



## Military Justice (Interim Measures) Amendment Bill 2011

Paula Pyburne  
Law and Bills Digest Section

### Contents

Purpose .....	2
Background .....	2
Characteristics of the AMC .....	3
Lane v Morrison .....	4
Government response .....	5
Military Court of Australia Bill 2010 .....	6
Basis of policy commitment.....	6
Committee consideration .....	6
Policy position of non-government parties .....	7
Financial implications.....	7
Key provisions .....	7

# Military Justice (Interim Measures) Amendment Bill 2011

**Date introduced:** 12 May 2011

**House:** House of Representatives

**Portfolio:** Defence

**Commencement:** On the day of Royal Assent

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

## Purpose

The purpose of the Military Justice (Interim Measures) Amendment Bill 2011 (the Bill) is to provide for the appointment, remuneration and entitlement arrangements for the Chief Judge Advocate and two Judge Advocates for the period ending in September 2013, or until an earlier day which has been declared by the Minister for Defence.

## Background

In June 2005, the Senate Foreign Affairs, Defence and Trade References Committee (the Senate Committee) published its report entitled: *The Effectiveness of Australia's Military Justice System*.<sup>1</sup> The report noted that:

Despite several attempts to reform the military justice system, Australian Defence Force (ADF) personnel continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.

A decade of rolling inquiries has not met with the broad-based change required to protect the rights of Service personnel. The committee considers that major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.<sup>2</sup>

- 
1. Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, Senate, Canberra, June 2005, viewed 24 May 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/completed\\_inquiries/2004-07/miljustice/report/index.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/miljustice/report/index.htm)
  2. Ibid.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

The Government accepted many of the recommendations made by the Senate Committee and, as a result, introduced legislation which was intended to give effect to those recommendations. Specifically, the *Defence Legislation Amendment Act 2006* (2006 Amendment Act) established a permanent Australian Military Court (AMC) under the *Defence Force Discipline Act 1982* (DFDA).<sup>3</sup> The role of the AMC was to replace the current system of Courts Martial (CM) or Defence Force Magistrates (DFM).

The Explanatory Memorandum to the 2006 Amendment Act states:

Proposed section 114 creates the [Australian Military] Court ... 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 [Courts Martial and Defence Force Magistrates] it is therefore part of the military justice system, the object of which is to maintain military discipline within the Australian Defence Force.<sup>4</sup>

Clearly, the Government expected that the constitutional validity of the 'service tribunals' which the AMC was intended to replace, could be extended to include the AMC.

The relevant Bill was referred to the Senate Standing Committee on Foreign Affairs, Defence and Trade (the 2006 Committee) for inquiry and report. The 2006 Committee concluded:

Overall, the committee believes that the government settled for the barest minimum reforms required to its service tribunals to escape a constitutional challenge. In so doing, the committee takes the view that, in striving for the minimum, the government has not removed the risk that at some stage the High Court may find that the AMC is constitutionally invalid.<sup>5</sup>

## Characteristics of the AMC

The 2006 Amendment Act established the AMC, comprised of a Chief Military Judge, two permanent Military Judges and a part-time Reserve panel of judges. It was intended that the AMC would satisfy the principles of impartiality and judicial independence, and independence from the chain of command, through:

- statutory appointment of judges by the Minister
- security of tenure (five year fixed terms with a possible renewal of five years)

---

3. S Harris-Rimmer, *Defence Legislation Amendment Bill 2006*, Bills Digest, no. 48, 2006–07, Parliamentary Library, Canberra, 3 November 2006, viewed 25 May 2011, <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd048.pdf>

4. Explanatory Memorandum, *Defence Legislation Amendment Bill 2006*, paragraph 15.

5. Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, Senate, Canberra, October 2006, p. 6, viewed 25 May 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/completed\\_inquiries/2004-07/def\\_leg\\_bill\\_06/report/report.pdf](http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/def_leg_bill_06/report/report.pdf)

- remuneration set by the Remuneration Tribunal, and
- no eligibility for promotion during tenure as a judge.<sup>6</sup>

As the recommendations of the Senate Committee were so extensive, the amendments to the DFDA were made in two tranches. The second of those was the *Defence Legislation Amendment Act 2008* (the 2008 Amendment Act)<sup>7</sup> which provided an automatic right of appeal from a summary authority to a single Military Judge of the AMC and provided defence members with the right to elect trial by a Military Judge of the AMC for most disciplinary offences.<sup>8</sup>

The Australian Military Court ... completed its first full year of operation in calendar year 2008, having commenced in October 2007. In calendar year 2008, 91 trials were conducted resulting in 571 convictions.<sup>9</sup>

## Lane v Morrison

As predicted by the 2006 Committee, the validity of the AMC was the subject of a High Court challenge in the case of *Lane v Morrison*.<sup>10</sup> The issues for the High Court were first, whether the 2006 Amendment Act, in creating the AMC, fell within the description of a law in relation to military justice that could be supported by section 51(vi) of the Constitution; and secondly, whether the power conferred on the Parliament by section 51(vi) extended to include the AMC as a 'Court' in accordance with Chapter III of the Constitution.<sup>11</sup>

In a joint decision, Chief Justice French and Justice Gummow stated that the powers of the Parliament to create courts were founded in sections 71, 72 and 122 of the Constitution. The presence of section 114(1A) in the 2006 Amendment Act, which provided that the AMC 'is a court of record', emphasised a legislative intention to create a body resembling a Chapter III court, save for the manner of appointment and tenure of Military Judges. However, their Honours distinguished the AMC on the grounds that its creation was not supported by section 122, nor was the AMC comprised of Justices who were appointed by the Governor-General in Council and with tenure as set out in section 72 of the Constitution.<sup>12</sup>

- 
6. Explanatory Memorandum, Defence Legislation Amendment Bill 2006, paragraph 3.
  7. The passage of the Bill was delayed because Parliament was prorogued in October 2007 for the 2007 election.
  8. Further information about the contents of the amending act can be found in P Pyburne, *Defence Legislation Amendment Bill 2008*, Bills Digest, no. 75, 2007–08, Parliamentary Library, Canberra, 8 March 2008, viewed 25 May 2011, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd075.pdf>
  9. Department of Defence, *Defence Annual report 2008–09*, vol. 1, Commonwealth of Australia, 2009, p. 159, viewed 25 May 2011, [http://www.defence.gov.au/budget/08-09/dar/2008-2009\\_Defence\\_DAR\\_06\\_v1s5.pdf](http://www.defence.gov.au/budget/08-09/dar/2008-2009_Defence_DAR_06_v1s5.pdf)
  10. *Lane v Morrison*, [2009] HCA 29, (26 August 2009), (2009) 239 CLR 230, viewed 25 May 2011, <http://www.austlii.edu.au/au/cases/cth/HCA/2009/29.html>
  11. A Salapak, 'Back to the drawing board for Australia's military justice system', *Young Lawyers News*, March 2010, viewed 26 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FNRBW6%22>
  12. Ibid.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

In addition, their Honours determined that the jurisdiction conferred upon the AMC by section 115 of the 2006 Amendment Act, to try charges of service offences, involves the exercise of the judicial power of the Commonwealth otherwise than in accordance with Chapter III of the Constitution. That being the case, the 2006 Amendment Act took the AMC beyond what is authorised by section 51(vi) of the Constitution.<sup>13</sup>

## Government response

The Government's reaction to the decision was swift. The *Military Justice (Interim Measures) Act (No. 1) 2009* (No. 1 Act) and the *Military Justice (Interim Measures) Act (No. 2) 2009* (No. 2 Act) were enacted on 22 September 2009.<sup>14</sup>

The purpose of the No. 1 Act was to amend the DFDA so that the service tribunal system that existed before the creation of the AMC was returned. The purpose of the No. 2 Act was to impose disciplinary sanctions on persons which would correspond to the punishments imposed by the AMC and, where necessary, summary authorities in the period between the establishment of the AMC and the High Court decision in *Lane v Morrison*. It also provided persons with the right to seek review of a disciplinary liability that had been imposed by the AMC.<sup>15</sup>

The Government made clear that this was merely a 'temporary reinstatement of the military justice system which pre-existed the establishment of the Australian Military Court' which would 'allow time for the establishment of a military court which meets the requirements of Chapter III of the Constitution'.<sup>16</sup>

This Bill amends the No. 1 Act to extend the interim measures for a period of up to two years.

---

13. Ibid.

14. The originating Bills were introduced in the Senate on 9 September 2009 and introduced into the House of Representatives on 10 September 2009. The text of the Bills was agreed in both Houses on 14 September 2009 and the Bills were given Royal Assent on 22 September 2009. Due to the rapid progress of the Bills, Bills Digests were not prepared. Further details are available on the relevant Bills homepage:  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs727%22>

15. S Conroy, (Deputy Leader of the Government in the Senate), 'Second reading speech: Military Justice (Interim Measures) Bill (No. 1) 2009 and Military Justice (Interim Measures) Bill (No. 2) 2009', Senate, *Debates*, p. 6070, 9 September 2009, viewed 25 May 2011,  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2009-09-09%2F0056%22>

16. Ibid.

## Military Court of Australia Bill 2010

The Military Court of Australia Bill 2010 was introduced into the House of Representatives on 24 June 2010 for the purpose of establishing the Military Court of Australia in accordance with Chapter III of the Constitution.<sup>17</sup>

The Bill lapsed on 19 July 2010 when the Parliament was dissolved and has not been reintroduced.

## Basis of policy commitment

The Australian Labor Party (ALP) published its 'Plan for Defence' prior to the 2010 Federal election stating:

The former Coalition Government set up the Australian Military Court without making it fully independent, despite concerns expressed at the time that the model was potentially unconstitutional. The Court's incompatibility with our constitutional arrangements was confirmed by the High Court two years later. Federal Labor had to move quickly to establish an interim system of military justice, and has since introduced legislation to establish a fully independent court, the Military Court of Australia.<sup>18</sup>

The Minister for Defence, Stephen Smith, MP, has stated that 'the Department of Defence and the Attorney-General's Department are currently working to finalise the details of a Military Court of Australia Bill and associated consequential and transitional amendments'.<sup>19</sup>

In the meantime, this Bill extends the interim measures for a period of up to two years.

## Committee consideration

At its meeting of 12 May 2011, the Senate Selection of Bills Committee determined that consideration of the Bill should be deferred until its next meeting.<sup>20</sup>

- 
17. R McClelland (Attorney-General), 'Second reading speech: Military Court of Australia Bill 2010', House of Representatives, *Debates*, 24 June 2010, p. 6522, viewed 25 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-06-24%2F0022%22>
  18. Australian Labor Party, *Election 2010: Plan for Defence*, [undated], p. 9, viewed 25 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FN00X6%22>
  19. S Smith (Minister for Defence), 'Second reading speech: Military Justice (Interim Measures) Amendment Bill 2011', House of Representatives, *Debates*, 12 May 2011, p. 10, viewed 25 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-05-12%2F0019%22>
  20. Senate Selection of Bills Committee, *Report no. 6 of 2011*, Senate, Canberra, 12 May 2011, viewed 25 May 2011, [http://www.aph.gov.au/Senate/committee/selectionbills\\_ctte/reports/2011/rep0611.pdf](http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2011/rep0611.pdf)

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

## Policy position of non-government parties

The non-government parties have not publicly expressed a position on the measures in the Bill.

However, the introduction of the No. 1 Act and No. 2 Act which contained the original interim measures was ‘taken with the opposition’s support’.<sup>21</sup> In addition, Bob Baldwin, MP stated:

The coalition will urge the government to move expeditiously in bringing forward legislation that will establish a Chapter III court. Needless to say, the coalition is also committed to supporting the government in resolving the current impasse in an expedient manner while ensuring that the new system adheres to Chapter III requirements.<sup>22</sup>

It would appear that the Bill will have bi-partisan support.

## Financial implications

According to the Explanatory Memorandum, ‘there will be no net impact on consolidated revenue’.<sup>23</sup>

## Key provisions

The Bill amends Schedule 3 to the *Military Justice (Interim Measures) Act (No. 1) 2009* (the No. 1 Act) which contains application and transitional provisions. Importantly, Schedule 3 refers to the ‘**commencement day**’ of the application provisions as being the day that the No. 1 Act commenced. That day was 22 September 2009.

This Bill introduces a new term—‘**termination day**’. **Item 9** inserts proposed clause 8 into Schedule 3 of the No. 1 Act to provide that the Minister may declare a specified day, in writing, as the ‘**termination day**’ for the purposes of Schedule 3. That day must be **after** the declaration is made. It must also be **before** the end of the four year period beginning on the commencement day.

Clause 2 of the Schedule 3 deems the person who held office as the Chief Military Judge under the DFDA immediately before the decision in *Lane v Morrison* to be the Chief Judge Advocate under section 188A of the DFDA. Subclause 2(3) of Schedule 3 currently operates so that the person was appointed for a period of two years from the commencement day. That period ends on

- 
21. B Billson, ‘Second reading speech: Military Justice (Interim Measures) Bill (No. 1) 2009’, House of Representatives, *Debates*, 14 September 2009, p. 9463, viewed 25 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-09-14%2F0084%22>
  22. B Baldwin, ‘Second reading speech: Military Justice (Interim Measures) Bill (No. 1) 2009’, House of Representatives, *Debates*, 14 September 2009, p. 9449, viewed 25 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-09-14%2F0077%22>
  23. Explanatory Memorandum, Military Justice (Interim Measures) Amendment Bill 2011, p. 2.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

21 September 2011. **Items 1 and 2** of the Bill amend subclause 2(3) so that period of appointment is extended from two years to four years; or until the termination day, if a termination day is declared by the Minister.

Clause 3 of Schedule 3 of the No. 1 Act sets out the benefits to be paid at the time that the Chief Judge Advocate ceases to hold office. **Items 3 and 4** of the Bill amend clause 3 to clarify that the Chief Judge Advocate is not entitled to be paid any of the amounts set out in subclause 3(2) of Schedule 3 if, before the termination day:

- the Commonwealth offers the person employment that would have been suitable alternative employment, or
- the person ceases to be a member of the Permanent Forces.

Clause 4 of Schedule 3 of the No. 1 Act deems that a person who held office of Military Judge under the DFDA immediately before the decision in *Lane v Morrison* to be a Judge Advocate under section 188AP of the DFDA. Subclause 4(3) of Schedule 3 currently operates so that a person was appointed for a period of two years from the commencement day. **Items 5 and 6** of the Bill amend subclause 4(3) so that the period of appointment is extended from two years to four years; or until the termination day, if a termination day is declared by the Minister.

In similar terms to items 3 and 4, **items 7 and 8** of the Bill amend clause 5 of Schedule 3 of the No. 1 Act so that a Judge Advocate is not entitled to be paid any of the amounts set out in subclause 5(2) of Schedule 3 if, before the termination day:

- the Commonwealth offers the person employment that would have been suitable alternative employment, or
- the person ceases to be a member of the Permanent Forces.



---

© Commonwealth of Australia 2011

This work is copyright. Except to the extent of uses permitted by the Copyright Act 1968, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

**Disclaimer:** Bills Digests are prepared to support the work of the Australian Parliament. They are produced under time and resource constraints and aim to be available in time for debate in the Chambers. The views expressed in Bills Digests do not reflect an official position of the Australian Parliamentary Library, nor do they constitute professional legal opinion. Bills Digests reflect the relevant legislation as introduced and do not canvass subsequent amendments or developments. Other sources should be consulted to determine the official status of the Bill.

Feedback is welcome and may be provided to: [web.library@aph.gov.au](mailto:web.library@aph.gov.au). Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Enquiry Point for referral.

---

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2434.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.