

Defence Legislation (Enhancement of Military Justice) Bill 2015

Portfolio: Defence

Introduced: House of Representatives, 26 March 2015

Purpose

1.168 The Defence Legislation (Enhancement of Military Justice) Bill 2015 (the bill) seeks to amend the *Defence Force Discipline Act 1982* (Defence Force Discipline Act) and the *Defence Act 1903* to:

- repeal provisions in respect of 'old service offences' and 'previous service law', being certain offences committed between July 1982 and July 1985;
- clarify that a service offence is an offence against the law of the Commonwealth—meaning that a conviction imposed by a service tribunal (a court martial, a Defence Force magistrate or a summary authority) will be considered a conviction under the ordinary criminal law;
- create two new service offences and clarify the elements of an existing offence;
- replace recognisance release orders with the power to set fixed non-parole periods, and apply parts of the *Crimes Act 1914* to the non-parole periods set by a service tribunal;
- enable the disclosure of certain convictions of service offences to an authority of the Commonwealth or state or territory and ensure a convicted person is not required to disclose certain other convictions;
- replace dollar amounts with penalty units (and increase the applicable penalty);
- correct technical errors in the charge referral process and in the Discipline Officer scheme; and
- establish the Director of Defence Counsel Services as a statutory office.

1.169 The bill also seeks to amend the *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) to extend the period of appointment of the Chief Judge Advocate and full-time Judge Advocates by a further two years, making the period of appointment up to eight years instead of six years.

1.170 Measures raising human rights concerns or issues are set out below.

Background

1.171 In 2005 the Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the effectiveness of Australia's military justice

system (the 2005 report).¹ In this report, the Committee noted that a number of countries had seen numerous court challenges to the legal validity of their respective military justice systems, including whether service tribunals could be said to be independent and impartial.

1.172 Following the 2005 report, legislation² was introduced to create a permanent military court (the Australian Military Court) which was intended to satisfy the principles of impartiality, judicial independence and independence from the chain of command.³ However, in 2009 the High Court struck down this legislation as being unconstitutional.⁴ In response, Parliament put in place a series of temporary measures pending the introduction of legislation to establish a constitutional court. The *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) largely returned the service tribunal system to that which existed before the creation of the Australian Military Court.⁵

1.173 In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 amended the Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and Judge Advocates by an additional two years. The committee reported on this bill in its *Sixth Report of 2013*.⁶

Extension of the appointments of Chief Judge Advocate and full-time Judge Advocate

1.174 Initially, the Interim Act provided a fixed tenure of up to two years for both the Chief Judge Advocate and full-time Judge Advocates who were appointed pursuant to the provisions of the Interim Act. In 2011 and 2013 the period of appointment was extended by a further two years each time, so that the current period of appointment is up to six years.⁷ That tenure is due to expire in September 2015. The bill amends Schedule 3 of the Interim Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years, thereby providing a fixed tenure for the Chief Judge Advocate and current full-time Judge Advocate of up to eight years, or until the

1 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005.

2 *Defence Legislation Amendment Act 2006*.

3 See Explanatory Memorandum (EM) to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

4 *Lane v Morrison* [2009] HCA 29.

5 See EM to the Military Justice (Interim Measures) Bill (No. 1) 2009, 1.

6 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 40.

7 See the *Military Justice (Interim Measures) Amendment Act 2011* (extended the period of appointment to four years) and *Military Justice (Interim Measures) Amendment Act 2013* (extended the period of appointment to six years).

Minister for Defence declares, by legislative instrument,⁸ a specified day to be a termination day, whichever is sooner.

1.175 The committee considers that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and Judge Advocates engages and may limit the right to a fair hearing and fair trial.

1.176 The committee notes that there are other provisions in this bill that relate to the system of military justice, however, as they do not in themselves expand the operation of the system, the committee makes no further comment in relation to them.

Right to a fair hearing and fair trial

1.177 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.178 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to fair hearing and fair trial

1.179 The Defence Force Discipline Act sets out a number of disciplinary offences, ranging from defence specific offences such as mutiny or failure to follow commands to offences such as assault and theft. These offences are dealt with by court martial, Defence Force Magistrates or by summary authorities. The trial of members of the armed services for serious service offences by service tribunals (including courts-martial) has been identified as giving rise to issues of compatibility with the right to a fair hearing in the determination of a criminal charge. The question is whether a person who is a member of a military with a hierarchical chain of command and who serves as a judge or member of a military tribunal, can be said to constitute an independent tribunal in light of the person's position as part of a military hierarchy. Concerns about the impartiality of the disciplinary structure and the need to ensure defence personnel are able to access fair and independent tribunals were influential

8 The legislative instrument would not be subject to disallowance.

in the establishment of the Australian Military Court that was held to be unconstitutional by the High Court.⁹

1.180 The UN Human Rights Committee has stated that 'the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception' and that 'the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military'.¹⁰

1.181 The question of whether a tribunal enjoys the institutional independence guaranteed by article 14(1) requires consideration of a number of factors, including whether the members of the court or tribunal are independent of the executive. In addition to the relationship of members of a tribunal to a military chain of command, the term of appointment of members may also be relevant. In particular, the fact that the term of appointment of a member of a court or tribunal is terminable at the discretion of a member of the executive, would appear to be incompatible with the requirement that tribunals be independent.¹¹

1.182 The statement of compatibility states that it is necessary to further extend the statutory period of appointment 'to support the current arrangements...[and] continue the effective operation of the superior tribunal system pending a decision in respect of a permanent system to try serious service offences'.¹² The statement of compatibility does not assess whether extending the operation of the military system of justice is compatible with the right to a fair trial. Rather, it has an overview statement of the human rights implications of the bill as a whole and states:

The purpose of Australia's military discipline system is to support military commanders in maintaining and enforcing service discipline to enhance operational effectiveness. A military discipline system that supports the authority and effectiveness of commanders is of vital importance in the efficient, effective, and proper operation of the [Australian Defence Force].

...

The Bill operates to make military justice enhancements to the existing military discipline system and to extend the appointments of the current CJA and full-time Judge Advocate, who contribute to the effective operation of the military justice system and the dispensation of military discipline.

9 These concerns were raised by the Senate Standing Committee on Foreign Affairs, Defence and Trade, in its report *The effectiveness of Australia's military justice system*, June 2005, which was the impetus for the introduction of legislation establishing the Australian Military Court.

10 UN Human Rights Committee, General Comment No. 32 (2007) para [22].

11 UN Human Rights Committee, General Comment No. 32 (2007) paras [19]-[20].

12 Explanatory Memorandum (EM) 9.

The Bill reflects a positive human rights milieu. It is, therefore, compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹³

1.183 The committee notes that maintaining and enforcing discipline within the Defence Force, including supporting the authority of commanders, is an important objective under international human rights law. However, the committee notes that the requirement under article 14 of the independence and impartiality of a tribunal is an absolute right and not subject to any exceptions. The Australian Military Court was established, in part, to satisfy the principles of impartiality, judicial independence and independence from the chain of command.¹⁴ As a result of the High Court's decision in 2009, the system of military justice has reverted to the previous system which had raised questions about independence and impartiality.¹⁵ The committee notes that it has been six years since the Interim Act was introduced. In 2010 and 2012 bills were introduced into Parliament to establish a permanent military court, but both bills have lapsed.¹⁶ No information was provided in the statement of compatibility as to what steps are being taken to establish a permanent system of military justice.

1.184 The committee therefore considers that extending the appointments of the Chief Judge Advocate and full-time Judge Advocate, and thereby extending the current system of military justice, may limit the right to a fair hearing. As set out above, the statement of compatibility does not address this issue. The committee therefore seeks the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial.

13 EM 3.

14 See Explanatory Memorandum to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

15 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005.

16 See Military Court of Australia Bill 2010 and Military Court of Australia Bill 2012 and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012.