JUDGE ADVOCATE GENERAL
Australian Defence Force

Department of Defence, RGC-2-28, CANBERRA ACT 2600

2005-1057298
JAG 206/06

The Secretary
Senate Foreign Affairs Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Secretary

SUBMISSION ON THE PROVISIONS OF THE DEFENCE LEGISLATION AMENDMENT BILL 2006

Introduction

1. Thank you for your invitation to make a submission in connection with the Bill. In responding, I shall refer to issues raised in my earlier submission to the Senate Foreign Affairs Defence and Trade References Committee Inquiry into the Effectiveness of Australia's Military Justice System (MJI) and in my annual reports to Parliament. Copies of these documents are available at www.defence.gov.au/jag.

2. Before proceeding further, it is important that I flag, as I do in my annual reports, that the Judge Advocate General (JAG) should not act as general legal adviser to the Australian Defence Force (ADF), nor the Government, as that would be inconsistent with judicial office.[1] Accordingly, I shall confine my observations to broad issues principally related to the proposed establishment of the Australian Military Court (AMC). I note that the Bill does not include any provisions concerning the proposed simplification of summary procedures or the proposed right of appeal from summary proceedings to the AMC.

Background

3. The legislative arrangements for the AMC and for the transition of existing members of the judge advocates/Defence Force Magistrate (JA/DFM) panels, must be considered against relevant legal developments, and particularly the history of High Court challenges to the military jurisdiction. I reviewed these in my submission to the MJI.[2] In general terms, a significant minority of the Court has consistently been concerned about the conduct of criminal trials by Service tribunals because the tribunals are not established under Chapter III of the Constitution, and might not be thought to afford the protections provided by those courts. Indeed, my suggestion to the MJI was that the AMC should be established pursuant to Chapter III, although I did express the view that this could possibly be problematical having regard to section 80 of the Constitution. I understand that subsequent advice to Government was to the effect that this would be so. Under the circumstances, I can have no concern about the decision to establish the AMC under the Defence power rather than Chapter III, but that fact does mean the risk of a successful Constitutional challenge will depend entirely upon the statutory safeguards guaranteeing the judicial independence and impartiality of the AMC.

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1 See for example Annual Report for 2005, paragraph 9.
2 Reproduced at Annex O to my Annual Report for 2003.

4. Again, as I mention in my submission to the MJI, there have been significant developments overseas concerning the ability of Service tribunals to provide an "independent and impartial" trial. Those issues have not yet been comprehensively argued before the High Court. They focus, however, upon the independence of the tribunals themselves and the judicial officers constituting them.

5. No one can guarantee that a particular arrangement outside of Chapter III will withstand legal challenge. However, I think that it is self evident that the more closely the arrangements for the AMC are aligned to those prevailing in Chapter III (or recognised State) courts, the greater the prospect of those arrangements withstanding legal challenge. Again, this is an issue that I addressed in the course of my annual reports.[3] It must be recognised that there is no single model of judicial independence and there is room for legitimate choice about structural and other arrangements affecting judicial independence. What is clear is that a judicial body such as the AMC must satisfy (and be perceived to satisfy) minimum requirements of independence and impartiality.[4]

6. There are three discrete areas of risk in the move to the AMC. These are:

a. The integrity of the proceedings being conducted under the present arrangements;

b. The transition to the AMC itself; and

c. The integrity of the arrangements for the AMC.

The first two areas which I have identified will be directly affected by the arrangements for the current system to transition to the new AMC. This is an issue to which I shall return subsequently.

The Approach Envisaged in my Submission to the MJI

7. I raised the prospect of a permanent military court with the MJI with a view to shoring up the military jurisdiction from future High Court challenge and because such an initiative had the potential to set the benchmark for common law Service tribunals internationally. To this end, I included the following observation in my submission to the MJI:

> "I commend to the Committee the approach recommended by former Chief Justice (of Canada) Lamer in his recent report to the Canadian Minister of National Defense. At page 21 he states:
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> > 'In *Genereux*, the Court stated that the Constitution did not necessarily require that military judges be accorded tenure equivalent to that enjoyed by judges of the regular criminal courts. However, constitutionality is a minimum standard. As I said at the outset, those responsible for organising and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied. For this reason I have come to the conclusion that military judges should be awarded tenure until retirement from the Canadian Forces.'[5]

8. In so far as the Canadian model provided an indication of comparable international best practice, I also invited attention to Part IV of former Chief Justice Lamer's report dealing with military judges and the court martial administrator. As I there observed, former Chief Justice Lamer recommended, inter alia:

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3 Report for 2005, paragraph 44 et seq.

4 *Forge v ASIC* [2006] HCA (5 Sep 06), per Gleeson CJ (Callinan J agreeing) at [36]-[37], [41] Gummow, Hayne and Crennan JJ at [64], [68], [84]; Kirby J at [209].

5 Submission to the MJI paragraph 26.

a. That military judges be awarded security of tenure until retirement from the Canadian Forces, subject only to removal for cause on the recommendation of an inquiry committee (Recommendation 5); and

b. The amendment of the National Defense Act to establish a permanent military court of record (Recommendation 13).[6]

9. It was against this background that, subject to particular issues of approach addressed elsewhere in the Report, I felt able to comment generally in my Annual Report for 2005 in connection with the MJI:

> "Regardless of how the initiatives came about, I congratulate the Senate Foreign Affairs Defence and Trade References Committee and the Government on the ultimate outcome. In my view, these changes go a substantial way to modernising the disciplinary structure provided by the (Defence Force Discipline Act 1982) DFDA and bringing it into line with developments in the law both within Australia and abroad. So far as I am aware, the ADF will be the first of our traditional common law allies to establish a permanent military court, although I understand that similar moves are intended for the United Kingdom and have, at least, been recommended for Canada."[7]

Approach Disclosed by the Bill

10. It is with considerable disappointment that I note that the approach taken in the Bill is to establish the AMC as a tribunal akin to the Administrative Appeals Tribunal (AAT), in terms of status and independence, rather than as a court of record in the sense in which that term is generally understood. The AMC will have complete (and exclusive) Australian jurisdiction over members of the ADF outside Australia. 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. It occurs to me that this is the one opportunity likely to present itself for many years for the Parliament to establish a world class military court with proper independence and status. Quite aside from the risk associated with a lesser course, it would be a great pity for that opportunity to be wasted.

11. The matter has to be seen against the risks of successful challenge to which I have referred earlier. In my view this risk is greatly increased by the decision to align the AMC with a tribunal rather than to imbue it with the guarantees of independence of a court. These are issues to which I referred in some detail in my Annual Report for 2005.[8]

12. The Bill fails to address any of these concerns, save for the adoption of the term "Military Judge" in lieu of the outmoded "Judge Advocate". Rather, in practical terms, it provides for five year terms for the military judges, renewable in limited circumstances, and for termination effectively by the Executive. In summary, the provisions relating to the appointment and termination of military judge (cl 188AO - 188BA) envisage:

a. appointments are to be by the Minister;

b. for a term not longer than 5 years;

c. the Minister would have a power to re-appoint, but only in defined exceptional circumstances;

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6 Submission to the MJI paragraph 20.

7 Paragraph 26.

8 Paragraph 39 et seq.

d. military judges may not be promoted during their tenure (unless appointed CMJ);

e. appointments may be terminated by the Minister; and

f. a military judge will cease to be a member of the ADF when his or her term expires.

13. It is astounding that in implementing my suggestion for a permanent military court made with a view to shoring up the military jurisdiction from future High Court challenge, (and because such an initiative had the potential to set the bench mark for common law Service tribunals internationally), it is now proposed effectively that the military judges will have even less independence, so far as their terms of appointment are concerned, than they have under the existing arrangements. 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. Brigadier Westwood [the Chief Judge Advocate (CJA)] gave evidence to that effect at the MJI hearings.[9] 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.

14. In terms of balancing risk and benefit there does not appear to me to be much to be gained from this approach, yet everything to be lost. I can understand concern that officers appointed as judges of the AMC not sit for very extensive terms. However, given that the compulsory retiring age (CRA) 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. I might also say that the proposed five year terms are insufficient to permit the development of proper experience in the discharge of judicial duties, and are such that I would be amazed if the ADF were able to support the flow-through of officers for these highly specialised duties at that rate.

15. Indeed, 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. These are issues which I have discussed with Brigadier Westwood, who completely agrees.

16. 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.

17. So far as the termination arrangements are concerned, I did suggest an approach which included the Governor General and both Houses of Parliament.[10] Rather than adopt those suggestions, the Bill provides for termination by the Minister. Effectively, this is termination by the Executive. If termination (for cause) is to be left with the Minister, one further possible approach which might temper the notion of control by the Executive, might be to have such termination subject to annulment by either House of Parliament.

18. I have mentioned my understanding that it was originally intended that the AMC would be a court of record. I support that approach. The Bill contains no provision to that effect.

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9 Transcript for 6 Aug 04, page 34.

10 Annual Report for 2005 paragraphs 52 et seq.

19. A court of record is a court that keeps a record of the proceedings, generally has a seal (to authenticate its records), the power to fine or imprison for contempt, is an entity itself and is independent of the its judicial officers (ie, a court of record retains its identity despite changes in its membership or the procedures by which it arrives at its decisions), and review of its decisions are generally by way of appellate review and not trial *de novo* (a complete retrial as if the original trial had not occurred). Under the Bill, the AMC will have all of these attributes, including the power to punish for contempt. That is already contained in DFDA s.53, but the problem to date has been that there could be no offence until the particular ad hoc tribunal had been convened. The establishment of a permanent court will overcome that problem. In my 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.

Transitional Arrangements

20. The Bill is silent on the issue of the transition of CJA and the other members of the JA/DFM panels to the AMC. By default, it would appear to follow that new appointments by the Minister are envisaged in accordance with the selection committee process for which the Bill provides. This occasions me great concern so far as the integrity of proceedings being conducted under the existing arrangements is concerned. It 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 perception that the officer concerned will decide issues influenced by the desire for re-appointment. This has the plainest potential to undermine public confidence in the existing tribunals. It is also an approach that fails to address the issue of continuity and leadership for the new court as it is stood up to take over the trials currently conducted by the JA/DFM panels.

21. This latter issue is particularly important having regard to the expiry of my own appointment on the 5th October 2007. As I have indicated in my 2005 Report, I shall not accept a further appointment.[11] The constitutional convention where a court is abolished or reconstructed is:

> "to ensure that all willing members of the existing court are, in the absence of proved misbehaviour or incapacity, appointed to the new court."[12]

22. If this is followed, not only would the integrity of current proceedings not be weakened, but it would facilitate an orderly transition to the AMC and staggered new appointments as officers retired from the Court. This will occasion considerably less risk than endeavouring to fill three full time and eight part time positions in one appointment process.

23. So far as providing continuity and leadership for the AMC is concerned, I consider it essential that Brigadier Westwood's current appointment as CJA transition to that of Chief Military Judge (CMJ) of the AMC.

Director Defence Counsel Services

24. In my annual report for 2005, I referred to the desirability of the Director Defence Counsel Services (DDCS) being established as an independent statutory position.[13] For the reasons there set out, I reiterate that this is, to my mind, preferable to the approach of delegated authority from CDF taken in the Bill.

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11 Paragraph 4.

12 *A-G (NSW) v Quin* (1990) 170 CLR 1, per Deane J.

13 Paragraphs 68-69.

Appeals to the Defence Force Discipline Appeals Tribunal

25. The Registrar of Military Justice (to become the Registrar of the AMC), Colonel Cameron, has invited to my attention the fact that the creation of his position provides an opportunity for the handling of appeals to the Defence Force Discipline Appeals Tribunal (DFDAT) to be centralised through his office. There would, no doubt, be efficiencies from the adoption of this course. It would mean that the one office would be responsible for both the proposed appeals from summary proceedings to the AMC,[14] and appeals taken from the AMC to the DFDAT.

Conclusion

26. The issues associated with the establishment of a new court and the transition from the existing arrangements are complex. While I appreciate that the Parliamentary process led to very worthwhile agreement as to the way ahead, it is important that this be seen for what it was: An indication of broad general approach. In my view, it is important that it be modified, where necessary, to accommodate the legal complexities involved.

Recommendation

27. I recommend that consideration be given to the following amendments:

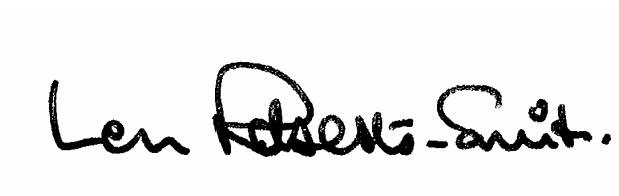
a. Expressly provide that the AMC is a court of record;[15]

b. Specifically provide for the CJA currently appointed under DFDA s.188A, and the JAs and DFMs currently appointed for fixed terms in accordance with DFDA s.196(2A)[16] to transition as CMJ and military judges respectively of the AMC;

c. Provide for CMJ and the other military judges to be appointed until CRA; and

d. Provide for CMJ and the other military judges to be removed only by the Governor General on the address of both Houses of Parliament.

Yours sincerely



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14 Government Response to recommendation 23 of the MJI Report.

15 In this regard, I note that other courts created by statute are deemed to be courts of record, including the Federal Court, the Federal Magistrates Court, the District Court (NSW) and the local courts (NSW) and the Land and Environment Court (NSW).

16 See Annual Report for 2004 paragraph 75.