

## Appendix 3

### Written questions on notice to the Department of Defence

#### Jurisdiction of the Australian Military Court (AMC)

1. In your submission, you indicated that you had advice that a military court outside Chapter III would be valid 'provided jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purposes of maintaining or enforcing service discipline'.<sup>1</sup>

- From whom did you obtain this advice? Could it be made available to the committee?

2. The Judge Advocate General stated in his submission:

*The AMC will have complete (and exclusive) Australian jurisdiction over members of the ADF outside Australia.*<sup>2</sup>

- Is this correct?

3. The Judge Advocate General stated further:

*Given the present and likely future tempo of operations and exercises, it is entirely foreseeable, if not likely, that there will be charges of the most serious offences (such as rape or murder) against members of the ADF at some stage. The AMC would be the only Australian court which would have jurisdiction. The notion that such charges would be dealt with by a body described as a 'tribunal' and equivalent to the AAT is extraordinary.*<sup>3</sup>

- Is it correct that the AMC would be the only Australian court that would have jurisdiction over crimes committed overseas such as rape and murder committed by ADF personnel against another ADF personnel?
- Could you please explain the extent of the AMC's jurisdiction? Does it cover civilian defence personnel and, if so, in what way and under what circumstances?
- In your view is the risk of a successful challenge to the AMC increased by the decision to allow the jurisdiction of the AMC to extend to criminal offences committed overseas?

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1 Department of Defence, *Submission 4*, p. [2].

2 *Submission 3*, paragraph 10, p. 3.

3 *Submission 3*, paragraph 10, p. 3.

## Terms and conditions of appointment

### *Fixed and renewable terms*

4. The JAG submitted that military judges will have even less independence, so far as their terms of appointment are concerned, than they have under the existing arrangements. He explained:

*They are currently appointed for three year terms by the JAG, but it is on the basis that the terms will be automatically renewed subject to good behaviour in the judicial sense of that term...To now move to five-year renewable terms, which are not automatic (and indeed, must be sought to be justified as exceptional), considerably reduces the actual and perceived independence of the judges of the AMC and greatly impedes the AMC's ability to develop experience and excellence.*

5. The Law Council of Australia concurred with this view, arguing that, 'the possible extension of 5-year terms may lead to the perception that Military Judges are beholden to the military chain of command or political appointees'.

- Would you like to respond to the concerns of the JAG and the Law Council?

6. The JAG suggested that 'given that the compulsory retiring age is 55 for permanent officers and 60 for the Reserve, I would not have thought that there was any real practical difficulty in effectively limiting appointments to about a ten-year term while still affording the protection of an appointment until retiring age'.<sup>4</sup>

- Would you like to comment?
- Did Defence consider the compulsory retirement age of ADF personnel when deciding on the term of appointment?

7. The JAG stated further that the proposed five year terms are insufficient to permit the development of proper experience in the discharge of judicial duties. He said he would be amazed 'if the ADF were able to support the flow-through of officers for these highly specialised duties at that rate'. The Law Council reinforced this view stating, 'In practical terms, five year terms for MJ's will have the result that the AMC is constituted by relatively inexperienced judges, given that the officers concerned are to retire at the expiration of their appointment'.

- Would you like to comment on the likely effect that the 5-year fixed term is likely to have on the level of experience in the AMC?

### *Termination of appointment*

8. One of the grounds for terminating the appointment of the Chief Military Judge or Military judges is 'if the Judge no longer meets his or her individual service deployment requirements'.

- Could you explain what this means and why this arrangement does not weaken the independence of the Judge?

9. Another reason for terminating the appointment of the Chief Military Judge or a military judge is if he or she ceases to be a member of the ADF or the ADF Reserves. The JAG, in his annual report, alerted the government to the risk that the CJA and the JAs may be removed by what he termed 'collateral attack' on the basis of their appointment as a serving officer.

- Did the ADF consider such matters when drafting the bill?
- Are there safeguards to prevent this type of 'collateral attack'?

10. In his submission to the committee, the JAG reinforced his long-held view that the termination of a military judge's appointment should involve the Governor-General on address by both Houses of Parliament. He was concerned about undue influence by the executive.

- Could you explain why the advice of the JAG was not accepted?

### ***Compulsory retirement***

11. The proposed bill also means that a military judge will cease to be a member of the ADF when he or she ceases to hold office as a Military Judge unless the person is to be immediately appointed Chief Military Judge<sup>5</sup> The JAG was of the view that:

*In practical terms, the provisions for military judges to automatically separate from the Service at the end of those five year appointments, with no provision for financial incentive, causes me to wonder whether the ADF will be able to find suitably qualified officers prepared to undertake these demanding and important duties.*

- Would you like to comment on the JAG's observations about financial incentives and whether the ADF will be able to find suitably qualified officers prepared to undertake these demanding and important duties?

12. The Law Council also found fault with the compulsory retirement provision arguing that compulsory retirement from the Defence Force at the end of an MJ's term of appointment, 'will dissuade most suitable appointees to the office of MJ from applying for appointment'.

- What is the reason behind the compulsory retirement provision and in Defence's view could it be a disincentive for people to apply for the position?

13. Could you explain the consultation process that led to the decisions on the provisions dealing with a military judge's terms and conditions of appointment?

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5 Section 188BA.

### ***The rank of Military Judges***

14. The Law Council also observed that a MJ is to be of no lower rank than Commander equivalent, which permits appointments of MJs that are two ranks lower than the CMJ, the DMP and the Registrar of the Court. It was of the view that the lower rank of a MJ 'may undermine the perception of the importance and authority of judges in the military justice system'. It explained further:

*the possibility of the appointment of MJs two ranks subordinate to the DMP and the Registrar will create difficulties with respect to the actual or perceived independence or authority of a MJ and the court. Given that rank (and its display) is such a public and significant aspect of the 'hierarchy of importance' in the Defence Forces, the presently proposed rankings would indicate publicly that the position of the MJ is of lower status and importance than that of the DMP. There is a likely risk that accused servicemen and women will perceive the higher-ranked DMP to be being more important in the system of military justice than the Judge. This could also create the appearance of the submissions of the DMP having greater influence over a MJ, especially if the Defending Officer were also of lower rank than the DMP.<sup>6</sup>*

- Would you like to respond to the Law Council's concerns?
- Could you detail the reasoning behind the decision have an MJ hold the rank no lower than Commander equivalent?

15. The Law Council recommended that:

*no formal rank other than that of "military judge" to an appointee but to provide that each, including the CMJ, was entitled to the same privileges and status as a one star appointee. This would import the primus inter pares principle found in the civilian judiciary. The administrative authority of the CMJ could be conferred by statute.<sup>7</sup>*

- What are Defence's view on this suggestion?

### ***Qualifications of military judges***

16. The Law Council of Australia took issue with the requirement for a MJ to be a serving member:

*As there does not appear to be any real reason for requiring that appointments to the military court be drawn only from the ranks of the military, allowing appointments of civilian judges, and senior counsel, would not only improve the number and quality of available judges, it would also improve the perceived independence of judicial appointments. Under the current proposal, the comparatively pool of suitably qualified*

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6 Submission 5, p. 6.

7 Submission 5, p. 6.

*candidates for the office of MJJs will be quickly depleted, which is likely to prevent the adequate staffing of the military court with MJJs.<sup>8</sup>*

- The committee can understand the importance of requiring military judges to have an understanding and knowledge of military law and ADF culture but would like an explanation for requiring a Military Judge to be a serving officer?

### **Class of offences**

17. The JAG submitted that although the explanatory memorandum suggested that minor territory offences would fall into class 3, the bill 'does not achieve this, given that the proposed Schedule 7 effectively places all territory offences into either class 1 or class 2.' He expressed concern that the operation of proposed section 132A(3) is such that:

*There is no option for the Director of Military Prosecutions (DMP) to refer class 3 offences for trial by military judge and jury; and*

*While the default position under the section is one of trial by military judge alone, there is no limitation on the maximum sentence that may be imposed.<sup>9</sup>*

- Could you please inform the committee whether the JAG is correct in his statement?

18. The JAG explained in full:

*One might have expected that if the default position was one of trial by military judge alone, this would be accompanied by a corresponding limitation on the maximum sentence available on conviction. This would be analogous to the situation in the civil courts where an indictable matter is referred for summary trial. Such an arrangement would offer some incentive for the accused to opt for the more administratively convenient trial by military judge alone (in that the sentencing powers would be less than on trial by military judge and jury). If the DMP were given a corresponding right to require that the matter proceed before military judge and jury (analogous to proceeding in the civil courts on indictment), then serious class 3 offences could be referred for trial by military judge and jury such that the maximum punishment would appropriately be available on conviction.<sup>10</sup>*

- Would you like to respond to the JAG's observation?

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8 Submission 5, paragraph 1.6

9 Supplementary submission 3, p. 2.

10 Supplementary submission 3, p. 2.

## **Trial by judge and military jury**

19. The proposed military jury differs significantly from the current jury system in Australia's criminal law. In Australia the standard number of jurors in a criminal trial is twelve, the generally accepted method of ensuring representativeness of the jury is random selection and the prosecution or defence may prevent jurors presented by the sheriff from being sworn in as jurors.<sup>11</sup> 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.

- What measures have been taken to ensure that the protections offered under the civilian jury system operate to protect the rights of ADF personnel being tried by a Judge and military jury—a jury of six, majority decisions of 4 of the 6 jurors?
- If it is correct that an ADF member may be tried by the AMC for a criminal offence committed overseas, why then does that person not have the same protections and entitlements offered by a civilian jury?

## **Miscellaneous matters**

### **Court of record**

20. The JAG understood that the original intention was that the AMC would be a court of record but noted that the bill contains no provision for it to be a court of record. In his view:

...there is no sensible reason why the AMC should not expressly be made a court of record and making it so would put beyond doubt its status as a court and its judicial authority.<sup>12</sup>

- Could you explain the reason for the bill not stipulating that the AMC is to be a court of record?

### **Transitional arrangements**

21. Assuming that new appointments by the Minister are contemplated, the JAG was concerned about the transitional arrangements. He explained that this process:

...has the real prospect of weakening the integrity of those trials pending the establishment of the AMC. If the JA/DFM concerned wishes to be considered for appointment to the AMC, there must be a risk of the

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11 See Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy', 62 *Law & Contemp. Probs.* 69 (Spring 1999), <http://www.law.duke.edu/jprnals/lcp/articles/lcp62dSpring1999p69.htm> (accessed 25 September 2006).

12 *Submission 3*, p. 5.

perception that the officer concerned will decide issues influenced by the desire for re-appointment.

The Law Council of Australia also anticipated difficulties with the appointment process of the military justice system:

It is conceivable that there may be waves of reappointments every five years, which will stretch the capacity of an organisation the size of Defence Legal.

It suggested that in order to stagger appointments, existing appointments expire at compulsory retirement age.

- The committee notes Defence's explanation for the arrangements for transition to the AMC but would like to know whether the concerns raised by the JAG and the Law Council were considered and how they were addressed?

## **Staffing**

22. The Law Council of Australia voiced its concern about the AMC's access to resources:

It is of serious concern that, under the Bill, the court will not be established with access to suitable resources and an explicitly acknowledged status, similar to the Federal Magistrates Court. Section 121 requires that staff available to assist the military court be defence members and persons under the Public Service Act made available by the Secretary. This does not appear to accord with the original intention that the military court would have similar status to the FMC.<sup>13</sup>

- Could you respond to the Law Council's concerns?

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

23. In his recent annual report, the JAG expressed concerns about serving judicial officers being members of Boards of Inquiry and other types of administrative inquiry processes. He noted that administrative inquiries are not an exercise of judicial power—they are constrained by their terms of reference; are not required to apply the rules of evidence; and do not make binding determinations. He stated:

To use serving judicial officers to conduct administrative inquiries is, to my mind, to potentially debase or undermine the very characteristics of their judicial office which make their appointment so attractive to the Executive.<sup>14</sup>

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13 *Submission 5*, p. 7.

14 Judge Advocate General, *Annual Report 2005*, p. 15.

In his supplementary submission, the JAG again mentioned the difficulties of using serving judicial officers to conduct administrative inquiries.<sup>15</sup>

- Could you respond to the JAG's concerns about serving judicial officers being members of a CDF Commission of Inquiry?

24. The Law Council was concerned about the mandatory requirement for the CDF to conduct a Commission of Inquiry in every case of death of a member of the ADF particularly as it affected suicide and road deaths unrelated to defence service. It was of the view that such cases are more properly suited, at least at first instance, to State Coroners. It argued that this arrangement would 'require an acknowledgement of the primacy of civil over military jurisdiction'. Furthermore it argued that the lack of any provision for the interrelationship between the coronial jurisdiction and Commissions of inquiry 'may produce curious conflicts in suicide cases where Defence cannot arrogate to itself the right to conduct a COI before the coroner has determined that the cause of death was in fact suicide'.

- Would you like to respond to the Law Council's concerns?
- The committee has also sought on a number of occasions clarification on the role of the coroner in investigating the sudden death of an ADF member and the relationship and interaction between ADF inquiries and the relevant coroner. Could you explain the current arrangement with State coroners and proposed changes to this arrangement?

25. The Law Council also mentioned flaws in the proposed procedures for terminating COIs and a failure to deal satisfactorily with vacancies in the membership of COIs, proposed practice and procedure of COIs and appearances as matters requiring further consideration. In light of its concerns, it suggested that the process for the CDF commission of Inquiry and BOI 'remain under the close scrutiny of Parliament from the outset, by having the essential provisions relating to these inquiries spelt out in the bill rather than being left for implementation by regulation'.

- Is the intention to have the procedures governing the conduct of a CDF Commission of Inquiry specified in the Act or in regulations? If they are to be by regulation, could you explain why?
- Could you also comment on the perceived flaws identified by the Law Council—the proposed procedures for terminating COIs and a failure to deal satisfactorily with vacancies in the membership of COIs, proposed practice and procedure of COIs and appearances?

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15 *Supplementary submission 3*, p. 1.