

Chapter 3

Military tribunals

Office of the Director of Military Prosecutions

3.1 As noted in Defence's first progress report, the statutory position of Director, Military Prosecutions (DMP) was established under legislation assented on 12 December 2005. The position is at one star rank and the Commonwealth Remuneration Tribunal determines the remuneration for the DMP. Defence informed the committee that in line with recommendations made by the committee, eleven additional positions have been established and are being filled and additional resources such as IT and accommodation have been reviewed and are being progressed. Other measures taken include:

- two new training positions have been established in the Office of the Director of Military Prosecutions (ODMP) to facilitate the training of newly assigned officers;
- the Commonwealth Director of Public Prosecutions (DPP) is providing assistance in the training of newly assigned officers to the ODMP;
- the DMP has commenced a range of briefs to the services and various command and staff courses to raise the awareness of the ODMP;
- a web page has been developed to further assist raising awareness and the profile of the DMP;
- all legal officers in the ODMP now hold practicing certificates; and
- relevant professional ethical standards are under consideration.¹

3.2 The DMP, Brigadier Lynette McDade, informed the committee that she had 12 prosecutors, including herself, and anticipated two more joining the team in June. According to the DMP, the current number of prosecutors represented a significant increase in that resource. She also explained that no one in the ODMP had yet been seconded to civilian practice. It was her intention, however, to have people seconded to work with the State and Commonwealth DPPS and legal aid services for short periods of time to give them exposure and experience 'to enable them to become effective prosecutors'. In her view, rather than rely on the reserve which it had done in the past, the ODMP would develop a very good capacity to prosecute.²

1 *Australian Defence Force Report to the Senate Standing Committee on Foreign Affairs, Defence and Trade on Progress of Enhancements to the Military Justice System*, October 2006, recommendations 12–16.

2 *Committee Hansard*, 26 February 2007, p. 22.

Director of Defence Counsel Services

3.3 In its previous report, the committee noted that the position of Director of Defence Counsel Services (DDCS) had been established and filled. The committee notes, however, that in his annual report for 2005, the Judge Advocate General (JAG) referred to the desirability of the DDCS being established as an independent statutory position. He outlined the reasons for having the DDCS independent from the chain of command:

While DDCS remains as a staff officer within the chain of command, it seems to me inevitable that there will be the potential for conflicts so far as the expenditure of resources on an accused person's defence is concerned. On the other hand, if DDCS is independent of the chain of command, with a budget to manage and is answerable to Parliament for the expenditure of those funds and the provision of adequate legal representation to accused persons, this would free the discharge of the functions from any perception that resources were in some way being limited because of command influence.³

3.4 In his submission to the committee's inquiry into the Defence Legislation Amendment Bill 2006, the JAG reiterated his view that the DDCS should be a statutory appointment which to his mind was preferable to the approach of delegated authority from CDF taken in the bill.⁴

3.5 In its consideration of the proposed legislation, the committee suggested that as part of its review of the provisions of the bill, the government consider the desirability of establishing the DDCS as an independent statutory position.⁵ The committee reiterates this suggestion.

Permanent Military Court

3.6 During its inquiry into Australia's military justice system, the committee examined the ADF's 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.⁶

3 Judge Advocate General, *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2005*, paragraph 69, pp. 16–17.

4 *Submission 3*, paragraph 24.

5 Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, paragraph 1.26.

6 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxii.

3.7 The committee recommended that the government establish an independent permanent military court. It would be 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.⁷

3.8 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'.⁸

3.9 On 14 September 2006, the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, introduced the Defence Legislation Amendment Bill 2006 into the House of Representatives. The main purpose of the bill was 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 2005 report on Australia's military justice system.

3.10 The bill proposed to replace the current system of trials by Courts Martial (CMs) and DFMs, with an 'Australian Military Court' (AMC) that was to consist of the Chief Military Judge (CMJ), two full-time Military Judges (MJs) and no more than 8 part-time MJs. A service offence would be tried by a MJ alone or MJ with a military jury depending on the classification of the offence. In some cases, the accused person could elect to be tried by a MJ alone or a MJ and military jury.

3.11 The provisions of the bill were referred to the committee for inquiry and report. In its report on the proposed legislation, the committee acknowledged that the bill introduced a number of positive features that would confer a greater degree of independence on the proposed AMC. While it recognised that the bill was intended to improve service tribunals, the committee was 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. The evidence before the committee identified a number of areas of concern including :

- 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;

7 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxii.

8 *Explanatory Memorandum*, paragraph 2.

- 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;⁹
- 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.¹⁰

3.12 The committee concluded that overall:

...the government settled for the barest minimum reforms required to its service tribunals to escape a constitutional challenge...that, in striving for the minimum, the government has not removed the risk that at some stage the High Court may find that 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.¹¹

3.13 The government decided to delay debate on the bill to allow time for amendments to be drafted and presented to parliament. On 29 November 2006, the

9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 11 of 2006, 11 October 2006, p. 20.

10 The Senate Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, paragraph 1.22.

11 The Senate Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, paragraph 1.24, pp. 5–6.

government introduced amendments. They were to give effect to the matters raised by the committee in its consideration of the bill. The most significant amendments included:

- extending the term of appointment of the CMJ and MJs from a 5-year to a fixed ten-year period;
- the automatic promotion of the CMJ and MJs at the mid-point of their 10-year appointment;
- the Governor-General, not the Minister, to appoint the CMJ and MJs;
- the Governor-General, not the Minister, to have the authority to terminate the appointment of the Chief Military Judge and Military Judges;¹²
- removing the requirement for the automatic retirement of a member from the ADF following his or her tenure as the CMJ or a MJ;¹³
- a jury of 12 members required for class 1 offences (the more serious offences);¹⁴
- a decision of a military jury to be unanimous or alternatively, by a five-sixths majority but only in the following circumstances:
 - where it had deliberated for at least 8 hours and unanimous agreement had not been reached but a five-sixths majority agreement had; and
 - the court was satisfied that the deliberation time was reasonable, having regard to the nature and complexity of the case; and
 - after examining one or more jurors (on oath or affirmation) it was unlikely that the jurors would reach unanimous agreement following further deliberation;¹⁵
- according the AMC the status of a court of record but with a provision that would limit the publication of proceedings in the interests of the security and

12 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 19, 20, 24, 26, 29, 31, 39 and 41.

13 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 27 and 42.

14 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 15.

15 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 16.

defence of Australia, the proper administration of justice or public morals or any other matter the court considers relevant.¹⁶

3.14 The amendments were a positive step toward providing members of the AMC with security of tenure and judicial independence.¹⁷ They also included additional safeguards that would protect the right of an accused to a fair trial. The bill as amended was passed by parliament and received assent on 11 December 2006.

3.15 The CDF informed the committee that with the legislation coming into force, the ADF was putting in place procedural and administrative matters to allow the AMC to commence on 1 October 2007 or earlier by proclamation.¹⁸

3.16 It should be noted that the form of the right to elect trial from summary procedures to the AMC is to be included in legislation to revise summary procedures. The right of appeal from summary authorities to a MJ of the AMC will also be included in legislation to revise summary procedures. Defence expect the legislation to be introduced into Parliament in 2007.

16 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 12 and 13.

17 House of Representatives *Hansard*, 29 November 2006, p. 125.

18 *Committee Hansard*, 26 February 2007, p. 9.