The Senate

Standing Committee on Foreign Affairs, Defence and Trade

Defence Legislation Amendment Bill 2006 [Provisions]

October 2006

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Members of the Committee

Core Members

Senator David Johnston, LP, WA (Chair)
Senator Steve Hutchins, ALP, NSW (Deputy Chair)
Senator Mark Bishop, ALP, WA
Senator Alan Ferguson, LP, SA
Senator John Hogg, ALP, QLD
Senator Marise Payne, LP, NSW
Senator Russell Trood, LP, QLD

Secretariat

Dr Kathleen Dermody, Committee Secretary
Ms Angela Lancsar, Executive Assistant

Standing Committee on Foreign Affairs, Defence and Trade
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535
Fax: + 61 2 6277 5818
Email: fadt.sen@aph.gov.au
Internet: www.aph.gov.au/Senate/committee/fadt_ctte/index.htm

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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]

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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);

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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 MJs;
- 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

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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.

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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

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'.[1] 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.[2] 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.[3]

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'.[4]

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.[5]

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. [6]

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).[7] 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.[8]

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.[9] To his mind, the proposition was 'counterproductive'.[10]

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…'[11] 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'.[12]

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.[13]

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

Appendix 1

Public submissions

P1	Inspector General - Australian Defence Force
P2	Mr Douglas McDonald
P2A	Mr Douglas McDonald
P3	Judge Advocate General - Australian Defence Force, the Hon. Justice L.W. Roberts-Smith
P3A	Judge Advocate General - Australian Defence Force, the Hon. Justice L.W. Roberts-Smith
P4	Minister for Veterans' Affairs, Minister assisting the Minister for Defence, the Hon. Bruce Billson MP
P5	Law Council of Australia
P5A	Law Council of Australia

Appendix 2

Public hearing and witnesses

Monday, 9 October 2006 - Canberra

BONSER, Rear Admiral Mark, Head, Military Justice Implementation Team, Department of Defence

BURMESTER, Mr Henry, Chief General Counsel, Australian Government Solicitor; and Legal Adviser, Department of Defence

PARMETER, Mr Nick, Policy Lawyer, Law Council of Australia

ROBERTS-SMITH, Major General Leonard William, Judge Advocate General, Australian Defence Force

SALMON, Mr Ben Jefferson, QC, Member, Military Justice System Working Group, Law Council of Australia

WILLEE, Mr Paul Andrew, RFD, QC, Chair, Military Justice System Working Group, Law Council of Australia

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'.[1]

- 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.*[2]

- 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*.[3]

- 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'.[4]

- 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'.

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4 *Submission 3,* paragraph 14, p. 4

- 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[5] 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.*[6]

- 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.*[7]

- 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 MJs will be quickly depleted, which is likely to prevent the adequate staffing of the military court with MJs.*[8]

- 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.*[9]

- 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.*[10]

- 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.[11] 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.[12]

- 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.[13]

- 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.[14]

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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 offers to conduct administrative inquiries.[15]

- 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?

15 *Supplementary submission 3,* p. 1.

Appendix 4

Additional questions based on a submission received by the committee on 3 October from Mr Douglas McDonald

26. Mr Douglas McDonald raised concerns about the eligibility of jurors as proposed in the bill. He noted that: 'The proposed Defence Force Discipline Act section 122 will require a military jury to consist of six members with at least one holding a rank not lower than Lieutenant Colonel (E). The proposed Defence Force Discipline Act subsection 123(1) will state that in order to be eligible as a member of a military jury, a juror must be an officer of not less than 3 years service and at a higher rank than the Defendant. If the Defendant is not an officer, the proposed Defence Force Discipline Act subsection 123(2) will specify that a juror must be an officer or a Warrant Officer Class One (E) for a period not less than 3 years service and at a higher rank than the Defendant.' He surmised:

> *Undoubtedly at the commencement of these trials by Military Judge and Jury, the Military Judge would address members of the jury on all aspects of the decisions that have to make and the process of how they determine a Defendant's guilt or innocence. If this is the jurors' preparation for a trial, then a case exists to allow Warrant Officers Class Two (E), Sergeants (E) or even Corporals (E) to also become members of a military jury. I believe that the reason this has not been considered may well be due to their lack of an appropriate level of seniority, military experience and credibility to make decisions on military justice matters.*

- Could you explain the reasons for the proposed eligibility criteria including the reasons for excluding 'Sergeants or even Corporals'?
- Was the criteria based on an existing model for military juries?

27. Mr McDonald also suggested that there was the potential for junior officers—Captains or Lieutenants—to be influenced or even dominated by the more senior officer on the jury and their votes of Guilty or Not Guilty, may be based on the views held by the Lt. Colonel.

- Could the committee have your views on the potential for junior ADF members on military juries to be unduly influenced in their decision-making by a senior officer?
- One of the major concerns expressed by the committee on a number of occasions has been the influence of the chain of command in the operation of the military justice system. What are the safeguards in the proposed military jury that would prevent this influence from happening?

28. Mr Douglas was also concerned that the level of training required for jurors was inadequate.

- Would you like to comment on his views?

Appendix 5

Department of Defence - answers to questions on notice

THE HON BRUCE BILLSON MP
Minister for Veterans' Affairs
Minister Assisting the Minister for Defence

09 OCT 2006

Senator David Johnston
Chair
Senate Standing Committee on Foreign Affairs,
Defence and Trade
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ David,

I write to you concerning your Committee's request for Defence comment on questions raised about the Defence Legislation Amendment Bill 2006 by the Judge Advocate General, the Law Council of Australia and Mr Douglas McDonald.

As you are aware, in response to the 2003 Senate Report into *'The Effectiveness of Australia's Military Justice System'* dated 16 June 2005, the Government announced significant enhancements to the military justice system. As part of these enhancements, the Government agreed to the establishment of a permanent Australian Military Court to replace individually convened trials by Courts Martial and Defence Force Magistrates (recommendations 18 and 19).

The Defence Legislation Amendment Bill 2006 will give effect to the Government's response to the above recommendations and is intended to provide for the maintenance of effective discipline and the protection of individuals and their rights.

The responses to your Committee's questions are consistent with the Government response to the 2005 Senate Inquiry Report, the Bill and its Explanatory Memorandum. They also amplify the previous Defence submission to the Committee of 22 September 2006.

I am pleased to provide you with the Department of Defence's responses to your Committee's questions.

I trust these responses will provide you with the information required.

Yours sincerely

BRUCE BILLSON

Parliament House, Canberra ACT 2600 Tel: (02) 6277 7820 Fax: (02) 6273 4140

Senate Standing Committee on Foreign Affairs Defence and Trade

Defence Legislation Amendment Bill 2006

Responses to Questions

Jurisdiction of the Australian Military Court

1. The advice in respect of the validity of a military court established outside Chapter III came from the Chief General Counsel, Australian Government Solicitor, Mr Henry Burmester QC. The independent advice of Chief General Counsel was sought in respect of various issues that arose in the course of policy development for the Bill, including the jurisdiction of the Australian Military Court (AMC). The final draft Bill was also made available to the Chief General Counsel for comment. He expressed the view that the provisions for the military judges in the Bill were valid and provided sufficient independence and impartiality, and that the limited role of the Minister in appointment, reappointment and termination does not detract from the independence of the office of the Chief Military Judge or the military judges. The Bill reflects this advice, and related advice from the Attorney General's Department.

2. The AMC will have the same Australian jurisdiction over the members of the ADF outside Australia as does the current system of courts martial and trials by Defence Force magistrates under the *Defence Force Discipline Act 1982* (DFDA). The same jurisdiction was also exercised for decades by the system of courts martial under the authority of the previous single Service Discipline Acts. However, the AMC will not have complete (and exclusive) Australian jurisdiction over members of the ADF outside Australia. The most serious offences committed outside Australia in Australian warships or Defence aircraft might normally be returned to Australia for trial before a civilian court under legislation like the *Crimes at Sea Act 1991* or *Crimes (Aviation) Act 2000*. The Commonwealth Criminal Code, Division 115 may also apply. Similar offences committed on foreign soil might also come under the jurisdiction of the host nation, subject to any status of forces agreements that may be in place.

3. As described in paragraph 16 of the explanatory memorandum for the Bill, it is not intended to increase the jurisdiction of the AMC beyond that of the Service tribunals it will replace. It may deal with the same matters that are specified in current sections 115 (court martial) and 129 (Defence Force magistrate) of the DFDA. Specifically, the consent of the Director of Public Prosecutions for the institution of DFDA proceedings for certain serious offences committed within Australia, such as treason, murder, manslaughter and serious sexual offences for trial under section 63 of the DFDA, will be retained.

4. The AMC will also retain the current jurisdiction to deal with matters that fall outside the Australian civilian jurisdiction, or matters that might otherwise be dealt with by a foreign jurisdiction. Albeit such occurrences are rare, the power ensures that there is a jurisdiction for all circumstances that will provide natural justice and a fair trial. Any trial by Service tribunals (irrespective of location) maintains the safeguards inherent in the current and future expanded appeals systems to the Defence Force Discipline Appeals Tribunal, the Federal Court and ultimately the High Court.

5. Claims that the present and likely future tempo of operations make it likely that there will be charges of the most serious offences at some stage, are speculative. It is not possible to predict which serious offences might occur at any particular time. However, should one occur, it would not be unusual for a serious offence committed outside Australian jurisdiction to be dealt with by a Service tribunal. This has been the case ever since the Australian Naval and Military Forces were established following Federation. There are many types of tribunal established under

Commonwealth legislation. Service tribunals are established under the DFDA for a specific purpose, that is, to control the forces and thereby maintain discipline. Another tribunal with a particular purpose is the Defence Force Discipline Appeals Tribunal which hears appeals from Service tribunals. Neither of these tribunals are equivalent to the AAT, which has an entirely different purpose.

6. In *Re Tracey* (1998) 166 CLR 518, all seven judges of the High Court accepted that the defence power authorised establishment of (Service) tribunals outside Chapter III of the Constitution. Subsequent High Court challenges have reinforced the jurisdiction of the DFDA by varying majorities. The jurisdiction of Service tribunals has by necessity always extended to Service offences that occur overseas, including those which are also civilian criminal offences. In *Aird* (2004) 199 CLR 308 the High Court required there still to be a Service connection in relation to offences overseas. For operational and discipline reasons, it is necessary to ensure that Service offences can be dealt with when they occur outside Australian civilian jurisdiction, and to provide an alternative to foreign jurisdictions. Given that the AMC will exercise the same jurisdiction as the Service tribunals it will replace, it seems unlikely that the risk of a successful challenge to the AMC would increase on this basis.

7. Service tribunals such as courts martial and the new AMC do not normally exercise jurisdiction over civilian defence personnel. They are covered only to the extent outlined in subsection 3(1) of the DFDA (definition of 'defence civilian'). A 'defence civilian' is a person who accompanies the Defence Force on operations outside Australia and who has consented in writing to be subject to the DFDA and Defence Force discipline.

Fixed and renewable terms

8. The Government agreed that military judges would be appointed for fixed five year terms with a possible renewal of five years. These provisions provide for considerably more independence than the appointment provisions for courts martial panels (the current Service tribunal with the most authority) and the current judge advocates panel from which Defence Force magistrates are selected. Judge advocates will no longer be appointed by CDF or the Service Chiefs, and Defence Force magistrates will no longer be appointed by the same authority (DFDA section 127) that is responsible for reviewing their proceedings (DFDA section 154), removing any perception that they might be beholden to their reviewing authority. Additionally, the five year terms almost double the existing three year terms, and allow for a maximum tenure of ten years if a reappointment is necessary to maintain a level of experience on the AMC. Given this, it would seem unlikely that the new appointments might impede the AMC's ability to develop experience and excellence.

9. Advice to Defence is that a term appointment with the opportunity for reappointment is not incompatible with the necessary independence required of a military tribunal (paragraph 79 of the explanatory memorandum). Security of tenure during an appointment and during any reappointment period is more important. To facilitate this, the use of the reappointment provisions is by exception and will only be used if the failure to reappoint a particular military judge would reduce the level of experience on the court to an extent that could be detrimental to the operation of the AMC given existing and possible future demands. Before making such a reappointment, the Minister must receive a report from the Chief Military Judge on the workload and experience available to the AMC in light of existing or likely judicial vacancies (objective criteria). This significantly reduces any perception that military judges might be beholden to political appointees, and does not involve the military chain of command.

10. The Bill is consistent with advice to Defence that there is nothing incompatible with judicial independence in allowing the reappointment of a judge beyond an initial term, provided the existence of the power to reappoint cannot reasonably be seen to cause the person seeking

reappointment to be beholden to the executive in discharging their judicial duties. In the case of the AMC, there is no general discretion to reappoint. Any reappointment may only occur when the Chief Military Judge identifies the need to maintain a level of experience on the court, and only then can the reappointment be approved by the Minister.

11. The issue of compulsory retirement age was considered in deciding on the term of appointment. The Government has agreed that military judges will be appointed for a fixed term to provide security of tenure. Fixed terms also allow for factors peculiar to the Defence Force, such as the hardship of the job in operations and the physical demands of constant travel and stress. Fixed terms are also consistent with other statutory appointments in Defence, and allow for matters of military purpose, such as the career development of officers. In particular, fixed terms allow for each generation of officers to aspire to the position of military judge, rather than being denied the opportunity because previous appointments have been made until retirement age. They also ensure that the members of a Service tribunal, who have the authority to impose a punishment such as dismissal, are not seen to be subject to entirely different conditions of service than the members over whom they exercise this authority.

12. It is not practical to limit appointments to a fixed term (of any length) and still afford protection of an appointment until retiring age. This would require the selection committee (provided for in the Bill) to discriminate by age to ensure that the term completed when the military judge reached retiring age. The ADF would prefer that any qualified officers voluntarily make themselves available for fixed term appointment at a time in their career that suits the individual, and in the full knowledge that it will be a terminal appointment. In the normal course, this would be expected to result in the most qualified legal officers becoming military judges, irrespective of age.

13. Speculation about the ADF's ability to support the flow-through of officers to be military judges needs to be considered in the context of expected workloads, rather than the maximum number of military judges that may be appointed. One permanent judge advocate and a few of the part time judge advocates conduct most of the current Defence Force magistrate trials and are the judge advocates in courts martial (about 50 to 60 cases per year). Even if this workload was to triple with the introduction of a new right of appeal and a revised right to elect trial, three permanent military judges ought to have the capacity to meet most of the requirement, with occasional support from the part time panel. Indeed, three permanent military judges may not always be required, nor might it be necessary to appoint all of the full time or part time judges at the same time. If so, this simple administrative action will create a natural stagger in the replacement process that would overcome the perception of waves of reappointments every five years.

14 Should one of the military judges go on to become the Chief Military Judge, this would naturally contribute to the maintenance of a level of experience on the AMC. The requirement to subsequently appoint two new permanent military judges at any time, might also be reduced, if it were necessary to maintain a level of experience on the AMC by using the reappointment provision. And, while there is provision for up to eight part time military judges, it is not clear at this stage whether they will all be required or need to be appointed at any one time.

15. Five year terms also recognise that the new offices of the Director of Military Prosecutions, the Registrar of the AMC (five year terms) and the Directorate of Defence Counsel Services should increase the pool of qualified officers for appointment as military judges. The expectation is that there will be an increasing number of available qualified officers over the period of every five year term. This pool will be further augmented by qualified Reservists who might be attracted to becoming either full time or part time military judges for five years on the basis of the new statutory arrangements. While it is too early to make a judgement either way, in practical terms, five year

fixed terms in these circumstances are unlikely to have an effect on the level of experience in the AMC.

Termination of appointment

16. One of the criteria for appointment as a military judge is that a member is deployable, in the sense of meeting his or her operational readiness, military skills and training, medical and physical fitness requirements. This is essential as the AMC will be a fully deployable court, comprised of members who must meet all their individual Service deployment requirements. These are the same objective standards that apply to all the members of the ADF. In having military judges meet these common standards, it also establishes the credibility and acceptance of the AMC within the Defence Force and is consistent with the recurrent theme of the Bill, that the AMC is a Service tribunal comprised of military judges who are serving ADF members.

17. Advice to Defence is that termination for misbehaviour and physical and mental incapacity are seen to provide for the necessary independence of the AMC, subject to there being a proper evidentiary basis and natural justice afforded. Any other grounds for removal or termination are generally expressed to operate automatically removing any perception of executive discretion, e.g., becomes bankrupt. In specifying the failure to meet individual Service deployment requirements as grounds for termination, it has been made clear that there is no residual discretion to terminate on other unspecified grounds, removing the perception of 'collateral attack' on this basis.

18. Advice from many sources was received in respect of various issues in the development of the Government response and the Bill, including the views of the JAG. All the advice received was considered and reflected in the Bill where appropriate. Indeed, it was agreed to change the name of the original judge advocates to military judges, based on the views of the JAG. Where there were disparate opinions, independent legal advice was obtained. The Government agreed that the appointment (and hence the termination) of military judges was to be by the Minister. Advice to Defence was to the effect that provided a proper evidentiary basis and natural justice were accorded, this should suffice to establish the necessary independence of the AMC, without the need to involve Parliament as is required for Chapter III judges. Defence also received advice that it is not essential for the integrity of the process to confer responsibility on the Governor General rather than the Minister.

Compulsory retirement

19. The provisions for a military judge to cease being a member of the ADF when he or she ceases to hold office as a military judge reflects previous advice from the JAG and others that these should be terminal appointments. The effect of the provision is to avoid any perception that military judges might be beholden to the executive for subsequent employment. Additionally, the provision overcomes the possibility of having to reduce a military judges' remuneration from a statutory level to a standard military salary, should they continue in the Service. This is similar to the contract terms in place for other statutory appointments in the ADF.

20. Given that the remuneration for military judges will be determined by the Remuneration Tribunal (Commonwealth), it is likely to be significantly more than the standard military salary for the same rank. As an example, the remuneration for the Chief Judge Advocate is about double the standard one star salary. Given this financial incentive, it is likely that there will be increased interest in these duties, both from full time and part time legal officers. This has been previously reflected in the number of applications submitted for the statutory appointments of Director of Military Prosecutions and Registrar of Military Justice. The former position was filled by a Reserve legal officer with coronial and Crown Prosecutor experience.

21. The development of the Government response to the 2005 Senate report and the legal and policy development of the Bill were subject to extensive internal and external consultation.

Internally, the requirements of the Services for the maintenance of effective discipline were clearly very important. External consultation included the Office of Parliamentary Counsel, the Attorney General's Department and the Australian Government Solicitor. Overseas jurisdictions (such as Canada, Britain, New Zealand and the United States) were also considered and reflected in the Bill where appropriate.

The rank of military judges

22. The status, authority or independence of the position of a military judge will in no way be compromised by their minimum rank being at the Commander (E) level. A military judge is so appointed pursuant to the Bill and it is by virtue of that appointment and the swearing an oath or making an affirmation of office that gives the authority to the position. It should also be noted that the provision specifies that the rank be not lower than Commander (E) which in effect means that a judge may be at a higher rank.

23. In Service tribunals, it is a matter of fact that prosecuting officers, defending officers, and judge advocates may from time to time be senior in military rank to members of a court martial panel, the accused and witnesses. Provided there is a fair trial and natural justice is accorded, the matter of relative rank is not relevant. The High Court also found that there is no substance in this point in *The King v Bevan and others* (1942) 66 CLR 452 (ex parte Elias and Gordon).

24. The rationale for the minimum rank of a military judge being Commander (E) was to ensure that the largest pool of qualified available officers was considered in the selection process. This arrangement ensures that all officers who are capable of being promoted to this rank will be considered. It also caters for the existing rank levels of many Reserve legal officers who may be potential candidates for a military judge position.

25. The suggestion proposed by the Law Council that there be no formal rank other than the title of 'military judge' with one star privileges, does not meet military purposes. Military judges require military rank for the performance of their non-judicial duties, such as training. Military rank is a reflection of judges' military credibility, not their status as a military judge. Such a move would also be inconsistent with the intent of the Bill, that the AMC is a Service tribunal, comprised of serving ADF members with military rank.

Qualification of military judges

26. As advised in the Government Response to Senate recommendation 18, a military court is not an exercise of the ordinary criminal law. It is a military discipline system, the object of which is to maintain military discipline within the ADF. This requires more than being able to understand specialist military evidence in a civilian criminal trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force both in Australia and on operations and exercises overseas. The court must be able to sit in theatre and on operations. It must be deployable and have credibility with, and acceptance of, the Defence Force.

27. The principal factor peculiar to the Defence Force is the military preparedness requirements and the physical demands of sitting in an operational environment. The appointment of civilian judges and senior counsel as military judges, without military service and training, would not satisfy the operational requirements of the AMC. Further, it impacts on the credibility of the AMC, where punishments such as dismissal from the service or reduction in seniority or rank may be imposed, if the judges are not members of the ADF subject to the same standards of discipline or operational expectations.

Class of Offences

28. There is no option for the Director of Military Prosecutions to refer class three offences for trial by military judge and jury. As a matter of fairness, this option has been provided to the accused. This ensures consistency by providing that the option remains with the accused to choose either trial by military judge or by military judge and jury. Administrative convenience was not seen to be a compelling argument in establishing this provision, and given that there is no option for the Director of Military Prosecutions, it is not necessary to provide for a reduction in the maximum sentence available.

29. The limitation on the maximum sentence that may be imposed for class 3 offences is 5 years imprisonment. DLAB 06, section 7 (new definition - *class 3 offence*) refers. Territory offences are catered for as a group, rather than them all being listed individually in the DFDA, as is the current case.

Trial by judge and military jury

30. Since 1985, the DFDA has provided for a trial by General Court Martial with a panel of five ADF officers. For a Restricted Court Martial, the panel comprises three ADF officers. In both cases, a majority decision is required. The proposed military jury is similar but not identical to the function of court martial panels or to a civilian jury. Unlike a court martial panel, a military jury will only determine if an offence has been committed. Also, the military judge, not the jury, will determine punishment. A military jury will comprise six ADF members, and a majority of four is necessary for a conviction to be imposed.

31. This matter has been the subject of advice along the following lines:

- There do not appear to be any major legal policy concerns with instituting majority verdicts for a military jury. Although the High Court has held that unanimous verdicts are required for federal criminal matters (*Cheatle v The Queen* (1993) 177 CLR 541), majority decisions are allowed in civil trials and this is also the trend for most States and Territories in relation to criminal trials. Given the specific requirement for the composition of military juries, which necessitates drawing from a smaller pool of potential candidates, smaller numbers of jurors may be appropriate.

- The proposal does not involve juries in the usual sense – they are a military jury with their own features. The perception of fairness may be strengthened if a special majority, say three quarters or two thirds, was required.

32. Additionally, the accused will have increased levels of protection with an expanded right of appeal on both conviction and punishment to the Defence Force Discipline Appeals Tribunal.

Court of Record

33. Similar to courts martial and trials by Defence Force magistrates, it is not necessary for the functioning of the AMC for it to be a court of record. However, section 148 of the DFDA currently requires that courts martial and trials by Defence Force magistrate shall keep records of their proceedings. This provision will also apply to the AMC on the commencement of the DLAB 06.

34. Separately, advice to Defence was that it would be inappropriate to provide that the AMC is a court of record. The concept has meaning in connection with the civilian court system. The AMC is not part of that system and should not be conferred with a status that might be taken to suggest that it is (or that it has a similar jurisdiction). There is no reason to expand the use of the concept in relation to the AMC, which is a unique statutory creature. Its powers should generally be set out in its enabling legislation and not determined by reference to powers exercised by courts in the civilian system. The statutory status of the proposed AMC and its judicial authority is clear. The status of

'court of record' is also not required to establish the independence or impartiality of the proposed AMC.

Transitional arrangements

35. The matters that were raised by the JAG and the Law Council were considered in developing the Bill. The issue of five year terms has been addressed previously in this submission. The issue of whether a failure to appoint all existing members of the judge advocates panel could affect the perception of independence of the current members in the interim period was the subject of separate advice to Defence.

36. In that advice, it was considered that there is no substance in that claim if an appointment process for the AMC is adopted that involves merit selection and an opportunity for all those on the panel, as well as other eligible persons, to be considered. Additionally, it was not considered that the possibility that not all or any of the existing members of the panel may be appointed to the AMC prevents them having the independence they currently have to discharge their functions in the meantime.

37. As mentioned above, there are currently ten part time judge advocate appointments which cannot automatically transition to fill eight part time military judge appointments, even if the AMC needed all eight positions filled. In any event, the Bill makes no provision for automatic transition to the first AMC. The Bill provides an opportunity for all qualified available officers to be considered in an independent merit selection process, which is consistent with natural justice principles. In a practical sense this also means that the military judges for the first AMC, and thereafter, may be fairly selected from the largest pool of qualified available officers.

Staffing

38. The Government has not agreed that the AMC would have the same status as the Federal Magistrates Court. Indeed, such a status might infer a change of jurisdiction that could place the validity of the AMC at risk. The Government response to Senate recommendations 20 and 21 states that the appointments to the AMC should have appropriate experience and that they should be based on the same professional qualifications and experience that apply to other judicial appointments, such as those applicable to a Federal Magistrate.

39. Proposed section 121 of the Bill provides for *necessary* staffing to the AMC. This legislative requirement gives effect to recommendation 18 of the Government response to provide the AMC with appropriate para-legal support for it to function independent of the chain of command. The purpose of the Bill is to create a permanent military court under Defence legislation that is independent of the chain of command in its judicial duties, with appropriate support staff, not to confer on it the status of a civilian court.

Chief of the Defence Force Commission of Inquiry

40. The Government's response to the Senate Inquiry into the Effectiveness of Australia's Military Justice System stated that CDF shall appoint a mandatory Commission of Inquiry (COI) into suicides by ADF members and deaths in service. In the response to Senate recommendation 34 it said that the Commission may consist of one or more persons, with one being a civilian with judicial experience, who will also be the President of the Commission. There is no requirement for the civilian with judicial experience to be a serving judicial officer. However, should serving judicial officers make themselves available for a CDF Commission of Inquiry, they will do so of their own volition and with the leave of their court.

41. The procedures governing the conduct of a CDF Commission of Inquiry will be provided for in the *Defence (Inquiry) Regulations 1985* which are the most appropriate means to provide for the establishment of, and procedures for, CDF Commissions of Inquiry. As an interim measure,

pending the permanent arrangements for CDF Commissions of Inquiry, all ADF suicides and deaths in service are subject to a CDF Board of Inquiry presided over by a civilian and established under the *Defence (Inquiry) Regulations 1985*. The Regulations will address the matter of deaths unrelated to Defence service.

42. CDF Commissions of Inquiry will not arrogate the responsibilities of State and Territory Coroners. The ADF and the various State/Territory coroners have been negotiating a form of understanding governing the relationship and operating procedures between the various parties concerning deaths of Service personnel and coronial jurisdiction. It was agreed that each coroner would write separately to the CDF outlining the protocols to be observed between the two parties, in regard to that particular coronial jurisdiction. To date both Victoria and Tasmania have provided such a protocol (copies attached). The remaining coroners are engaged with Defence with a view to agreeing similar protocols.

43. It is unclear what the 'perceived flaws' identified by the Law Council are, concerning the proposed procedures for terminating CDF Commissions of Inquiry, the failure to deal satisfactorily with vacancies in the membership of Commissions of Inquiry, proposed practice and procedure of Commissions of Inquiry and appearances. The current Bill simply adds a CDF Commission of Inquiry to the range of existing types of inquiries that may be conducted under the *Defence (Inquiry) Regulations 1985*. Details such as those raised by the Law Council are being considered separately in proposed amendments to the *Defence (Inquiry) Regulations 1985*.

Questions from Mr Douglas McDonald

44. The criteria for military juries have been based on the existing model of a court martial panel. Paragraphs 24 to 27 of the explanatory memorandum explain the proposed constitution of, and eligibility for, a military jury. The introduction of non-commissioned officers (NCOs) reflects the responsibilities and status of senior NCOs and a desire to broaden the eligibility of potential jurors in deference to the rank of the accused. It also alleviates previous difficulties in securing only officers to serve on court martial panels. Warrant Officers Class Two were not included because the rank is only particular to the Army.

45. Other than for exigencies of the Service precluding the availability of members on certain occasions, there will be no command involvement in the operation of military juries.

46. The independence of military jurors will be established similar to the rules for a court martial panel. Currently, the members of a court martial panel vote in reverse order of seniority. Along with other safeguards, this measure ensures that the voting is not influenced by the senior officers. The Bill provides for AMC rules to be made, which includes rules for polling of a military jury. It is proposed that these Rules will be legislative instruments for the purposes of the *Legislative Instruments Act 2003*, which will ensure that they are subject to tabling and disallowance requirements under that Act.

47. At the commencement of trials by military judge and jury, the military judge would address members of the jury on all aspects of the decisions they have to make and the process of how they determine a defendant's guilt or innocence. This is consistent with civilian practice. Additionally, the ADF intends to include training in the general duties of military jurors in the career courses for officers and warrant officers.

TASMANIA

TELEPHONE: (03) 6336 2615
FAX: (03) 6336 2662
DX: 70121, Launceston
Website: www.courts.tas.gov.au

MAGISTRATES' CHAMBERS
PO Box 551
Launceston
Tasmania 7250

16 August 2006

Air Chief Marshal Angus Houston,
Chief of Defence Force,
R1-5-B CDF Suite
Department of Defence
CANBERRA ACT 2600

Dear Air Chief Marshal Houston,

Re: Protocol for investigating deaths of ADF members: Magistrates Court of Tasmania (Coronial Division)

I am writing to advise the relevant sections of the Australian Defence Force (ADF) of the protocols to be adopted between the ADF and the Magistrates Court of Tasmania (Coronial Division) in the event of the death of an ADF member arising in the course of the member's service which is being investigated by a Tasmanian coroner.

This protocol is subject to the discretion of an individual Coroner who is conducting an investigation or inquest under the *Coroners Act* 1995 (Tas) and may be treated as a general guide only.

In Tasmania, the obligations of a Coroner investigating a death are set out in the *Coroners Act* 1995 (Tas) section 28,

> 28. Findings, &c., of coroner investigating a death
>
> (1) A coroner investigating a death must find, if possible –
>
> (a) the identity of the deceased; and
>
> (b) how death occurred; and
>
> (c) the cause of death; and
>
> (d) when and where death occurred; and

(e) the particulars needed to register the death under the *Births, Deaths and Marriages Registration Act 1999*; and

(f) the identity of any person who contributed to the cause of death.

(2) A coroner must, whenever appropriate, make recommendations with respect to ways of preventing further deaths and on any other matter that the coroner considers appropriate.

(3) A coroner may comment on any matter connected with the death including public health or safety or the administration of justice.

(4) A coroner must not include in a finding or comment any statement that a person is or may be guilty of an offence.

(5) If a coroner holds an inquest into the death of a person who died whilst that person was a person held in custody or a person held in care or whilst that person was escaping or attempting to escape from prison, a secure mental health unit, a detention centre or police custody, the coroner must report on the care, supervision or treatment of that person while that person was a person held in custody or a person held in care.

In order to undertake this process the Coroner is assisted by a range of agencies (including Tasmania Police) and, in appropriate cases, experts may be used.

During an investigation or inquest there may be many issues that require the decision of a Coroner including: the application of privacy legislation; confidentiality of issues associated with National Security; investigation management. In some instances these issues may need to be raised with all of the Parties who have a sufficient interest in the death investigation for comment or submissions before a decision is made by the investigating Coroner.

General introduction and the intention of this protocol

This protocol should be regarded as a document that may be subject to review. Although it will generally apply as a guide to the conduct of most Coronial death investigations in this State, as the circumstances surrounding an incident may differ, from time to time there may be a requirement to alter or add to the processes under this protocol. The proposed alteration/addition will be notified to the ADF Liaison Officer for Defence's consideration and an opportunity provided for comment.

As there is a range of Parties and circumstances involved in an incident where a Coronial investigation is required to be conducted definitions may be useful for interpreting this document and these are attached and marked *Attachment A*.

A function of the Chief Magistrate of Tasmania is to oversee and coordinate Coronial services within this State and this may include the holding of an inquest where any death or suspected death has occurred. The jurisdiction may extend offshore. Attached to this document is a statement of what constitutes a 'reportable death' for the purposes of the law of Tasmania. See *Attachment B*.

A Tasmanian Coroner may investigate the scene of death and assume responsibility for the body, the holding of a post-mortem and the disposal of a body, taking into account the wishes of the next of kin. I understand that while *Defence Force Regulations* 1952 permit the ADF to appoint a medical officer to conduct a post-mortem, if requested by a Coroner, the practice will be that a Tasmanian Coroner will arrange the post-mortem examination to be conducted by a forensic pathologist. However, a Coroner may also permit an ADF appointed medical officer and/or dental officer to be present at the post-mortem.

I understand that the ADF has certain statutory powers in relation to the deaths of ADF members occurring while on Service under Part VI of the *Defence Force Regulations* 1952. In certain circumstances the Regulations enable a commissioned officer of the ADF to issue directions for the disposal of the body of a member of the ADF who has died on Service thereby excluding this Court's jurisdiction. However, I understand that the Minister has issued a Direction under the *Defence Force Regulations* 1952 which limits the circumstances whereby a commissioned officer can issue a direction concerning the disposal of a body to those in which there is armed conflict within Australia, or where the death occurs outside Australia, including on a ship at sea outside Australian coastal waters. I also understand that the ADF is able to issue a Death Certificate noting the cause of death of its personnel under the *Defence (Certification of Deaths) Regulations* 1953.

In certain circumstances I understand that Military Inquiries may be initiated by the ADF under the *Defence (Inquiry) Regulations* 1985. My belief is that the purpose of such inquiries is to investigate matters that have the potential to detract from the operational capability of the ADF. Also my understanding is that these inquiries are primarily concerned with determining facts and are not employed to investigate disciplinary or criminal matters nor empowered to impose punishment.

The intention of this Coroner's protocol is to facilitate the efficient management and clarify the requirements of this Court in conduct of the Coroner's powers of inquest and investigation involving the death of ADF members while on Service (which includes any case in which the remains of the deceased ADF Member is repatriated to Australia). It is understood that it will apply to the death of an ADF member on Service whether occurring either within or outside Australia.

My understanding is that the ADF is proposing to establish an ADF Liaison Officer to more efficiently deal with Coronial investigations in Tasmania.[1] On the death of an ADF member occurring (if reportable to the Coroner) the ADF Liaison Officer will be notified and will act as the primary point of contact between the relevant Coroner's Office of this Court, the forensic pathologist and the ADF.

[1] The role of the ADF Liaison Officer is further discussed in this protocol under the sub-heading "The ADF Liaison Officer and role"

I understand that the ADF has implemented a five step process to manage a sudden death situation when it arises in the course of an individual's military duties within Australia, except in the event of armed conflict. Following the initial site management and assessment, the Base/Unit Liaison Officer will advise Military Police, Tasmania Police and the relevant Coroner's Office of this Court to enable an investigation to begin.

I understand that the ADF will provide access for the Coroner and Tasmania Police to the incident scene and will cooperate where possible in the forensic investigation subject to any Security concerns of the relevant Commanding Officer. In most cases, this will amount to securing any weapons or ordnances and to provide for the dignity of the body to be preserved with the least disturbance to the scene of death.

I understand that the ADF agrees generally to assist the investigations of this Court. Also where possible, the ADF will provide assistance of a technical nature to assist in investigations by a Tasmanian Coroner.

Participation – the ousting of the jurisdiction of the Coroner

I understand that under regulation 27 of the *Defence Force Regulations* 1952 it is possible for a commissioned officer to oust the jurisdiction of the Coroner where an ADF member dies while on Service. This occurs when the officer issues a direction concerning the disposal of the body. I also understand that the Minister has issued a direction under the *Defence Force Regulations* 1952 which limits the circumstances where a commissioned officer can issue a direction concerning the disposal of a body to where there is armed conflict within Australia, or where the death occurs outside Australia, including on a ship at sea outside Australian coastal waters. In these circumstances the ADF Liaison Officer will advise my office as soon as practicable after such a direction has been issued.

The ADF Liaison Officer and role

The ADF Liaison Officer will be the person occupying from time to time the position of Head Defence Personnel Executive, or delegate.

The ADF Liaison Officer will be provided with contact details for the Magistrates Court of Tasmania (Coronial Division) and the Tasmanian State Forensic Pathologist..

I understand that, for the purpose of the Coroner's investigation, the ADF Liaison Officer will deal with issues such as, but not limited to: coordinating information requests; requests to de-classify information; assistance with requests to the Minister to release information; publicity; decision-making processes; and secondment of ADF personnel to aid in an investigation.

In addition, as mentioned elsewhere in this protocol, the ADF Liaison Officer has the role to inform the Coroner when there has been a decision to oust the jurisdiction of the Coroner in relation to a particular death and notify the Coroners in respective jurisdictions where the place of ordinary residence applies or the body of the deceased ADF member arrives.

A Military Inquiry

Even if the ADF decides to hold a Military Inquiry, a Tasmanian Coroner is not precluded from conducting his/her own inquiries and investigating the death. A Coroner retains the

discretion whether to include any findings made as a result of a Military Inquiry into his/her final report.

It is also understood that where the ADF has conducted a Military Inquiry into the circumstances of a death, it will provide such report to the Coroner as has been publicly released to assist the Coroner in the investigation.

Death occurring outside Australia

I understand that where a death occurs outside Australia, other than on board a ship, usual practice is that as part of operational orders, every ADF mortuary plan will include contract mortuary services to repatriate the remains to Australia.

I understand that in the event that an ADF member dies outside Australia (where the circumstances of the death indicate that the death may be reportable to a State or Territory Coroner), the ADF Liaison Officer will notify both the Coroner of the State or Territory that is receiving the body of the deceased ADF member and the Coroner of the deceased member's last place of residence. If this occurs, and either of these options applies to Tasmania, then the Chief Magistrate (or the Chief Magistrate's delegate or nominee) will consult with the head of the other Coronial jurisdiction and the ADF Liaison Officer will be informed as to which Coroner's office will accept jurisdiction to conduct the investigation. The ADF may raise matters for consideration by the Coroners in this process.

I understand that the ADF may ask that the Chief Magistrate undertake an investigation or inquest where it is necessary to provide documentation certifying the death of an ADF member, a Defence civilian or accompanying member that has occurred outside Australia, to foreign authorities, for customs, quarantine or transport purposes.

Safety issues and the Coroner's investigation

I understand that if a death occurs on Commonwealth land or premises where the Commanding Officer believes there is a danger to persons, he/she may temporarily restrict access to a site, and secure any weapons, unexploded ordnance or dangerous items. In these circumstances the Base Liaison Officer will advise the relevant Coroners Office that such action has been taken and provide the investigating Coroner with assistance at the site and during the investigation. By way of example, the Coroner's investigation may include (but is not limited to) taking measurements, photographs or obtaining evidence from witnesses.

It is also understood that where the ADF is aware that a body may have been contaminated by any chemical, biological or radiological material, it will inform the Coroner that it believes such contamination has occurred.

Notification as an interested Party to an inquest and applications for suppression

If requested by the ADF Liaison Officer, my office will ensure that the ADF will be notified of an inquest into the death of an ADF Member. Subject to *Coroners Act* 1995 (Tas) the ADF may be entitled, on application to the investigating Coroner, to appear as a sufficiently interested Party at any such inquest. If determined to be a Party with sufficient interest, the ADF will be usually entitled to a copy of the Coroner's Brief of Evidence

before the inquest. In most circumstances, the ADF will also be entitled to a copy of the investigating Coroner's finding.

At the inquest, under the *Coroners Act* 1995 (Tas), if the ADF is determined by a Coroner to be a sufficiently interested Party it may seek suppression orders. It may also seek orders in relation to information having Security implications. It is noted that the ADF may also seek to rely on the *National Security Information (Criminal and Civil Proceedings) Act* 2004 in support of any application made on Security grounds.

Access to post-mortem report by ADF

In the event that an investigating Coroner considers that the ADF is an interested Party on application by the ADF Liaison Officer, he/she may provide the ADF with a copy of the post-mortem report.

Confidentiality of information

Where in connection with this protocol, Confidential information is provided to another Party the receiving Party shall not disclose the information to a third Party without the prior consent of the providing Party except where disclosure of the information is required by law or statutory duties, or by Parliament.

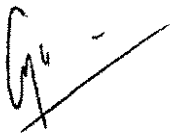
A major incident

I understand that, in the event of a major incident involving deaths of a large number of Defence personnel, the ADF Liaison Officer and the relevant Coroners Office will consult regarding the most appropriate arrangements concerning the provision of resources for responding to the incident.

Review of this protocol

In the event that the ADF considers that aspects of this protocol need revision then it should write to the Chief Magistrate setting out the issues. These issues may then be considered by the Chief Magistrate who will decide as to whether or not the protocol requires amendment.

Yours sincerely



Arnold Shott
CHIEF MAGISTRATE

ATTACHMENT A

"Service" means any activity involving an ADF member on duty, whether in Australia or overseas.

"In the course of a member's Service" includes circumstances where a death arises that are incidental to or have a connection with the member's Service, such as suicide or drug overdose.

"**Confidential information**" means information of a Party that:

- is by its nature Confidential;
- which the relevant Party identifies as Confidential at the time of the disclosure to the other Party; or
- the Party knows or ought to know is Confidential,

but does not include information which:

- is or becomes public knowledge other than by breach of the protocol;
- is in the possession of the receiving Party without restriction in relation to disclosure before the date of receipt from the disclosing Party; or
- has been independently developed or acquired by the receiving Party.

ATTACHMENT B

Coroners Act 1995 (Tas) section 3,

3. Interpretation

In this Act, unless the contrary intention appears –

"reportable death" means –

(a) a death where –

(i) the body of a deceased person is in Tasmania; or

(ii) the death occurred in Tasmania; or

(iii) the cause of the death occurred in Tasmania; or

(iiia) the death occurred while the person was travelling from or to Tasmania –

being a death –

(iv) that appears to have been unexpected, unnatural or violent or to have resulted directly or indirectly from an accident or injury; or

(v) that occurs during anaesthesia or sedation; or

(vi) that occurs as a result of anaesthesia or sedation and is not due to natural causes; or

(vii) the cause of which is unknown; or

(viii) of a child under the age of one year which was sudden and unexpected; or

(ix) of a person who immediately before death was a person held in care or a person held in custody; or

(x) of a person whose identity is unknown; or

(xi) that occurs at, or as a result of an accident or injury that occurs at, the deceased person's place of work, and does not appear to be due to natural causes; or

(b) the death of a person who ordinarily resided in Tasmania at the time of death that occurred at a place outside Tasmania where the cause of death is not certified by a person who, under a law in force in the place, is a medical practitioner; or

(c) the death of a person that occurred whilst that person was escaping or attempting to escape from prison, a detention centre, a secure mental health unit, police custody or the custody of a person who had custody under an order of a court for the purposes of taking that person to or from a court; or

(d) the death of a person that occurred whilst a police officer, correctional officer, authorised officer or a prescribed person within the meaning of section 31 of the *Criminal Justice (Mental Impairment) Act 1999* was attempting to detain that person;

STATE
CORONER
VICTORIA

State Coroner's Office
57-83 Kavanagh Street
Southbank 3006

Telephone: (03) 9684 4444
All Hours
Toll Free: 1800 136 852
(Only Country Victoria)
Fax: (03) 9682 1206

17th August, 2006.

Air Chief Marshal Angus Houston,
Chief of Defence Force,
R1-5-B CDF Suite
Department of Defence
CANBERRA ACT 2600

Dear Air Chief Marshal Houston,

Re: State Coroner's Protocol for Investigating Deaths of ADF members

I am writing to advise the relevant sections of the Australian Defence Force (ADF) of the protocols to be adopted between the ADF and my office in the event of the death of an ADF member arising in the course of the member's service which is being investigated by a Victorian coroner.

This protocol is subject to the discretion of an individual Coroner who is conducting an investigation or inquest under the *Coroners Act* 1985 and may be treated as a general guide only.

The Coroner's process is not about finding blame but investigating the death and recording the facts. To undertake this process the Coroner is assisted by a range of agencies (including Victoria Police) and, in appropriate cases, experts may be used. The Coroner can also make recommendations on public health and safety or the administration of justice.

During an investigation or inquest there may be many issues that require the decision of a Coroner including: the application of privacy legislation; confidentiality of issues associated with National Security; investigation management. In some instances these issues may need to be raised with all of the Parties who have a sufficient interest in the death investigation for comment or submissions before a decision is made by the investigating Coroner.

General introduction and the intention of this protocol

This protocol should be regarded as a document that may be subject to review. Although it will generally apply as a guide to the conduct of most Coronial death investigations in this State, as the circumstances surrounding an incident may differ, from time to time there may be a requirement to alter or add to the processes under this protocol. The proposed alteration/ addition will be notified to the ADF Liaison Officer for Defence's consideration and an opportunity provided for comment.

As there are a range of Parties and circumstances involved in an incident where a Coronial investigation is required to be conducted definitions may be useful for interpreting this document and these are attached and marked *'Attachment 'A' to State Coroner's ADF Investigation Protocol'*.

The function of the State Coroner's Office is to oversee and coordinate Coronial services within this State and this may include the holding of an inquest where any death or suspected death has occurred. The jurisdiction may extend offshore to the coastal waters of the State where a death occurs at sea, or it may be invoked where the deceased was ordinarily a resident in this State at the time of death or a body arrives in this jurisdiction even when the death did not occur in Victoria.

A Victorian Coroner may investigate the scene of death and assume responsibility for the body, the holding of a post-mortem and the disposal of a body, taking into account the wishes of the next of kin. I understand that while *Defence Force Regulations* 1952 permit the ADF to appoint a medical officer to conduct a post-mortem, if requested by a Coroner, the practice will be that my office will arrange the post-mortem examination to be conducted by a forensic pathologist. However, a Coroner may also permit an ADF appointed medical officer and/or dental officer to be present at the post-mortem.

I understand that the ADF has certain statutory powers in relation to the deaths of ADF members occurring while on Service under Part VI of the *Defence Force Regulations* 1952. In certain circumstances the Regulations enable a commissioned officer of the ADF to issue directions for the disposal of the body of a member of the ADF who has died on Service thereby excluding my jurisdiction. However, I understand that the Minister has issued a Direction under the *Defence Force Regulations* 1952 which limits the circumstances where a commissioned officer can issue a direction concerning the disposal of a body to where there is armed conflict within Australia, or where the death occurs outside Australia, including on a ship at sea outside Australian coastal waters. I also understand that the ADF is able to issue a Death Certificate noting the cause of death of its personnel under the *Defence (Certification of Deaths) Regulations* 1953.

In certain circumstances I understand that Military Inquiries may be initiated by the ADF under the *Defence (Inquiry) Regulations* 1985. My belief is that the purpose of such inquiries is to investigate matters that have the potential to detract from the operational capability of the ADF. Also my understanding is that these inquiries are primarily concerned with determining facts and are not employed to investigate disciplinary or criminal matters nor empowered to impose punishment.

The intention of this Coroner's protocol is to facilitate the efficient management and clarify the requirements of my office in conduct of the Coroner's powers of inquest and investigation involving the death of ADF members while on Service (which includes any case in which the remains of the deceased ADF Member is repatriated to Australia).

It is understood that it will apply to the death of an ADF member on Service whether occurring either within or outside Australia.

My understanding is that the ADF is proposing to establish an ADF Liaison Officer to more efficiently deal with Coronial investigations in Victoria.[1] On the death of an ADF member occurring (if reportable to the Coroner) the ADF Liaison Officer will be notified and will act as the primary point of contact between the State Coroner's Office, the forensic pathologist and the ADF.

I understand that the ADF has implemented a five step process to manage a sudden death situation when it arises in the course of an individual's military duties within Australia, except in the event of armed conflict. Following the initial site management and assessment, the Base/Unit Liaison Officer will advise Military Police, Victoria Police and my office to enable an investigation to begin.

I understand that the ADF will provide access for the Coroner and Victoria Police to the incident scene and will cooperate where possible in the forensic investigation subject to any Security concerns of the relevant Commanding Officer. In most cases, this will amount to securing any weapons or ordnances and to provide for the dignity of the body to be preserved with the least disturbance to the scene of death.

I understand that the ADF agrees generally to assist the investigations of my office. Also where possible, the ADF will provide assistance of a technical nature to assist in investigations by a Victorian Coroner.

Participation – the ousting of the jurisdiction of the Coroner

I understand that under regulation 27 of the *Defence Force Regulations* 1952 it is possible for a commissioned officer to oust the jurisdiction of the State Coroner where an ADF member dies while on Service. This occurs when the officer issues a direction concerning the disposal of the body. I also understand that the Minister has issued a direction under the *Defence Force Regulations* 1952 which limits the circumstances where a commissioned officer can issue a direction concerning the disposal of a body to where there is armed conflict within Australia, or where the death occurs outside Australia, including on a ship at sea outside Australian coastal waters. In these circumstances the ADF Liaison Officer will advise my office as soon as practicable after such a direction has been issued.

The ADF Liaison Officer and role

The ADF Liaison Officer will be the person occupying from time to time the position of Head Defence Personnel Executive, or delegate.

The ADF Liaison Officer will be provided with contact details for the State Coroner's Office and the Victorian Institute of Forensic Medicine.

[1] The role of the ADF Liaison Officer is further discussed in this protocol under the sub-heading "The ADF Liaison Officer and role"

I understand that, for the purpose of the Coroner's investigation, the ADF Liaison Officer will deal with issues such as, but not limited to: coordinating information requests; requests to de-classify information; assistance with requests to the Minister to release information; publicity; decision-making processes; and secondment of ADF personnel to aid in an investigation.

In addition, as mentioned elsewhere in this protocol, the ADF Liaison Officer has the role to inform the Coroner when there has been a decision to oust the jurisdiction of the Coroner in relation to a particular death and notify the Coroners in respective jurisdictions where the place of ordinary residence applies or the body of the deceased ADF member arrives.

A Military Inquiry

Even if the ADF decides to hold a Military Inquiry, a Victorian Coroner is not precluded from conducting his/her own inquiries and investigating the death. A Coroner retains the discretion whether to include any findings made as a result of a Military Inquiry into his/her final report.

It is also understood that where the ADF has conducted a Military Inquiry into the circumstances of a death, it will provide such report to the Coroner as has been publicly released to assist the Coroner in the investigation.

Death occurring outside Australia

I understand that where a death occurs outside Australia, other than on board a ship, usual practice is that as part of operational orders, every ADF mortuary plan will include contract mortuary services to repatriate the remains to Australia.

I understand that in the event that an ADF member dies outside of Australia (where the circumstances of the death indicate that the death may be reportable to a State or Territory Coroner), the ADF Liaison Officer will notify both the Coroner of the State or Territory that is receiving the body of the deceased ADF member and the Coroner of the deceased member's last place of residence. If this occurs, and either of these options applies to Victoria, then the Victorian State Coroner will consult with the head of the other Coronial jurisdiction and the ADF Liaison Officer will be informed as to which Coroner's office will accept jurisdiction to conduct the investigation. The ADF may raise matters for consideration by the Coroners in this process.

I understand that the ADF may ask that the State Coroner's Office undertake an investigation or inquest where it is necessary to provide documentation certifying the death of an ADF member, a Defence civilian or accompanying member that has occurred outside Australia, to foreign authorities, for customs, quarantine or transport purposes.

Safety issues and the Coroner's investigation

I understand that if a death occurs on Commonwealth land or premises where the Commanding Officer believes there is a danger to persons, he/she may temporarily restrict access to a site, and secure any weapons, unexploded ordnance or dangerous items. In these circumstances the Base Liaison Officer will advise my office that such

action has been taken and provide the investigating Coroner with assistance at the site and during the investigation. By way of example, the Coroner's investigation may include (but is not limited to) taking measurements, photographs or obtaining evidence from witnesses.

It is also understood that where the ADF is aware that a body may have been contaminated by any chemical, biological or radiological material, it will inform the Coroner that it believes such contamination has occurred.

Notification as an interested Party to an inquest and applications for suppression

If requested by the ADF Liaison Officer, my office will ensure that the ADF will be notified of an inquest into the death of an ADF Member. Subject to *Coroners Act* 1985 the ADF may be entitled, on application to the investigating Coroner, to appear as a sufficiently interested Party at any such inquest. If determined to be a Party with sufficient interest, the ADF will be usually entitled to a copy of the Coroner's Brief of Evidence before the inquest. In most circumstances, the ADF will also be entitled to a copy of the investigating Coroner's finding.

At the inquest, under the *Coroners Act* 1985, if the ADF is determined by a Coroner to be a sufficiently interested Party it may seek suppression orders. It may also seek orders in relation to information having Security implications. It is noted that the ADF may also seek to rely on the *National Security Information (Criminal and Civil Proceedings) Act* 2004 in support of any application made on Security grounds.

Access to post-mortem report by ADF

In the event that an investigating Coroner considers that the ADF is an interested Party on application by the ADF Liaison Officer, he/she may provide the ADF with a copy of the post-mortem report.

Confidentiality of information

Where in connection with this protocol, Confidential information is provided to another Party the receiving Party shall not disclose the information to a third Party without the prior consent of the providing Party except where disclosure of the information is required by law or statutory duties, or by Parliament.

A major incident

I understand that, in the event of a major incident involving deaths of a large number of Defence personnel, the ADF Liaison Officer and the State Coroner's Office will consult regarding the most appropriate arrangements concerning the provision of resources for responding to the incident.

Review of this protocol

In the event that the ADF considers that aspects of this protocol need revision then it should write to the State Coroner setting out the issues. These issues may then be considered by the State Coroner who will decide as to whether or not the protocol requires amendment.

Yours sincerely

Graeme Johnstone
State Coroner

ATTACHMENT A

PROTOCOL FOR DEFENCE/CORONIAL RELATIONSHIP

"Service" means any activity involving an ADF member on duty, whether in Australia or overseas.

"In the course of a member's Service" includes circumstances where a death arises that are incidental to or have a connection with the member's Service, such as suicide or drug overdose.

"Confidential information" means information of a Party that:

- is by its nature Confidential;
- which the relevant Party identifies as Confidential at the time of the disclosure to the other Party; or
- the Party knows or ought to know is Confidential,

but does not include information which:

- is or becomes public knowledge other than by breach of the protocol;
- is in the possession of the receiving Party without restriction in relation to disclosure before the date of receipt from the disclosing Party; or
- has been independently developed or acquired by the receiving Party.

DIRECTION PURSUANT TO DEFENCE FORCE REGULATIONS 1952, REG 27

MINISTER'S DIRECTION

I, Mal Brough, Minister Assisting the Minister for Defence, acting under regulation 27 of the Defence Force Regulations, direct that a commissioned officer of the Australian Defence Force may only give directions for the disposal of a body of a member of the Defence Force who died while on service so as to exclude reference to a State or Territory Coroner in such circumstances where –

a. the death occurred during a period of armed conflict within Australia, or
b. the death occurred outside Australia, including on a ship at sea in waters outside Australian coastal waters.

Where a commissioned officer gives a direction for disposal of a body, the direction shall:

a. be made in writing and signed by the commissioned officer concerned, and
b. be issued after consideration of whether it is possible or appropriate to comply with applicable State or Territory law relating to coronial inquiries.

Original signed

MAL BROUGH

Minister Assisting the Minister for Defence

Dated...*5/5*...2004