

**SENATE STANDING COMMITTEE ON  
FOREIGN AFFAIRS DEFENCE AND TRADE**

**Defence Legislation Amendment Bill 2006**

**Preliminary Remarks of Major General the Hon Justice Len Roberts-Smith  
Judge Advocate General – Australian Defence Force  
9 October 2006**

**General**

It is true there is no constitutional imperative to make the Australian Military Court ("AMC") *completely akin* to a Chapter III Court. But it is also true that the further away the AMC is from those attributes, the greater will be the risk of a successful constitutional challenge.

In addition, the approach taken in the Bill seems to aim to provide what is *barely sufficient* or merely "essential" to survive constitutional challenge.

There are two points to be made about that:

- (1) There is significant risk that what is thought to be enough to be "sufficient" may in the end be found to not quite get over the line. If it does not, the result could be catastrophic – the whole system could fall.
- (2) We should be looking to give those who serve in the Australian Defence Force ("ADF") not just a system which will meet the bare constitutional requirements for validity, but the best one we can give them. We owe them no less.

Lamer CJ made that point in his report on the Canadian Military Discipline System. A copy of that was enclosed with my submission to the Committee dated 16 February 2004. I included the quotation in my submission. It is reproduced at [7] of my

present submission dated 19 September 2006. However it is so fundamental it is worth repeating. Lamer CJ said:

"In *Genereux*, the Court stated that the Constitution did not necessarily require that military judges be accorded tenure equivalent to that enjoyed by judges of the regular criminal courts. However, constitutionality is a minimum standard. As I said at the outset, those responsible for organising and administering a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied. For this reason I have come to the conclusion that military judges should be awarded tenure until requirement from the Canadian Forces."

I respectfully agree entirely with that comment. Can I say something more, briefly, about three issues.

### ***Fixed Terms***

My objections to the provisions for appointment of the Chief Military Judge and Military Judges are set out in my submissions. I can elaborate on those if the Committee have any questions. For the moment, I see from the response of the Hon Minister assisting the Minister for Defence, that fixed terms are said to also allow for factors peculiar to the Defence Force, such as hardship of the job on operations and the physical demands of constant travel and stress.

I remind the Committee that the Bill is predicated on the basis that military judges will be serving military officers and have to meet the same preparedness requirements of the rest of the Defence Force.

The rest of the Defence Force (both permanent and reserve) is expected to meet the hardships of operations, travel and stress until compulsory retirement age (CRA) at 55 (in the case of permanent officers) or 60 (in the case of reserve officers).

If military judges were appointed to CRA, as I recommend, they would be in the same position in that respect as all other members of the Defence Force.

In my opinion, this factor is simply no justification at all for fixed term appointments – and security of tenure and the military credibility and integrity of the AMC would be much better advanced by appointments to CRA.

### ***Transition to the AMC***

In my submission I have expressed concerns about the proposals contained in the Bill for the initial establishment of the AMC and in particular that it is intended to have no carry over at all of judicial officers from the current system to the AMC.

It is said the offices of JA/DFM cannot be equated with those of a judge or with the status of a judge and do not give rise to any entitlement or convention requiring them to receive special consideration when it comes to appointment to the AMC.

However, the fact is, JA/DFM do exercise judicial power and must do so judicially. The High Court has said so.

A JA could today be called upon to perform that judicial function, for example, on the murder trial of a defence force member in Iraq, Afghanistan, the Solomon Islands, or anywhere else outside Australia.

The perception of the lack of status and recognition of JA/DFM is in large part what this Bill is all about – or should be.

I do not suggest there is an entitlement in JA/DFM for special consideration. I do say that the convention to which I refer affords good guidance in principle why the current judicial officers *should* transition to the AMC, as the initial appointments.

Amongst the other reasons I have mentioned, one might be the perception that the intention is to take the opportunity to not appoint one or more

current JA/DFM with whom Defence or the Executive are not happy. I do not say for a moment that is so, but it is a perception which could reasonably arise. That would create great concern about the integrity of all further court martial or Defence Force Magistrate trials before the AMC is stood up – not to mention the perception about the AMC itself, that other officers, not presently JA/DFM, may have been "parachuted" into it.

There is no such possibility if the existing appointments automatically transition to the new Court.

There is a factual inaccuracy at [37] of the Defence Responses to Questions from the Committee.

There is currently only one permanent JA/DFM; that is, the Chief Judge Advocate ("CJA").

There are 8 reserve or part-time JA/DFM; and by July 2007 - 2 will have reached CRA anyway – so any automatic transition would apply only to 6. And the CJA will reach retiring age approximately 14 months after the Court is likely to be stood up.

I have this morning made enquiries of the CRA of the current JA/DFM:

- Brigadier Westwood's CRA is 11 September 2008; that is why he would have 14 months left to serve if the AMC were stood up in July 2007.
- Colonel Morrison has a CRA of 26 July 2018; he would have 11 years to serve.
- Wing Commander Devereux has a CRA of 30 January 2025; he would have a period of 17½ years to serve.
- Wing Commander Stapleton has a CRA of 16 March 2023; she could serve for another 16 years.
- Captain Callaghan RANR has a CRA of 5 April 2007; he will not be eligible for appointment.

- Wing Commander Burnett has a CRA of 30 March 2018; he could serve for another 11 years.
- Wing Commander Burke has a CRA of 2 April 2015; that would give him another 8 years to serve.
- Colonel Beckwith has a CRA of 25 December 2006; he would not be eligible for appointment.
- Colonel Morecombe has a CRA of 20 January 2009; he would have only 18 months in which he could serve on the AMC.

To summarise, if the transition is automatic with current JA/DFM to the AMC, when the AMC is stood up, there will be one permanent officer (the CMJ) and six others, so there would in any event be a need (or at least the Minister could) make two new permanent officer appointments and two new part-time appointments. In short, there would or could be four new appointments anyway.

I should mention that I have recently put in progress moves to appoint a second permanent JA/DFM to assist Brigadier Westwood. That position may or may not be filled before the AMC is stood up.

### ***Director of Defence Council Services***

This is another key military justice appointment. It is curious that it has not been created as a statutory appointment within the Bill. In my annual report for 2005 (at [69]) I recommended that it should be.

The DDCS is currently a Staff Officer function within Defence Legal. Perceptions of the position being subject to command influence, both military and civilian, remain.

DDCS may also have competing priorities in respect of other assigned duties, such as Defence Legal functions. Such potential conflicts seem inconsistent with the military justice enhancements spoken of by the Committee and the Government.

The fact that this position, going to legal representation of, and the conduct of defences at trials for, members of the ADF has not been treated with equality by comparison with other statutory appointments, especially the Director of Military Prosecutions and the Registrar of Military Justice, has not gone unnoticed.

If the Committee has any questions I would be pleased to answer them.