

# **Supplementary Comments by Labor Senators**

## **Inquiry into the provisions of the Defence Legislation Amendment Bill 2006**

1.1 Labor Senators endorse the findings of the committee's report that the proposed Australian Military Court (AMC) would not achieve the level of independence and impartiality needed to ensure a fair and effective military justice system as recommended by the References Committee. We believe that the provisions in the bill are so defective and the process leading to the tabling of the legislation so inadequate that stronger comment is needed. The following section outlines some of the major concerns held by Labor Senators.

### **The jurisdiction of the Australian Military Court and the constitution**

1.2 Labor's principal concern is that the legislation completely ignores the substantive basis of the committee's recommendation for a Military Court which was that such a court should have all the attributes of a court set up under Chapter III of the Constitution. The assertion by the government that this bill implements the committee's recommendation is therefore at best misleading, and deliberately so. The Military Court proposed in this bill has none of the attributes of a civilian court, and as expressed in evidence by witnesses, is nothing other than a re-badging of the current unsatisfactory tribunal system. The shortcomings listed in the committee report form the basis of this judgement, to which must be added the power and process of appointment, which remain totally within the military, and the requirement that all appointees remain purely military.

1.3 In evidence to this committee, the Judge Advocate General (JAG) questioned the conduct of criminal trials by Service tribunals. He was concerned because they 'are not established under Chapter III of the Constitution, and might not be thought to afford the protections provided by those courts'.<sup>1</sup> He mentioned the possibility of the most serious charges being laid against Australian Defence Force (ADF) members and the inappropriateness of the proposed AMC having jurisdiction over crimes such as rape and murder.<sup>2</sup> The Law Council of Australia added weight to the JAG's argument. It noted the potential for the AMC to be involved in 'very serious matters' and gave the example of any possible charges arising out of the Kovco inquiry and the shooting of the Iraqi security guards by Australian troops. It questioned whether the High Court would uphold a tribunal's constitutional entitlement to adjudicate these issues when it bears a greater resemblance to the Administrative Appeals Tribunal (AAT) than a court. It concluded:

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1 *Submission 3*, p. 1.

2 *Submission 3*, paragraphs 10 and 11.

This increases pressure for the inevitable challenge to be brought on the grounds of fairness and impartiality, challenges which have often been brought in the past and are likely to be brought with increasing frequency if this legislation is passed.<sup>3</sup>

1.4 Labor Senators note the hearing set aside for the Full High Court to hear a challenge to the validity of current service tribunals.

1.5 Labor Senators believe that not only does the proposed legislation do nothing to save the AMC from a constitutional challenge but threatens the effectiveness and independence of the court.

### **Tenure—fixed five-year renewable terms and retirement from the ADF on completion of term as MJ**

1.6 The proposed re-structuring of service tribunals is intended to confer on the ADF's discipline system greater independence and overall 'provide for the maintenance of effective discipline and the protection of individuals and their rights'.<sup>4</sup>

1.7 With this intention in mind, the bill proposes to introduce 5-year fixed terms for Military Judges (MJs) which the explanatory memorandum maintains is designed to strengthen the theme of independence from the chain of command. The JAG and the Law Council of Australia suggested otherwise noting that the five-year term would prevent the development in the AMC of proper experience in the discharge of judicial duties. Indeed the JAG observed:

...the provisions seem to be designed to ensure that the judges of the AMC acquire minimal judicial experience and that the Court is to undergo five-yearly disruptions as the judges are turned over. It is my opinion that these provisions are potentially inherently destructive of the professionalism and credibility of the AMC.<sup>5</sup>

1.8 Labour members of the committee are of the view that limiting the tenure of MJs to five years has the potential to curtail severely the AMC's ability to build up a reservoir of experienced judges. In brief, they believe that Defence has failed to produce any justification for 5-year fixed terms and that security of tenure and the enhancement of military justice would be served by other means.

1.9 The bill allows for renewable terms under strict conditions. Again both the JAG and the Law Council of Australia were critical. The Law Council concluded:

Renewable fixed terms for the MJ are inconsistent with the principle of judicial independence...The provision of a 5 year term of appointment for MJs may compromise their independence from the chain of command, by

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3 *Submission 5*, p. 4.

4 Department of Defence, *Submission 4*, p. [1].

5 *Submission 3*, paragraphs 14–15, p. 4.

providing the expectation (or even the condition for acceptance of the office) that well-behaved or compliant MJ's may be rewarded at the completion of their term of office, for (consciously or unconsciously) acting in accordance with the wishes of either the military chain of command (which could be perceived by some to include the DMP), or political appointers.<sup>6</sup>

1.10 Labor Senators are not convinced that the provisions governing renewable terms provide the necessary safeguards that would ensure the independence of military judges. In their view, the provisions allow for an expectation of a second term which could influence the conduct of a judge.

1.11 It should be noted that a military judge ceases to be a member of the ADF when the person ceases to hold office as a MJ unless the person is to be immediately appointed Chief Military Judge (CMJ).<sup>7</sup> The CMJ also ceases to be a member of the Defence Force when he or she ceases to hold that office. The explanatory memorandum stated that:

This provision is intended to overcome any perception of executive preferment that may influence decision making, specifically in the context of possible subsequent employment following a term as CMJ.<sup>8</sup>

1.12 The JAG doubted that there would be 'very many officers who have more than five years to their compulsory retiring age being interested in taking on an appointment [as a MJ] for five years which would effectively terminate their military career.'<sup>9</sup> To his mind, the proposition was 'counterproductive'.<sup>10</sup>

1.13 Along similar lines, Mr Paul Willee, Law Council of Australia, told the committee that 'no military officer, permanent or serving, worth their salt would want to commit professional suicide by taking an appointment at 35, 40 or 45 and deprive themselves of the association with the service...'<sup>11</sup> He noted further that, 'nor could they be said to be serving the position of independence in that circumstance whereby, if they did take it, they might be perceived to be toadying or in some way currying favour so that they could meet the conditions for a further five-year appointment'.<sup>12</sup>

1.14 It would seem that intent on avoiding any perception of undue influence on MJs by requiring them to retire from the ADF after serving their 5-year term, the bill has created a range of serious problems that could undermine the effectiveness of the

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6 *Submission 5*, paragraphs 9 and 10.

7 Section 188BA.

8 Explanatory Memorandum, paragraph 74.

9 *Committee Hansard*, 9 October 2006, p. 6.

10 *Committee Hansard*, 9 October 2006, p. 12.

11 *Committee Hansard*, 9 October 2006, p. 18.

12 *Committee Hansard*, 9 October 2006, p. 18.

AMC. Defence could not reassure Labor Senators that the proposed AMC would attract suitable, highly qualified officers. In the Senators' view, younger, suitable officers would simply not apply for the job knowing that in five years time not only would their position as a MJ cease but their ability to serve the country as an ADF member would also come to an abrupt end.

1.15 Labor Senators could find no satisfactory justification for the provisions governing the tenure of MJs and are certain that the provisions of the bill cannot achieve their stated intention. Indeed, they believe that taken as a whole the provisions governing the appointment and tenure of the CMJ and MJs could seriously undermine the effectiveness of the proposed AMC and damage its standing as a legal institution. On these grounds alone they cannot support the provisions of the bill as they now stand.

### **Military jury of six with a two-thirds majority decision**

1.16 Trial by jury is widely accepted as a necessary safeguard to individual liberty and is a right protected under the Australian Constitution. Section 80 of the Constitution states expressly that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. Section 4G of the *Crimes Act 1914* offers guidance on what should be considered an indictable offence. It suggests that 'offences against a law of the Commonwealth punishable for a period exceeding 12 months are indictable offences, unless the contrary intention appears'.

1.17 The bill provides for a military jury, a concept new to Australia's military law. It should be noted, however, that the military jury under the proposed legislation is to consist of 6 members as against 12. Also, a decision is to be made by the agreement of at least a two-thirds majority—a significantly less onerous requirement than in the civilian criminal law of either unanimity, especially for cases such as murder or treason, or a majority of 11 of 12 jurors or 10 of 11 jurors or in some cases a majority of 10 of 12 jurors.

1.18 Neither the explanatory memorandum nor the second reading speech offered any reasons for the different standards applying to a military jury. Defence's submission similarly provided no explanation. The legislation would mean that a Service person being tried before a military judge and military jury for a serious offence is not afforded the same protections as a civilian being tried by a civilian court in Australia. This arrangement is simply not good enough.

1.19 The Senate Standing Committee for the Scrutiny of Bills also commented on the military jury. It noted that:

...the classes of offences to be heard by a Military Judge and jury could potentially include offences of treason, murder and manslaughter. The Committee is concerned that the provision for a military jury to be composed of six members (proposed section 122) and to determine questions of guilt on the agreement of a two-thirds majority (proposed subsection 124(2)) is an infringement on the rights of an individual.

The Committee notes that the constitution of a military jury and the manner in which questions are to be determined differs substantially from the constitution and operation of civilian juries in criminal matters, which generally require, as a minimum, the agreement of 10 out of 12 jurors and then only in specific circumstances and with the approval of the judge. As the explanatory memorandum is silent on the basis for the proposed constitution and operation of a military jury, and the extent to which the rights of the individual have been balanced against the particular needs of the military justice system, the Committee seeks the Minister's advice as to the justification for this apparent variance from accepted practice.<sup>13</sup>

### **Court of record**

1.20 The committee notes that the jurisdiction of the AMC extends to the most serious offences. It supports the view that the bill stipulate that the AMC is a court of record.

### **Transitional arrangements**

1.21 Labor Senators note that problems could arise during this transition period and of the need for the proposed legislation to protect the integrity of current proceedings during the transition. The committee draws to the government's attention the JAG's suggestion that the current Judge Advocate/Defence Force Magistrate (DFM) automatically transition to the proposed AMC when it is stood up and his reasons for doing so.

### **The role of the Registrar of Military Justice**

1.22 Labor Senators note the suggestion by the Registrar of Military Justice endorsed by the JAG that appeals to the Defence Force Discipline Appeals Tribunal be centralised through the Registrar's office.

### **Director Defence Counsel Services (DDCS)**

1.23 Labor Senators support the JAG's recommendation that the DDCS be made a statutory appointment ensuring the office would have independence from the chain of command.

### **Chief of Defence Force Commission of Inquiry**

1.24 Labor Senators recognise that the parliament needs to continue to monitor developments in, and reforms to, Defence administrative inquiries and in particular how they interact with State coroners. They draw to Defence's attention the matters raised by the JAG and the Law Council with regard to the establishment of the Chief

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

Defence Force Commissions of Inquiry so that they can be addressed in future legislative changes.

1.25 Labor Senators have not examined all the concerns raised by submitters to the inquiry, it nonetheless has identified some of the more serious ones which are summarised below.

### Summary

1.26 While Labor Senators understand that the bill is intended to improve Service tribunals, they are disappointed that the government did not go further in strengthening the independence of the court and in guarding against possible influence from the chain of command. Labor Senators believe that the bill should be withdrawn and re-drafted taking account of the following suggestions:

- limit the jurisdiction of the AMC to matters that 'can be reasonably be regarded as substantially serving the purposes of maintaining or enforcing service discipline'—to put beyond doubt that the court's jurisdiction would not extend to civilian criminal offences committed overseas;
- change the fixed term appointment to compulsory retirement age or introduce other measures that would not limit a MJ's term to just five years considering the adverse effect that five year terms may have on the level of experience of the court;
- remove the renewable fixed term provision, which, according to both the JAG and the Law Council of Australia, are inconsistent with the principle of judicial independence and may 'lead to the perception that MJs are beholden to the military chain of command or political appointees';
- remove the provision that force a MJ to retire from the Services at the expiration of his or her appointment as it may discourage suitably qualified officers from applying for the position and replace with a provision stipulating that the tenure of a military judge is to compulsory retirement age;
- provide that all appointments should be made by the Governor General;
- make the termination of appointments consistent with the concept that removal of a judge should be only by the Governor-General on address from both Houses of Parliament in the same session;
- if the AMC is to try civilian criminal offences committed overseas then redraft the provisions so that in such cases the military jury aligns more closely with those of Australia's civilian courts—membership of 12 with the requirement for a unanimous decision;
- stipulate that the AMC is a court of record;
- ensure that transitional measures protect the integrity of current proceedings;
- establish the Director of Defence Counsel Services as a statutory position;

- clarify the role of state coroners in investigating sudden deaths recognising the primacy of the coroner's jurisdiction; and
- ensure that the essential provisions relating to the Chief of Defence Force Commission of Inquiry are contained in the Act and not regulations.

## **Consultation**

1.27 Labor Senators note that the majority report referred to the JAG's statement about Defence receiving advice from Defence Legal on provisions in the bill such as those governing the tenure and renewal of MJs' appointments which it appears to have ignored.

1.28 The lack of consultation and the closed minds of those responsible for this bill has produced legislation that if enacted would not serve our service people well. Labor Senators believe that Australia's service men and women are entitled to much better. They deserve a first class discipline system and not this ill conceived and poorly considered proposal.

1.29 The first step toward achieving a discipline system worthy of Australia's ADF must be a thorough and public consultation process. This process would draw on the experience and wealth of knowledge of serving and former ADF members who have had practical experience of Australia's current service tribunals. Labor Senators recommend that the government produce a draft bill and invite submissions on the draft. The submissions to be public and the government to report on the submissions and to make their findings public.

## **Conclusion**

1.30 Labor Senators considered the provisions of the bill and found a number of them so seriously flawed that the bill as a whole should be withdrawn. It suggests that, after a comprehensive process of consultation, the government draft a bill. This proposed legislation would achieve the stated intention of establishing an independent permanent military court. The court would be staffed by independently appointed judges who are well equipped to protect a Service member's inherent rights and freedoms, leading to impartial, rigorous and fair outcomes. It should be created in accordance with Chapter III of the Australian Constitution to ensure its independence and impartiality.

Senator Mark Bishop

Senator Steve Hutchins

Senator John Hogg

