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Defence Legislation Amendment Bill 2006

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Defence Legislation amendment Bill 2006

Date introduced: 14 September 2006

House: House of Representatives

Portfolio: Defence

Commencement: Sections 1 to 3 and Schedules 2 and 3 commence on the day the Act receives Royal Assent. Schedule 1 commences on a day to be fixed by proclamation, or by 1 October 2007, whichever is the earlier.

Purpose

The purpose of this Bill is to give effect to the [Government response](#) tabled on 5 October 2005 to certain recommendations of the 2005 Senate [report](#) into the effectiveness of Australia's military justice system by the Senate Foreign Affairs, Defence and Trade References Committee (the Senate Report).

This bill would establish a permanent Australian Military Court (AMC) under the *Defence Force Discipline Act 1982*. This would replace the current system of Courts Martial (CM) or Defence Force magistrates (DFM). Current military offences are restructured into Class 1, 2 and 3 offences, Class 1 being the most serious.

The bill will also amend the regulation making power in the *Defence Act 1903*, to facilitate the creation of a 'Chief of Defence Force Commission of Inquiry'. The Government agreed in its response to the Senate Report that the Australian Defence Force (ADF) conduct independent and impartial inquiries into notifiable incidents including suicide, accidental death or serious injury.

The Government has noted that further amendments to the DFDA will be tabled in the future, such as a right of appeal to hearings and findings of Summary Authorities, to be handled by the AMC.

This bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 14 September 2006 with an original reporting date of 10 October, extended to 27 October. Submissions to that inquiry can be accessed [here](#) and the final report can be accessed [here](#). The Committee recommended that the bill be withdrawn and amended.

The Senate Standing Committee on Scrutiny of Bills examined the present bill in its Alerts Digest No. 11 dated 11 October 2006 which can be accessed [here](#). It made comment on the military jury provisions as referred to below in the commentary on **Item 11, Schedule 1, proposed new sections 122 and 124**.

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Background

Basis of policy commitment

The Explanatory Memorandum states that many submissions to the Committee during the military justice inquiry raised serious concerns about the fairness of military justice proceedings:

The concerns stemmed from the location of judge advocates and DFMs within the military chain of command and the implications for their (actual and perceived) independence.¹

At recommendations 18 and 19, the Senate Report on military justice proposed that the Government amend the DFDA to create a permanent military court to replace offences tried by CM and DFM.

This bill partially implements those recommendations. The Government states that 'the changes are intended to provide for the maintenance of effective discipline and the protection of individuals and their rights'.²

Australia's military justice system

The military justice system exists to maintain discipline and to reinforce the chain of command in the Australian Defence Force (ADF). In a submission to the Senate inquiry into the system conducted in 2003-05, the then Chief of the Defence Force, General Peter Cosgrove AC MC, explained:

Establishing and maintaining a high standard of discipline in both peace and on operations is essential for effective day-to-day functioning of the ADF and is applicable to all members of the ADF. The unique nature of ADF service demands a system that will work in both peace and armed conflict. ... Without an effective military justice system, the ADF would not function ...³

The military justice system has two distinct but interrelated elements: the discipline system and the administration system. They provide the framework for (discipline) investigation and prosecution of offences committed under the *Defence Force Discipline Act 1982* and (administrative) maintenance of professional standards in the ADF and investigation of certain occurrences, such as accidental deaths of ADF personnel.

Offences dealt with under the discipline system can be grouped into three categories: 1) offences peculiar to the defence forces, such as absence without leave, disobedience of a command, and endangering morale; 2) offences similar or identical to civil offences, but that relate to service personnel or equipment, such as assault of a superior or subordinate, destruction or damage of service property, or dealing in narcotic goods on a base; and 3) offences imported from civilian criminal law, such as murder, manslaughter and theft of (non-service) property.⁴ The incorporation of civilian criminal offences into the military

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discipline system enables these offences to be dealt with should they occur when ADF members are overseas in circumstances where an adequate criminal law framework is absent (for example, in a war-torn country in which law and order has broken down) or if the application of host country law is undesirable (for example, if the death penalty were to apply).⁵

Under the existing discipline system, serious offences in the first two (military specific) groups are investigated by military police and may be dealt with by service tribunals which may be either Courts Martial or Defence Force Magistrates. A court martial is more formal, and is heard by presiding officers (of a higher rank than the accused) with a judge advocate to assist with legal matters; the court martial is not required to give reasons for findings or for the sentence imposed. Defence Force Magistrates, who are legal practitioners in uniform, hear the overwhelming majority of offences that might be considered serious; they sit alone when hearing cases, and give reasons on the determination of guilt or innocence and for the sentence imposed.⁶ Less serious offences may be heard by a Summary Authority, who is superior officer, given limited powers of punishment; or, for officer cadets or any member of the ADF below non-commissioned rank, a Discipline Officer who may impose punishment without trial (for minor offences, and with no permanent conduct record generated).⁷

For the third group of offences, which are those imported from civilian criminal law, a service tribunal may hear the matter only with the prior consent of the Commonwealth Director of Public Prosecutions (DPP). Usually, serious criminal law offences, such as murder and sexual assault, are referred to the DPP for investigation and prosecution.⁸

The administrative system is not an alternative to the discipline system. It deals with a different class of occurrence or wrongdoing within the defence forces. The intention is to ensure that the expected standards of professional judgement, command and leadership are maintained for the purpose of operational effectiveness. The administrative system enables the ADF to take action against a member or members whose professional conduct falls below the standard (while not having committed an offence), and the options for action include counselling, formal warnings, censures, removal from command, and discharge from the service.

Inquiries and oversight into the military justice system

Over the past decade, a number of court challenges and publicly aired complaints brought by former and serving personnel, their families and other community members suggested that the military justice system was flawed. Significant official inquiries included:

the 1997 Study into the Judicial System under the Defence Force Discipline Act Brigadier the Hon Mr Justice Abadee;

the 1998 Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*;

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the 1999 *Military Justice Procedures in the ADF* by the Joint Standing Committee on Foreign Affairs, Defence and Trade;

the same committee's 2001 *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*;

the 2001 Burchett QC *Inquiry into Military Justice in the Australian Defence Force*;

- and the 2002-03 West Australian Coroner's investigation of fire on board HMAS *Westralia*.

Each of these inquiries identified flaws in the ADF military justice system and processes, and recommended changes. As General Peter Cosgrove put it, while some of the recommendations were acted upon, there appeared also to be an element of resistance within the ADF, which viewed the military justice system as 'sound, even if it has sometimes not been applied as well as we would like'.⁹

In March 2003, the Defence Legislation Amendment Bill 2003 was introduced into Parliament. It contained amendments to the *Defence Force Discipline Act 1982* (DFDA) in relation to military justice (primarily a response to the Abadee report) and amendments to other acts in relation to areas such as the cadet services, the wearing of medals and false representation of oneself as a returned serviceman/woman, and the Defence Home Owner Scheme.¹⁰

After the second reading, in October 2003 the Senate referred the issue of military justice to the Foreign Affairs, Defence and Trade References Committee for inquiry. Its report, *The Effectiveness of Australia's Military Justice System*, was released in June 2005.

Senate inquiry into effectiveness of military justice system

The Foreign Affairs, Defence and Trade References Committee was instructed to inquire and report on the effectiveness of the military justice system in a number of areas. These included determining whether the system provided impartial, rigorous and fair outcomes for ADF members; mechanisms to improve transparency and public accountability of military justice procedures; the handling of inquiries into peacetime deaths in the ADF, from any cause; and allegations of mistreatment of ADF members and of drug abuse. The committee was also to assess the impact (if any) of previous reports on the military justice system, and determine whether recommendations were acted upon effectively. Several well known cases were identified for special evaluation.¹¹

The committee heard evidence from former and serving members of the ADF, including senior officers, family members, and other interested parties. It concluded that 'the ADF has proven itself manifestly incapable of adequately performing its investigatory function'.^{12 13} Investigations were found to be inadequate as a result of 'poorly trained and on occasion incompetent investigating officers'.¹⁴ Boards of Inquiry were lacking in transparency and independence. Processes of investigation and trial were found to have placed great stress on individuals, leading to loss of confidence, loss of employment,

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suicidal thoughts, and attempted and actual suicides. ADF members were reluctant to lodge complaints about superior officers, non-commissioned officers or their peers because they doubted the effectiveness and impartiality of the system. Review processes were inadequate. The report on military justice declared: 'The committee believes that the military justice system in its current form clearly needs a comprehensive, ground up reform.'¹⁵

Key recommendations in the report included better training of investigating officers, improved handling of complaints and investigations, establishment of a statutorily independent Director of Military Prosecutions and an independent Permanent Military Court, and the creation of a statutorily independent grievance and complaint review body. This was aimed at ensuring that 'the prosecution, defence and adjudication functions should be conducted completely independent of the ADF'.¹⁶

Government response

The Government issued its response on 5 October 2005. It agreed that 30 of the 40 recommendations should be accepted in whole, in part or in principle.¹⁷ Many could be dealt with by new or enhanced processes within the ADF. The civil and military leaderships of the Department of Defence expressed their commitment to providing 'a fair and equitable workplace that includes a transparent and cohesive military justice system'.¹⁸

The report had gone so far as suggesting that all serious criminal offences and military offences that had a close equivalent in civilian criminal law should be referred to civilian authorities for investigation and prosecution. On this, the Government disagreed strongly, stating:

The purpose of a separate system of military justice is to allow the ADF to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, sometimes, dealt with more severely than would be the case if a civilian engaged in such conduct.¹⁹

For the ADF to maintain its separate system of military justice, a framework for statutorily independent trial and review was required. The Government agreed that the ADF should have a permanent military court capable of trying offences under the DFDA, in place of a Court Martial or Defence Force Magistrate. This bill is intended to establish this framework.

Constitutional issues

While the Senate did recommend a permanent military court, it also recommended that this court be constituted under Chapter III of the Constitution and not have jurisdiction

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over criminal matters. As noted, military discipline includes offences imported from civilian criminal law, such as murder, manslaughter and theft of (non-service) property.²⁰

Briefly, Chapter III of the Commonwealth Constitution outlines the requirements for the exercise of judicial power, providing for the creation of judicial tribunals, the appointment of judges, and judge's conditions of tenure. Chapter III courts are independent from the parliament and the executive, as are the judges appointed to them. The independence of the judiciary is guaranteed by the judge's security of tenure—once appointed, federal judges are completely free from influence or interference when exercising the judicial function.

In *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 Dixon CJ, McTiernan, Fullagar and Kitto JJ at 270 held that:

... when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap. III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s.71...

The basic principle is that only Chapter III courts can authorise detention on the basis of the proper adjudication of criminal guilt. This basic principle has been stated by the High Court in the case of *Chu Kheng Lim v Minister for Immigration* (1992) [176 CLR 1](#).

The High Court has determined that courts martial stand as exceptions to the general separation of powers principle contained in the Constitution, but has not conclusively determined the basis or extent of the exception. In each of the three previous challenges to the DFDA, the High Court has split on the reasoning upholding the validity of court martial jurisdiction with regard to the conditions under which military tribunals may validly exercise a judicial function when dealing with civilian criminal charges.²¹

A recent decision of the High Court, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) raises several issues surrounding the validity of the defence power jurisdiction relied on for the AMC. By a 4-3 majority, the High Court held that it was a valid exercise of the Commonwealth's legislative power under s51(vi) of the Commonwealth Constitution for the Parliament to make the soldier's alleged conduct overseas a Service offence. The majority interpreted the defence power broadly and linked the charges to the maintenance of Service discipline. This aspect of the bill dealing with disciplinary issues within the ADF where there is no civilian equivalent charge is therefore on solid constitutional ground.

In the course of hearing the *Alpert* appeal on 3 March 2004, several Justices indicated that they were prepared to hear arguments regarding the validity of courts martial under Chapter III of the Constitution but the parties to the case chose not to do so.²²

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In obiter dicta²³ Justice Kirby warned against the extension of military tribunal's capacity to try civilian offences:

That conclusion could effectively exclude Australian criminal courts from their usual role in such trials. It could authorise a switch of the trials of defence personnel for crimes of rape to military tribunals, away from the ordinary courts, whose adjudications members of the public may more conveniently view, learn from and criticise. In practical terms, the election by a complainant could deprive service personnel in Australia of the ordinary right of jury trial in such matters. It could exclude citizens, as jurors, from participation in such trials. This Court may, as it pleases, ignore these consequences of expanding the ambit of service offences outside Chapter III. But it is a step opposed to past legal authority. It is antagonistic to very long constitutional history. It is also inconsistent with the Court's recent doctrine on Chapter III. And it is antithetical to the functions of citizen jurors and the rights of service personnel, enjoyed as Australian citizens, and long observed in the courts of our legal tradition.²⁴

While there is no domestic Federal bill of rights in Australia, Australia is still bound under international law by its obligations under Article 14(1) of the International Covenant on Civil and Political Rights to provide a fair and impartial trial in criminal matters.²⁵

As noted, the Government response did not accord with the Senate's recommendations in this regard. The AMC relies on the same jurisdiction as the present courts martial and Defence Force Magistrates. This is explained in a note to **proposed new section 114**. The Explanatory Memorandum states that 'the following philosophies and characteristics of the AMC are reflected in the Bill' to explain (rather obliquely) the reason the Government declined to set up a Chapter III court:

The AMC is not an exercise of the ordinary criminal jurisdiction. More is required than the ability to understand specialist evidence at a trial. A knowledge and background into the military environment and culture is required;

The AMC is a 'service tribunal' under the DFDA and therefore is part of the military justice system, the object of which is to maintain military discipline within the ADF;

The AMC must be deployable and be able to sit in theatre and on operations. A principal factor of the AMC that is peculiar to the Defence Force is the military preparedness requirements and physical demands of sitting in an operational environment;

A knowledge and understanding of the military culture and context is essential. This includes an understanding of the military operational and administrative environment, the unique needs for the maintenance of discipline of a military force in Australia and on operations and exercises overseas. The AMC must have credibility with, and acceptance of, the Defence Force;

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Military judges, as serving members of the Australian Defence Force, will still be subject to the provisions of the DFDA and ordinary discipline in the performance of their non-judicial duties, such as training.²⁶

The Judge Advocate General [submission](#) to the Senate inquiry into military justice provides an overview of recent High Court case law on the status of disciplinary hearings, as well as a summary of the developments in Canada, UK and NZ, where there is a requirement to hold fair and impartial trials under domestic bills of rights.

The legislative arrangements for the AMC and for the transition of existing members of the judge advocates/Defence Force Magistrate (JA/DFM) panels, must be considered against relevant legal developments, and particularly the history of High Court challenges to the military jurisdiction. I reviewed these in my submission to the MJI. In general terms, a significant minority of the Court has consistently been concerned about the conduct of criminal trials by Service tribunals because the tribunals are not established under Chapter III of the Constitution, and might not be thought to afford the protections provided by those courts. Indeed, my suggestion to the MJI was that the AMC should be established pursuant to Chapter III, although I did express the view that this could possibly be problematical having regard to section 80 of the Constitution. I understand that subsequent advice to Government was to the effect that this would be so. Under the circumstances, I can have no concern about the decision to establish the AMC under the Defence power rather than Chapter III, but that fact does mean the risk of a successful Constitutional challenge will depend entirely upon the statutory safeguards guaranteeing the judicial independence and impartiality of the AMC.²⁷

In response to Senate Committee questions, the Department of Defence has stated that it is necessary to have a parallel justice system when the ADF is deployed, and that judicial independence can be guaranteed by security of tenure even in a fixed term renewable appointment. Further, Defence points to the requirement for consent by the Commonwealth Director of Public Prosecutions for the institution of DFDA proceedings for certain serious offences committed within Australia (existing section 63 which is retained by this bill).²⁸ The full response from Defence as submitted by The Hon Bruce Bilson is commended to readers and can be accessed [here](#).

Defence emphasises that it received independent advice on these constitutional issues from the Chief General Counsel, Australian Government Solicitor, Mr Henry Burmester QC. This advice was referred to by the Judge Advocate General in the [transcript](#) of the oral hearings on 9 October 2006, however, it is not publicly available.

These issues, and the recent High Court jurisprudence on the validity of the military justice system are dealt with at length in the 2005 Senate report at Chapter Two. As noted by the Law Council in its [submission](#) to the current Bill, the High Court has said in relation to non-military courts, that ‘there is no single ideal model of judicial independence, personal or institutional. Within the Australian judiciary, there are

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substantial differences in arrangements that bear upon judicial independence.’²⁹ In other words, this may only be an issue that can be resolved by the High Court.

On 11 October 2006, the Hon Chief Justice Murray Gleeson AC, ordered that an application challenging the constitutional validity of service tribunals be referred to the Full Court of the High Court. The hearing is expected during the 2007 February sittings.

ALP policy position

The ALP has stated that this bill is ‘fatally flawed’ and must be withdrawn. In a statement by Senator Mark Bishop, Shadow Minister for Defence Industry, Procurement and Personnel, the following features of the bill were featured as ‘flaws’:

- likelihood of inexperienced judges deliberating in serious offences
- deliberately designed to limit the number of potential candidates as judges
- five-year, fixed term appointments for military judges, effectively narrowing the field of candidates to an elite few facing retirement
- majority verdicts, with juries consisting of just six military personnel (ranked at the same level or above as the defendant) able to return majority verdicts of four-two, and
- no provision for the court to be one of record.³⁰

Senator Bishop stated that ‘Military discipline can't be upheld unless the system is just; this bill is minimalist in its approach to justice and calls for a lower standard for justice in the military.’

In a [supplementary report](#) on the provisions of this Bill by the Senate Committee on FADT tabled on 27 October 2006, the ALP Senators elaborate in detail the party's reasons for opposition to the bill in its entirety.

Australian Democrats policy position

When speaking to the tabling of the military justice report, Australian Democrat Andrew Bartlett noted:

The Defence Force is a unique body, unlike any other. In that sense, it is special, but the people who serve in it are also special, and they certainly deserve justice wherever possible. It must be emphasised that the view of the Defence Force that the military justice system is sound was not concurred with by the committee. That is the fundamental issue.³¹

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Financial implications

The Explanatory Memorandum states that the initial funding for these amendments has been identified and will be provided from current allocations.³²

Main provisions

Commentary on individual provisions has been incorporated below.

Overview of Bill

Schedule 1, Part 1 contains the main amendments to the *Defence Force Discipline Act 1982* (DFDA) and the *Defence Force Discipline Appeals Act 1955* (DFDAA).

Items 1 to 19 make amendments to the *Defence Force Discipline Act 1982* (DFDA).

Items 1 to 10 amend the existing definition section, section 3 of the DFDA, to incorporate the establishment of the AMC.

Item 11 repeals Divisions 3, 4 and 5 of **Part VII** of the DFDA that deal with trials by Court martial (CM), Defence Force magistrates (DFM) and the nomination procedures for members of a CM and DFM. It also creates new Divisions 3 and 4.

New Division 3 creates and establishes the jurisdiction of the AMC (**proposed new sections 114 to 121**).

New Division 4 provides for a Military Jury (**proposed new sections 122 to 124**).

Item 13 inserts **new Division 2 of Part VIII** dealing with trials by the AMC (**proposed new sections 132A to 132F**). All new class 1, 2 and 3 offences are outlined in **new Schedule 7**, contained in **item 19**.

Item 14 inserts **new Subdivision B** concerning use of video and audio links in the AMC (**proposed new sections 148A to 148F**).

Item 16 inserts **new Subdivision C**—rules of procedure for service tribunals (**proposed new sections 149 to 149A**).

Item 17 substitutes a **new Division 2 of Part XI** dealing with the Chief Military Judge (**proposed new sections 188AA to 188AN**) and **new Division 2A** which deals with Military Judges (**proposed new sections 188AO to 188BA**).

Item 18 inserts **new section 196C** dealing with the AMC annual report.

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Items 20 to 31 make consequential amendments to the *Defence Force Discipline Appeals Act 1955*.

Part 2, items 32 to 254 make consequential amendments to a range of legislation, primarily to the *Defence Act 1903*.

Part 3 contains the application and transitional provisions (**items 255 to 264**).

Schedule 2 makes amendments to the *Defence Force Discipline Act 1982* in relation to Defence Counsel Services and to the *Defence Act 1903* in relation to the Chief of the Defence Force Commission of Inquiry.

Schedule 3 makes technical amendments to the *Defence Force Discipline Appeals Act 1955* to remove gender-specific language.

Amendments to the Defence Force Discipline Act 1982

Jurisdiction

Proposed new section 114 creates the Australian Military Court. It provides that the AMC will consist of the Chief Military Judge and such other military judges, all of whom hold office in accordance with the Act.

The Explanatory Memorandum states:

The notes to this clause make it clear that the AMC is not a court established under Chapter III of the Constitution (with all the features of such a court) and that it is a service tribunal (as defined in section 3 of the DFDA). Akin to its predecessors (CMs and DFMs) it is therefore part of the military justice system, the object of which is to maintain military discipline within the Australian Defence Force.³³

This is confirmed by **proposed new section 115** which provides that the jurisdiction of the AMC will be to try any charge against any person (i.e., a charge of any offence under the DFDA against any member of the ADF or an authorised Defence civilian). This is almost identical to existing sections 115 and 129 of the DFDA which currently provide for the jurisdiction of CM and DFM trials, including no jurisdiction to try a charge of a custodial offence as set out in [existing section 54A](#).

Proposed new section 116 provides that for the purposes of the exercise of its jurisdiction, the AMC is to be constituted by a single Military Judge (MJ). **Proposed new subsection 116(2)** allows more than one military judge to sit and exercise jurisdiction concurrently, ie several trials or other proceedings may happen at the same time both in Australia and overseas.

Proposed new section 117 provides that the AMC may sit at any place in or outside Australia and also that it may order that a proceeding or part of the proceeding can be

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conducted or continued at another place that is specified in the order. This provision will ensure that the court is deployable to any overseas operational areas.

Proposed new section 118 provides that the Registrar of the AMC (the Registrar) must refer a charge to the AMC and the Chief Military Judge (CMJ) (rather than the Judge Advocate General as in the old system) must nominate a military judge to try the charge. The Registrar must also refer a conviction to the AMC to take action under Part IV (punishments and orders) where the Director of Military Prosecutions (DMP) has requested the Registrar to do this.

Proposed new section 121 provides that the AMC will be staffed by defence members made available by a Service chief or persons engaged under the *Public Service Act 1999* and made available by the Secretary of the Department, to provide administrative and management services in connection with trials and charges under the DFDA.

Military Jury

New Division 4 provides for a Military Jury, based on provisions relating to membership of a court martial in existing section 116 of the DFDA.

Proposed new section 122 provides that there will be 6 members with at least one holding a rank that is not lower than the naval rank of commander, or the equivalent ranks of lieutenant-colonel or wing commander on a military jury. The rank requirement in this section and proposed section 123 is contingent on the exigencies of the service, decided by the CDF. Decisions are to be by two thirds majority which is current practice.

Proposed new section 123 contains the eligibility requirements for a membership of a military jury. **Proposed subsection 123(1)** provides that if the accused is an officer or a defence member, then a juror must also be an officer of not less than 3 years service and at a rank equal to or higher than the accused. If the accused is non-commissioned, the juror must be an officer or a warrant officer (Navy), warrant officer class 1 in the Army or warrant officer in the Air Force, for a period not less than 3 years service (**proposed subsection 123(2)**).

The Explanatory Memorandum states that:

The introduction of non-commissioned officers (NCOs) to be eligible to serve on a military jury is new; it reflects the responsibilities and status of senior NCOs and a desire to broaden the eligibility of potential military jurors in deference to the rank of an accused. It also alleviates previous difficulties experienced in securing only officers to serve on court martial panels.³⁴

In a [submission](#) to the current Senate inquiry, Mr Douglas McDonald raises concerns that the members of the jury could be inexperienced in military matters and receive insufficient or no training for the task. He notes members of junior rank could serve on a jury and suggest they may be influenced in their vote by senior officers. He submits:

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I believe that the membership of a military jury should be limited to officers holding a rank that is not lower than Major (E) and while I would like to suggest the addition of “who are holding the appointment of, or have previously been appointed as, a Summary Authority,” the subject of competence needs to be addressed.³⁵

Proposed new section 124 provides for the determination of questions of fact by a military jury. Where a service offence (as defined in the background section of this Digest) is to be tried by a military judge and jury, the jury will be responsible for determining the guilt, innocence or unsoundness of mind of the accused. When a jury is deciding these matters, it must sit without any other person present. Decisions are to be made by a clear two thirds majority.

Majority decision-making by a jury has been the subject of pointed commentary on this Bill.

In considering this bill, the Senate Standing Committee for the Scrutiny of Bills Committee noted the 2005 Report of the Senate Foreign Affairs, Defence and Trade References Committee and in particular that Committee’s concerns regarding the means through which the need for operational effectiveness is balanced against the individual rights of Defence members and Defence civilians, within the military justice system. In relation to Item 11, Schedule 1, proposed sections 122 and 124, the Committee stated:

By virtue of proposed subsection 115(1) of this bill the Australian Military Court has jurisdiction to try any charge against any Defence member or Defence civilian. The Committee notes that the classes of offences to be heard by a Military Judge and jury could potentially include offences of treason, murder and manslaughter. The Committee is concerned that the provision for a military jury to be composed of six members (proposed section 122) and to determine questions of guilt on the agreement of a two-thirds majority (proposed subsection 124(2)) is an infringement on the rights of an individual.

The Committee notes that the constitution of a military jury and the manner in which questions are to be determined differs substantially from the constitution and operation of civilian juries in criminal matters, which generally require, as a minimum, the agreement of 10 out of 12 jurors and then only in specific circumstances and with the approval of the judge. As the explanatory memorandum is silent on the basis for the proposed constitution and operation of a military jury, and the extent to which the rights of the individual have been balanced against the particular needs of the military justice system, the Committee **seeks the Minister’s advice** as to the justification for this apparent variance from accepted practice.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*³⁶

The response by the Department of Defence states there are no major policy concerns with instituting majority verdicts for military juries, although the High Court decision of

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Cheatle v The Queen (1993) 177 CLR 541 which held that that unanimous verdicts are required for federal criminal matters is noted.³⁷

Offences

Item 13 repeals existing sections 132 to 135 (which relate to the procedures of trials by CM and DFM trials) and inserts **proposed new sections 132A to 132F**.

Proposed new section 132A provides for the trial of Class 1, 2 and 3 offences and how they are to be dealt with. The options are to be tried by a military judge alone (equivalent to an old DFM trial), or a military judge and jury (equivalent to a CM). A military judge alone will determine the sentence in all trials.

All class 1, 2 and 3 offences are outlined in **new Schedule 7**, contained in **item 19**.

As noted above, offences dealt with under the discipline system can currently be grouped into three categories, which have now been restructured into Class 1, 2 and 3 offences:

- offences imported from civilian criminal law, such as murder, manslaughter and theft of (non-service) property (Class 1)
- offences similar or identical to civil offences, but that relate to service personnel or equipment, such as assault of a superior or subordinate, destruction or damage of service property, or dealing in narcotic goods on a base (Class 2); and
- offences peculiar to the defence forces, such as absence without leave, disobedience of a command, and endangering morale (Class 3).

Class 1 offences are the most serious military offences. Trial by jury is mandatory. The Explanatory Memorandum notes:

The Government response to the Senate report specifically identified some offences that require trial by a military judge and jury. These include, mutiny, desertion, commanding a service offence and offences committed with the intent of assisting the enemy. As these offences have a particular Service flavour, in that they go to the very core of maintaining discipline and morale, commission of any of these offences would result in a lessening of that discipline and morale. Trial by military judge and jury will therefore be mandatory.³⁸

An offence that is specified as a *Class 2 offence* in Schedule 7, or one that is not a Class 1 or 3 offence, is a Class 2 offence (**item 6**). For Class 2 offences, trial will be by military judge and jury, except where the accused elects to be tried by military judge alone through the Registrar of the Australian Military Court.

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Class 3 offences are those that are either listed in Schedule 7 as a class 3 offence or those that attract a maximum punishment of not greater than 5 years imprisonment are not listed as class 1 or 2 offences in Schedule.

For a Class 3 offence, while the default position for trial will be by military judge alone, the accused may elect to be tried by a military judge and jury under the following conditions:

- where the maximum punishment is not greater than 5 years imprisonment
- the offence is prescribed, or
- if the offence is able to be tried under section 61 of the DFDA (Territory offences), the offence could be tried summarily in a civilian court (item 7).

The Judge Advocate General in his [supplementary submission](#) to the current Senate inquiry on this bill states that:

The explanatory memorandum suggests that minor territory offences will fall into class 3.

The Bill does not achieve this, given that the proposed Schedule 7 effectively places all territory offences into either class 1 or class 2.

I am concerned that the operation of proposed section 132A(3) is such that:

- a. There is no option for the Director of Military Prosecutions (DMP) to refer class 3 offences for trial by military judge and jury; and
- b. While the default position under the section is one of trial by military judge alone, there is no limitation on the maximum sentence that may be imposed.³⁹

Proposed new sections 132B, 132C, and 132D outline the procedures that must be complied with for a military judge and military jury, or a military judge sitting alone.

Video and audio evidence

Item 14 inserts **new Subdivision B, sections 148A to 148F** that will provide for the use of video and audio links in the AMC in respect of proceedings and evidence similar to sections 47A to 47E of the *Federal Court of Australia Act 1976*.

The conditions for the use of such evidence set out in **proposed new section 148C** include:

- appropriate AMC courtroom facilities must be in place

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- appropriate facilities must be in place at the remote person's location to allow eligible persons present in the courtroom to see and/or hear the remote person, and
- conditions that are prescribed by the AMC rules of procedure or any other conditions imposed by the AMC must be fulfilled.

Proposed new section 148D outlines how documents may be put to a remote person in circumstances where the document is either present in the courtroom or at the remote person's location.

New section 148F ensures that the operation of the *Evidence and Procedure (New Zealand) Act 1994* is not affected by the new subdivision.

Rules of Procedure

Item 15 inserts **new Subdivision C** – 'Rules of Procedure for service tribunals'

Item 16 repeals and substitutes existing section 149 of the DFDA.

Proposed new section 149 introduces the concept of *Summary Authority Rules* which are separately established to the rules of procedure applicable to the AMC. The rules are legislative instruments for the purposes of the *Legislative Instruments Act 2003*, made by the Judge Advocate General.

Proposed new section 149A inserts the *Rules of the Australian Military Court*. The rules are legislative instruments for the purposes of the *Legislative Instruments Act 2003*, made by the Chief Military Judge.

The fact that the new AMC will not be a court of record⁴⁰ has been the subject of criticism from the JAG, although the existing requirement to keep records has been retained (**existing section 148**).⁴¹ The Defence Department has responded that this requirement is unnecessary and inappropriate to the AMC as a service tribunal.⁴²

Chief Military Judge

Item 17 repeals and substitutes **Division 2 of Part XI** headed Chief Military Judge.

Proposed new section 188AA establishes the position of the Chief Military Judge (CMJ).

Proposed new section 188AB provides that the CMJ will be responsible for:

- ensuring the orderly and expeditious discharge of the business of the AMC
- managing the administrative affairs of the AMC, and
- other matters conferred on him or her under the Act.

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The Minister will appoint the CMJ by written instrument and the CMJ holds office on a full time basis for a period specified in the instrument of appointment, but for a period not exceeding 5 years (**proposed new section 188AC**).

The CMJ position is what the Explanatory Memorandum terms a ‘terminal’ one, because there can be no reappointment (**proposed new subsection 188AC(3)**). **Proposed new section 188AM** provides that a person ceases to be a member of the Defence Force when he or she has ceased to hold office as the Chief Military Judge.

The Explanatory Memorandum posits that this is intended ‘to overcome any perception of executive preferment that may influence decision making, specifically in the context of possible subsequent employment following a term as CMJ’:

The appointment will provide security of tenure and judicial independence. Legal advice has indicated that there are three essential requirements of judicial independence, namely, security of tenure, financial security (that is the independent determination of remuneration, discussed in proposed section 188AG below) and institutional independence, all of which are catered for in this Bill. Furthermore, a term appointment for the CMJ is based on factors peculiar to the Defence Force, that is, the hardship of the job, particularly in operational environments.⁴³

Further, **proposed new section 188AJ** provides that a CMJ is not eligible for promotion in rank over the period that he or she is the CMJ.

Proposed new section 188AD outlines the necessary qualifications for the position of CMJ. The person must be:

- enrolled as a legal practitioner for not less than 5 years,
- a member of the Permanent Forces or a Reserve member rendering continuous full time service at the naval rank of Commodore, or the rank of Brigadier or Air Commodore, and
- able to meet his or her individual service deployment requirements.

Proposed new section 188AE allows the Minister to request the Chief of the Defence Force (CDF) to establish an independent selection committee to give the Minister suitable suggestions for the role of CMJ. This process is purely discretionary and relies on the Minister making the request, however if the Minister makes a request, this process must be followed by the CMJ. The Explanatory Memorandum states that:

Although it is not legally required, the statutory recognition of such a Committee and the process required for the appointment of the CMJ is desirable to demonstrate the independence of the selection process and its transparency.⁴⁴

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Proposed new section 188AG provides for the remuneration of the CMJ to be determined by the Remuneration Tribunal pursuant to the *Remuneration Tribunal Act 1973*. Otherwise, if no determination is in place then the remuneration (including allowances) will be as prescribed.

Proposed new section 188AH provides for the recreation leave entitlements of the CMJ which is to be determined by the Remuneration Tribunal. Any other leave is to be granted and on the terms and conditions determined by the Minister.

Proposed new section 188AI prohibits the CMJ engaging in employment outside the duties of his or her office.

Proposed new section 188AK allows the CMJ to resign his or her appointment, in writing to the Minister.

Proposed new section 188AL outlines the circumstances when the appointment of the CMJ may be terminated. The Explanatory Memorandum states that:

These are based on standard termination provisions contained in Commonwealth legislation and they refer to circumstances to which the proper evidentiary and natural justice principles will be required to be applied.⁴⁵

Proposed subsection 188AL(1) provides the Minister with the discretion to terminate the CMJ's appointment in circumstances including misbehaviour, physical or mental incapacity or failure to meet service deployment requirements.

Proposed subsection 188AL(2) provides for the automatic termination of the appointment of the CMJ in the circumstances outlined. These include where the CMJ ceases to be enrolled as a legal practitioner, becomes bankrupt, ceases to be a member of the Permanent Forces or a Reserve member on continuous full time service or is absent from duty without leave for a period.

Proposed new section 188AN provides for an acting CMJ. Only a full time military judge may be appointed to act as the CMJ where there is a vacancy in the office or where the CMJ is absent from duty or where he or she is unable to perform his or her functions.

Military Judges

Division 2A outlines the provisions for Military Judges (MJ).

Proposed new section 188AO states that there are to be Military Judges of the AMC.

Proposed new section 188AP provides that an appointment of a military judge must be made in writing by the Minister, on either a full or part time basis, for a period not exceeding 5 years. There must be two full time military judges and no more than eight part

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time military judges. However, it is not necessary for all of the part time positions to be filled at any one time.

Proposed new section 188AQ discusses the possibility of the reappointment of a military judge for another 5 year term in exceptional circumstances. In considering a reappointment, the Minister must receive and consider a report by the CMJ on the workload and the level of experience of the AMC in light of existing or likely vacancies. The Minister must be satisfied that a military judge satisfies the necessary qualification requirements for appointment. Once a military judge has been reappointed for a period, he or she will not be eligible for any further reappointment. The reappointment of a military judge is to be for a minimum period of 3 years, but not more than 5 years. It is not intended that a military judge serve for an overall period of more than 10 years.

The Explanatory Memorandum states:

Advice received by the Government is to the effect that there is nothing incompatible with judicial independence in allowing a reappointment of a military judge beyond an initial term, provided the existence of the power cannot reasonably be seen to cause the person seeking reappointment to be beholden to the executive in discharging their judicial duties. Furthermore, a term appointment with the opportunity for reappointment is not incompatible with the necessary independence required of a military tribunal.

Therefore, the intent of proposed section 188AQ is that the reappointment of a military judge will only be possible where the Minister considers that the level of experience on the Court would be reduced to an extent that may be detrimental to the effective operation of the Court if a particular military judge were not reappointed, taking into account the Court's existing and future demands.⁴⁶

In his submission to the current Senate inquiry, The Hon Justice L.W. Roberts-Smith, Major General, Judge Advocate General of the Australian Defence Force states:

13. It is astounding that in implementing my suggestion for a permanent military court made with a view to shoring up the military jurisdiction from future High Court challenge, (and because such an initiative had the potential to set the bench mark for common law Service tribunals internationally), it is now proposed effectively that the military judges will have even less independence, so far as their terms of appointment are concerned, than they have under the existing arrangements. They are currently appointed for three year terms by the JAG, but it is on the basis that the terms will be automatically renewed subject to good behaviour in the judicial sense of that term. Brigadier Westwood [the Chief Judge Advocate (CJA)] gave evidence to that effect at the MJI hearings. To now move to five-year renewable terms, which are not automatic (and indeed, must be sought to be justified as exceptional), considerably reduces the actual and perceived independence of the judges of the AMC and greatly impedes the AMC's ability to develop experience and excellence.⁴⁷

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The Law Council of Australia also focused on the proposal that military judges must be military personnel who would be appointed for five years, noting that only in exceptional circumstances would judges be reappointed and all others would be compulsorily retired. The Council submitted that these conditions would dissuade most suitable candidates from applying, as few would want their career cut short, and the pool would be quickly depleted. As well, all experience gained would be lost with each five-year turnover of judges. Finally, the Council had concerns about perceived or actual independence from the chain of command:

The possible extension of five-year terms may lead to the perception that military judges are beholden to the military chain of command or (the politicians who appoint them).⁴⁸

The Explanatory Memorandum states:

Therefore, the intent of proposed section 188AQ is to reflect that the reappointment of a military judge may be made only in exceptional circumstances, minimising any perception of executive preferment in a reappointment process, with the reappointment subject only to the Minister being satisfied that the operational requirements of the court justify the reappointment.

Proposed new section 188AR outlines the qualifications required of a military judge. A full time Military Judge (subsection 188AR(1)) must be:

- enrolled as a legal practitioner for not less than 5 years
- a member of the Permanent Navy, Army or Air Force or a Reserve member rendering continuous full time service
- at a rank not less than the Navy rank of commander, or the equivalent ranks of lieutenant colonel or wing commander, and
- able to meet his or her individual service deployment requirements [consistency with 188AD].

Proposed subsection 188AR(2) outlines the qualifications for a part time Military Judge. These are identical to a full time member except the person would be a member of the Reserve, not rendering continuous full time service.

Proposed new section 188AS outlines the selection process for a Military Judge. This provision is identical in terms to **section 188AE** discussed above in respect of the Chief Military Judge, including the fact that is a discretionary process.

Proposed new sections 188AT to 188BA are almost identical to sections 188AG to 188AN discussed above in respect of the CMJ. Part time military judges may also hold outside employment provide it does not conflict with their duties.

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Proposed new section 188AZ provides for the termination of the appointment of a Military Judge. If full time, a military judge is automatically terminated if he or she ceases to be a Permanent member or a Reserve member on continuous full time service. In the case of a part time military judge, if he or she is not a member of the Reserves who is not rendering continuous full time service, then their appointment will be automatically terminated (the bankruptcy and absence from duty grounds are also included in this proposed section).

Proposed new section 188BA notes that a person will cease to be a member of the Australian Defence Force when they cease to hold office as a Military Judge but there is a provision allowing a Military Judge to be subsequently appointed as CMJ.

Item 18 inserts **new section 196C** which requires the CMJ to prepare an annual report as soon as practicable after each 31 December. The report will relate to the operation of the AMC and the Rules of the AMC and any related statistical information.

Amendments to the Defence Force Discipline Appeals Act 1955—consequential amendments

Items 20 to 31 contain amendments to the *Defence Force Discipline Appeals Act 1955* consequential to the establishment of the AMC. The amendments reflect the availability of a right to appeal from the AMC to the Defence Force Discipline Appeals Tribunal (the Tribunal) by allowing :

- an offender appellant to appeal a court order, conviction and/or punishment within 60 days (**item 25 and 26**); and
- the Director of Military Prosecutions to appeal against a court order or punishment (**item 25**).

A new development is that the proposed amendments would enable the Director of Military Prosecutions, in addition to an offender appellant, to be able to refer a question of law to the Federal Court (**item 30, amended subsection 51(1)**) or appeal from the Tribunal to the Federal Court on a question of law (**item 31, amended subsection 52(1)**).

Part 2, items 32 to 254 contain further consequential amendments to Defence and other portfolio legislation, including the *Migration Act 1958* mainly in relation to replacing the new terminology of the AMC.

Items 134 to 169 provides for an **amended Part IX** of the DFDA which provides for the review of proceedings of service tribunals. Part IX has been amended to make it clear that it only applies to review of proceedings of summary authorities and not the AMC. Further legislation is foreshadowed by the Government relating to summary authorities.

Part 3 (items 255 to 264) contains the application, transitional and savings provisions. If a process has commenced under the old system of CM or DFM trial, it should be completed

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in accordance with that system. Which system applies during the transitional period will be determined by whether the service offence was committed before or after the commencement of the legislation and what action the Director of Military Prosecutions has initiated in respect of that offence.

A regulation making provision has also been included which will ensure that any matters that may not have been covered in the substantive provisions can be covered in regulations.

Schedule 2

Defence Counsel Services

Schedule 2, Part 1, provides for Defence Counsel Services which will continue the requirement in the DFDA to produce of a list of legal officers and to arrange legal representation for an accused. **Item 1** amends existing subsection 101F(2) to replace the reference to 'Judge Advocate General' with 'Chief of the Defence Force', so that it will now be the responsibility of the CDF to maintain this list rather than the Judge Advocate General.

Item 3 inserts **proposed subsection 101F(2A)** which allows the CDF to delegate the function under clause 101F to a military position, that has been organisationally staffed through the establishment of the new Director of Defence Counsel Services. The delegation will be at the rank of Navy captain or equivalent. **Item 4** amends section 137(1) to substitute the responsibility for organising legal representation from a superior authority to CDF (**proposed subsection 137(4)**).

Chief of Defence Force Commission of Inquiry

Schedule 2, Part 2 will amend existing paragraph 124(1)(gc) of the *Defence Act 1903* which enables regulations to be made in respect of the appointment, procedures and powers of courts of inquiry, boards of inquiry, inquiry officers and inquiry assistants. A reference to 'Chief of Defence Force Commission of Inquiry' will be included in this paragraph, which will enable such a Commission to be established under the Defence (Inquiry) Regulations 1985.

Subsection 124(2A) will also be extended to include a reference to the 'Chief of Defence Force Commission of Inquiry'. This means witnesses appearing before such as inquiry cannot rely on the self-incrimination privilege, but the evidence is not admissible in any court except in relation to giving false testimony (**proposed subsection 124(2C)**).

The Law Council was highly critical of these amendments in its submission to the current Senate inquiry as it felt that the substance of such a body should be scrutinised by Parliament in a Bill rather than contained in regulations. The Council felt that 'the matters of concern have a propensity to seriously impede the Defence operations'. These matters included:

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

b. the lack of any provision for the interrelationship between the coronial jurisdiction and COIs. This may produce curious conflicts in suicide cases where Defence cannot arrogate to itself the right to conduct a COI before the coroner has determined that the cause of death was in fact suicide. At very least CDF should have the power to delay a COI until cause of death has been determined. Without such a power, the results of the COI may be problematic, particularly where willful homicide is suspected. However, it could also be argued that if the CDF is to have the power to delay a COI, that officer should also have the power not to conduct one at all.

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

d. flaws in the proposed procedures for terminating COIs;

e. a failure to deal satisfactorily with vacancies in the membership of COIs, proposed practice and procedure of COIs and appearances.⁴⁹

Schedule 3—Technical amendments

Schedule 3 contains various technical amendments to provisions of the DFDAAs relating to gender specific language.

Concluding comments

One of the main points of contention still raised by this Bill is whether the decisions of the AMC would be found by the High Court to be constitutionally valid if challenged, which will depend on whether its proceedings meet basic standards of procedural fairness. The Senate Committee identified the following parts of the Bill as raising concerns in regard to fairness and impartiality, dealt with in detail in the 'Main Provisions' section above include:

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- the jurisdiction of military court and the possibility of a successful High Court challenge to its validity (military tribunals are not constituted in the same manner as courts created under Chapter III of the Constitution);
- the 5-year fixed terms and the possible adverse effect on the judicial experience of the court and its ability to attract high quality legal officers;
- the renewable five-year terms, which are not automatic and which, according to the JAG, 'considerably reduces the actual and perceived independence of the judges of the AMC';
- the provisions for terminating an appointment which, under specified circumstances, provides for the minister to terminate an appointment not the Governor-General on address by both Houses of Parliament;
- compulsory retirement for MJs from the ADF upon ceasing office as a MJ and the likelihood that this provision would diminish the attractiveness of the position and dissuade suitable appointees from applying for the office;
- the lack of incentive for an accused to opt for the more administratively convenient trial by MJ alone;
- the composition of a military jury especially in light of the jurisdiction of the AMC extending to criminal offences committed overseas—it should be noted that the Senate Standing Committee for the Scrutiny of Bills expressed concerns about the constitution of the proposed military jury and sought advice from the Minister;
- the failure to stipulate that the AMC was to be a court of record;
- the transitional arrangements from the current service tribunals to the Military Court;
- the desirability of the Director of Defence Counsel Services (DDCS) being established as an independent statutory position; and
- the provisions relating to the Chief of Defence Commission of Inquiry being contained in regulations and not the Act.⁵⁰

The Committee concluded:

1.27 The committee determined that the proposed AMC would not achieve the level of independence and impartiality needed to ensure a fair and effective military justice system. Because the committee understands that the bill is to be either amended or re-drafted, it decided not to give a comprehensive account of the evidence presented to it and its analysis of that evidence. The submissions and supplementary submissions to the inquiry, the committee's questions on notice to Defence and the

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transcript of the public hearing provide the grounds necessary for the government to review the legislation.

In his submission to the current Senate inquiry, The Hon Justice L.W. Roberts-Smith, Major General, Judge Advocate General of the Australian Defence Force conveys disappointment with the provisions of the bill, suggesting it is deficient in terms of judicial tenure which could effect its constitutionality, but also that it is a lost opportunity:

10. It is with considerable disappointment that I note that the approach taken in the Bill is to establish the AMC as a tribunal akin to the Administrative Appeals Tribunal (AAT), in terms of status and independence, rather than as a court of record in the sense in which that term is generally understood. The AMC will have complete (and exclusive) Australian jurisdiction over members of the ADF outside Australia. Given the present and likely future tempo of operations and exercises, it is entirely foreseeable, if not likely, that there will be charges of the most serious offences (such as rape or murder) against members of the ADF at some stage. The AMC would be the only Australian court which would have jurisdiction. The notion that such charges would be dealt with by a body described as a “tribunal” and equivalent to the AAT is extraordinary. It occurs to me that this is 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. Quite aside from the risk associated with a lesser course, it would be a great pity for that opportunity to be wasted.⁵¹

This Bill has not found favour with some of the families affected by failures in military justice investigated by the previous Senate inquiry, such as Charles Williams, the father of Private Jeremy Williams:⁵²

The new proposed system is once again, the military in this country investigating itself. These people are not trained extensively in investigative procedures in any case. But more importantly they have a vested interest to cover up, to conceal by any number of means the root cause of the problem, such as the bastardisation, the bullying, the beatings that were occurring at Singleton.⁵³

However, Senator Robert Hill, former Defence Minister has defended the new arrangement as a marked improvement:

The issue here is to make it work better. We've put a great deal of effort into refinement of the system so that it can work better. There'll never be a perfect system. The civilian alternative is not perfection, but we know that it can be administered better, the investigations can be more effective, the administration processes can be much improved and that's what will now occur and over a period of two years I hope that both within and without the force, there'll be greater confidence in the system that we're putting in place.⁵⁴

Parliament may wish to consider whether the bill requires revision to quarantine those few provisions which could face constitutional challenge so that the AMC scheme as a whole is not at risk. Any questions of constitutional validity arise only in relation to the

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adjudication of serious civilian criminal charges (Class 1 offences) by the AMC, particularly when deployed overseas. As noted, even though the body is named the Australian Military Court, it is not a court, and has carefully been designed not to be a court in order to meet service discipline needs. This may have ramifications for the provision of justice to individual ADF defendants facing serious criminal charges. As these cases are likely to be very rare (indeed, the Senate inquiry found only one instance of ADF personnel facing serious criminal charges whilst deployed overseas in the whole history of the ADF), perhaps another arrangement could be made to remove any doubt about the satisfaction of constitutional requirements.

Endnotes

1. Explanatory Memorandum, p. 1.
2. *ibid.*, p. 1.
3. General Peter Cosgrove, quoted in the Senate's Foreign Affairs, Defence and Trade References Committee report, *The Effectiveness of Australia's Military Justice System*, Commonwealth of Australia, Canberra, 2005, p. 10.
4. Andrew D Mitchell and Tania Voon, 'Justice at the sharp end – improving Australia's Military Justice System', *UNSW Law Journal*, Vol. 28:2, 2005, p. 396.
5. *The Effectiveness of Australia's Military Justice System*, pp.10–11.
6. Mitchell and Voon, *op. cit.*, pp. 399–400.
7. *ibid.*
8. *ibid.*, p. 402.
9. Cosgrove, *ibid.*, p. xxvi.
10. See: *Bills Digest* No. 183 2002–03: Defence Legislation Amendment Bill 2003, Parliament of Australia, Parliamentary Library, <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd183.htm>
11. These were the death of Private Jeremy Williams, who committed suicide during training at the School of Infantry in 2003; the 1998 fire on board HMAS Westralia, in which four sailors were killed; the suspension and suicide of Cadet Sergeant Eleanore Tibble, Air Training Corps, in 2000; allegations of misconduct by members of the Special Air Service in East Timor in 1999; and the disappearance at sea of Acting Leading Seaman Cameron Gurr, HMAS Darwin, in May 2002
12. *The Effectiveness of Australia's Military Justice System*, p. 52.
- 13.
14. *ibid.*, p. xxiii.
15. For a rundown of the findings, see *ibid.*, pp. xxi-xxiv.
16. *ibid.*, p. li.

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- 17 Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, 'Report on the Effectiveness of Australia's Military Justice System', 5 October 2005, http://www.defence.gov.au/mjs/docs/MJI_GOVERNMENT_RESPONSE_4oct052.pdf
- 18 R. C. Smith AO, PSM, Secretary, Department of Defence, and Air Chief Marshal A. G. Houston AO, AFC, Chief of the Defence Force, 'Year in Review', in Department of Defence, Annual Report 2004-05, Canberra, 2005, p. 9.
- 19 Government Response to Report on the Effectiveness of Australia's Military Justice System, p. 14.
- 20 Andrew D Mitchell and Tania Voon, 'Justice at the sharp end – improving Australia's Military Justice System', UNSW Law Journal, Vol. 28:2, 2005, p. 396.
21. *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.
22. *Ex parte Alpert—Re Aird & Ors* [2004] HCA Trans 42 (3 March 2004). Gleeson CJ, Kirby, McHugh and Gummow JJ all raised Chapter III issues in the course of hearing arguments from the prosecutor and respondents.
- 23 Obiter dicta are the remarks of a judge which are not necessary to reaching a decision, but are made as comments, illustrations or thoughts. They are persuasive but do not create a binding precedent for future decisions.
24. Kirby J, *Re Colonel Aird; Ex parte Alpert* [2004] HCA 44 (9 September 2004) at para. 113.
25. Article 14(1) states: In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by the law. Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.
26. Explanatory Memorandum, p. 2.
27. Submission P3, 19 September 2006, p. 2.
28. Dept of Defence response to questions raised, 9 October 2006, pp. 1–2.
- 29 As per Gleeson CJ in *Forge v Australian Securities and Investments Commission* [2006] HCA 44 (5 September 2006), citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 152 [3]).
30. Senator Mark Bishop, 'Deliberate Flaws Emasculate Bill For Military Court', media statement, 10th October 2006.
31. [Tabling speeches](#). Senate, *Debates*, 16 June 2005, p. 11.
32. Explanatory Memorandum, p. 1.
33. Explanatory Memorandum, p. 2.
34. Explanatory Memorandum, p.6.
35. Submission P2A, 26 September 2006, pp. 2–3. Note response by Defence Department dated 9 October 2006, p. 8, paragraphs 44 to 47.

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36. Alerts Digest No 11, 11 October 2006, p. 19.
37. Defence Department response to Committee questions, 9 October 2006, p. 6, at paras. 30–32.
38. Explanatory Memorandum, p. 7.
39. Submission P3A, p. 2.
40. In common law jurisdictions, a court of record is a court that keeps permanent records of its proceedings. Judgments of a trial court of record are normally subject to appellate review. In many jurisdictions, all courts are courts of record. In many jurisdictions, courts that have the power to fine or imprison must be courts of record. In almost all jurisdictions, a court of record will have a court clerk whose primary duty is to maintain the permanent records. Traditionally, a court of record was required to have its own unique seal, which was used to authenticate its judgments and copies of its records.
41. Submission 3, p. 4.
42. Defence Department, *op. cit.*, p. 6, paras 33–34.
43. Explanatory Memorandum, p. 10 and 12.
44. Explanatory Memorandum, p. 11.
45. Explanatory Memorandum, p. 12.
46. Explanatory Memorandum, pp.12–13.
47. Submission P3, 19 September 2006, p. 4.
48. Submission P5, 26 September 2006, p. 1.
49. Submission P5, 26 September 2006, pp. 7–8.
50. Senate Foreign Affairs, Defence and Trade Committee, Report on the inquiry into the provisions of the Defence Legislation Amendment Bill 2006, 27 October 2006, para 1.22.
51. Submission P3, 19 September 2006, p. 5.
52. Note endnote reference 11.
53. ABC TV, ‘Senate reports find problems’, *The 7:30 Report*, 6 October 2006.
54. ABC TV, *op cit.*

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