Military Justice (Interim Measures) Amendment Bill 2013

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Law and Bills Digest Section

Contents

Purpose of the Bill .......................................................................................................................... 2
Background ....................................................................................................................................... 2
  Australian Military Court .................................................................................................................. 4
  Government response ....................................................................................................................... 4
Military Court of Australia Bill 2010 ............................................................................................ 5
Military Court of Australia Bill 2012 ............................................................................................ 5
Committee consideration .................................................................................................................. 6
  Selection of Bills Committee .......................................................................................................... 6
  Senate Standing Committee for the Scrutiny of Bills ....................................................................... 6
  Parliamentary Joint Committee on Human Rights ......................................................................... 7
Statement of Compatibility with Human Rights ............................................................................... 7
Policy position of non-government parties/independents ............................................................... 7
Financial implications ....................................................................................................................... 7
Key issues and provisions .................................................................................................................. 7
Military Justice (Interim Measures) Amendment Bill 2013

Date introduced: 21 March 2013
House: House of Representatives
Portfolio: Defence

Commencement: Sections 1–3 and items 1-2, 4–6 and 9–10 of Schedule 1 on Royal Assent; all other provisions on 22 September 2009.

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/Parliamentary_Business/Bills_Legislation. 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 of the Bill

The purpose of the Military Justice (Interim Measures) Amendment Bill 2013 (the Bill) is to again amend the Military Justice (Interim Measures) Act (No. 1) 2009 (the Interim Measures No. 1 Act) to further extend the appointment, remuneration and entitlement arrangements for the Chief Judge Advocate and one Judge Advocate for another period of two years to September 2015, or until an earlier day which has been declared by the Minister for Defence.¹

Background

Information relating to the previous extension of this arrangement is outlined in the Bills Digest on the Military Justice (Interim Measures) Amendment Bill 2011.² A summary of this information follows.

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.³ The report noted that:

1. The text of the Military Justice (Interim Measures) Act (No. 1) 2009 can be viewed at: http://www.comlaw.gov.au/Details/C2009A00091/Download The purpose of the Interim Measures No. 1 Act was to provide a temporary arrangement for the Chief Judge Advocate and one Judge Advocate for two years from September 2009 to September 2011. These temporary arrangements were then extended for a further period of two years as a result of the enactment of the Military Justice (Interim Measures) Amendment Act 2011. As this period will soon expire a further extension is now required until a permanent solution comes into force.
3. Foreign Affairs, Defence and Trade References Committee, The effectiveness of Australia’s military justice system, Senate, Canberra, June 2005, viewed 22 March 2013,
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.  

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). 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 (Court 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.

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

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4. ibid., p. xxi.
7. Explanatory Memorandum, Defence Legislation Amendment Bill 2006, paragraph 15, viewed 22 March 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22legislation%2Fems%2FFr2621_emsex33dcae-40a8-4b85-8cad-42ac048f9f2e%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22legislation%2Fems%2FFr2621_emsex33dcae-40a8-4b85-8cad-42ac048f9f2e%22)
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.\(^{8}\)

**Australian Military Court**

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.

However, 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*.\(^{9}\) That challenge was successful as the High Court determined that the jurisdiction conferred upon the AMC by section 115 of the 2006 Amendment Act, to try charges of service offences, involved the exercise of the judicial power of the Commonwealth otherwise than in accordance with Chapter III of the *Commonwealth of Australia Constitution Act* (the Constitution).\(^{10}\) That being the case, the 2006 Amendment Act took the AMC beyond what is authorised by section 51(vi) of the Constitution.\(^{11}\) In addition, their Honours determined that the AMC did not comply with the provisions of section 72 of the Constitution as it was not comprised of Justices who were appointed in the manner, or for the period, specified by that section.\(^{12}\)

**Government response**

The Government responded to the decision of the High Court by enacting the Interim Measures No. 1 Act and the *Military Justice (Interim Measures) Act (No. 2) 2009* (Interim Measures No. 2 Act).\(^{13}\)

The purpose of the Interim Measures 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 Interim Measures 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


\(^{11}\) Further discussion about the outcome of the decision in *Lane v Morrison* is contained in P Pyburne, *Military Justice (Interim Measures) Amendment Bill 2011*, op. cit.

\(^{12}\) *Lane v Morrison*, op. cit.

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.

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’. The interim measures were expected to operate for only two years.

**Military Court of Australia Bill 2010**

The Military Court of Australia Bill 2010 (the first Military Court Bill) 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.

However, the Bill lapsed on 19 July 2010 when the Parliament was dissolved for the Federal election. That necessitated an extension of time for the operation of the interim measures. As a result, the *Military Justice Interim Measures Amendment Act 2011* was enacted to amend the Interim Measures No. 1 Act and thereby extend the measures for a further two years to September 2013.

**Military Court of Australia Bill 2012**

It was not until 21 June 2012 that the Military Court of Australia Bill 2012 (the current Military Court Bill) was introduced into the House of Representatives. That Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee (the Legal and Constitutional Affairs Committee) for inquiry. The Legal and Constitutional Affairs Committee reported on 9 October 2012.
Whilst the majority of the Legal and Constitutional Affairs Committee recommended that the current Military Court Bill be passed, the Liberal Party members provided a dissenting report recommending an amendment to provide a right to trial by jury for all service offences punishable by over 12 months imprisonment. In addition, those Liberal Senators recommended that the current Military Court Bill be amended to permit reservists and standby reservists to be appointed as judicial officers of the Military Court to the extent that Chapter III of the Constitution allows this to occur.

Similarly, whilst the Australian Greens member of the Legal and Constitutional Affairs Committee was broadly supportive of the current Military Court Bill, the Senator recommended an amendment to allow a right to trial by jury for the most serious offences, being those which could lead to a significant term of imprisonment.

According to the Minister for Defence, Stephen Smith, ‘these dissenting recommendations are the subject of discussion between the Government and the relevant Senators’. It is this ongoing discussion which has necessitated the introduction of this Bill which will again extend the existing interim measures for a period of up to two years.

**Committee consideration**

**Selection of Bills Committee**

On 21 March 2013, the Selection of Bills Committee resolved that the Bill not be referred to Committee for inquiry and report.

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing this Bills Digest the Senate Standing Committee for the Scrutiny of Bills had not published any comments about the Bill.

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9 October 2012, viewed 21 January 2013, 

22. Ibid., p. 57.
23. Ibid.
24. Ibid., p. 60.
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%22%3Phansard%22%2F7d2bd3b-35ed-2f4e82a3829%2F0017%22
26. Selection of Bills Committee, Report no. 4 of 2013, Senate, Canberra, 21 March 2013, viewed 22 March 2013, 
Parliamentary Joint Committee on Human Rights

At the time of writing this Bills Digest the Parliamentary Joint Committee on Human Rights had not published any comments about the Bill.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Policy position of non-government parties/independents

The non-government parties have not publicly expressed a position on the measures in the Bill. However, the introduction of the Interim Measures No. 1 Act and the Interim Measures No. 2 Act which contained the original interim measures was ‘taken with the opposition’s support’. 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.

It would appear that this Bill, like the Interim Measures Bill of 2011, will have bi-partisan support.

Financial implications

According to the Explanatory Memorandum, ‘there will be no net impact on consolidated revenue’.

Key issues and provisions

As noted above, this Bill extends the current interim arrangements for the service tribunal system for a further period of two years pending resolution and enactment of the Military Court Bills before Parliament.

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27. The Statement of Compatibility with Human Rights can be found at pages 2–3 of the Explanatory Memorandum to the Bill.

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 Bill amends Schedule 3 to the Interim Measures 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 Interim Measures No. 1 Act commenced.\(^{31}\) That day was 22 September 2009.

Clause 2 of Schedule 3 to the Interim Measures No. 1 Act 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 to the Interim Measures No. 1 Act originally operated so that the person was appointed for a period of two years from the commencement day. This was subsequently extended to four years from the commencement day. **Items 1 and 2** of the Bill amend subclause 2(3) of Schedule 3 to the Interim Measures No. 1 Act so that period of appointment is extended from four years to six years; or until the *termination day*, if a termination day has been declared by the Minister.\(^{32}\)

Clause 3 of Schedule 3 to the Interim Measures No. 1 Act sets out the benefits to be paid at the time that the Chief Judge Advocate ceases to hold office. **Item 4** of the Bill amends clause 3 to insert a reference to a six year period of tenure instead of the current reference to four years.

Clause 4 of Schedule 3 to the Interim Measures No. 1 Act deems a person who held the 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 to the Interim Measures No. 1 Act currently operates so that a person was appointed for a period of four 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 four years to six years; or until the termination day, if a termination day has been declared by the Minister.

**Item 9** of the Bill amends clause 5 of Schedule 3 to the Interim Measures 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.

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\(^{31}\) Clause 1 of Schedule 3 to the *Military Justice (Interim Measures) Act (No. 1) 2009*.

\(^{32}\) Clause 8 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* provides that the Minister may declare a specified day, in writing, as the *termination day* for the purposes of Schedule 3. The termination day must be a day that is after the day on which the declaration is made. **Item 10** of the Bill amends clause 8 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009* so that the termination day must also be before the end of the six year period beginning on the commencement.