

Military Justice (Interim Measures) Amendment Bill 2013

Introduced into the House of Representatives on 21 March 2013

Portfolio: Defence

Summary of committee view

1.148 The committee seeks clarification as to the basis for the claim in the statement of compatibility that the bill 'does not have an impact on human rights', given that the bill will extend the current interim arrangements for the service tribunal system for another two years. It also seeks clarification whether these interim arrangements are consistent with the criteria of an independent and impartial tribunal.

Overview

1.149 This bill is one of a series of enactments that followed the 2009 decision of the High Court of Australia in *Lane v Morrison*,¹ in which the court held that the Australian Military Court was unconstitutional. The Parliament put in place a series of temporary measures (corresponding in large part to the system which predated the Australian Military Court), pending a decision by Parliament on how to permanently address the issue of the trial of serious service offences in the Australian Defence Force.²

1.150 The *Military Justice (Interim Measures) Act (No. 1) 2009* currently provides a fixed tenure of up to four years for both the Chief Judge Advocate and current full-time judge advocate who were to be appointed pursuant to the provisions of that Act. That tenure is due to expire in September 2013. The bill amends Schedule 3 of that Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years, thereby providing a fixed tenure for the Chief Judge Advocate and current full time judge advocate of up to six years, or until the Minister for Defence declares, by legislative instrument, a specified day to be a termination day, whichever is sooner. The legislative instrument would not be subject to disallowance.

1 [2009] HCA 29.

2 A bill to establish an Australian Military Court in conformity with Chapter III of the Constitution is currently before the Parliament. The Military Court of Australia Bill 2012 was introduced into Parliament on 21 June 2012. As that bill is still being considered by the Parliament, it has necessitated the introduction of this current bill to again extend the existing interim measures.

Compatibility with human rights

1.151 The bill is accompanied by a self-contained statement of compatibility which states that the bill has no impact on human rights and therefore gives rise to no issues of incompatibility.

Right to a fair hearing before an independent and impartial tribunal

1.152 The trial of members of the armed services for serious service offences by service tribunals (including courts-martial) has been identified as giving rise to issues of compatibility with the right to a fair hearing in the determination of a criminal charge as contained in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The question is whether a person who is a member of a military with a hierarchical chain of command and who serves as a judge or member of a military tribunal, can be said to constitute an *independent* tribunal in light of the person's position as part of a military hierarchy. These considerations were influential in the establishment of the Australian Military Court that was held to be unconstitutional by the High Court in *Lane v Morrison*.

1.153 The UN Human Rights Committee has stated that 'the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception'³ and that 'the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military'.⁴

1.154 The question of whether a tribunal enjoys the institutional independence guaranteed by article 14(1) of the ICCPR requires consideration of a number of factors, including whether the members of the court or tribunal are independent of the executive. In addition to the relationship of members of a tribunal to a military chain of command, the term of appointment of members may also be relevant. In particular, the fact that the term of appointment of a member of a court or tribunal is terminable at the discretion of a member of the executive, raises concerns about the independence of the tribunal.⁵

1.155 Under clause 2(3)(a)(ii) of Schedule 3 of the *Military Justice (Interim Measures) Act (No 1) 2009* the period of appointment of the Chief Judge Advocate was to be for a period of four years or for a period terminating on the day declared by the Minister (clause 8). This bill extends the maximum period of appointment to six years; the possibility of earlier termination by declaration remains.

3 UN HRC, General Comment No 32, para 19.

4 UN HRC, General Comment No 32, para 22.

5 UN HRC, General Comment No 32, paras 19-20 (2007).

1.156 The committee recognises that the bill and associated legislation are intended to provide for the trial of serious service offences pending a final decision by the Parliament on how to deal with this issue in light of the judgment of the High Court in *Lane v Morrison*. The committee, however, notes that reversion to the system that predated that 2009 decision gives rise to concerns about the independence of tribunals hearing serious service offences.

1.157 The committee intends to write to the Minister for Defence to seek clarification:

- as to the basis for the claim in the statement of compatibility that the bill 'does not have an impact on human rights', given that the bill will extend the current interim arrangements for the service tribunal system for another two years; and**
- whether these interim arrangements are consistent with the criteria of an independent and impartial tribunal as required by article 14(1) of the ICCPR.**