Defence Legislation Amendment Bill 2006

Senate Standing Committee on Foreign Affairs Defence and Trade

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Executive Summary

The Law Council of Australia is pleased to provide comments regarding the *Defence Legislation Amendment Bill 2006*, which provides for the creation of the military court and appointment of the Chief Military Judge and other members of the bench.

This submission has been prepared by the Law Council's Military Justice System Working Group, which is comprised of highly regarded members of the profession with extensive experience in the military and reserves. Accordingly, the comments in this submission reflect a substantial amount of knowledge and experience with regard to the military justice system.

The Law Council's submissions are summarised, as follows:

- The structure of the Australian Military Court may lead to problems with respect to the independence of the court and the attractiveness of the offices of the military judiciary;
- The limitation of terms to 5 years is unlikely to overcome these problems and may further undermine the perceived independence of judicial officers;
- The minimum rank of Military Judges, compared to the minimum rank of the Director of Military Prosecutions, may undermine the perception of the importance and authority of judges in the Military Justice System;
- Compulsory retirement of Military Judges and the limited scope for continuing practice while serving part-time may limit the attractiveness of the office of Military Judge and diminish the pool of suitable candidates;
- Staffing arrangements and resources for the Australian Military Court should be set down under legislation; and
- 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 appointers.

The submission also sets out the Law Council's concerns regarding regulations under development with respect to the Chief of Defence Force Board of Inquiry.

Comments

1. The High Court has said in relation to non-military courts, that '' there is no single ideal model of judicial independence, personal or institutional. Within the Australian judiciary, there are substantial differences in arrangements that bear upon judicial independence." (per Gleeson CJ in *Forge v Australian Securities and Investments Commission* [2006] HCA 44 (5 September 2006), citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 152 [3]).

2. The following comments and submissions are made in respect of the model proposed by the Government under the Bill. The provisions for the Chief Military Judge (CMJ) and the other Military Judges (MJs) can be characterized as being consistent with a Tribunal but not with a Court. However, the military court will have the potential to deal with very serious matters. For example, any charges arising out of the Kovco inquiry and the shooting of the Iraqi security guards by Australian troops provide potential situations for the Australian Military Court (AMC) to preside over matters that would otherwise be within the province of a state or territory Supreme Court.

3. This raises the question of whether the High Court will 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. 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.

Structure of the military court

4. The structure of the AMC under the Bill is as follows:

   a. the Chief Military Judge (CMJ) is appointed at a rank no lower than 1 star General, which places the CMJ on a par with the rank of the Director of Military Prosecutions (DMP) and the Registrar;

   b. a MJ 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;

   c. MJs are to be compulsorily retired from the Australian Defence Force (ADF) at the end of their term of appointment except where granted a reappointment, which can only be in exceptional circumstances, and then only for one further term;

   d. part time MJs "must not engage in employment outside the duties of his or her office as Military Judge if to do so would conflict with his or her duties as Military Judge".

5. In practice there are unlikely to be appointments to the office of MJ at a higher rank than commander equivalent because sufficient candidates holding, or

qualified to hold, higher rank are unlikely to be available in the Defence Force (including the Reserves).

6. While suitably qualified civilians (i.e. persons with the necessary military law experience to be considered suitably qualified for appointment) are available, they are excluded by the requirement that appointments must be made from serving members of the Defence Force. That requirement is at odds with the civilian practice of appointing retired judges, senior counsel and even practitioners in private practice as acting judges of State courts, subject to the requirements set out in *Forge v Australian Securities and Investments Commission*[1].

7. Practising reserve officers are likely to be able to maintain a viable practice if appointed to a part time position as an MJ. This is because the exigencies of private practice, where hearings cannot be predicted to be of a specific duration, are bound to conflict with part time duties as an MJ. If the private practice is made subservient to the military appointment it is likely to suffer to the extent that the appointee's livelihood would be threatened following the termination of the military appointment. Without knowing the potential remuneration on a part time basis in advance, the acceptance of such an appointment would be so fraught as to dissuade appropriate persons from becoming applicants.

Problems associated with fixed terms

8. The Law Council believes that the proposed structure of the military court will create significant concerns with respect to the independence and experience of the appointees to the bench of the military court.

Independence of military court may be compromised

9. Renewable fixed terms for the MJ are inconsistent with the principle of judicial independence. This was made clear by the Judge Advocate General in paragraphs 40-43 of his last report to Parliament. The provision of a 5 year term of appointment for MJs may compromise their independence from the chain of command, by 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. The same perception might also arise if MJs are subject to pressure from the much higher ranking CMJ.

10. 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. Nothing is achieved by this provision other than ensuring the continued inexperience of the military court bench and a turnover rate in respect of MJs that will be impossible to meet, given the size of the Defence Force and the unique skills required.

11. It is apparent that appointments are envisaged to take place at the same time and, accordingly, all MJ's will reach their five year expiry at the same time (unless

[1] [2006] HCA 44

there happen to be older MJ's who reach compulsory retirement age in the meantime). 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.

12. A more attractive option may be to stagger appointments to ensure vacancies are filled from time to time, rather than in large tranches every five years. This would be achieved if the existing appointments were to transition and expire at compulsory retirement age. However, the Bill as presently drafted appears to create a perception that they are a potential trigger, to be used improperly for the exercise of the re-appointment provisions in so called "exceptional circumstances"

13. It is further noted that 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.

14. One way of meeting these concerns would be to give 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.

Compulsory retirement may dissuade suitable applicants

15. The proposed solution put forward under the Bill – 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. A young capable qualified commander equivalent will not wish to have a promising military career cut short in his or her late thirties or early forties by such an appointment, thus depriving the military court of a huge well of talent particularly in the Reserve component of the Force.

16. 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 candidates for the office of MJs will be quickly depleted, which is likely to prevent the adequate staffing of the military court with MJs.

17. The Law Council believes that attempting to achieve independence by fixing the rank and remuneration of military judges at the time of appointment is ill-conceived. Moreover, it is likely that this provision will diminish the attractiveness of the position and therefore the pool of suitable candidates for appointment. This problem will be exacerbated by the failure of the provisions

concerning the CMJ and MJs, coupled with their forced retirement at the expiration of their appointment, to make any mention of the financial benefits, if any, that may be claimed upon retirement. In the absence of a suitable retirement package, it would be surprising if anyone (who would not otherwise attain their compulsory retirement age at the expiration of his or her appointment) would be prepared to accept either the full or part-time appointments. They are certainly not conditions designed to attract and retain the best qualified officers for the appointments.

Staffing

18. 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.

"Exceptional Circumstances"

19. The Law Council submits that proposed section 188AR - Exceptional Circumstance for Re-appointment of a Particular Military Judge, is likely to be unworkable in practice. Given that the Act envisages that the judges are only to serve five year terms, it can never be said that the retirement of one of them at the expiration of that period can trigger the level of experience reduction provision envisaged by sub section 2.

Chief of the Defence Force Commission of Inquiry

20. It is to be noted that these are to be brought into existence by regulations under the *Defence Act* by amendment to the regulation making power under that legislation. The Law Council is advised that planning, if not drafting, of the regulations is well advanced in Defence.

21. The current guidelines proposed by the implementation team, if followed are likely to produce undesirable consequences. There is little indication that the implementation team will follow the advice given by senior experts in military law within the ADF and the Reserve to avoid that result. Accordingly it is considered essential that the main thrust of the process for Chief of Defence Force Commissions of Inquiry and Boards of Inquiry (COI and BOI) remain under the close scrutiny of Parliament from the outset, by having the essential provisions relating thereto spelled out in the Bill rather than being left for implementation by the Regulations. The matters of concern have a propensity to seriously impede the Defence operations. Briefly they include the following:

    a. Mandatory requirements compelling CDF to conduct a COI in every case of the death of a member of the Defence Force. This is of particular concern with suicide and road traffic deaths unrelated to defence service, which are cases more properly suited, at least at first instance, to State Coroners.

This will require an acknowledgement of the primacy of civil over military jurisdiction;

b. the lack of any provision for the interrelationship between the coronial jurisdiction and COIs. This 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. At very least CDF should have the power to delay a COI until cause of death has been determined. Without such a power, the results of the COI may be problematic, particularly where willful homicide is suspected. However, it could also be argued that if the CDF is to have the power to delay a COI, that officer should also have the power not to conduct one at all.

c. the requirement that the President of a COI to be a civilian with judicial experience may not always be possible in practice. The Law Council is advised that there is a potential for the ADF to conduct more than 40 COIs per year, or to have to conduct them. It is doubtful that it will be able to procure that many presidential candidates with judicial experience. Many Chief Justices of courts within the system have declined to make their judges available for even the most significant Royal Commissions for very good reasons. Where civilian inquiries are concerned, there is a very long history of the more usual practice of using retired judges and currently practising or retired Queen's or Senior Counsel for this role. It is submitted that the pool of commissioners should be expanded to include such persons in order to make the proposal workable;

d. flaws in the proposed procedures for terminating COIs;

e. a failure to deal satisfactorily with vacancies in the membership of COIs, proposed practice and procedure of COIs and appearances.

22. The Law Council would welcome the opportunity to expand on these submissions or to answer any queries raised by them in oral submissions to the Senate Committee inquiry.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.