

The Senate

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Standing Committee on  
Foreign Affairs, Defence and Trade

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Defence Legislation Amendment Bill 2007  
[Provisions]

Interim report

September 2007

# **Standing Committee on Foreign Affairs, Defence and Trade**

## **Inquiry into the Provisions of the Defence Legislation Amendment Bill 2007**

### **Interim Report**

1.1 On 16 August 2007, the Senate referred the provisions of the Defence Legislation Amendment Bill 2007 to the Senate Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report by 5 September 2007.

#### **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.<sup>1</sup>

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.<sup>2</sup> The committee also recommended the introduction of a right to elect trial by court martial before the permanent military court for summary offences and the introduction of a right of appeal from summary authorities to the permanent military court.

1.4 The government supported the committee's main recommendation to create a permanent military court.<sup>3</sup> It agreed in principle with the concept of a right to elect trial. It stated:

The form of that right and appropriate thresholds will be needed to be determined once the structure of the Australian military court is established,

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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.

but will be based on existing determinations that certain classes of serious offences must be tried by a court incorporating a military jury.<sup>4</sup>

1.5 The government also agreed with the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian military court.<sup>5</sup>

### **Purpose of the Bill**

1.6 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.<sup>6</sup>

1.7 In 2006, legislation was passed establishing the Australian Military Court (AMC) which then prepared the way for the introduction of the right to elect trial from summary procedures and the right of appeal from summary authorities to the AMC. According to the Explanatory Memorandum, the bill's 'comprehensive system of elections and appeals in respect of summary authority proceedings provides a direct link to the statutorily independent AMC and in so doing enhances existing safeguards.'<sup>7</sup>

1.8 This bill accords with the committee's recommendations dealing with the ADF's summary discipline system. It will introduce an automatic right of appeal from a summary authority to a single Military Judge of the AMC. It will provide an accused with the right to elect trial by a Military Judge of the AMC for all but a limited number of certain disciplinary offences mainly minor infractions of discipline such as cases of absence without leave. These minor offences are ones that must be dealt expeditiously by a summary authority to maintain discipline and moral. Individuals will still have the right of appeal from a summary trial.

1.9 The Explanatory Memorandum also noted that the evidence regime currently applying to summary trials is 'overly complex and not easy to apply by persons without formal legal training'. The bill recognises the importance of having 'a fair but simple and easily understood evidence framework and intends to simplify the evidence regime for summary trials. The Explanatory Memorandum stated that the changes introduced by the bill would 'mean that summary hearings will be more

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4 Government's response to the committee's recommendations contained in its report, *The effectiveness of Australia's military justice system*, June 2005. A copy of the government's response can be found in the committee's first and second progress reports on reforms to Australia's military justice system., August 2006 and March 2007.

5 *ibid.*

6 A copy of the government's response can be found in the committee's first and second progress reports on reforms to Australia's military justice system. August 2006 and March 2007.

7 Explanatory Memorandum, p. 4.

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efficient and timely, while maintaining all the necessary safeguards for an accused person'.<sup>8</sup>

## Submissions

1.10 The committee advertised the inquiry in *The Australian* on 22 August 2007, calling for submissions by Monday 27 August 2007. The committee also wrote to a number of relevant organisations and individuals to invite submissions.

1.11 The committee received submissions from the Acting Chief of the ADF, the three Service Chiefs, the Judge Advocate General, the Inspector General of the Australian Defence Force, the Director of Military Prosecutions, and the Law Council of Australia.

## Conduct of the Inquiry

1.12 The committee notes the importance of the proposed legislation and the short amount of time allowed to prepare submissions and to present evidence before the committee at a public hearing. To allow witnesses time to consider the views presented in submissions, the committee decided that it would not hold a public hearing until 5 September. To further expedite proceedings the committee prepared written questions on notice to Defence. These questions, sent to Defence on 30 August 2007, dealt largely with minor drafting matters or were seeking clarification on terms used in the legislation.

1.13 The committee received Defence's responses to the questions on 4 September.

1.14 There was strong support for the bill especially from the Acting Chief of the ADF and the three Service Chiefs. The Inspector General Australian Defence Force stated that:

Given the imminent commencement of the AMC and its intended role in the summary system it is in the interests of the ADF military justice system and its new summary procedures be introduced as soon as possible.<sup>9</sup>

1.15 The committee notes the clear endorsement of the proposed legislation and the desire to have it in place as soon as possible. It was concerned, however, about a number of matters that it believed needed to be examined. They included:

- An omission on the right of the Director of Military Prosecutions to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order given or made in proceedings in an Australian Military Court. The Law Council proposed s.5F of the Criminal Appeal Act (New South Wales) as a suitable model for adoption.<sup>10</sup>

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8 Explanatory Memorandum, paragraph 12.

9 *Submission* 1, p. 4.

10 *Submission* 8, pp. 2–3.

- The exclusion of non-commissioned officers from the discipline officer scheme. The Inspector General Australian Defence Force and the Director of Military Prosecutions identified this as a matter that should be addressed.
- The apparent lack of wide consultation on the proposed legislation.
- Comments by the Director of Military Prosecutions who, while supporting the right of an accused person to elect trial, noted that the scope of the election appeared to be limited.

1.16 In light of these concerns and of the need to give thorough consideration to the evidence presented at the public hearing on 5 September, the committee decided to present an interim report. The committee will be presenting its final report on the provisions to the Defence Legislation Amendment Bill 2007 on or before 10 September 2007.

1.17 Submissions and the transcript of the public hearing will be tabled with the final report. The written questions on notice to the Department of Defence together with Defence's responses will be included as an appendix to the final report.

SENATOR MARISE PAYNE  
CHAIR