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

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Dear Senator Johnston

Thank you for your letter of 14 September 2006 to the Minister for Defence, the Hon Dr Brendan Nelson MP, concerning the invitation to Defence to make a written submission to your Committee's inquiry into the Provisions of the Defence Legislation Amendment Bill 2006.

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 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.

I am pleased to provide you with Defence's submission into your Committee's inquiry.

Yours sincerely

BRUCE BILLSON

DEPARTMENT OF DEFENCE SUBMISSION

TO

THE SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

INQUIRY INTO THE PROVISIONS OF THE DEFENCE LEGISLATION AMENDMENT BILL 2006

Overview

In October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The Committee's report, *The Effectiveness of Australia's Military Justice System*, was tabled on 16 June 2005.

In its response to the Senate Report, the Government announced significant enhancements to the military justice system. These changes are intended to provide for the maintenance of effective discipline and the protection of individuals and their rights.

Service Tribunals

A number of submissions to the inquiry concerned the structure of disciplinary tribunals and appeals processes available to Service personnel, in particular courts martial and Defence Force magistrate trials, under the *Defence Force Discipline Act 1982* (DFDA). The concerns stemmed from the location of courts martial panels, judge advocates and Defence Force magistrates within the chain of command and the implications for their (actual and perceived) independence.

The Senate Report recommended the establishment of a permanent military court based on Chapter III of the Constitution. The Government disagreed on the basis that a permanent military court under Chapter III is not consistent with, and imposes real constraint on, military purposes. The following characteristics of the proposed Australian Military Court (AMC) are relevant in this regard:

- The AMC is not an exercise of the ordinary criminal jurisdiction (many of the offences under the DFDA are unique to the Defence Force). More is required than being able to understand specialist evidence at a trial.
- The AMC is part of the military justice system, the object of which is to maintain military discipline within the Defence Force (and through it operational effectiveness).
- The AMC must be deployable and be able to sit in theatre and on operations. A principal factor of the AMC that is peculiar to the Defence Force is the military preparedness requirements and physical demands of sitting in an operational environment.
- A knowledge and understanding of the military culture and context is essential. This includes an understanding of the military operational and administrative environment, the unique needs for the maintenance of discipline of a military force in Australia and on operations and exercises overseas. The AMC must have credibility with, and acceptance of, the Defence Force.
- Military judges will not be immune from the provisions of the DFDA, other than in the performance of their judicial duties. Military judges will be subject to ordinary discipline in the performance of their non-judicial duties such as training.

Policy Development

The Government response was based on advice that a military court (the Australian Military Court) outside Chapter III is 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. This is the same jurisdiction that applies to the current system of trials by courts martial and Defence Force magistrate.

Although it is not a Court established under Chapter III of the Constitution, the AMC has some features similar to such a Court and these are reflected in the Bill. This reflects the previous advice to Government that there is no constitutional imperative to make any military court (with limited jurisdiction) completely akin to a full Chapter III court. There is no intention to increase the jurisdiction of the AMC, or confer it with a status that might suggest that it is part of the ordinary civil court system. The AMC will deal with the same offences as those dealt with under the current system of trial by courts martial and Defence Force magistrate. Current provisions concerning the consent of the Director of Public Prosecutions for the institution of DFDA proceedings for certain serious offences, such as treason, murder, manslaughter and serious sexual offences for trial under section 63 of the DFDA, will be retained.

The Government agreed the AMC will be established under appropriate Defence legislation and it will sufficiently satisfy the principles of impartiality, judicial independence and independence from the chain of command through:

- Statutory appointment of judge advocates by the Minister with:
 - security of tenure (five year fixed terms with a possible renewal of five years);
 - remuneration set by the Remuneration Tribunal (Commonwealth);
 - no eligibility for promotion during tenure as a judge;
- Comprise judge advocates, who are to be selected from any of the available qualified full or part time legal officers and include:
 - one permanent Chief Judge Advocate (to be retitled Chief Military Judge);
 - two permanent Judge Advocates (to be retitled Military Judge);
 - a part-time Reserve panel of judges, selected from any of the available qualified Reserve ADF legal officers; and
- Appropriate para-legal staff sufficient for the AMC to function independently from the chain of command;
- Provide for military judges to sit alone or with a military jury; and
- Provide for a mandatory military jury for certain serious military offences.

The Government response, including these provisions, was tabled in Parliament on 5 October 2005.

Purpose of the Bill

The Bill has primarily been drafted to amend Defence administered legislation, particularly the DFDA, to establish a permanent military court, to be known as the “Australian Military Court” (AMC). As discussed above, the AMC will replace the current system of trials by courts martial and Defence Force magistrate under the DFDA.

The AMC will be established permanently, have military judges with security of tenure and financial security, and be administratively independent. These are significant enhancements over the current system of courts martial and trial by Defence Force magistrate.

In addition, the Bill will also amend the *Defence Act 1903* to facilitate the creation of a 'Chief of Defence Force Commission of Inquiry', which will be presided over by a civilian with judicial experience, and that will be mandatory for all suicides and deaths in service.

Separate amendments to legislation are being developed for introduction in Parliament in 2007 which will introduce the right of appeal from summary procedures to the AMC, and a right to elect trial before the AMC for certain offences.

Legislation Development

The legislation was developed on the basis that the three essential requirements of judicial independence are security of tenure, financial security and institutional independence with respect to matters of administration bearing directly on the exercise of the judicial function. Provided these requirements are met the current policy is assessed to be valid and the risk of a successful challenge to the validity of the AMC low.

The Government has agreed that military judges will be appointed by the Minister for a fixed term to provide security of tenure. In addition to providing 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. Provided there is security of tenure during an appointment, appointments for fixed terms are not seen to be incompatible with judicial independence.

The provisions were also developed on the basis that termination for misbehaviour and physical or mental incapacity are seen to provide for the necessary independence of the AMC, subject to there being a proper evidentiary basis and natural justice accorded. Any other grounds for removal or termination are generally expressed to operate automatically removing any perception of executive discretion, eg, becomes a bankrupt.

The Bill has been drafted on this basis, and also makes it clear that military judges are required to meet the same preparedness requirements as the rest of the Defence Force. This is an important factor in establishing the credibility and acceptance of the AMC with the Defence Force. Additionally, it ensures that the grounds are specified and there is no residual discretion to terminate on other unspecified grounds.

The Government has also agreed that military judges will be appointed for fixed five year terms with a possible renewal of five years. The use of a reappointment provision is by exception, and will only be used if the failure to reappoint a particular MJ would reduce the level of experience on the court to an extent that could be detrimental to the operations of the AMC given existing and possible future demands. Before making such a reappointment, the Minister must receive a report from the CMJ on the workload and experience available to the AMC in light of existing or likely judicial vacancies. If reappointed, a MJ is not eligible for any further reappointment.

The Bill has been drafted on the basis that there is nothing incompatible with judicial independence in allowing reappointment of a judge beyond an initial term, provided the existence of the power cannot reasonably be seen to cause the person seeking reappointment to be beholden to the executive in discharging their judicial duties.

The Government agreed that the panel of judge advocates (military judges) would be selected from any of the available qualified full or part-time legal officers. The intent of this was to

ensure the selection of the best available people to be the military judges in the first permanent military court, especially noting the significant change from mostly part-time members on military salary to a permanent court with statutory remuneration. It is also the fairest way to consider the relative merits and qualifications of all the qualified available officers.

Apart from one full time member, the members of the current judge advocates panel serve only on a part time basis. These offices at present cannot be equated with those of a judge or office with the status of a judge and do not give rise to any entitlement or convention requiring them to receive special consideration when it comes to appointment to the AMC. There could also be issues concerning natural justice if some but not all members were considered or appointed without an opportunity to apply being given to the other members. Finally, the proposed AMC is entirely different in structure and composition from the current system. Given this, the means for selecting its military judges is best addressed by establishing an appointments committee and allowing existing members to apply for consideration, along with other eligible persons.

The Bill has been drafted on this basis.

Key Points of the Bill

Current and Future Changes to Legislation

As outlined above, the Bill will amend Defence administered legislation, in particular the *Defence Force Discipline Act 1982* to establish the AMC which is intended to replace the current system of trials by courts martials and Defence Force magistrates under the *Defence Force Discipline Act 1982* (DFDA). As a result of this, subsequent changes to the DFDA will simplify summary procedures, and introduce a right of appeal and a right to elect trial from summary procedures to the new AMC for certain offences.

The Bill also makes a number of consequential amendments to Defence legislation and legislation administered by other Departments required as a result of the new AMC trial structure including the *Migration Act 1958* and the *Defence Force Discipline Appeals Act 1955* to give effect to the intended regime. Specifically, it revises the DFDA to replace references to 'court martial' and 'Defence Force magistrate' where appropriate. The Bill also provides for an appeal process to the Defence Force Discipline Appeals Tribunal from the AMC (similar to the current system of appeals to the Tribunal from a court martial or Defence Force magistrate). It will, however, expand the right to appeal to a person in respect of a conviction, prescribed acquittal and/or punishment (in accordance with the Government response to recommendation 23) and also to allow the Director of Military Prosecutions to appeal in respect of punishment.

Significantly, the Bill does not in any way affect the integrity of the summary proceedings system which remains unchanged until the proposed second stage of amendments to the DFDA proceeds early in 2007, consistent with the Government agreed Implementation Plan. The only overlap may be in respect of an election by an accused person for trial and/or punishment by the AMC. However, given current numbers of such elections for courts martial and Defence Force magistrate trials this will not be significant and, in any case, the AMC will simply replace the existing tribunals for the purpose of these elections.

Military Jury and Offence Regime

The Bill also restructures the existing military offences in a new concept of Class 1, 2 and 3 offences. The more serious military offences will be Class 1 offences. It is intended that,

depending on the offence, they will be dealt with either by military judge alone or by military judge and military jury. A trial by military judge and jury will be akin to a trial by court martial and a trial by military judge alone will be akin to a trial by a Defence Force magistrate. All Class 1, 2 and 3 offences are outlined in the Bill and replicate the current offences in the DFDA.

Establishment of a Chief of Defence Force Commission of Inquiry

The Bill will also amend the *Defence Act 1903* to facilitate the creation of a 'Chief of Defence Force Commission of Inquiry'. The Government agreed in its response to the Senate Report that the level of independence and rigour of inquiries into ADF incidents resulting in death will be strengthened. In demonstrating that ADF inquiries into these incidents are independent of the chain of command, the Government is creating a new mandatory Commission of Inquiry for all suicides and deaths in service, and an independent civilian, with judicial experience, will be its president.

A panel of judicially experienced persons is being established to provide presidents for Chief of Defence Force Commissions of Inquiry. The panel includes retired judges and magistrates, and currently serving judges and magistrates who will participate with the leave of their court.

Conclusion

As mentioned in the overview, the Bill will give effect to the Government's response to recommendations 18 and 19 (amend the DFDA to create a permanent military court to replace offences tried by CM and DFM) of the 2005 Senate report into *'The effectiveness of Australia's military justice system'* by the then Senate Foreign Affairs, Defence and Trade References Committee.

The Bill to establish a permanent Australian Military Court is a significant element and is also complementary to other work being done to the overall program for enhancing the military justice system.

This Bill not only constitutes a major step in the restructuring of the Australian military justice system but, importantly, reflects the Chief of the Defence Force's and the Service Chiefs' commitment to ensuring a fair and just military work environment.

In conclusion, this Bill will provide the Australian Defence Force with a system that will better ensure impartial and fair outcomes and strike an effective balance between the need to ensure effective discipline within the ADF and to protect individuals and their rights.