location of judge advocates and Defence Force Magistrates (DFMs) within the military chain of command and the implications for their (actual and perceived) independence'.³

1 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxii.

2 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxii.

3 Explanatory Memorandum, paragraph 2.

1.5 The references committee in its 2005 report on Australia's military justice system also raised concerns about administrative inquiries into grave and complex matters such as sudden death or serious accidents. It could not stress strongly enough the importance of having investigating authorities 'above any suspicion of partiality'.

1.6 The government agreed that there was a need to demonstrate that ADF inquiries into notifiable incidents, including suicide, accidental death or serious injury should be independent and impartial. It indicated that it would propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry.

Purpose of the bill

1.7 The main purpose of this bill is to give effect to the government's undertaking to enhance Australia's military justice system as outlined in its response to recommendations contained in the report on Australia's military justice system. The stated intention of the government was to 'provide a system that will better ensure impartial and fair outcomes and strike an effective balance between the need to ensure effective discipline within the Australian Defence Force and to protect individuals and their rights'.⁴

1.8 The bill proposes to replace the current system of trials by Courts Martial (CMs) and DFMs with an 'Australian Military Court' (AMC) that is to consist of the Chief Military Judge (CMJ), two full-time Military Judges and no more than 8 part-time Military Judges (MJs). A service offence may be tried by a Military Judge alone or Military Judge with a military jury depending on the classification of the offence. In some cases, the accused person may elect to be tried by a Military Judge alone or a Military Judge and military jury.

1.9 As a service tribunal under the DFDA, the AMC will be a part of the military justice system with the primary aim of maintaining military discipline within the ADF. Although the AMC replaces CMs and DFMs, in large measure it assumes the role and functions of these service tribunals. Most of the provisions governing the conduct and operation of CMs and DFMs would apply to the AMC. The main changes to the system are designed to strengthen the independence of the court and to align it more closely with courts constituted under the Australian constitution. They are intended to enhance the military justice system.

1.10 The proposed legislation covers a range of matters associated with the establishment of the Australian Military Court (AMC) and include:

- the jurisdiction of the court;
- terms and conditions of appointment including the provisions governing the appointment, reappointment, termination of appointment and qualifications of the Chief Military Judge (CMJ) and Military Judges (MJs);

4 The Hon Bruce Billson, MP, Second reading speech, 14 September 2006, House of Representatives *Hansard*, p. 8.

- military offences and trial by military judge and military jury;
- procedures of service tribunals for example those to be followed in laying a service charge, in a trial and in taking evidence by video or audio links; and
- right of appeal from the AMC.

1.11 The bill also foreshadows the establishment of Chief of the Defence Force Commissions of Inquiry by enabling the Governor-General to make regulations for the appointment, procedures and powers of such commissions.

1.12 The changes are part of a broader reform program and are intended to enhance Australia's military justice system. The Minister Assisting the Minister for Defence advised the committee:

The Bill not only constitutes a major step in the restructuring of the Australian military justice system but, importantly, reflects the Government's commitment to ensuring a fair and just military work environment.⁵

Matters not covered by the provisions of the bill

1.13 The inquiry also gave submitters an opportunity to alert the committee to matters they considered relevant to the legislation but not covered by the provisions in the bill. They raised a number of matters including:

- the AMC as a court of record;
- transitional arrangements for appointing MJJs;
- staffing and resources for the AMC;
- the Director Defence Counsel Services as an independent statutory appointment; and
- summary offences.

Submissions and conduct of the inquiry

1.14 The committee advertised the inquiry in the *Australian* on 16 and 20 September 2006, and on the committee's website calling for written submissions to be lodged preferably by 22 September 2006. It also invited the Department of Defence and statutory officers including the Inspector General of the Australian Defence Force, the Judge Advocate General, the Defence Force Ombudsman, the Registrar of Military Justice and the Director of Military Prosecutions to make written submissions. To canvass views on the provisions of the bill from legal experts, the committee also wrote to law societies and bar associations throughout Australia as well as legal specialists who made submissions to the inquiry into Australia's military

5 Covering letter to Department of Defence, *Submission 4*.

justice system. The committee received 5 submissions which are listed in Appendix 1. It also received one confidential submission.

1.15 Based on the submissions and its own deliberations, the committee lodged on 2 and 3 October a series of written questions with the Department of Defence. The questions together with Defence's responses are at appendices 3, 4 and 5. The committee held a public hearing on 9 September. The witnesses who appeared are listed in Appendix 2.

1.16 It should be noted that as the inquiry progressed the committee became increasingly aware of possible serious flaws in the proposed legislation—as it probed deeper into the provisions of the bill new problems seem to emerge. The 28 written questions on notice from the committee to Defence certainly signalled that there were problems with the proposed legislation.

1.17 Defence's answers to the committee's questions, received on the morning the committee held its public hearing, raised even more doubts about whether the provisions of the bill could achieve the legislation's stated intention. The committee's public hearing on 9 October did little to allay the committee's growing misgivings about the soundness of this bill. Indeed, rather than provide reassurance, it added to the committee's growing list of concerns.

1.18 During this hearing, a number of committee members spoke in blunt terms about their misgivings, leaving no doubt that in their opinion the bill was flawed.

1.19 In light of concerns about the soundness of the bill, the committee anticipated that the government would amend the proposed legislation. With this in mind, it sought and was granted an extension to report on its inquiry to 27 October 2006. The terms of reference were also changed to take account of any government amendments. The committee placed a notice in the *Australian* on 17 October explaining that the reporting date had been extended and the terms of reference now required the committee to inquire also into any government amendments.

1.20 It should be noted further that on 11 October 2006, the Hon Chief Justice Murray Gleeson AC, ordered that an application challenging the constitutional validity of service tribunals be referred to the Full Court of the High Court. The hearing is expected to be heard during the 2007 February sittings.

1.21 By the time the committee was due to report, debate on the bill had been delayed and the committee had no formal advice as to the status of the proposed legislation.

Identified concerns

1.22 The submissions received by the committee, the 28 written questions on notice and the transcript from the public hearing clearly identify a number of serious misgivings about the bill which centre on:

- the jurisdiction of military court and the possibility of a successful High Court challenge to its validity (military tribunals are not constituted in the same manner as courts created under Chapter III of the Constitution);
- the 5-year fixed terms and the possible adverse effect on the judicial experience of the court and its ability to attract high quality legal officers;
- the renewable five-year terms, which are not automatic and which, according to the JAG, 'considerably reduces the actual and perceived independence of the judges of the AMC';
- the provisions for terminating an appointment which, under specified circumstances, provides for the minister to terminate an appointment not the Governor-General on address by both Houses of Parliament;
- compulsory retirement for MJs from the ADF upon ceasing office as a MJ and the likelihood that this provision would diminish the attractiveness of the position and dissuade suitable appointees from applying for the office;
- the lack of incentive for an accused to opt for the more administratively convenient trial by MJ alone;
- the composition of a military jury especially in light of the jurisdiction of the AMC extending to criminal offences committed overseas—it should be noted that the Senate Standing Committee for the Scrutiny of Bills expressed concerns about the constitution of the proposed military jury and sought advice from the Minister;⁶
- the failure to stipulate that the AMC was to be a court of record;
- the transitional arrangements from the current service tribunals to the Military Court;
- the desirability of the Director of Defence Counsel Services (DDCS) being established as an independent statutory position; and
- the provisions relating to the Chief of Defence Commission of Inquiry being contained in regulations and not the Act.

1.23 It should be noted, that the bill introduced a number of positive features that would confer a greater degree of independence on the proposed AMC and retained many of the current provisions which have served the ADF well. The committee believes, however, that the flaws in the bill completely overshadow the positive gains.

1.24 Overall, the committee believes that the government settled for the barest minimum reforms required to its service tribunals to escape a constitutional challenge. In so doing, the committee takes the view that, in striving for the minimum, the government has not removed the risk that at some stage the High Court may find that

6 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 11 of 2006, 11 October 2006, p. 20.

the AMC is constitutionally invalid. In addition to this concern, the committee believes that some of the provisions would:

- lead to greater inefficiencies in the court;
- fail to strengthen the independence and impartiality of the court; and
- undermine its experience and hence the court's standing as a judicial institution.

Consultation

1.25 Without doubt this proposed legislation represented a significant change in the structure of the ADF's discipline system. It required thorough consultation and open public debate. This process did not appear to take place. Indeed, the committee notes a comment by the JAG that he was aware of advice from Defence's own legal department, dated 28 August 2006. In part, he said:

The advice by way of the minute, interestingly enough, begins with the observation that previous advice on appointment, renewal et cetera of military judges had been based on the question of whether Defence was legally required to do certain things, not what was the recommended or safest course of action...What is in the bill does not seem to reflect that sort of approach. There are others. I will not go through them, but I suggest the committee might look at that because there is much in there.⁷

1.26 The committee requested Defence to provide the committee with a copy of the correspondence but as at the reporting date, it had not yet received a copy.

Conclusion

1.27 The committee determined that the proposed AMC would not achieve the level of independence and impartiality needed to ensure a fair and effective military justice system. Because the committee understands that the bill is to be either amended or re-drafted, it decided not to give a comprehensive account of the evidence presented to it and its analysis of that evidence. The submissions and supplementary submissions to the inquiry, the committee's questions on notice to Defence and the transcript of the public hearing provide the grounds necessary for the government to review the legislation.

1.28 The committee has made plain in this report that the government needs to reconsider the proposed legislation. It now waits either for a re-drafted bill or for amendments to the current bill before making further comment.

1.29 Before preparing the final draft of the bill, the committee believes that a thorough consultation process needs to be undertaken on the proposed changes to the military tribunals. Open and frank debate is vital to the success of such reforms.

7 *Committee Hansard*, 9 October 2006, pp. 8–9.

Acknowledgement

1.30 The committee acknowledges the assistance of those who provided the committee with a submission within such a short time frame. The committee thanks those who assisted with the inquiry.

Recommendation 1

1.31 The committee recommends that the government review the bill based on the evidence presented to this committee and amend or re-draft the bill accordingly before proceeding with it.

Recommendation 2

1.32 The committee recommends that the government undertake a comprehensive consultation process designed to promote wide public debate before amending or re-drafting the bill for presentation to the parliament.

Senator David Johnston
Chairman

