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SENATE STANDING COMMITTEE ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

Monday, 9 October 2006

Members: Senator Johnston *(Chair)*, Senator Hutchins *(Deputy Chair)*, Senators Mark Bishop, Ferguson, Hogg, Payne and Trood

Participating members: Senators Adams, Bartlett, Bernardi, Boswell, Brandis, Bob Brown, Carol Brown, George Campbell, Carr, Chapman, Conroy, Crossin, Eggleston, Chris Evans, Faulkner, Ferris, Fielding, Fierravanti-Wells, Fifield, Forshaw, Heffernan, Hurley, Joyce, Kirk, Lightfoot, Ludwig, Lundy, Ian Macdonald, Marshall, McGauran, Mason, Milne, Nash, Nettle, Polley, Robert Ray, Scullion, Siewert, Sterle, Stott Despoja, Watson, Webber and Wortley

Senators in attendance: Senators Adams, Mark Bishop, Ferguson, Hutchins, Johnston, Payne and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Provisions of the Defence Legislation Amendment Bill 2006

WITNESSES

Committee met at 4.35 pm

CHAIR (Senator Johnston)—I declare open this meeting of the Senate Standing Committee on Foreign Affairs, Defence and Trade. Today's public hearing is part of the committee's inquiry into the provisions of the Defence Legislation Amendment Bill 2006. The committee's proceedings today will follow the program as circulated. These are public proceedings although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist upon an answer a witness may request the answer be given in camera. Such a request may of course be made at any other time.

[4.37 pm]

ROBERTS-SMITH, Major General the Honourable Justice Leonard William, Judge Advocate General, Australian Defence Force

Evidence was taken via teleconference—

CHAIR—I welcome via teleconference from Perth, Western Australia, the Judge Advocate General, Major General Roberts-Smith. I thank him for his participation in the proceedings and for his various submissions. The committee has before it submissions numbered 3 and 3A from the Judge Advocate General. Do you wish to make any amendments to those submissions?

Mr Justice Roberts-Smith—I do not, but I would like to make some preliminary marks.

CHAIR—I invite you to make a brief opening statement and then we will proceed to questions.

Mr Justice Roberts-Smith—My comments on the bill are set out in those submissions stated 19 and 22 September and I will not repeat them now. I would like to make some general observations to begin with. It is true that there is no constitutional imperative to make the Australian Military Court completely akin to a chapter III court. But it is also true that the further away the AMC is from those attributes, the greater will be the risk of a successful constitutional challenge. In addition, the approach taken in the bill seems to aim to provide what is 'barely sufficient' or merely 'essential' to survive constitutional challenge. There are two points to be made about that.

First, there is significant risk that what is thought to be enough to be sufficient may in the end be found to not quite get over the line. If it does not, the result could be catastrophic—the whole system could fall. Secondly, we should be looking to give those who serve in the Australian Defence Force not just a system which will meet the bare constitutional requirements for validity but the best one we can give them. We owe them no less. Chief Justice Lamer made that point in his report on the Canadian military discipline system. A copy of that was enclosed with my submission to the committee dated 16 February 2004; it is reproduced in paragraph 7 of my present submission dated 19 September. However, it is in my view so fundamental that it is worth repeating:

> 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.

I respectfully agree entirely with that comment.

I would like to say something briefly about three issues. The first issue is fixed terms. My objections to the provisions for the appointment of the chief military judge and military judges are set out in my submissions. I can elaborate on those if members of the committee have any questions. For the moment, I see from the response of the Minister Assisting the

Minister for Defence that fixed terms are said to also allow for factors peculiar to the Defence Force, such as hardship of the job on operations and the practical demands of constant travel and stress. I remind the committee that the bill is predicated on the basis that military judges will be serving military officers and have to meet the same preparedness requirements as the rest of the Defence Force.

The rest of the Defence Force, both permanent and reserve, is expected to meet the hardships of operations, travel and stress until compulsory retirement age of 55 in the case of permanent officers and now 60 in the case of reservists. If military judges were appointed to compulsory retirement age, as I recommend, they would be in the same position in that respect as all other members of the Defence Force. In my opinion this factor is simply no justification at all for fixed-term appointments, and security of tenure and the military credibility and integrity of the AMC would be much better advanced by appointments to compulsory retiring age.

The second point is on transition to the Australian Military Court. In my submission I have expressed concern about the proposals contained in the bill for the initial establishment of the Australian Military Court and in particular that it is intended to have no carryover at all of judicial officers from the current system to the Australian Military Court. It is said that the offices of judge advocate and Defence Force magistrates cannot be equated with those of a judge or 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 Australian Military Court. However, the fact is that judge advocates and Defence Force magistrates do exercise judicial power and must do so judicially. The High Court has said so. A judge advocate could today be called upon to perform that judicial function, for example, in the murder trial of a Defence Force member in Iraq, Afghanistan, the Solomon Islands or anywhere else outside Australia. The perception of a lack of status or recognition of judge advocates and Defence Force magistrates is in large part what this bill is all about—or should be. I do not suggest that there is an entitlement in judge advocates and Defence Force magistrates for special consideration; I do say that the convention to which I refer affords good guidance in principle why the current judicial officers should transition to the Australian Military Court as the initial appointments.

Amongst the other reasons I have mentioned, one might be the perception that the intention is to take the opportunity to not appoint one or more current judge advocates and Defence Force magistrates with whom Defence or the executive are not happy. I do not say for a moment that that is so, but it is a perception that could reasonably arise. That would create great concern about the integrity of all further courts martial or Defence Force magistrate trials before the Australian Military Court is stood up, not to mention the perception about the Australian Military Court itself that other officers not presently judge advocates or Defence Force magistrates may have been 'parachuted' into it. There is no such possibility if the existing appointments automatically transition to the new court.

In that regard, I should point out that there is a factual inaccuracy at paragraph 37 of Defence responses to the questions asked by the Senate. Paragraph 37 says that there are currently 10 part-time judge advocate appointments which cannot automatically transition to fill eight part-time military judge appointments even if the AMC needed all eight positions

filled. That proposition at paragraph 37 is incorrect; there are currently eight part-time appointments plus one reserve plus one permanent officer who is the Chief Judge Advocate. In that regard, I should also point out that the compulsory retiring age for a permanent officer is 55. By July 2007, which we might perhaps take as the starting point for the AMC, two of the existing part-time judge advocates and Defence Force magistrates will have reached compulsory retiring age anyway so automatic transition would apply only to six, and the Chief Judge Advocate would reach retiring age approximately 14 months after the court is likely stood up.

Since receiving the responses this morning I had inquiry made of the compulsory retiring ages of the current appointees. The results are as follows: Brigadier Westwood, the Chief Judge Advocate, is currently appointed to that position until 18 May 2009, but his compulsory retirement age is 11 September 2008, which is why he would have 14 months to go were he to transition automatically to the AMC. Colonel Morrison has a compulsory retiring age of 26 July 2018. He would have 11 years to go. Wing Commander Devereux has a compulsory retiring age of 30 January 2025. He would have 17½ years to go. He is a recent appointment and is relatively young. Likewise, Wing Commander Stapleton has a compulsory retiring age of 16 March 2023, which would give her 16 years to run to compulsory retirement age if she were automatically transitioned. Captain Callaghan from the Royal Australian Naval Reserve will reach compulsory retiring age on 5 April 2007 and so will not be available for the Australian Military Court, anyway. Wing Commander Burnett has a compulsory retiring age of 30 March 2018, so he would have 11 years to run. Wing Commander Burke has a compulsory retiring age of 2 April 2015 and would have eight years to run. Colonel Beckwith will retire compulsorily on 25 December this year, so he will not be available for transition. Colonel Morcombe has a compulsory retiring age of 20 January 2009, which would mean he would have time left to serve only 18 months if transitioned. So the committee can see that there would indeed be a staggering of retirements from the court.

To summarise, if transition were to be automatic of the current judge advocates and Defence Force magistrates to the AMC when the AMC is stood up, there will be one permanent officer, plus six others. There would, in any event, therefore need to be—or, at least, there could be—appointments for two new permanent members and two new part-time appointments. So there would be four new appointments, in any event. In relation to the three permanent positions, I have recently put in train a proposal to appoint a second permanent officer to assist Brigadier Westwood. If that comes through then that would obviously reduce the permanent positions by one.

The final comment I would like to make before turning to questions from the committee concerns the Director of Defence Counsel Services. This is another key military justice appointment. It is curious that it has not been created as a statutory appointment within the bill. In my annual report for 2005, at paragraph 69, I recommended that it should be. The Director of Defence Counsel Services is currently a staff officer function within Defence Legal. Perceptions of the position being subject to command influence, both military and civilian, remain. The position may also have competing priorities in respect of other assigned activities, such as Defence Legal functions. Such potential conflicts seem inconsistent with the military justice enhancements spoken of by the committee and the government. The fact

that this position, going to legal representation of, and the conduct of defences and trials for, members of the Defence Force, has not been treated with equality by comparison with other statutory appointments—especially the DMP and the RMJ, (the Registrar of Military Justice)—has not gone unnoticed. Those are my preliminary remarks. If the committee has any questions, I would be pleased to answer them.

CHAIR—Thank you, Your Honour. Before we go to questions, I will just go through who is with the committee for your benefit and understanding. We have Senator Judith Adams, a government senator from Western Australia; Senator Alan Ferguson, a government senator from South Australia—and Senator Ferguson is also Chair of the Joint Standing Committee on Foreign Affairs, Defence and Trade—Senator Russell Trood, a government senator from Queensland; Senator Marise Payne, a government senator from New South Wales; the committee secretary, Dr Kathleen Dermody; Senator Steve Hutchins, an opposition senator from New South Wales and deputy chair of the committee; and, Senator Mark Bishop, an opposition senator from Western Australia. I thought it appropriate to introduce those senators to you so you know who is present.

Senator MARK BISHOP—Thank you for taking the trouble to make a submission and to appear today. I am familiar with your work history in Western Australia. Would you outline your academic and legal and military career for the record, because you do have an interesting bringing together of different aspects which is of interest to the committee. I have questions deriving from your experience in both civil and military areas, so if you would not mind briefly putting on the record your legal and military career that would be appreciated.

Mr Justice Roberts-Smith—I will try to do that briefly!

Senator MARK BISHOP—If you can!

Mr Justice Roberts-Smith—I graduated from law school in Adelaide in 1969 and was admitted in 1970 to private practice. Not very long after that in that year I went to Papua New Guinea, working for what was then the Australian administration of Papua New Guinea. I worked for the crown law department there and began in civil litigation and advisings, and after a couple of years transferred to prosecutions. I remained there until I was appointed Chief Crown Prosecutor shortly prior to independence in Papua New Guinea. The transitional provisions of the Constitution on independence provided that whoever was Chief Crown Prosecutor would automatically become the first public prosecutor of that country on independence, so that happened to me. I remained in Papua New Guinea for another year to set up the Office of the Public Prosecutor. That position was responsible for all prosecutions at all levels throughout the country and had constitutional independence. I remained there doing that, presented my first annual report to parliament, and then returned to South Australia where I was appointed a stipendiary magistrate. I remained there for almost a couple of years and then came to Western Australia to take up appointment as the first Director of the first Legal Aid commission in Australia. I remained there for 11 years. Then I went to the bar in February 1979 and took silk at the end of that year. I was appointed a judge of the Supreme Court in November 2000 and a Judge of Appeal in the new Court of Appeal here in February last year when that court was established.

So far as my military career is concerned, I joined the Adelaide University Regiment while I was at that university. On completion of my university studies, I had also progressed through the system and gained a commission as a second lieutenant in the infantry. I had some infantry postings, battalion postings, for a time, and I went to Papua New Guinea. I wanted to remain active but the only way I could do that was to change corps. There were no active infantry positions available to me up there, so I transferred to the legal corps where I remained until my appointment as a colonel, which of course transfers one to the staff corps. I was appointed a judge advocate, Defence Force magistrate, in 1985 in the first group of those appointments that were made. Subsequently, I was appointed Acting Judge Advocate General and then made substantive, and I continue to hold that position as substantive Judge Advocate General which, of course, as you know, is a statutory appointment. And the custom of the service has been that on appointment as Judge Advocate General the incumbent is promoted to two-star rank.

Senator MARK BISHOP—Thank you for outlining that background. Deriving from that, you clearly have considerable experience in both the military and the legal fields. You made some critical comments in your submission about the five-year appointment and about the limited ability to reappoint after five years. Do that limited term appointment and limited ability to reappoint have any impact on the professional development and intellectual growth of the officers appointed to those ranks? Is it in any way harmful to the system of military justice that we will have a system of constantly reappointing relatively new and younger men, as opposed to getting the experience that develops in the civil courts of judges who grow and grow in their job? Do you have any comments on that?

Mr Justice Roberts-Smith—I do. It is indeed my view that this will be a problem. As you would appreciate, I do have a fairly good awareness of the personnel who comprise Defence Legal and I have a very high regard for all of them. But it is like any other area of professional practice—one cannot hope to know everything to do with one's profession. Not many of them, certainly in recent times, have had any great exposure to military discipline law. Possibly the main reason for that has been, in one sense, the greater attraction which many people see in areas of professional work such as operations law, which involves deployments of troops on operations and on ships and so forth. One can really understand that. Part of the consequence of that has been, to my perception, a limitation, a restriction, in the number of legal officers within Defence who have any in-depth knowledge of military discipline law. That is the first point.

The pool of lawyers from which the military judges will eventually come is not going to be a very large pool. It will not be all the lawyers in Defence, for example. Many of them will not wish to be a military judge in any event. I think that is another consideration which flows from the proposals as they presently are in the bill in relation to the fact that it is a terminal appointment, the fact that it is only a five-year term and the fact that certainly, at the moment, no provision, it seems to me, is made for what is to happen to these officers once they reach retiring age. I find it very difficult to comprehend that there will be very many officers who have more than five years to their compulsory retiring age being interested in taking on an appointment for five years which will effectively terminate their military career. That is definitely, in my view, a likely consequence.

I have already commented on the ministerial or departmental response about fixed terms allowing for factors peculiar to the Defence Force. I have dealt with that. I note that paragraph 11 also says that fixed terms are consistent with other statutory appointments in Defence. They may be, but that really is not an answer because these, of course, are unique positions. What must be borne in mind throughout this is that these are judicial appointments. We are expecting these officers to be judges, and not just judges at what one might call a 'magisterial level' in the civilian equivalence; these judges will be directing military juries—as, indeed, judge advocates are now expected to do in appropriate cases—in cases which can be as serious as murder. That is a Supreme Court jurisdiction, and one really does need to bear these considerations in mind.

Senator Bishop, to come back to your question, for the reasons I have set out I am very much of the view that the limitation on the number of lawyers who would be available for this is likely to create a churning situation within Defence. The turnover every five years will create a churning situation. The numbers available to replace them are not going to be from as big a pool as one might think.

Your observation about the level of experience is entirely apt, if I might say so. In the context of judicial work, five years is not a very long time. It might realistically be said that somebody who has not had previous judicial experience and comes into it and has been doing it for five years is probably pretty well just hitting his or her judicial straps. You are getting them at a time when they are at optimum effectiveness, integrity and credibility, and that is the time, on this proposal in the bill, at which they would be dumped—and I mean 'dumped', because it is a terminal appointment.

Senator MARK BISHOP—It is indeed. On the other side of that coin, we are constantly aware of political comment that those who choose to serve forgo a range of human rights and civil rights—that they freely do it—and they need to be properly rewarded and properly protected by the system. In terms of serious offences that might be committed overseas and hence be subject to the jurisdiction of this tribunal, will the four factors you have just referred to in your summary have an impact on the quality of proceedings and hence the quality of justice that is visited upon those who might be charged with offences and indeed those who are responsible for the administration of the system? Do you have a comment on that?

Mr Justice Roberts-Smith—Again, for the reasons I have indicated, that is a distinct possibility. To replace military judges every five years means by definition that every five years you will be getting someone who ordinarily would not have had judicial experience before and will take some time to learn on the job. There is, I think, a very real risk that over a period of time the limitations to which I have referred might well result in a lessening of perceived experience, in any event. It is difficult to see what will actually happen, because one is guessing. My concern is with the structural aspect of it. It is not a structure, to my mind, which encourages the gaining of proper professional experience and hence expertise and credibility.

Senator MARK BISHOP—The government has made it quite clear in the explanatory memorandum, and in the more detailed response we have received today to questions prepared by the secretariat, that the tribunal to be established—it is not a court but a tribunal—will function as part of the military justice system and that the normal respect that is

shown for human rights and civil rights is subordinate to operational requirements and the need to maintain discipline and order, particularly by serving personnel in operations. Can you explain to me, from both your legal experience and your extensive career in the armed forces, why it is that personnel engaged in operations necessarily need to have their civil rights and human rights removed from them? Secondly, why are the CDF and the chiefs of staff so insistent that the need for discipline in operations is necessarily more important than all the other facets of the legal system? I do not quite understand that connection.

Mr Justice Roberts-Smith—I do not quite see it that way. I do not quite see that the CDF and the service chiefs necessarily do see operational requirements and the requirements of military discipline as meaning that the human rights and civil rights of members of the Defence Force must be subordinated. There is a degree of that, necessarily of course, due to the very nature of the beast, but I would not have seen it to the extent which perhaps your question implies.

I think what ought to be achieved by this system, or our military discipline system generally, is a proper balance between those requirements because sometimes they may be conflicting. That will particularly be so on operations. but that does not mean that the fundamental requirements of human rights and civil rights, as Australians anywhere would recognise them, need be abrogated to the sort of extent which I think is suggested. The proposals for the Australian Military Court, subject to the general concerns which I have expressed, are capable of generally meeting those human rights obligations and the civil rights of the members of the Defence Force, given they are operating and working within a disciplined force. I suppose the concern that I have expressed is to try and ensure that they go as far as possible consistently with the requirements of military discipline. I think the suggestions that I have made do that.

I am concerned, as I indicated at the outset, that the bill seems to equate the Australian Military Court as a tribunal. That is a matter of very grave concern to me because that would derogate from its authority and its perceived role and integrity and credibility, particularly when dealing with the more serious offences such as rape or homicide or the like. One has to remember that this court potentially can deal with all of those things, as indeed courts martial can do now. So that is the end at which we really need to look to see what standing and status this entity should have.

Most of what is in the bill goes to establish the Australian Military Court as a court. To call it a tribunal, I think, derogates from that proposition. There is a sense that some of the provisions seem to be deliberately designed to reduce, or at least at best have the effect of reducing, the status of the court to a tribunal. I see no reason why it should not be a court. It should be a court, given the jurisdiction that it will exercise. Indeed, that is a very large part of where my observations come from in terms of maintaining its constitutional validity and integrity, given the jurisdiction it will exercise. It was not to be a tribunal I was interested to note that in response to the question from the committee about from where advice had been sought, the departmental response was that advice had been sought from the Australian Government Solicitor, Mr Henry Burmester QC and from the Attorney-General's Department. I am quite sure that is right—indeed I know it is.

I am also aware that advice was sought from Defence's own legal department, which is the Defence Legal Service, and from the head of Defence Legal. I was an information addressee on a minute dated 28 August 2006, which attached notes on meeting with Mr Burmester. There was rather more to the advice reflected in those notes, I think, than appears to be reflected in the questions. If I might just for a moment advert to that, that is perhaps something which the committee might wish to see. The advice by way of the minute, interestingly enough, begins with the observation that previous advice on appointment, renewal et cetera of military judges had been based on the question of whether Defence was legally required to do certain things, not what was the recommended or safest course of action. That is a note in part of a meeting with Mr Burmester himself. What is in the bill does not seem to reflect that sort of approach. There are others. I will not go through them, but I suggest the committee might look at that because there is much in there.

Senator MARK BISHOP—I have a final question arising out of your response. Responses to questions have been provided to the committee in recent days by Minister Billson. Paragraphs 1 to 4 trace the history of predecessor institutions to the proposed Australian Military Court and then paragraph 5 says:

Service tribunals—

by implication predecessor institutions to the AMC and now the AMC—

are established under the DFDA for a specific purpose, that is, to control the forces and thereby maintain discipline.

So there is a strong emphasis on control and the exercise of discipline. Do these service tribunals and the AMC into the future also have an important role in dispensing justice as opposed to simply maintaining control, order and discipline? Are you satisfied that the AMC does have that critical role?

Mr Justice Roberts-Smith—I am satisfied that the AMC should have the role of administering justice according to law within the Australian Defence Force in relation to disciplinary offences. That seems to me to be its role. It has no role to exercise control over anything, other than the procedures before it. What it does do is serve the purpose of military discipline, and military discipline cannot be served unless the system itself is just. That is the whole point of having an independent and impartial tribunal. A system which is perceived to be unjust will be entirely counter-productive in terms of military discipline. Military discipline will come only from a system which is seen to be a fair, independent and just system. To my mind, it is the role of the current court martial Defence Force magistrate trial system now—and should be the role of the Australian Military Court—to administer justice according to law in matters which come before it for the purpose of maintaining military discipline. That is how it works.

Senator CHRIS EVANS—Are you satisfied with all those caveats—that is, that the proposed Australian Military Court will achieve that purpose?

Mr Justice Roberts-Smith—It has some potential difficulties at least in terms of perception in relation to the issues which I have specifically raised, such as, for example, the transition to the AMC from the current system and the term appointments rather than

appointments to compulsory retiring age. Those essentially are the considerations to which I refer.

Senator CHRIS EVANS—Thank you for your help.

CHAIR—Would you be prepared to provide to the committee a copy of the notes that you have of the meeting with Mr Burmester?

Mr Justice Roberts-Smith—I could provide a copy but that is a minute from the head of Defence Legal addressed to the head of the Military Justice Implementation Team, Admiral Bonser, and for information to CDF and various other people, including me. I suggest that the committee might simply obtain a copy of that from the head of Defence Legal. I am happy to provide it but it was given to me by way of an information copy.

CHAIR—Thank you; we will pursue that. Could you possibly fax us a copy of your opening statement at a convenient opportunity?

Mr Justice Roberts-Smith—Yes.

CHAIR—Thank you.

Senator PAYNE—I want to pursue some of the issues that Senator Bishop has raised about the status of the court and the way in which the drafting of the legislation establishes that. You refer in your first submission to the opportunity that the parliament has to:

... establish a world-class military court with proper independence and status. Quite aside from the risk associated with a lesser court, it would be a great pity for that opportunity to be wasted.

Senator Bishop has gone to some of those issues but one of the matters to which you advert in your submission and which is responded to in part by the government's response today is the matter of whether this should be a court of record in the formal sense. In your observations in relation to the seriousness of matters which may come before the court you note the importance of it being formed as a court of record. In response to that, Defence have indicated that they have apparently received advice that it would be inappropriate to provide that the AMC is a court of record. Have you had an opportunity to have a look at that response and can you provide the committee with your views on Defence's statement in that regard?

Mr Justice Roberts-Smith—I was provided with a copy of that response this morning, so I have looked at that. In relation to the proposition, paragraph 33 says:

Similar to courts martial and trials by Defence Force magistrates, it is not necessary for the functioning of the AMC for it to be a court of record.

That may strictly be correct because, as I pointed out in my submission, virtually all—if not all—of the powers of a court of record are probably included in the bill in any event without actually calling it a court of record.

Paragraph 34 uses the word to which you draw attention: that the advice to Defence is that it would be 'inappropriate'. I do not know where that advice came from. I think the advice from Defence Legal was to the contrary. My understanding is that Defence Legal's advice was that it ought to be a court of record, and that certainly is my view. The difficulty perceived there seems to be reflected in the middle of paragraph 34. It says:

The AMC is not part of that system—

the civilian court system—

and should not be conferred with a status that might be taken to suggest that it is (or that it has a similar jurisdiction).

I would see the position as being to the contrary. I see no reason why it should not be said to be a court of record, particularly if we want—as I would suggest we should—the Australian Military Court to have a status appropriate to the jurisdiction which it can potentially exercise.

Senator TROOD—On this issue of a court of record, in the last sentence in paragraph 19 you say:

In my view there is no sensible reason why the AMC should not expressly be made a court of record and making is so would put beyond doubt its status as a court and its judicial authority.

Is that the argument here about the reason it should be a court of record—that is to say, that the question that may arise as to the status of the court can be obviated—or is there another and more substantive reason why it should be a court of record?

Mr Justice Roberts-Smith—I think that is probably the main reason. There is another substantive reason and that is that a court of record has the power to punish for contempt of itself. There is a provision in the Defence Force Discipline Act already, which I think I mentioned in my submission, which creates an offence of contempt but that is not something which vests the jurisdiction to deal with a contempt, for example, in the face of the court—in the court itself—instantly, as a court of record would have. That is simply another offence which would need to be charged in the same way as any other offence under the Defence Force Discipline Act and would then come to be put before the court at the appropriate time.

So it has that incidental advantage of the power to punish for contempt of itself as and when the contempt is committed, which one would think might be a useful attribute if one has an Australian military court sitting outside Australia. That aside, my main reason for contending that it ought to be a court of record is to put its status as a court beyond question, which I think saying that would do.

Senator PAYNE—One other issue which was canvassed in part by Senator Bishop was in relation to appointment and termination of military judges to be made by the minister. You have made some observations about that in your submission as well, including the observation which occurred to me on reading the explanatory memorandum that the design of the act seems to be to ensure that judges of the court acquire minimal judicial experience rather than build any capacity in that regard. The response we have received this morning from Defence in paragraph 18 in reference to appointment and termination says:

Advice to Defence was to the effect that provided a proper evidentiary basis and natural justice were accorded—

I assume that means in relation to appointment and termination—

this should suffice to establish the necessary independence of the AMC, without the need to involve Parliament as is required for Chapter III judges.

I have been trying to work out all day what ‘provided a proper evidentiary basis and natural justice were accorded’ means in that context. I wondered if you have a view on that and how,

in an opaque process of direct appointment by the minister, you end up with the sort of independence that we would actually seek in any judicial situation, in my experience.

Mr Justice Roberts-Smith—Senator Payne, I would have to say that I really cannot answer your question in terms of explaining what it means to talk about a proper evidentiary basis and natural justice in this context. One assumes it means that there would be the production of evidence which demonstrates that in some way the military judge was unfit to continue his or her appointment, but before what forum and what rules might apply to that are entirely conjectural. It is said that that would be done. Affording natural justice ordinarily means that the person who is subject to the action would be told of the complaint or charge and what the evidence is and given an opportunity to respond to or deal with it. Again, all of that is pretty much open as things stand at the moment, so one really does not know what might be intended by that. It sounds good, but, without knowing specifically what is proposed, one really cannot comment.

I notice, too, that in that paragraph to which you referred—paragraph 18—there are two words which I think rather reinforce the statement I made at the outset. Towards the end it says: 'this should suffice to establish the necessary independence'—and then in the next sentence Defence also received advice that it is not essential. Again, we see there, I suggest, this minimalist approach to provide only that which is sufficient or just essential, whereas I would put to the committee that what we really need to be looking at here is to take the approach advocated by Chief Justice Lamer of putting in place the best possible system we can.

Senator PAYNE—Thank you. I have one final question. You talk about the relatively small pool of lawyers available to fit the criteria, to put it broadly. Why would somebody at that stage of their legal and military career decide to take on a five-year term that may or may not be renewable and that terminates the military career at the expiration of the term? What possible career-enhancing opportunity does that provide?

Mr Justice Roberts-Smith—I do not think it does, which is precisely my point. Furthermore, when you talk about the possibility of reappointment, of course, it is made very clear in the bill and in the government responses that that is by way of an exception, which I would think would be very difficult to establish, so one could realistically assume that these five-year appointments will be exactly that and very rarely if ever will there be any extension. It certainly will not be a general thing.

Senator Payne, you are quite right. We are talking about five-year terms for judicial officers, and I agree with the suggestion that it is very difficult to see at all why experienced lawyers, or indeed any lawyers, with more than five years until their compulsory retirement age would want to take up this terminal appointment which not only terminates their appointment but means thereafter they cannot perform any military service at all. It removes them completely from the Defence Force. To my mind it is a very counterproductive proposition.

Senator TROOD—You cite approvingly the remarks of Chief Justice Lamer from Canada. It raises the question in my mind as to the structure of this system compared to other jurisdictions which might be said to be comparable. I am not familiar with the Canadian one,

but could you help us in relation to this particular structure that is being proposed? Are you aware of whether it accords with other arrangements around the world with similar kinds of jurisdictions? Can you help us on that issue?

Mr Justice Roberts-Smith—We have been having a very interesting time in the area of military discipline law in the last few years. Most of the observations which I have been advancing in the last two or three years through my reports and in my submissions to the committee derive from international experience, particularly in the United Kingdom and Canada. The United Kingdom had a very serious problem with their courts martial some time ago and, as a consequence—I think it was in 2000—the army and the air force moved away entirely from having military judges or military personnel sitting as judge advocates on their courts martial. The system in the United Kingdom does not currently allow for judges to sit alone—and I will use the term 'judge' generically rather than talk about judge advocates and defence force magistrates. We have had that facility since the Defence Force Discipline Act came in in 1985, and that has proved to be a very significant advantage.

The British do not have that. Indeed, in 2000 the air force and the army decided not to have serving military officers as judge advocates at all but to have civilian judges sit as the judge advocates on military courts martial. That is the way they operated afterwards. The Royal Navy chose not to do that. They continued to have military officers sitting as judge advocates and, in the case of Grieves, which went to the European court of human rights, the Royal Navy system was found to be in conflict with article 4, I think it was, of the European Convention on Human Rights. As a consequence, the view was taken that all Royal Navy courts martial since 2000 were probably invalid. That is the sort of potential consequence which one can see from getting this sort of thing wrong. That was not just because the judge advocate was a serving military officer; there were a raft of other reasons why that came unstuck, not least of which was that the judge advocate was appointed by the Chief Naval Judge Advocate, who was also the prosecuting authority's legal adviser. There was an obvious problem with that and there were others as well. I will not go into them now.

As a consequence, the Royal Navy has now joined the army and the air force and now all of them only have civil judges sitting on their courts martial. That is not an approach I personally agree with. There was an instance recently which illustrated that. I was told anecdotally that a civilian judge sitting in a military court martial recently dealt with a person who had been a deserter or absent without leave for about a year and who had nothing to do with the army. One would have thought he would probably have been discharged but, because that was what he wanted, the judge by way of punishment ordered that he rejoin his unit and go with them to Iraq. As you might imagine, that was the last thing either the soldier or the unit wanted because this fellow had no military experience for at least 12 months and did not want any. That is anecdotal, as I say, but it is the kind of problem that might arise when you do not have military judges, who have an appreciation of the requirements of the military environment.

In Canada, the situation is that they do have military judges called by that name, and they can sit without a court martial or they can sit with one. Ironically enough, they have chosen not to sit with courts martial because they consider that military juries might not be compliant with the Canadian Charter of Rights and Freedoms, so the military judges, as a matter of

practice, as far as I am aware, have to date only sat alone since they were established. Both of those are in the process of further change, as we speak.

In the United Kingdom, they still have three different disciplinary systems—one each for army, navy and air force. A bill was introduced into parliament which in fact was due to be signed to receive the royal assent this month which, for the first time, brings all the three services together under one disciplinary system, which is of course what we had in 1985 with the Defence Force Discipline Act. We have been in many respects at the forefront of developments.

We need to keep an eye on these international developments, to learn from them and to try to make improvements to our system which will withstand the sorts of challenges—recognising there are, of course, constitutional and other international law differences—that have succeeded in other jurisdictions at other times. That is also why I take the position that we ought to be striving to present the best possible system, not one that will simply survive constitutional challenge.

CHAIR—I have the last question and it is about section 188AD of the act. I will read it out and discuss it with you so that we know exactly what we are talking about. It is to do with the qualification of the chief military judge. It says:

> A person must not be appointed as the Chief Military Judge unless:
>
> (a) the person is enrolled—

and I will pause on the word 'enrolled' for a moment—

> as a legal practitioner and has been so enrolled for not less than 5 years; and
>
> (b) the person is a member of the Permanent Navy, the Regular Army or the Permanent Air Force, or is a member of the Reserves who is rendering continuous full-time service; and
>
> (c) the person holds a rank not lower than the naval rank of commodore or the rank of brigadier or air commodore; and
>
> (d) the person meets the person's individual service deployment requirements.

My first question regards the qualification. Firstly, does anybody spring to mind or are you aware of anyone or is there a group of people that would fit that qualification? We have five-year enrolled commodores, brigadiers, air commodores or above who are permanent in the Australian Defence Force. Secondly, if we were to change the word 'enrolled' to 'the holder of a practising certificate in one of the six states' or two territories' jurisdictions', is there anybody who would fit that requirement? You touched on this in answers to previous questions. It strikes me that we have limited the field here very grievously as to who may fill the role of chief military judge.

Mr Justice Roberts-Smith—First of all, I do not see a problem with the notion of a requirement that the person be enrolled as a legal practitioner for five years. That is a fairly standard sort of provision which requires appointment to judicial office or other similar appointments. One can be enrolled for five years without holding a practising certificate. Of course, as things currently stand, my understanding is that members of the Defence Force who are working with Defence Legal ordinarily do not have practising certificates in any event.

That is to change, I believe, as a result of the Vance decision, but that is a policy matter which I think government and Defence Legal are addressing. To require that they hold a practising certificate for five years would be more of a limitation than the requirement that they be enrolled as legal practitioners. In terms of availability of personnel, with respect to the other restrictions at the rank of commodore, brigadier or equivalent rank—that is, one star rank—obviously, there is a very limited pool of legal officers who meet that requirement. In fact, apart from the current Chief Judge Advocate, Brigadier Westwood, there would probably be only four, three of whom would be my deputy JAGs. They would not be likely candidates for appointment as the chief military judge. In fact, three of them are now serving judges, in any event, so they are not going to take up another judicial appointment within Defence. The way I would read that—and it may be a drafting matter—is that a person who would wish to apply for such an appointment should be either of that rank or eligible for promotion to that rank. That is not how it reads necessarily, but that would be how I would construe it. To require that the person hold the rank prior to appointment is clearly a limitation.

CHAIR—Your Honour, on behalf of the committee, I thank you not just for this evening's attendance and evidence but also for the submissions and the assistance you have given this committee over some long period with respect to some of these more complex and difficult issues. Thank you, again, for participating tonight.

Mr Justice Roberts-Smith—Thank you, Senators. Thank you, Mr Chairman.

[5.39 pm]

PARMETER, Mr Nick, Policy Lawyer, Law Council of Australia

SALMON, Mr Ben Jefferson, QC, Member, Military Justice System Working Group, Law Council of Australia

WILLEE, Mr Paul Andrew, RFD, QC, Chair, Military Justice System Working Group, Law Council of Australia

CHAIR—Welcome. Is there anything you would like to add about the capacity in which you appear today?

Mr Parmeter—I am with the Law Council Secretariat. I am here to assist Mr Willee and Mr Salmon in providing evidence to the senators today.

Mr Willee—I am the current chair of the Law Council of Australia's working party group on military law. I hold the naval rank of captain. I am currently the head of the military bar. I do not make representations in that capacity, or have any authority to do so, but I mention it because of Senator Bishop's questions to the previous witness. I do only make representations in relation to the matters that come within my purview as chair of the working party. I also apologise for Mr Webb, who has been unavoidably detained by the airlines.

CHAIR—My apologies to you for not mentioning that you are a Queen's Counsel.

Mr Willee—I am not sure you would have necessarily known that.

CHAIR—I would not have known that, because it is not on your name tag.

Mr Salmon—I am a retired lieutenant colonel—I was in the Army—and a former defence force magistrate and judge advocate. I am a member of the working group of the Law Council on military justice and I am here to support, if necessary, Captain Willee.

CHAIR—You have a copy of today's opening statement before you. Do you have any questions regarding that document?

Mr Willee—No, sir.

CHAIR—The committee has before it submission No. 5 from the Law Council of Australia. Do you wish to make any amendments to that submission?

Mr Willee—No. We do not wish to make any alterations other than the ones that we made initially, which I think are now incorporated in the document.

CHAIR—I invite you to make a brief opening statement and then I will go to senators for questions.

Mr Willee—The only brief opening statement I would make is that we deliberately made our submission as succinct as we possibly could. I believe that it strikes at the matters which the committee would have concerns about. There may be some gaps in that. We can certainly address those but I do not see, unless you have a different view, that an opening statement would do anything other than delay the committee getting to the heart of the matter.

CHAIR—Then I will go to senators for questions.

Senator MARK BISHOP—Welcome, gentlemen. Thank you for taking the opportunity to come up here and share with us your thoughts. And thank you also for the brevity of your submission. It was very easy to read and to the point. This body that is to be created is characterised, I think, as a tribunal, not as a court. The description in the bill of the creation of the Australian military court: in your mind, is that accurate or is it misleading?

Mr Willee—That is a difficult question. I do not think there was any intention to mislead, but my concern is not so much with it misleading as with the degeneration from our previous tribunals which were obviously courts martial to what is now a tribunal, and more with the way in which the legislation is framed so that it is minimalist rather than taking the opportunity that the previous witness adverted to to get a really good system in place.

Senator MARK BISHOP—Do you view the new Australian military court as being perhaps not an advance in addressing problems that have been identified in more recent years in terms of military justice?

Mr Willee—I do not see it as an advance.

Senator MARK BISHOP—You do not see it as an advance? Is that the view of the Law Council?

Mr Willee—In some ways it is an advance, inasmuch as it has at least proclaimed a court.

Senator MARK BISHOP—Yes.

Mr Willee—But in terms of what it has practically done, I do not see it as an advance, and that is the approach that the Law Council takes.

Senator MARK BISHOP—Let us go to some of the particular issues that have been raised with you and the previous witness. You make the point in paragraph 5 that it is likely that there will be an insufficient number of persons available to be appointed as the chief and as military judges. Can you explain why that is the case? What are your fears?

Mr Willee—The people who would take such an appointment and be an advantage to the service of the institution are unlikely to take it because of the terms and conditions of that appointment. In our view, it does not in any way go far enough in dealing with the independence questions, which is a detractor for any professional person who wants to belong to an independent court that is seen to be independent—and, after all, that is the thrust of what the improvements were supposed to do. As we said in our submission, the High Court said there is not a perfect independent court system, but our grave concern is that this falls far short of even what the High Court might consider appropriate. No military officer, permanent or serving, worth their salt would want to commit professional suicide by taking an appointment at 35, 40 or 45 and deprive themselves of the association with the service in any other capacity; nor could they be said to be serving the position of independence in that circumstance whereby, if they did take it, they might be perceived to be toadying or in some way currying favour so that they could meet the conditions for a further five-year appointment.

Those are the principal reasons. The other reasons are probably of lesser importance, but certainly there is no provision for what happens to them at the termination of their service. Reserve officers generally have no entitlement to superannuation. I have served since 1961

but not one penny of superannuation will I see as a result of that. Whether or not that changes as a result of continuous full-time training I am not sure. In any event, a five-year term, even at this level of salary, would in our opinion be an inducement only to those who are lackadaisical or who want to leave their professional service and civil careers on a mediocre level without working too hard.

Senator MARK BISHOP—In paragraph 6 you have observed that appointments must be made from serving members of the Defence Force. Is there any value, in your mind, in making appointments from persons who have retired from the defence forces? Increasingly, we observe that people may do a six, 12 or 18-year stint, reach relatively senior office at a young age—under the age of 50—and choose to move into other careers or professions. Is there any value in having the ability to appoint persons to this tribunal from suitably qualified retired personnel?

Mr Willee—There would be tremendous advantage, just as there is tremendous advantage in the civilian arena in appointing retired judges in effectively a part-time capacity—although some even make it a full-time return to duty. That wealth of experience that comes with the length of practice is vested in some of the individuals that have already been mentioned by the previous witness—his deputies, for example, certainly two of whom are looking at 'statutory senility', as it were. Those three individuals have very fine legal minds of extreme acuity, and are articulate and have a huge well of service knowledge.

Senator MARK BISHOP—Going down that path a bit further, for very serious offences such as grievous bodily harm, murder, sexual assault and rape, at the trial stage, in both prosecution and defence aspects, does the presiding officer add serious additional value to the process by dint of his or her experience, or is having been a serving officer and been whacked into this job for five years adequate to preside over such an important type of trial?

Mr Willee—In our view, no. You cannot begin to grapple with the complexities of a criminal trial that involves offences of that seriousness—and admittedly they will be extremely few—

Senator MARK BISHOP—Yes, rare.

Mr Willee—But the potential is there for them to be increasing in the theatres in which we are engaged. It requires a long exposure to the criminal process to be able to deal with that, to be able to instruct military juries in their duties in relation to it and to supervise those practitioners who appear before such a tribunal dealing with that sort of matter, and make sure that the individual gets as fair a trial as is possible. Only experience can do that.

Senator MARK BISHOP—On a slight tangent from that, the system provides for what I think is a new jury system, whereby you have a jury of six persons and that jury is comprised—you might correct me if I am wrong, Chair—of persons who are of no lesser rank than the person who is charged. It also provides for, from memory, majority decisions of four out of six—

CHAIR—A two-thirds majority.

Senator MARK BISHOP—Thank you—a two-thirds majority. That is quite different to the civil jurisdictions in nearly all of the states. Do you have a comment on its utility and why we might be creating this precedent path in the military?

Mr Willee—I cannot understand why we would want to do it. Military tribunals, court martials, in my experience are probably much better able to reach consensus than, in many cases, civilian juries can. There are many reasons for that, but of course since you can no longer take part in the deliberations of a civil jury or a military jury, as we used to when I was first a judge advocate, you cannot test the validity of those reasons in modern circumstances. Be that as it may, that is my experience. So why we would want to go that far, in isolation almost, and create a public perception that there was a lower standard in some way required of the military, without justification, is quite beyond me.

Senator MARK BISHOP—Is it fair to characterise it as a radical departure from the norm?

Mr Willee—The process of taking majority verdicts exists in a number of states. It exists, for example, in New South Wales, Victoria, Tasmania and the Northern Territory. Western Australia and South Australia allow conviction in cases of 10 or 11 out of 12 jurors if there is a decision of guilty. The purpose of that was generally to cover situations where one juror was generally thought to be hanging out, as it were, either for or against, which was just an impediment to the process. But it is certainly not true to suggest, as the government's most recent responses suggested, that there are no policy considerations in relation to this. This is a matter that is extremely dear to the heart of most criminal lawyers throughout the Commonwealth.

Senator MARK BISHOP—Including military lawyers?

Mr Willee—Yes, certainly including military lawyers, because we would want to be seen, where we possibly could, to provide a system of justice that was better than the civilian system, certainly not lower.

Senator MARK BISHOP—Mr Willee, you might be able to help me with this point: I was struck by the EM's outline of the qualification to be a juror. Essentially if an officer is charged, the jury is to consist of officers, none of whom are to be of a subordinate rank to the accused. My understanding, and correct me if I am wrong, of the civil jurisdiction is that, if a person is charged with either a serious criminal offence or a serious civil offence—witness the recent scandals in the financial world—and the accused goes to trial, any person is capable of being a juror. So an ordinary man off the street can be a juror in the trial of a person charged with the most serious and senior types of financial offences. What is the explanation or justification for a jury of officers being at a senior rank and not for enlisted men to be able to do that? What is the rationale?

Mr Willee—I think there is provision for non-commissioned officers, at least at warrant officer—

Senator MARK BISHOP—A warrant officer with three years of service.

Mr Willee—Yes. There are two reasons. Firstly, it has always been traditional in the service that you were not tried, as it were, by members of a court martial who were inferior to

you in rank. Secondly—and this seems to heighten one of the inconsistencies in the current bill—it was to make sure that there was a hierarchical concept within the process that is common to the military, military discipline and military tradition and the way in which military people serve and their expectations. But that cannot be the reason; otherwise, why would we have military judges at the level that has been given?

Senator MARK BISHOP—So you have put forward two reasons: tradition and hierarchy—and there is a bit of a hole in the last one. You are both silks, you have both been in private practice and you have both been career officers, so you have had wide exposure to all elements of life. Apart from tradition and hierarchy, in today's modern world, where we increasingly recruit skilled and trained people and want to keep skilled and trained people, even at entry level, is there any sound reason why in the goodness of time they would not be suitable to sit on a jury of a more senior NCO or more senior officer?

Mr Willee—Yes, there are levels within the service which deprive an individual of the understanding necessary to deal with matters at a higher level. There is a civil precept that one can take judicial notice of certain things that are going on in a particular milieu at a time that is relevant to the proceedings because they are common knowledge. If you put a person who is of lower rank in the hierarchy in a situation where they are, in fact, deciding what may happen to somebody of higher rank then two things might happen. They might be influenced in some way by the difference in hierarchy but, more importantly, they might not have the appreciation of the circumstances that go with the alleged commission of the offence. For example, if you were dealing with negligence in the service you would be required to apply a standard expected of a reasonable officer in that particular situation.

Senator MARK BISHOP—You speak now of military offences, don't you?

Mr Willee—I do, yes.

Senator MARK BISHOP—Do your comments also apply to non-military offences?

Mr Willee—To a much lesser extent, because you have—

Senator MARK BISHOP—That is what I am driving at, sorry.

Mr Willee—They apply to a lesser extent because the size of the jury, at 12, as it normally is, is extremely important to the process. It puts into the process a sufficient number of people who might have disparate views and disparate experience to almost ensure that there is always at least one, and probably more than one, person who can understand the most complex proposition that is being put in the evidence. That is why it is unnecessary to have expert juries—it is not the jury's fault that they do not agree or do not come to the verdict that is expected; it is counsel's fault for not being able to persuade them properly and put the evidence before them in such a way that they understand it. But the process is enhanced by the fact that if you have a spread of 12 then you have, really, a jury where they can help each other understand the difficult concepts and then they can get the benefit of whatever they do not know from the judge or from passing questions back through the judge to the expert concerned. The military cannot afford that luxury in reality. You cannot have these sorts of proceedings, with juries of 12, going on in operational areas and you certainly could not have them at sea. It is hard enough to get a court martial board together, let alone 12 people; it is just not practical.

CHAIR—Mr Salmon, you are entitled to address the committee should you so require. We would be very interested to hear from you.

Lt Col. Salmon—Thank you. I was merely going to add to the answer that Captain Willee has given, and that is that there is a perception that having lower ranks dealing with, say, lieutenants or captains could have one of two results. One is that they are so affected by the person being of that rank that they will not be able to give their independent consideration—which would be quite different to their position on a civilian jury. Equally, of course, there might be the desire to get revenge on officers, and I think that might be part of the historical reason for not having members of a court martial of a lower rank than the person charged.

As Captain Willee has already said, when you are dealing with non-military offences it is a rather lesser issue, but the same problem still applies and that is that you have the potential for junior ranks to be affected by even a sergeant—anyone who has been in the Army knows that sergeants can be gods to private soldiers or recruits. I think one of the reasons is to provide a more impartial and factual tribunal. Theoretically, that should not apply, but I think we have to face reality.

Senator MARK BISHOP—In the submission, the council expresses concerns with respect to the independence of the court. Would you like to outline for the committee what your concerns are? It says, 'may lead to problems with respect to the independence of the court'. I think you may have referred to a few.

Mr Willee—I have referred to most of them already in, perhaps, a slightly different context. But the issue of independence, of course, is paramount, and you will not get true independence from a five-year appointment. If you have a five-year appointment where it is not terminal then people are going to be looking to perform in a way which makes them good candidates for whatever might be available to them at the end of the process. If you have a terminal appointment that does not coincide fairly neatly with the time when the officer expects to retire in the normal course of events then no officer worth their salt is going to take it unless they want a sinecure. It is a nonsense that, as is suggested by the government, it is not possible to organise this to occur. Civilian courts have been doing it for a very long time indeed. No appointments are generally made where an individual is within 10 years of the statutory retiring age of 70 unless that individual is considered particularly worthy of appointment and that individual undertakes to take a percentage of the retirement benefits commensurate with the amount of service that they can actually render if they are within the 10-year period. It is quite easy to arrange that and it ought to be done to remove this sort of stigma.

Lt Col. Salmon—The Judge Advocate General, in his very persuasive address to you, pointed out that there is a range of retiring ages for currently appointed JAs and DFMs, and if all of them were appointed—and appointed until retirement—then some of them would have quite a long while to go and some of them would have a very short time to go, but that would automatically create a situation where there are going to be some appointments which would come up soon and some which will not come up for a while. But those who have been currently conducting courts and acting as Defence Force magistrates, as far as I am aware—and I have been out of it now since 9 December 1999—are all people of competence and in whom there is confidence. So part of the problem would be solved firstly by giving up five-

year appointments and making appointments until retiring age, and secondly by appointing as a starting point the current appointees and appointing new ones as they retire. But they of course would all be part-time members.

Mr Willee—That has already been done in relation to the statutory appointments, in effect, in the legislation for the registrar, the Director of Military Prosecutions and the Chief Military Judge. There might be other reasons why that should not be done, but certainly it can be done in that way. But by and large—I forget which of the honourable senators asked the question of the previous witness about the pool, but I think it was you, Mr Chair; forgive me—that is extraordinarily pertinent. The pool of experienced people is very limited indeed, and most of those are on the way out.

Senator PAYNE—Thank you for your submission. There is one point that I wanted to check in terms of the expression. In paragraph 7 you make some observations about practising reserve officers. I assume it is meant to say that practising reserve officers are 'unlikely' to be able to maintain a viable practice if appointed to a part-time position as an MJ?

Mr Willee—Yes. That slipped through my guard; I apologise.

Senator PAYNE—That is absolutely fine. I wondered if you could make in very practical terms some more comments on those observations. It goes to the question of availability, qualifications and where to find people to fill these roles.

Mr Willee—One of the things that was happening in the legal milieu was that a number of officers, mostly reserve officers, who had people well-placed in the system were getting the majority of the work. This was something which, quite rightly, thoroughly enraged the permanent service officers because they could see in effect reserve officers and others getting a substantial amount of their remuneration from military duties and it appeared to them to be far in excess of what they were earning as military officers.

That had to be stamped out. The way to stamp it out was to police it better and make sure that those within the system who were handing out the work were not handing it out to their favourites and to people who really should not have had it. That is in some ways reflected by part of the government's present submission about the appointment of somebody to Defence Counsel Services broadening the field. I might come back to that in a moment. It will broaden the field but it will dilute the experience, which is an even worse result.

To answer Senator Payne's question, you have a situation where most reserve officers with the experience that the military requires conduct practices that are pretty full on. The service has never been able to understand that in those circumstances a reserve officer cannot put down his tools and come immediately and deal with whatever it is that has to be dealt with. Thus over time we have managed to persuade them that we can get five minutes to be there, but that is all.

Most reserve officers learn over a period of time that that is what the service expects and you have to make a choice, you have to make a sacrifice. You have to give away the remunerative brief that is going to cover your overheads to serve the military and accept something lesser for the joy of making the service or you might as well not be on deck. Most reputable reserve officers are professional in that respect. You cannot, of course, if you are in

the middle of another proceeding, stop work and down tools. I think everybody understands that. But you can certainly accommodate the service.

If you ask those sorts of people to take on a five-year appointment in these circumstances under these conditions, they are going to laugh at you, and they are the very people you want. They are the people that the service has drawn on—as far as I can remember, since 1970, when I moved from the executive branch to the legal branch to do this sort of work—that have the experience and have done the work because there have not been people in the permanent services who could point to the experience to do it. To me, throwing away that experience is a retrograde step and simply should not happen.

The reason that these people will not take the work is quite obvious: not only would it be a signal to the military at, say, age 35 or 40 that they regarded their military career as having ended, but also if they regarded their career as having ended, are they really worthwhile briefing in a professional capacity in a civilian milieu? They certainly will not like that. I hope that answers your question. I can give you a classic example. The chairman of the New South Wales Bar Association, Michael Slattery QC, is a captain in the Navy and has been doing a board of inquiry into a helicopter crash for well over 12 months, day in and day out, but, if you offered him one of these positions, he would be highly insulted.

Senator PAYNE—I just wanted to go to one other issue which we have not canvassed very much and that is the aspect of the bill that goes to the CDF commissions of inquiry. One of the points that you made in your submission was the observation about the requirement that the president of a COI be a civilian with judicial experience and the difficulty with that possibility occurring in practice. I understand that you have had an opportunity to see the government's responses to some of the questions put to them both pertaining to your submission and others. They indicate in paragraph 40:

There is no requirement for the civilian with judicial experience to be a serving judicial officer.

Your submission makes some observations about using retired judges and so on. Does that address some of your concerns?

Mr Willee—No, it does not. The thrust of the Law Council's submission was not the requirement that they had to be serving judicial officers but the interpretation that is put on 'judicial officers'. For example, they regard judicial officers as anybody in the civil system who has been a justice, a judge or a magistrate. But if you have had judicial experience as, for example, chairman of a disciplinary services board for the Public Service or the Merit Protection Review Agency, or you have been a Defence Force magistrate or a judge advocate, that is not regarded as judicial experience. That seems to me to be pretty short-sighted.

For a very, very long time indeed the civilian courts have not been able to get people to sit on boards of inquiry or royal commissions. I can remember there was tremendous concern when Justice Stewart took over the National Crime Authority and the Chief Justice of New South Wales made some very pointed comments about having one of his judges in that position and how he disapproved of him being on a commission of that sort. It was only this body that saved the day. I can remember taking the phone call from the Senate committee concerned that gave him the equality of a Federal Court judge which enabled him to take the job up and keep the independence that it required. For centuries we have been using senior

Queen's Counsel—and certainly retired judges where you can get them—to do this job because (a) they are well qualified to do it and (b) there is just not the pool to do it from anywhere else. I guarantee that I have done more murders than most coroners have had hot dinners.

Mr Salmon—You mean you have appeared for more alleged murderers.

Mr Willee—No, I mean I have prosecuted more, and you are on the list!

Senator PAYNE—I understood what you meant. Finally, the Judge Advocate General noted in his first submission of 19 September that he regarded this as:

> ... 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.

Do you think this bill achieves that aim?

Mr Willee—No, I would not be here if I did—and I do not think I would have made the remarks that I did. And it pains me to have to do it. It is such a splendid opportunity to really restore military justice to the position that it should have. To have it trammelled in any way is very upsetting. But I certainly do not regard this bill as achieving it any more than I am sure the JAG does.

Senator ADAMS—Thank you for your submission. Captain Willee, I refer to paragraph 18, under the heading 'Staffing' of the government's response to your question, which you have probably read as well. I was worried about your concern that:

> ... the court will not be established with access to suitable resources and an explicitly acknowledged status, similar to the Federal Magistrates Court—

and the fact that the staff available are to be:

> ... defence members and persons under the *Public Service Act* made available by the Secretary.

You say here that this does not appear to accord with the original intention that the military court would have similar status to the Federal Magistrates Court. Then the government is coming back saying that it really was not going to. Can you help me with this. I am very worried about the resources and the suitability of the people who will be assisting there.

Mr Willee—The government has not agreed that the AMC would have the same status as a Federal Magistrates Court, as they say in paragraph 38:

> ... such a status might infer a change of jurisdiction that could place the validity of the AMC at risk.

I do not understand that.

Senator ADAMS—I do not. That is why I was asking the question.

Mr Willee—I would be delighted to be able to explain it to you if I did. I do not know how it could place it at risk, unless it was to suggest that in some way it would be that parallels would be drawn that would place the military court in some sort of contest with the Federal Magistrates Court as to jurisdiction, which is clearly not the aim. What those concerned about staffing arrangements are on about is that the staffing is at least the equivalent of what the Federal Magistrates Court is provided. It is just used as an example, not as any sort of crossing over or conflict with it. It needs to have adequate staff to enable it to do the job that it is going to do properly. That is the concern. If the government can satisfy the committee that

that can happen without weakening all the other areas in Defence legal and further diluting the pool, then of course there could be no objection. But if this court is going to be seen as it should be, it must have the staff to do the job. I think that is the only point we are making.

Senator MARK BISHOP—Mr Willee, I want to return to that discussion we were having earlier about the juries. Bearing in mind the points that I made about the ranking of the persons on the jury in terms of their roles—and, presumably arising from that, their close familiarity with and understanding of the culture of their particular service, and all of those types of things—do you have any concerns about a decision of a military jury not having to be unanimous, that it can be four out of six?

Mr Willee—Yes, I do.

Senator MARK BISHOP—Are they serious concerns?

Mr Willee—They are serious concerns, because it weakens us in comparison with the civilian standard. We have gone down to two-thirds; they have at most gone down to five-sixths. That is a considerable disparity. Why would we be leading the way when already we have a reduced number on the military jury in comparison with the civilian jury to draw on for the experience that is needed—of life, common sense, age, background and just about every other human condition? The same thing must apply to military juries. Why there should be any logic in taking it back, or need to provide for it at all, is beyond me—as I think I said before.

Mr Parmeter—It should also be clarified that, while a number of jurisdictions have taken on majority verdicts, the majority of those jurisdictions, with only the exception of the Northern Territory, do not allow majority verdicts in the case of murder or more serious offences. So the dilution in this instance is, in fact, worse than it appears.

Senator MARK BISHOP—Thank you, Mr Parmeter, that is a useful addition.

Mr Willee—I should also add that courts martial are majority verdicts and always have been. They are now of course behind closed doors as majority verdicts. Their deliberations are not with anybody else but the results are. There have been majority verdicts in courts martial for a very long time. It may be that it flows from that. But, if you elevate the organisation to the status of a court or even a court-cum-tribunal or whatever, perhaps you ought to move away from that because the Commonwealth through the High Court's ruling has provided that, particularly in the case of serious crime, there must be a unanimous verdict not a majority verdict.

CHAIR—When you, Mr Willee, say that it is common that there be majority verdicts, are you referring to a six-man jury, four-two verdict?

Mr Willee—I am.

CHAIR—Is that service offences and beyond?

Mr Willee—Yes, as I understand it.

CHAIR—So we have that system in place in the ADF now?

Mr Willee—Yes, that is the situation.

Senator MARK BISHOP—I have one final issue to do with the commissions of inquiry. Your comments at the rear of your submission are quite strong where you have made the point that there are a number of issues that need to be resolved. You advocate that the commissions of inquiry be established by legislation not by regulations. Why is that?

Mr Willee—It is purely from the point of view of making sure that the process is controlled to the extent of parliament ensuring that some of the more important issues are enshrined in legislation rather than left to regulation. There is a process going on at the moment in relation to these, which I have already adverted to in relation to those people who are going to be able to chair such commissions. But there is a process going on which is very advanced in relation to the regulations and the changes to the appropriate board of inquiry regulations as they currently exist. There is a strong concern out there that, in fact, some of the difficulties that we have experienced in relation to those regulations are not going to be cured by the new regulations, they are going to be made worse.

There are also very strong concerns about the interrelation between the service and the various coroners. Are we to decide what is suicide before a coroner makes a verdict about suicide? There are concerns about the power of the Chairman of Commissions to decide that they should not go on, and there are concerns about Chief of Defence Force being forced into a situation, which is clearly inappropriate, of having a compulsory board of inquiry, which might do absolutely grave damage to the service because it is not what the relatives want. A person might be on extended leave somewhere and be killed by a falling tree and, under this legislation, CDF would have to have a commission of inquiry because the person who died was a serving member. That sort of thing has to be tempered, and there is concern that it is not. I only have second-hand knowledge of this; I do not have personal knowledge of it. It may be that these concerns are being addressed in the regulations and that it will come to fruition, but there is a grave concern amongst my military colleagues that this is not what is happening.

Senator MARK BISHOP—For your own information, there are some senior legal people from Defence in the public gallery. We might ask them to address in their submission in due course your points in paragraphs 21(a) through (e) on potential problems with the commissions of inquiry, because you are the only body that has drawn those problems to our attention.

Mr Willee—I can assure you that the Law Council of Australia will be highly delighted if they can disabuse us of our concerns, but we submit that the best way of dealing with it is to make sure that it is enshrined in the act.

CHAIR—Thank you, Mr Willee and gentlemen, for coming along. We very much appreciate your time this evening.

Mr Willee—Thank you very much, Mr Chairman and senators, for the polite way in which you have dealt with us. We really appreciate it.

Proceedings suspended from 6.23 pm to 6.37 pm

BONSER, Rear Admiral Mark, Head, Military Justice Implementation Team, Department of Defence

BURMESTER, Mr Henry, Chief General Counsel, Australian Government Solicitor; and Legal Adviser, Department of Defence

CHAIR—I welcome representatives from the Department of Defence. A copy of today's opening statement is before you. Do you have any questions regarding that document?

Rear Adm. Bonser—No.

CHAIR—The committee has before it submission No. 4, from the Department of Defence. Do you wish to make any amendments to that submission?

Rear Adm. Bonser—Our original submission was made on 22 September and we have provided answers to questions that were raised on 2 and 3 October. I would like to clarify an answer to one of those questions, and that was the question on class of offences. We misunderstood that question as relating only to a possible option for the Director of Military Prosecutions, and it is correct that schedule 7 places territory offences in class 1 or class 2. The bill still provides the option for the accused to elect trial without a jury for class 2 offences, similar to the default position for class 3 offences. Nevertheless, that is an unintended inconsistency with the explanatory memorandum, which reflects the intent that, other than where the punishment or character of the offence might warrant otherwise, offences with a maximum sentence of five years or less would normally be class 3 offences. That is my oversight, Mr Chair. I am taking action to initiate a parliamentary amendment to schedule 7 of the bill to accurately reflect the intent and the explanatory memorandum.

CHAIR—Thank you for that. I now remind you that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I invite you to make an opening statement—I believe you do not have an opening statement, Admiral Bonser.

Rear Adm. Bonser—No, Senator.

CHAIR—Nor do you, Mr Burmester?

Mr Burmester—No, Senator.

CHAIR—I will go straight to questions. You have heard the evidence of the Judge Advocate General and the Law Council witnesses today.

Senator FERGUSON—Mr Chair, I would like to suggest that the witnesses at the table, having heard all of the evidence and the issues that are raised, should be asked whether they would like to respond to the evidence that they have heard before we go any further with questions.

CHAIR—Do you wish to respond or would you prefer to go through questions arising from the evidence?

Rear Adm. Bonser—In a general sense I can make a very short response to the points that have been made by other witnesses, which appear to be focused almost solely on the matter of the tenure of judges rather than looking at the Australian Military Court that is being implemented in the context of the entire system and which the ADF and Defence are putting in place to enhance the military justice system in the area of our discipline and service tribunals. It ought to be considered in the context of the new statutory position of the Director of Military Prosecutions, which has taken over all of the convening and appointing authority duties that used to be performed by commands. There is the Registrar of Military Justice position, which also has a role in convening of trials, and is going to become the registrar of the Australian Military Court. There is the new Director of Defence Counsel Services to better provide defence counsel for members and also the enhanced appeal system that is being put in place from the Australian Military Court to the Defence Discipline Appeals Tribunal, which actually expands the right of appeal for members.

CHAIR—I appreciate that.

Senator PAYNE—Admiral, it is not my job to defend the submissions of others to this committee, whether they are from the Judge Advocate General or the Law Council. I think when you said their observations were almost entirely focused on tenure, the committee has noted a number of other issues to which their submissions go and the committee has found those submissions very useful. You indicated that the court should be seen in the context of the entire system. I do not disagree with that but the point that the submissions seem to me to make and the point that some members of the committee would certainly make is that this Australian Military Court is meant to be the pinnacle of the system, the apex of the system. As the Judge Advocate General says in his worthy submissions, it should present us with an opportunity to establish a world-class military court.

The fact that it is characterised as a service tribunal seems in the drafting to go so far down a road and then just stop. One good example is in relation to being a court of record. The language that is used in, for example, Defence's response to questions made by the committee includes phrases like 'providing sufficient independence' and 'is not incompatible with necessary independence'. There are the phrases, 'should suffice to establish the necessary independence' and 'it is not essential for the integrity of the process to confer responsibility on the Governor-General rather than the minister' and so on. These all seem to the submitters and to some members of the committee to be in some halfway house that does not get us to the point of a world-class military court, does not admit to establishing less than that and leaves the committee with a lot of questions which go to much greater issues than tenure.

Rear Adm. Bonser—I think you hit the nail on the head towards the end—that, in fact, this is a military court, and it was never intended to have been anything other than a military court with the limited jurisdiction that our current service tribunals have. Our service tribunals are not tribunals in the ordinary sense; they have a specific purpose, which is for the maintenance of discipline in the ADF, which is essential for the maintenance of effective operations. Our court martial system and, more recently, our system of Defence Force magistrates have all been part of that arrangement of service tribunals. This new military court, with the same jurisdiction, dealing with the same range of offences and punishments, is

replacing our current system of courts martial and Defence Force magistrates under the umbrella of our service tribunals.

Senator PAYNE—Taking that observation under the current system, would we prosecute a murder committed on a deployment in, say, Iraq in the current system?

Rear Adm. Bonser—If there were no other jurisdiction to deal with it, yes, we would. We have allowance for it under the DFDA so that it can be dealt with if there is no other jurisdiction, albeit that happens extremely rarely.

Senator PAYNE—Indeed—and that really is the point, I think, of the difference in terms of jurisdictions. The question of tenure is one which we will inevitably go to, so we might as well start now.

Senator MARK BISHOP—Mr Chairman, I have a question that derives directly from your opening question and the admiral's response before we go into the nitty-gritty of the bill. It might be of assistance if I ask it. Admiral, you just gave a very succinct summary of the intention of the bill in creating the Australian Military Court, and indeed it reflected the comments in the EM and the later comments circulated under the title of Minister Billson, I think, earlier this week. Taking that as read, and accepting that, how is the new system under the proposed Australian Military Court significantly different from the predecessor institutions which you outlined and which it seeks to replace?

Rear Adm. Bonser—It is exceptionally different. It is so different as to be an entirely new system. For a start, we will no longer have military line officers sitting on a court martial dealing with our most serious offences; it will be a statutorily appointed military judge. That is the most significant change to this whole system. We will no longer have officers from the chain of command presiding over the court.

CHAIR—It seems that a Chief Military Judge having to be a permanent member of the ADF or a full-time reservist is exactly what you wish to avoid.

Rear Adm. Bonser—But they will then be appointed statutorily to generate their independence.

CHAIR—But they are from the chain of command.

Rear Adm. Bonser—They may have been originally. But once appointed to these new positions they are appointed statutorily and, after they have taken oath or affirmation, they take up their office and are no longer beholden to the chain of command for the performance of their judicial duties.

CHAIR—And that is the end of them after five years?

Rear Adm. Bonser—There can be absolutely no perception that they would come under undue influence from the command in performing their judicial duties or making their judicial decisions.

Senator MARK BISHOP—I would have thought the opposite, Admiral: that they have limited appointment—five years—can only be reappointed in exceptional circumstances, can be called back to their line position if necessary and, if seeking to return at the end of their five years to their former position or a more senior position, reliant on the goodwill of the

chain of command. My own reading of the bill and the discussion today leads me to the conclusion that under this system they are even more dependent on the chain of command and even less independent than they were. That is the opposite conclusion to what you assert to us.

Rear Adm. Bonser—If I go to your last point first, Senator, the fact that they do not come back to a normal line position after completing a tenure as a military judge actually enhances their independence. There can be no perception that they actually curry favour to seek subsequent employment from the same executive after they complete their tenure.

CHAIR—Are you saying there is no room for any job associated or related to the ADF after completing a five-year term?

Rear Adm. Bonser—As a member of the ADF, no.

CHAIR—No, I am not talking about that; as, for example, an inspector general or filling one of those halfway related administrative positions in Defence?

Rear Adm. Bonser—That is correct, Senator; otherwise there could be perceptions that they might curry favour to seek that employment, and that would—

CHAIR—So what about a young man at the bar who has completed five years participating in a board of inquiry representing parties to that board of inquiry? I mean in a judicial process, a board of inquiry or a prosecution, representing one of the parties in one of those things? Do you understand the situation? So we have a retired military judge from this court who goes back to the bar and then participates in future proceedings. Highly likely, I would have thought.

Rear Adm. Bonser—It would not happen, Senator, because they would no longer be a member of the Defence Force, and if they did they would not be representing Defence.

CHAIR—No, they would not be representing Defence; they would be representing someone else. They would be representing one of the parties—the parents or whatever. But can you see the difficulty?

Rear Adm. Bonser—But they would not be employed by Defence.

Senator PAYNE—Senator Johnston's question is 'would they be precluded from taking up such a role', isn't it?

CHAIR—Yes. They are at the bar; they are available—

Rear Adm. Bonser—I cannot imagine that they could be precluded from that, because that would be private employment.

CHAIR—Precisely. You have got a situation here where it is five years, and if you put in a 40-year-old or a 45-year-old he is in the prime of his professional career. At the age of 50 or even older, he is going to come out and be in practice having served in, arguably, one of the most senior judicial posts that the Australian Defence Force has. I think you are creating a problem here, aren't you? You are releasing people who have been inside the system to outside the system such that a former judge is going to appear before the new judge and we are going to get this sort of almost conflicted scenario evolving of a club of people who have been serving judges.

Rear Adm. Bonser—I do not know how they would appear before a new judge in a board of inquiry, because there would not be any military judges at the board of inquiry.

Senator FERGUSON—Why is there a time limit at all? If you did not have the time limit, this problem would not arise.

Rear Adm. Bonser—You are talking about the actual five-year term?

Senator FERGUSON—Yes; if there was no five-year term, all the questions that Senator Johnston is asking may never arise.

Rear Adm. Bonser—The five-year fixed terms—and we based it on good advice that a fixed term does provide judicial independence—mean that we no longer have appointments of judge advocates by CDF or the service chiefs. Those five-year terms, in fact, as we said in answer to the questions, almost double the existing three-year terms. They do allow for a maximum tenure of 10 years if there is a reappointment necessary to maintain a level of experience on the AMC, and the advice we have is that a term appointment with opportunity for reappointment is not incompatible with the necessary independence required of a military tribunal.

Senator MARK BISHOP—What the senators are asking you is: why is it a fixed appointment of five years? What is the policy reason?

Rear Adm. Bonser—We will have military judges presiding over military courts, dealing with matters of professional military competence and potentially having the authority to institute a punishment of dismissal from the service. We need the military court to have credibility and the respect of the rest of the ADF. Potentially for members to be dismissed by a military judge who does not serve under the same conditions of service as the members whom they are punishing is entirely inconsistent with having a credible system for the rest of the ADF.

Senator MARK BISHOP—Because the term of engagement is six years—or however long—recurring to be in the Army or the Navy, that is the justification for a five-year term of appointment to the judge's position; is that correct? Is that what you are saying?

Rear Adm. Bonser—Five-year terms also allow for a throughput of officers to aspire to a pinnacle appointment, as you have stated, to become a judge on the Australian Military Court. One of the key issues in this is that, if you put people into these jobs for an indefinite period until retiring age, you actually block a whole generation or more of officers from aspiring to these positions. One of the things that we need to look at here is the ability to create a career throughput for our legal officers.

Senator TROOD—There must be a thousand people around the country who might aspire to be Federal Court judges and they are blocked because there are only a certain number of Federal Court judges until such time as those judges retire. What is the argument here? You are a lawyer. You know the principle of judicial independence. The proposition is that judges should be appointed in such a way that there is no likelihood that a question can arise in relation to their independence. Why is that not a proposition that applies in this situation?

Rear Adm. Bonser—I should correct you; I am not a lawyer. I would say that they are appointed to meet that proposition. Perhaps Mr Burmester can discuss the manner in which they do.

Mr Burmester—The policy decision having been made that there should not be long-term or until retirement appointments, the bill then goes out of its way to ensure that, because the appointment is for a fixed five-year term, there is no possibility of undue influence. Hence it is envisaged that a person ceases to be a member of the Defence Force when they finish their term as a military judge. There is an expectation that there will generally not be reappointment except in a case where the need for continuity of experience is found to exist. There is not a general discretion to reappoint someone. That was done deliberately in order to remove the suggestion that it was a fixed five-year term subject to renewal, which might be seen to detract from the independence of the military judge. The decision was made to have—for operational or other policy reasons—a relatively short term of five years and not an appointment to some retirement age, which could mean a person serving as a judge for a considerable time. The bill then went out of its way to ensure that that five-year term was insulated from command or executive influence.

Senator MARK BISHOP—It being by definition a career pinnacle position or a career end position, what is the value derived from the knowledge, experience and endeavour gained by the men and women who hold this position for five years who are, by the act itself, then prohibited from continuing in the ADF? That is my first question.

My second question is: why do you not seek people who are aged 40, 45 or 50 and mid-career and expose them to this area of endeavour as an aid to their professional development so that they can go into very senior positions in a strategic sense? If I go into this position at the age of 40, I cannot continue to contribute to this country's armed services. Why do we have a policy objective of achieving that?

Rear Adm. Bonser—It becomes purely voluntary for the people who wish to be judges. There is a clearly articulated termination of their appointment at the end of their tenure as a military judge, and they are well aware of that before they join. That was put in place to overcome perceptions that judges might then go on and seek subsequent employment. That enhances their independence. We make it quite clear to them that it is a terminal appointment and they make themselves available voluntarily on the basis of that. There is nothing hidden that precludes them from applying at any age, but one would expect that they would do so voluntarily on the basis of the termination of appointment at the end of their tenure.

Senator MARK BISHOP—But by definition, it being what we are calling a terminal appointment, you do not want the skills, knowledge and experience gained in this job to be fed back into our armed services. I have never heard of such a proposition.

Rear Adm. Bonser—What we want is the skills, knowledge and employment that we gain through all of the jobs leading up to this to lead into the ability for them to become military judges in the new court.

CHAIR—Where in any jurisdictional sense at any level, be it administrative or judicial, is there a model like this, where you say, 'Join us for five years in a relatively niche area of

judicial administration and at the end of that, you're out'? I have never seen anything like this before. Is there some model we have copied here? Where did the concept come from?

Mr Burmester—It is not drawn from any civilian court model, where judges are generally appointed to a retiring age.

CHAIR—I think I was reasonably assured in understanding that.

Mr Burmester—It is a unique body, and in that sense I do not think you can point to direct analogies. Obviously tribunals such as the Administrative Appeals Tribunal do tend to have appointments for periods of five or 10 years, but those provisions do not have built around them the measures that this bill contains in order to ensure that the office is free from independence. They are usually term appointments subject to reappointment at the discretion of the minister of the day. It is not based on models that apply to administrative tribunals; it is a model designed to meet the needs of Defence and to have people for relatively short periods at the end of a long military career, when they have built up considerable experience and are in a situation where there will not be expectations of further military advancement.

Senator PAYNE—Can you say that last sentence or so again?

Mr Burmester—I think the model reflects the expectation of the defence department that the people appointed to these offices will be appointed at the end of a legal and defence career in a situation where there will not be expectations of future advancement within the Defence Force and hence no suggestion of being influenced by that prospect of advancement. It was a deliberate choice that the sorts of people that might well be appointed would be those, as the admiral said, who planned generally to retire in a five-year time frame at the end of their appointment as a military judge. That is the assumption that I think lies behind them.

Senator PAYNE—How does the bill or the explanatory memorandum make that evident? How does your submission and your response to the questions of the committee, which focused on this issue, make that evident?

Rear Adm. Bonser—I think the response to the questions that we have provided answers that question.

Senator PAYNE—I do not believe it does.

CHAIR—In line with Senator Payne's question—and I think her comment begs the question—in section 188AR, qualification for military judges, you expect them to be five-year enrolled legal practitioners. How many of those do we have running around at senior levels?

Senator PAYNE—Apparently, a generation.

CHAIR—I would have thought this is a very exclusive qualification in this bill. I would really think we would have a problem in finding a permanent member of the ADF or the reserves, full-time with a law degree of five years standing. Do we have that many of these people?

Rear Adm. Bonser—Senator, we fully expect that we are not going to get the prime bulk of our military judges from our permanent legal officers, albeit there are some that meet those qualifications. I should point out that those are the same qualifications that are required for a

Federal Court magistrate. We do expect that we would get most of our officers with that experience from the reserve in the first instance, until such time as we build the experience through the office of the Director of Military Prosecutions and through the new Defence Counsel Service, to build a larger pool of qualified permanent legal officers. In the matter of our reserve legal officers, there are lots of them who meet those qualifications because they are enrolled for their civil practice.

CHAIR—No, but you have said that they have to be rendering continuous full-time service.

Rear Adm. Bonser—They do not have to be rendering continuous full-time service at the time of applying or making themselves available. They only have to render continuous full-time service if they are a reserve officer and wish to become a permanent military judge.

CHAIR—Well, I do not think that that is what this section says. It says:

A person must not be appointed as the Chief Military Judge unless ...

(b) the person is a member of the Permanent Navy, the Regular Army or the Permanent Air Force, or is a member of the Reserves who is rendering continuous full-time service ...

Mr Burmester—I think, as the JAG indicated—and I think this was the intention—it was referring to eligibility to fulfil those qualifications at the time of appointment so that the selection criteria would be rather 'eligible to fulfil those criteria'—

CHAIR—Well, why don't we say '... and shall be capable of rendering ...'?

Rear Adm. Bonser—I can clarify that, Senator. If you look at section 188AE of the bill, part 3, it says:

The committee must invite all persons who satisfy, or who are capable of satisfying, the qualification requirements in section 188AD ...

CHAIR—That is the chief.

Rear Adm. Bonser—That applies for both the Chief Military Judge and the military judges.

Senator PAYNE—So you need to read 188AR in conjunction with 188AD?

CHAIR—No, AS(3) is the comparative section, at the bottom of that page.

Rear Adm. Bonser—They can be selected but they cannot be appointed to the position until they are promoted to the requisite minimum rank, but it does not mean that they have to be at the requisite minimum rank beforehand or a permanent member.

CHAIR—Just tell me what we are paying a military judge.

Senator PAYNE—Whatever the Remuneration Tribunal says.

Rear Adm. Bonser—That will be a matter for the Remuneration Tribunal.

CHAIR—Do we have an approximate figure?

Rear Adm. Bonser—I can give an approximate figure based on what the Remuneration Tribunal has determined for the current Chief Judge Advocate.

CHAIR—No, I mean just for an ordinary military judge.

Rear Adm. Bonser—That determination has not yet been made by the Remuneration Tribunal, but I would expect it would be similar to, but not quite as much as, the Chief Military Judge and that it would be likely to be similar to what we have at the moment for the Chief Judge Advocate.

CHAIR—Which is?

Rear Adm. Bonser—For the Chief Judge Advocate that that is $230,000-odd. I think it is about twice what we pay the standard military one-star officer.

CHAIR—And he is a serving, full-time Supreme Court justice in Western Australia?

Rear Adm. Bonser—No, this is the Chief Judge Advocate, who is our one permanent Defence Force magistrate at the moment.

Senator PAYNE—Will that determination be made before you send your letters of invitation to all persons who satisfy or are capable of satisfying the qualification requirements so they will know what they are applying for?

Rear Adm. Bonser—That is happening right now so that we will have the determination, but of course we need the determination at about the same time as the legislation enabling the court. The aim is to have it prior to the selection process.

Senator PAYNE—On the question of those eligible: the Law Council of Australia—not just as the Law Council but by bringing as witnesses before the committee individuals with extensive experience in military justice practice—and the JAG both observed in their submissions and in their verbal contributions here today that they simply cannot see where you will find the people who are prepared to sign up for five years and then leave the military as a result of the enormous opportunity this gives them for that five years. They cannot see why people would do that. These are people who have been practising in these areas for decades and they simply cannot see where you are going to find the people. What is your response to that?

Rear Adm. Bonser—I do not know what the basis of that argument is—

Senator PAYNE—Their experience, I think, Admiral.

Rear Adm. Bonser—I can say that the level of attention and the number of applicants we had for some of our other newly created statutory positions, such as the Director of Military Prosecutions and the Registrar of Military Justice, would not indicate that this will be the case.

Senator PAYNE—Do you have to leave the military when you cease being the DMP or the registrar?

Rear Adm. Bonser—No, they do not because—

Senator PAYNE—I think that is very relevant.

Rear Adm. Bonser—they are not going to be military judges.

Senator PAYNE—But that is a point that our witnesses and the submissions make. It is not about having a position that runs for five years; it is about having a position that runs for five years which is in theory supposed to be an independent judicial position—and I do believe

there are questions over that—and then having to cease your military career, just like that. That is the difference. So you can say you had great applicants for the DMP and for the registrar—and I am sure that you did and that the appointments are very worthy ones, and the committee has commented on those—but those people do not have to leave the military.

Rear Adm. Bonser—That is correct. I could also say that I have recently had conversations with a number of reserve legal officers who have indicated a degree of interest in these sorts of positions, including from a currently serving senior magistrate.

Senator PAYNE—Do they know they have to leave the military?

Rear Adm. Bonser—They are aware of this, yes. Indeed, our part-time military judges would still be able to go on and conduct their civil practice when they were not required to sit or required to perform their duties as a military judge.

Senator PAYNE—We have also had evidence on that point, which you would have heard, where people who have been in that environment before think that is simply not viable as a proposition.

Rear Adm. Bonser—I do not know how that can be said, given that that is exactly the case that exists for our current part-time judge advocates.

CHAIR—Admiral, we had chapter and verse last year on why that system does not work. It was one of the principal findings of the committee: there are problems.

Rear Adm. Bonser—And that is why we have created three full-time positions, rather than just the one that we have at the moment, which is augmented by a part-time panel.

Senator PAYNE—I have a question about the appointment of military judges under proposed section 188AP and how you intend that process to work. Proposed section 188AP(4) says:

A Military Judge holds office for the period specified in the instrument of appointment. The period must not exceed 5 years—

which we have already discussed. Is the intention to make a series of rolling appointments at the beginning, some lasting five and some lasting less than that, to ensure that you are not replacing the entire court at the expiration of the first five-year period?

Rear Adm. Bonser—No, that is not the intention. The explanatory memorandum talks about appointments up to five years only in the case of officers who do not have a full five years until compulsory retirement age, if they are worthy of the position. They could be appointed for less than five years to allow them to serve through to compulsory retirement age. The mechanism by which you can avoid what I think has been termed a wave of renewals every five years is simply that you do not appoint all of the judges at the same time. We do not believe—

Senator PAYNE—That is essentially what I was asking, I suppose. Sorry, I did not express it properly.

Rear Adm. Bonser—I do not believe that they all need to be appointed at the same time and, given that, you can stagger the replacements.

CHAIR—Can we just come back to the apparently underlying principle that is not contained within the legislation—as a repository for senior officers in the twilight of their careers. That concept really does concern me. We are talking about the administration of justice. Certainly you have qualifications—which I find curious in some respects, given that, whilst you can be enrolled, you do not ever have to practise. Nowhere else in any jurisdiction—and I think not in any military environment around the world that is comparable to ours—have we looked at our military justice system as a repository for retiring officers.

Rear Adm. Bonser—I am not sure that I understand the question.

CHAIR—The tenor of the commentary of your response to our question is that the role of military judge is something to do with someone's career—as in 'We move them through quickly so there is somewhere to put people.'

Mr Burmester—Defence counsel or DMP, you said.

Rear Adm. Bonser—Those are some of the options, but those are just some of the options to expand the pool. As I said, we expect that by far the majority of the officers who would have the requisite qualifications to be military judges will in the first instance come from the reserve until such time as that pool expands.

Senator MARK BISHOP—It is almost as though you are creating a sinecure for senior people about to enter retirement. You are 57; you are at the peak of your career; you are about to retire. Instead of getting appointed to the Repatriation Commission or some other tribunal, they put you here for five years.

Rear Adm. Bonser—Not at all. What it means is that, if you wish to make yourself available to become a military judge at any time in your career, you can apply to do so and be selected through a fair and open merit selection process. It is not a sinecure at all.

Senator MARK BISHOP—How many 40-year-olds do you know who are midway through their career in the Navy or the Army and want to end it there? Career officers do not want to end when they are 40, 43 or 47, do they? They want to end up like you—a rear admiral or a two-star or three-star.

Rear Adm. Bonser—Many in our younger generation actually seek second careers.

Senator MARK BISHOP—Yes, they do.

Rear Adm. Bonser—And there is nothing to say that an officer might voluntarily make themselves available to be a military judge at a younger age in their career, do the job and then leave in the full knowledge that that is the case—or wait until later in their career to make themselves available. In the end, it is entirely up to the officer when they wish to make themselves available.

Senator PAYNE—That seems to be a curious argument to mount in terms of the current discussion on retention. Where does that leave the committee in that regard?

CHAIR—That is a question you may care to answer now or later. I want to know whether we have actually analysed our personnel—to work out, firstly, how many serving full-time members have five years enrolment standing—so that we have not drafted this concept in a vacuum. Do we have that information?

Rear Adm. Bonser—I do not have it with me, but we can get that information.

CHAIR—All right. And have we then reconciled those people in terms of age and internal demographic—as to where they are from—so that we have some understanding of what the likely pool is?

Rear Adm. Bonser—The likely pool is all of the officers that meet the basic qualifications.

CHAIR—I am asking what is that pool. I am asking you to help me with the concept. You may yet convince me that this has merit, but at the moment I am ignorant about what we are dealing with.

Rear Adm. Bonser—I would have to get back to you with the answer to that question.

CHAIR—I really would appreciate it if you could, because I think that might clarify the situation substantially.

Senator HUTCHINS—We had this afternoon—and I think you were here for most of it—the Judge Advocate General and the Law Council make the point about the fear they have about the independence of this court if it remains on these limited tenures. In the last few years we have had four inquiries into military justice in which parliamentary committees and other inquiries have not been satisfied that the military is capable of conducting military justice fairly. Why should we be convinced by your arguments today—and I invite you to respond—if we have had, as I said, the Judge Advocate General and the Law Council of Australia say that this is wrong; that this—I will use my words—is the wrong way to go?

Rear Adm. Bonser—That is in the context of independence of the military court as it is proposed here?

Senator HUTCHINS—Yes.

Mr Burmester—There is obviously a whole range of models that could be adopted. As the High Court did in the recent Forge decision and with acting judges, it said there is no one model of what makes an independent and impartial court or tribunal. The comments by the Law Council and JAG as to what they think would be preferable—as I listened to them—seemed to be that in their ideal world this is the direction they would go: somewhere else than what is here in the bill. They are not, as I read them, saying that this bill does not provide independence and impartiality; rather, they think that maybe there should be a decision made to try and, as it were, equate this tribunal very much with a full civilian court or to adopt what they would say is world's best practice to allow some of the foreign precedents—which, I must say, seem to have been driven largely by bills of rights and human rights treaty obligations and which are part of the domestic law in Britain and Canada. They want to use those to, as it were, define the model they choose, but the bottom line is that there is no one model of independence and impartiality. This model, in my view, meets the requirements for an independent, impartial tribunal, but I am not suggesting it is the only model or that one could not deal with it in other ways.

CHAIR—And Teoh would suggest that we are similarly enmeshed in foreign conventions and treaties.

Mr Burmester—I think the High Court has probably stepped back from that case.

CHAIR—I think it probably has, and we are waiting with great consideration as to when it is going to pronounce that step back and how far that step back will actually go.

Mr Burmester—The only point I was trying to make is that one should not take some of these foreign decisions and say therefore that requires us to mirror the outcome they adopt.

CHAIR—I think that is a very good point to take from your perspective, but my rejoinder to that is, 'We are making this up as we go along.' I do not have a single shred of a precedent of a model that mimics anything we are doing here. How could the committee really have any confidence in this system when I look around and there is not one shred of similarity to anything we do in Australia in terms of tenure or in terms of qualification? It strikes me that we are doing something that we have learned to stop doing in other defence occupations and practices, and that is to finetune and deviate from the norm. To have a five-year term for a judge and then say, 'Your career in defence is finished' strikes me as being one of the most interesting models for us to want to bring in and, as you confirm, there isn't anything to compare it with. I would love you to come back and say that it is actually working very well somewhere, but I just cannot see where this has come from. I have a Supreme Court justice, who is your Judge Advocate General, saying, 'No good.' I have the Law Council, which is made of serving part-time military men—of some standing I take it; I was very impressed with them—

Senator PAYNE—Queen's counsel.

CHAIR—Queen's counsel. They say, 'No good.' I asked you for a comparative model, and you said that there is not one. I have to tell you that that leaves me lacking confidence in this system. Tell me why I am wrong.

Mr Burmester—It is not for me to defend the model as such but to say from a legal point of view—and this is the legal advice that I have been providing the Department of Defence—that it does provide an adequate impartial and independent body to exercise military jurisdiction.

CHAIR—You worry me with words like 'adequate'.

Senator PAYNE—That is right. 'It should suffice.'

CHAIR—Why does it need to be just adequate? Why are we simply doing just enough? Why are we doing that? Why aren't we doing it using the things we know and understand and rely on the administration of justice, such as security of tenure—

Senator PAYNE—Independence.

CHAIR—independence, transparency—those sorts of things?

Mr Burmester—There is a lot of that built into this model, but it is not for me to explain or defend a particular model beyond that.

CHAIR—It worries me even more when you say that you do not want to defend it.

Mr Burmester—As the legal adviser, I say that this model meets the legal requirements of an independent and impartial tribunal.

CHAIR—And you are imparting to me that we are just talking about the idea that barely enough is enough. Our experience here in this committee is that barely enough never works in

this area. We are No. 5 in terms of reports on military justice. The response has been excellent to this point, may I say. There has been a good response to our last report. But when we look at this piece of legislation—and I think that I am speaking for the committee broadly here—we are perplexed as to why we are deviating away from the administrative norm in terms of justice. I am asking you to tell me not just that it meets the criteria but why we are going down the path we are on.

Mr Burmester—The best I can do is to say that we are creating here not an ordinary court. On that basis, my client, the defence department, has not sought to copy and directly pick up the situation which applies to ordinary civilian courts. They tell me—and this is how I understand it—that it is designed to serve military purposes, and to deal with offences with a military and service connection and to deal with the need for military justice in operational circumstances. It is all those special and unique circumstances about a military court or tribunal which have led the Department of Defence to put forward this particular model. They have deliberately not set out to simply say, 'We're having a military court, and we want to make it as closely akin to an ordinary court as possible,' because, as I understand it, their judgement is that that does not meet and satisfy the military needs, particularly in operational situations.

CHAIR—Mr Burmester—and please indulge me, members of the committee—when we reported on military justice, such a small proportion of our adverse comment related to the actual judicial administration. And yet here we have something that seems to be turning the whole thing on its head, as if this inquiry—as if our scrutiny—is an excuse to completely deviate from normal practice and clean up an area that previously, apparently, was not the root cause of the problems. I cannot help but think that we have opened Pandora's box here. This piece of legislation, with five-year terms for judges, goes no way towards alleviating our angst over this. It simply makes us more uneasy. Unless you can take me any further, I will go to one of the other senators. But that is the feeling that I have, and a lot of senators agree with me.

Mr Burmester—I am here to be the legal adviser. I am sure the Department of Defence has listened to what you have said, but I am not here to defend the policy; I am here to be the legal adviser.

Senator HUTCHINS—Maybe Admiral Bonser would like to comment.

Rear Adm. Bonser—In terms of independence, the bill provides for fixed terms, which do ensure independence. It also provides for the other two key elements of independence for the military judges in terms of their statutory remuneration and in terms of ensuring that they have adequate administrative support to be able to operate independent of the chain of command.

CHAIR—I do not think that was a real problem. I have not got an issue with the Judge Advocate General and I do not think that the committee has. Yet here we are doing this. I think there was a whole host of issues in the way, firstly, that we funded things. We had a prosecutor who was a colonel—okay, we have changed that and we have made the appropriate amendment. Now we seem to be doing something totally different. When you say 'judicial independence', was there some problem with a lack of judicial independence?

Rear Adm. Bonser—The issue is with what this new court really replaces, which is the court martial. That was where we had military officers who were not legally trained sitting on the panel making the decisions and setting the punishments. In moving towards a system that was more independent of the chain of command we created the military court where the military judge presides. Under the existing system the judge advocate is simply an adviser to the court. They do not make the decisions.

Senator PAYNE—Chair, I would not like Mr Burmester or Admiral Bonser left with the view that the committee is seeking to achieve something that is close to, or akin to, a civilian court. What the committee made clear in its report and what the committee seeks to explore in these discussions is about achieving for the men and women of the ADF the best arrangement we can. Senator Johnston said far more eloquently than I ever could that the committee has doubts as to whether this reaches that point. In the words of the Defence response to questions on notice, which I went through before, this should not be about the amount of independence necessary to get over the line. It should not be about what should suffice. It should not be about what is sufficient, but about making it the best it can be. When I asked at the beginning, Admiral Bonser, about JAG's apparently ambitious dream of producing the best possible military court and using this opportunity to do that, to paraphrase you, you said—if I recall correctly, and I stand to be corrected if I check the record—that that was not what we were setting out to do. We were setting out to create a military service tribunal. That bothers the committee, as Senator Johnston so eloquently set out.

Rear Adm. Bonser—I am not sure that I said that, Senator. We are putting in place a court to deal with offences that have a service connection, predominantly matters to deal with the performance of the military. It is unique in that nature and it is one part of our service tribunal system.

Senator PAYNE—We understand that. But in putting together the arrangement that is before us now you are not presenting to this committee a court. You are trying to call it a court but all of the drafting and all of the words of Defence keep taking a step back from that.

Rear Adm. Bonser—This system replaces a current court martial, which was one of our service tribunals. This is going to be the Australian Military Court which is one of our service tribunals. It is in the context of a service tribunal with a particular purpose, which is a military purpose, rather than an ordinary tribunal with any other purpose.

Senator PAYNE—For the record, Chair, I reiterate that the committee was seeking in its recommendations to achieve an outcome that was the best it could be. This member of the committee is not persuaded that this delivers that.

Senator ADAMS—This participating member is of the same opinion. I would like to go to your answers to questions about trial by judge and military jury. I am a JP; I know this is not referring to a civilian court but I do have some problems with the answers you have given. I will quote a part that concerns me:

Given the specific requirement for the composition of military juries, which necessitates drawing from a smaller pool of potential candidates, smaller numbers of jurors may be appropriate.

Could you please explain why smaller numbers 'may be appropriate'?

Rear Adm. Bonser—I think that perhaps Mr Willee answered that when he talked about the fact that we are drawing from a smaller pool, which means it is more difficult to have larger numbers at any one time. There is also the fact that we are drawing from a pool which brings specific military experience and knowledge to the party. That is different from a civil jury which is drawn from all parts of the community and may have no specific expertise in the area that is being dealt with by a court, so they necessarily have larger numbers to ensure that there may be one or two people on the jury that may have some experience in those matters. In a military jury they will all have military experience and so we can have fewer members and still have the requisite expertise.

Senator ADAMS—The jury is only there to determine whether an offence has been committed. We have men and women before the court; they have committed something but I am not happy about the 'may be appropriate'. Further down it says:

> The proposal does not involve juries in the usual sense—

I know about that. It goes on:

> The perception of fairness may be strengthened if a special majority, say three quarters or two thirds, was required.

It really has me worried. I had better declare a conflict of interest to a point, because I have a son in the Army. Hopefully, he will never have to appear before a court but I am still concerned about other members of our Defence Force. I do not like these 'maybes'; it is not good enough for this committee as far as having something that is to be, as we have heard, an apex of a court that is going to be held up as an example of good practice.

Rear Adm. Bonser—I think that advice was in the context of having majority decisions.

Mr Burmester—The question to which that sentence probably relates was: should you have a 50 per cent majority—three out of six—or should you have something more than that? The advice that is reflected in the bill is that fairness would obviously be enhanced if one had a special majority.

Senator MARK BISHOP—Following on from Senator Adams's questions, if you have a relatively homogenous officer population from which to draw your jury and they have, by definition of being officers, considerable experience and understanding of how their particular service operates, why does the ADF feel the need to create this precedent of going to four out of six? Why do you not stick with what is common in other courts trying serious offences of 10 out of 12, five out of six or unanimous? Why this virtual simple majority? Why are you creating this precedent?

Rear Adm. Bonser—It is not precedent in our context; that has always been the case with a court martial panel—a majority decision. A general court martial has a panel of five and a majority decision. A restricted court martial has a panel of three and a majority decision. There is no precedent in the context of a military court.

CHAIR—That issue is a problem. We are looking to improve and raise the quality and standard of justice administered to accused persons. This is lowering the bar to a four-two majority; the lowest you can get in civil jurisdiction is a 10-two majority, and that is under very special and stipulated legislative circumstances.

Going to a four-two majority I do not think imparts the level of confidence we want in the system—and here we are talking about having further powers in that regard. I think that is swimming totally in the wrong direction. If anything, we want to go to five-one, at the very least, in very special circumstances, such that the accused person has the maximum opportunity to have his defence being judged by his peers, as he is, as opposed to in the civilian scenario where he would have absolutely no relationship, by and large, with his jurors. I think you want to be very careful about lowering that bar because, in terms of what we complain about to you, it goes in the wrong direction.

Rear Adm. Bonser—I take your point, Senator. But there are no additional powers and it is not lowering the bar in the context of current practice in military courts.

CHAIR—You talk about a service offence in section 124, which says that in a trial of a charge of a service offence that is to be tried by military judge and military jury, the jury responsible has to make certain determinations. You set out there that a decision of a military jury on those questions 'is to be made by the agreement of at least a two-thirds majority'. In most of the civil jurisdictions it is specified; it does not use the word 'two-thirds'. I have not looked at the rules, but the rules may make the pool of jurors 12 and you go down to eight—an eight-four verdict. I do not think that imparts confidence. If that is what you can do I do not think that imparts confidence. If you are going to terminate someone's career—he is out—because of an eight-four verdict, I think that is the wrong way to go.

Senator PAYNE—It is only six—

CHAIR—Yes, but the rules might raise the bar from six jurors in the pool—the judicial officer might be able to raise it. I do not know because I have not seen the rules.

Mr Burmester—Section 122 prescribes that there will be six, so there is no flexibility there.

Senator ADAMS—No, there is not. It is only six. That was why I was so concerned.

CHAIR—On the probabilities, the four-two is even worse, on that basis.

Senator ADAMS—Yes. That was why I asked the question.

Rear Adm. Bonser—All I can say is that it is consistent with what we have had in the courts martial system prior to that, and there has never been an issue raised around the majority decision of courts martial.

CHAIR—Well, I actually think that is one of the underlying problems that we have with the system.

Senator MARK BISHOP—Where do you appeal from courts martial?

Rear Adm. Bonser—To the Defence Force Discipline Appeals Tribunal, exactly the same way as you will be able to appeal from this particular Australian Military Court, but in this case we are actually expanding the right of appeal to on both conviction and punishment rather than just on conviction on points of law, as it currently is.

Senator TROOD—It could be, Admiral, you have been very fortunate in that respect that there have not been appeals. It strikes me that the evidence that came before the inquiry was that people are becoming much more protective of their rights and perhaps there is a stronger

inclination these days to press those rights when they feel aggrieved by a decision. I accept your proposition that there has not been an appeal, and it may be that there will never be one, but I do not know that we would want to rely upon that history going forward.

Rear Adm. Bonser—Of course that is why we have an appeal system.

Senator TROOD—Yes, indeed.

Senator MARK BISHOP—Admiral, can you give us an idea of the scale of the problem? I understand the AMC is to apply to troops involved in operations overseas. You would have done a bit of scenario painting. For the sake of argument, divide the offences into minor and major offences. How many minor and major offences do you anticipate will be heard by this AMC on an annual basis going into the future?

Rear Adm. Bonser—On the basis of the current number of cases that are heard by courts martial and Defence Force magistrates, it is somewhere between 50 and 60 cases a year. We have only had occasion for a Defence Force magistrate to deploy overseas for relatively minor offences on about four or five occasions. The vast majority of our offences are of a minor nature and they are dealt with by the summary system. They are in thousands.

Senator MARK BISHOP—And they are done with in the field shortly after the offence is committed and alleged.

Rear Adm. Bonser—That is correct.

Senator MARK BISHOP—So you anticipate the number of major offences that are going to have to use the AMC into the future to be minor.

Rear Adm. Bonser—For courts martial and Defence Force magistrates it currently stands at somewhere between 50 and 60 on average per year.

Senator MARK BISHOP—Is that major offences or total offences?

Rear Adm. Bonser—It is total offences. Very serious offences are in single figures. There are very few very serious offences. We will be introducing a right of appeal and revising the right to elect trial by the Australian Military Court from summary procedures in our next tranche of legislation. That may see an increase in the workload for the Australian Military Court. But estimates are that it is unlikely, even at the peak, to be more than an increase of about threefold over what we have at the moment. And we are increasing the number of permanent military judges to three from one.

Senator MARK BISHOP—So even in the worst-case scenario, with a lot more deployments overseas, the incidence of offences is pretty minor.

Rear Adm. Bonser—There is no indication that operational tempo is actually changing significantly the number of serious offences. There is nothing in the trends to indicate that. Indeed, what we see is that when people are busier conducting operations there is less chance that they will get involved in—

Senator MARK BISHOP—Other activities.

Rear Adm. Bonser—other matters, yes.

Senator TROOD—The Judge Advocate General's submission alludes to the problem that may arise with an appeal about the court's jurisdiction—an appeal to the High Court that this is not a court. You have moved between the terms 'court' and 'tribunal' in your evidence, and the submission seems to do the same thing. Perhaps this is a question for you to answer, Mr Burmester: did you begin in your design of this artifice with a view to being sure that it could withstand an appeal to the High Court in relation to the exercise of criminal jurisdiction, for example?

Mr Burmester—That has certainly been one of the driving considerations, and so where one sees words like 'adequate' or 'sufficient' then that is in a sense the benchmark against which this model has been tested. It is not a chapter III court within the meaning of the Constitution; it is a special tribunal supported by the defence power, which exercises judicial power but which the High Court has recognised is outside of chapter III. Its jurisdiction is therefore necessarily confined to a limited range of offences that have a service connection. Overseas that may be very broad, but it is still a limited jurisdiction. Hence, in designing the tribunal, the criteria of independence and impartiality were considered in terms of whether it would be likely to pass muster with the High Court as a military tribunal, not a chapter III court. My assessment is that this model has a low risk of being successfully challenged.

Senator TROOD—So the concerns that the Judge Advocate General raises are not ones that you think are substantial?

Mr Burmester—I do not share those concerns. The High Court, in the cases we have had dealing with military justice, has tended to focus on ensuring the jurisdiction of these tribunals is in some way limited to matters with a service connection. Provided that limitation remains—and it does, because the jurisdiction of this court is no different from the jurisdiction of current military tribunals—then my assessment is that attacks on the grounds that it is not independent or impartial, or not sufficiently independent or impartial, are unlikely to succeed with a model such as we have in the bill.

Senator TROOD—I am grateful for that clarification. It does not, I must say, allay the wider concern about sufficiency that my colleagues have raised. They are concerns that I share with regard to this particular proposal.

CHAIR—As there are no further questions, gentlemen, I thank you for your attendance. We appreciate it very much.

Committee adjourned at 7.50 pm