Amendments moved on behalf of the Government

(Circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP)
The proposed amendments give effect to certain matters that were raised by the Senate Standing Committee for Foreign Affairs, Defence and Trade in its consideration of the Defence Legislation Amendment Bill 2006 on 9 October 2006. The Bill establishes a permanent military court, to be known as the “Australian Military Court” (AMC) to give effect to certain aspects of the recommendations of the 2005 Senate Report of the ‘inquiry into the effectiveness of Australia’s military justice system’. These matters include the appointment, tenure, retirement, resignation and promotion of military judges, the composition of military juries and the offence regime. These matters have been refined and strengthened from their original form in the Bill.

Financial Impact Statement

The proposed amendments do not have a financial impact on Commonwealth expenditure or revenue.
NOTES ON AMENDMENTS

1. As the 2005 Senate Report noted, open and accountable governance is demanded and expected in respect of all arms of government, including the delivery of rigorous, fair and impartial outcomes. The military justice system is not exempt from this expectation. The Bill as a whole, strengthened by the proposed amendments, will establish a permanent military court, independent of the chain of command, to replace the current system of courts martial and trial by Defence Force magistrate.

2. In the period 1998 to 2005 there were 405 cases heard by courts martial and Defence Force magistrates (an average of 50 cases per year). 400 of these cases were heard by a Service tribunal with the authority to impose a maximum punishment of no more than six months imprisonment. Five cases (just over 1%) were heard by a Service tribunal (General Court Martial) with the authority to impose a punishment in excess of six months imprisonment or detention. These five cases did not include very serious offences such as murder, manslaughter or treason. These very serious offences occur even more rarely and are only dealt with under the DFDA in exceptional circumstances when there is no other Australian jurisdiction available. Given this, it is appropriate to structure the new AMC to meet the nature of the majority of cases (about 99%), and provide a standby capacity to deal with very serious cases (less than 1%), in those rare and exceptional circumstances where they occur outside Australian civilian jurisdiction. The intent of the Bill has always been to achieve this best practice by allowing for the selection of military judges who are part of the Reserve and come from private practice or the civilian courts where they have developed the experience to deal with very serious offences.

3. Current trends suggest that the proportion of minor to major offences is unlikely to vary significantly. The proposed introduction of a right of appeal from summary authorities to the AMC and a redesigned right to elect trial by the AMC will increase overall workload (perhaps threefold), however, this will only involve relatively minor matters that otherwise would have been dealt with at the summary level.

4. The ADF has some 470 Reserve and Permanent Force legal officers. Half of these officers meet the qualifications by rank to become military judges in the new AMC. The Reserve includes some 19 civilian judges and magistrates and about 20 Senior Counsel (Queen's Counsel). Unlike civilian lawyers, military lawyers progress through a rank structure that reflects both their military and legal experience. There are three permanent positions at the top of this structure (less than 1%) that require a minimum of one star rank. The Chief Military Judge will be one of these three positions when the AMC commences. The capacity for ADF legal officers to progress to the highest ranks available is enhanced by military judges serving fixed terms. Fixed terms also ensure security of tenure, for the purposes of judicial independence.

5. In general, it would be expected that a military judge would come from the more senior and experienced legal officers. However, there are very experienced lawyers in the Reserves, who for many reasons (such as joining at a later age) may be at a lower military rank. In ensuring that the pool of legal officers from which military judges will be selected is as broad as possible, the rank requirement is that the
officers be capable of promotion to the equivalent rank of Lieutenant Colonel. This allows all officers with a rank equivalent of Major and above to be considered.

6. Noting the very limited number of the most serious offences that occur, the provision of ten year terms, the broad pool from which a military judge may be selected (including civilian judicial officers and Senior Counsel in the Reserve) and the addition of acting judges that may be drawn from currently serving former military judges and civilian judicial officers in the Reserve for particular cases, the amendments allow for even more capacity to deal with very serious cases in those exceptional circumstances where they might occur outside Australian civilian jurisdiction. This capacity is likely to be drawn primarily from part time or acting military judges (Reserves).

7. Paragraphs (1) to (3) and (5) reflect the amendments made to Schedule 7 discussed in paragraphs 44 and 45 below (which will remove the anomaly in the current Bill in respect of references to Class 1, 2 and 3 offences). The proposed amendments correctly cross reference the definitions of Class 1, 2 and 3 offences in subsection 3(1) to Schedule 7. This amendment does not alter the substance or intent of the Bill.

8. Paragraph (4) amends the definition of 'Class 3 offence' to include an offence that is not punishable by imprisonment. This amendment further clarifies the requirement that a Class 3 offence is one that has a maximum penalty of a period not greater than 5 years imprisonment and is not a Class 1 or 2 offence.

9. Paragraph (6) omits the reference to section 188AQ in the definition of 'military judge'. This is required as section 188AQ is being repealed. This section currently provides for the possible reappointment of a military judge. However, as the proposed amendments will not allow reappointment this section is being repealed.

10. Paragraph (7) inserts in the definition of 'military judge' a cross reference to new section 188BB (which outlines the circumstances where an acting military judge may be appointed (see the discussion in paragraphs 39-43 below)). This provision will extend the definition of military judge to include an acting military judge under proposed section 188BB. The provision for acting military judges will make use of the skills and experience of military judges after a ten year fixed term, and increase the experience levels available to deal with the exceptional very serious offences that might occur outside Australian civilian jurisdiction.

11. A court of record is a court that is declared by an Act to be so or a court that has the power to impose a fine or imprisonment for contempt against it or for another substantive offence (contempt includes disturbance of proceedings, interference with the authority of the court or publication of material which may prejudice its proceedings).

12. Courts martial and trials by Defence Force magistrates were not designated as 'courts of record' under the DFD&A. Consistent with this, the AMC was not specifically made a court of record because there was no legal or practical reason for doing so. Additionally, it avoided conferring the characteristics of a civilian court (with greater jurisdiction) on the AMC. Notwithstanding this, the functional attributes of a court of
record are provided for in the Bill, including the capacity to deal with contempt of the court, conduct of proceedings in public, and a requirement to record proceedings. The AMC has now been accorded the status of a court of record, noting that there will be a provision to limit publication of proceedings in the interests of the security and defence of Australia or for particularly sensitive matters.

13. Paragraph (8) will reinforce the provisions discussed in paragraphs 11 to 12 by inserting new subclause 114(1A), to provide that the AMC is a ‘court of record’. It will reinforce existing provisions in the DFDA which will require the public publication of AMC records except where it would be inappropriate to do so (for example, if it would be contrary to the interests of the security or defence of Australia, the proper administration of justice or public morals). These examples currently apply to the conduct of public hearings. This amendment further enhances the status of the AMC.

14. Section 122 of the Bill currently provides for the constitution of a military jury to be 6 members. Section 124 provides that a decision of a military jury is to be by the agreement of at least a two-thirds majority. It is now intended to align the constitution of a military jury with the Class of service offence (as defined).

15. Paragraph (9) of the amendments therefore amends section 122 to provide that for a Class 1 offence, (the more serious offences), a jury of 12 members will be required. For a Class 2 or 3 offence (the lesser offences), a jury of 6 members will be required. This will allow for the small jury pool available to the ADF for the majority of cases, but provide for a larger jury in the case of the more serious offences.

16. Paragraph (10) omits and substitutes subsections 124(2) and (3) of the Bill to provide that, a decision of a military jury is to be unanimous or alternatively, by a five-sixths majority but only in the following circumstances –

- where it has deliberated for at least 8 hours and unanimous agreement has not been reached but a five-sixths majority agreement has; and
- the court is satisfied that the deliberation time is reasonable, having regard to the nature and complexity of the case; and
- after examining one or more jurors (on oath or affirmation) it is unlikely that the jurors would reach unanimous agreement following further deliberation.

17. These provisions will reduce the potential for a 'hung jury' and allow for the examination of jurors where unanimous agreement cannot be reached. The effect of these provisions will be to increase the rigour of the decision making process. This section is similar to provisions pertaining to juries in the Jury Act 1977 (NSW).

18. Paragraph (11) inserts new item 13A into the Bill which will amend current section 148 of the DFDA. This section deals with the requirement of a service tribunal, including the AMC, to keep a record of its proceedings. New item 13B inserts new subsection 148(2) so that the AMC will not be required to publish a record of its proceedings in certain circumstances (for example, if it would be contrary to the interests of the security or defence of Australia, the proper administration of justice or public morals). These exceptions will reinforce the
military court requirement that matters of national security are not compromised, in addition to the interests of public and individual privacy.

19. Paragraph (12) amends section 188AC of the Bill which currently provides for the appointment of the Chief Military Judge to be made by the Minister for Defence. To unequivocally demonstrate the independence of this appointment, it is now intended that the Governor General (acting on the advice of the Executive Council), appoint the Chief Military Judge.

20. Paragraph (13) also amends clauses 188AC which currently provides that the Chief Military Judge's appointment must not exceed 5 years. To better maintain a consistent level of experience on the AMC and to further demonstrate security of tenure and judicial independence, a fixed 10 year period of appointment of the Chief Military Judge will be provided. A term appointment such as this will establish security of tenure and also recognise factors peculiar to the Defence Force, such as career progression in the ADF.

21. The note to this paragraph makes it clear that whilst there is a statutory 10 year period of appointment, the Chief Military Judge may serve a shorter period, for example in the case where he or she retires on reaching compulsory retirement age.

22. Paragraph (14) omits and substitutes subsection 188AC(3) of the Bill to make it clear that a person is not eligible to be appointed as the Chief Military Judge if that person has previously been a Chief Military Judge (however, a person may be appointed as an acting military judge under new section 188BB). The amendment will allow for the career progression of military judges who may aspire to the Chief Military Judge position. It will also confirm the overall intent of section 188AC of a fixed 10 year term of the Chief Military Judge.

23. Paragraphs (15) and (16) amend section 188AH by substituting "Governor General" for "Minister" in respect of the granting of leave of absence for the Chief Military Judge. This is consistent with amendments to the appointment and termination provisions (to now be by the Governor General).

24. Paragraph (17) makes it clear that a Chief Military Judge is not eligible for promotion except in the circumstances provided for in new section 188AJ. New section 188AJ currently provides that the Chief Military Judge is not eligible for promotion. Given that the period of a fixed term will now be 10 years, it would be appropriate that the Chief Military Judge should be automatically promoted at the mid point of his or her appointment (5 year mark). The promotion of the Chief Military Judge will be limited to the rank of Rear Admiral in the Navy, Major General in the Army and Air Vice-Marshal in the Air Force. This provision is intended to recognise the status of the appointment of Chief Military Judge, which will, in turn, increase its attractiveness to qualified and experienced legal officers.

25. Paragraph (18) omits and substitutes section 188AK which provides for the resignation of the Chief Military Judge. To better ensure the timely replacement of a resigning Chief Military Judge, new subsection 188AK(2) provides for a three month period of notice for resignation, or shorter period, as agreed to by the Governor General.
26. Paragraph (19) amends section 188AL so that the Governor General rather than the Minister may terminate the appointment of the Chief Military Judge. This is also consistent with amendments to the appointment provisions. This (and the provisions relating to a military judge), reflect the overall intention to demonstrate the independent and impartial appointment and termination process.

27. Paragraph (20) omits section 188AM, which currently automatically retires a member from the Defence Force following his or her tenure as Chief Military Judge. The effect of this omission will be to allow for acting military judges in certain circumstances (see discussion of proposed section 188BB below) by enabling the experience and expertise of a former Chief Military Judge or Military Judges to be utilised. This will be particularly beneficial in the event of those exceptional very serious cases that might occur outside Australian civilian jurisdiction.

28. Paragraph (21) substitutes "Governor General" in section 188AN in respect of an acting Chief Military Judge, this will also further demonstrate the independence of the appointment process.

29. Paragraph (22) replaces the reference to "Minister" with "Governor General" in section 188AP, which provides for the appointment of military judges. Similar to the appointment of the Chief Military Judge, this will also further demonstrate the independence of this appointment process.

30. Paragraph (23) inserts a note after subsection 188AP(3) of the Bill which specifies the number of full time (2) and part time (no more than 8) military judges. The new note will make it clear that this limitation does not apply to acting military judges appointed under new section 188BB, noting that they are appointed only to meet the requirements of a particular case.

31. Paragraph (24) is similar to amendment paragraph (13) above in respect of the period of appointment of the Chief Military Judge. To better maintain a consistent level of experience on the AMC and to further demonstrate security of tenure, a fixed 10 year period of appointment of a military judge will be provided in section 188AP. This provision will also allow for regular progression of legal officers through the military ranks.

32. The note to this paragraph makes it clear that whilst there is a statutory 10 year period of appointment, a military judge may serve a shorter period, for example in the case where he or she retires on reaching compulsory retirement age.

33. Paragraph (25) inserts new subsection 188AP(4A) in similar terms to paragraph (14) above so that a person must not be appointed as a military judge if he or she has been a Chief Military Judge or a Military Judge (however, a person may be appointed as an acting appointment under section 188BB). This amendment will allow for the career progression of suitably qualified military legal officers who may aspire to a Military Judge position. It will also confirm the overall intent of section 188AP of a fixed 10 year term of a Military Judge.
34. Paragraph (26) omits and substitutes, section 188AQ as the reappointment of a military judge will not be possible. Reappointment to maintain levels of experience on the AMC is no longer necessary given the tenure of the appointment and the proposed provisions relating to acting appointments. New section 188AQ makes it clear that the appointment of a part time military judge (which includes an acting military judge by operation of new paragraph 188BB(7)(a)) will not affect such matters as the rank, title, privileges, tenure or salary of a person who is also a justice of the High Court or a justice or judge of a federal court.

35. Paragraph (27) adds new subsections (4), (5) and (6) to section 188AU (which deals with the remuneration arrangements for a military judge).

36. Consistent with current provisions in the DFDA pertaining to the remuneration of the Judge Advocate General and Deputy Judge Advocate General, new subsection 188AU(4) will preclude a magistrate, federal court or State or Territory court justice or judge, appointed as a part time military judge or an acting military judge, from receiving remuneration under the DFDA if they receive salary or annual allowances by virtue of their judicial office. The rationale for such a provision is not only to reinforce the independence and impartiality of judicial office, it is to counteract any perception of financial advantage, incentive, or inducement in the remuneration arrangements surrounding appointment of a part time or acting military judge. However, a judge or magistrate will not be financially disadvantaged by the operation of the proposed provisions, because of the intended arrangements that the Minister may enter into to secure the services of a military judge (this also includes the possible reimbursement of a State or Territory by the Commonwealth) (new subsections 188AU(4) and (5).

37. The ADF currently has, as Reserve members, serving magistrates, federal court and State and Territory judges. As it is possible that these officers may be considered for appointment as either a part time military judge or an acting military judge, these provisions will apply to both part time and acting military judges.

38. Paragraphs (28) and (29) replace the reference to "Minister" with "Governor General" in respect of the granting of leave of absence of a military judge. This is consistent with amendments to the appointment and termination provisions (to now be by the Governor General) and again reinforce the independence and impartiality in the appointment/termination process.

39. Paragraph (30) omits and substitutes section 188AX which currently provides that a Military Judge is not eligible for promotion. New section 188AX reinforces this concept, however it will reflect that, given that a military judge is appointed for a fixed term of 10 years, it would be appropriate that a military judge should be automatically promoted at the mid point of his or her appointment (5 year mark). The promotion of a military judge would be limited to the rank of Commodore, Brigadier or Air Commodore. An acting Military Judge will not eligible for promotion (see new paragraph 188BB(7)(f)). This provision is intended to recognise the importance of the appointment of a Military Judge, which will, in turn, increase its attractiveness to qualified and experienced legal officers.
40. Paragraph (31) omits and substitutes section 188AY which provides for the resignation of a Military Judge. To better ensure the timely replacement of resigning military judges, and make provision for currently serving former military judges to be used in an acting capacity, new subsection 188AY(2) provides for a three month period of notice for resignation, or shorter period, as agreed by the Governor General.

41. Paragraph (32) amends section 188AZ by substituting the reference to "Minister" with "Governor General" in respect of the termination of a military judge's appointment. This is consistent with amendments to the appointment provisions (to now be by the Governor General) and again to reinforce the independence and impartiality in the appointment/termination process.

42. Paragraph (33) omits section 188BA which currently automatically retires a member from the Defence Force following his or her tenure as a Military Judge. The repeal of this section will be balanced by the insertion of new section 188BB which will provide for acting military judges in certain circumstances (see discussion of section 188BB below).

43. Paragraph (34) inserts new section 188BB to provide for "Acting Military Judges". The intent of this amendment will be to enable a former Chief Military Judge, military judges or civilian judicial officers serving in the Reserve to try a charge and (if the accused has been convicted) take action under Part IV (Punishments and orders), that may require specific expertise. It will also encourage professional development of currently serving former military judges which will in turn maintain the availability of their skills and experience in the future.

44. As mentioned above, the appointment of military judges will be for a 10 year period. However, section 188BB will enable a former Chief Military Judge or military judge or other judicial officers (for example a judge or magistrate of a federal court or a court of a State or Territory serving in the Australian Defence Force) to act as a military judge, in circumstances where the expertise or experience of that person is required in respect of a particular charge. An acting military judge will be appointed on a part time basis and be subject to the qualification and Service deployment criteria currently contained in the Bill in respect of a military judge (enrolled as a legal practitioner for not less than 5 years, a Permanent or Reserve member at the Commander (E) rank and compliance with Service deployment requirements). An acting military judge will not be eligible for promotion (see paragraph 188BB(7)(f), which cross refers to subsection 188AX(1).

45. The Governor General will appoint an acting military judge for a period specified in the instrument of appointment. However, the period must end on the day specified in subsection 188BB(4). That is,

- if a charge has been terminated (where the accused has not been convicted or acquitted), on that day; or
- where the accused has been acquitted, on that day; or
- if the accused has been convicted, when action under Part IV (Punishments and orders) has been taken.
46. These provisions will ensure that a period of a military judge's acting appointment is limited so that an accused has closure in respect of a charge against him or her, that a matter is not unnecessarily protracted and also that Commonwealth resources are protected.

47. Some of the terms and 'conditions of employment' that apply to military judges will also apply to an acting military judge. These are identified in subsection 188BBB(7) and include matters such as, the requirement to make an oath or affirmation, remuneration, leave of absence, termination, ineligibility for promotion, and limitation (full time member) on outside employment.

48. Paragraphs (35), (36) and (37) amend Schedule 7 of the Bill, which provides for classes of offences. Schedule 7 outlines the Class 1, 2 and 3 offences and items 5, 6 and 7 of the Bill (which amend section 3 of the DFDA) define these terms. The Bill in its current form, in the definition of “class 3 offence”, includes offences that are not specified in Schedule 7 and which are punishable by imprisonment for 5 years or less. This definition will be amended (see amendment paragraph (1) above) to also include offences which are not punishable by imprisonment (for example, offences where a monetary fine can be imposed as the punishment). Schedule 7 will therefore be amended to provide that Territory offences punishable by imprisonment for 5 years or less, or not punishable by imprisonment, or triable summarily in civilian court may also be Class 3 offences. This amendment further clarifies the definition of Class 3 offences, consistent with the intention of the Bill.

49. Finally, Schedule 7 currently provides that certain Territory offences are Class 1 offences. These are certain serious Territory offences (for example, treason, murder and manslaughter) that are committed in Australia. Section 63 of the DFDA requires the consent of the Director of Public Prosecutions before they can be prosecuted under the DFDA. However, if the same Territory offence was committed outside Australia, Schedule 7 currently provides that they are a Class 2 offence. This anomaly will be removed by making those particular offences Class 1 offences, whether they were committed in or outside Australia.

50. Paragraph (38) amends the Judges Pensions' Act 1968. Given that the AMC is a federal court, and the proposed term of appointment is for 10 years, an unintended consequence would see military judges being eligible for pensions under the Judges’ Pensions Act 1968, in addition to the military pension scheme that applies to all Defence Force members. In order to correct this anomaly, this paragraph amends the Judges’ Pensions Act 1968 to prevent the payment of pensions to military judges under that Act.

51. Paragraph (39) inserts new item 33A into the Bill, to consequentially amend section 89 of the Defence Act 1903. This section prohibits the contempt of a service tribunal. As the AMC will have the status of a court of record under new section 114(1A), the proposed amendment to paragraph 89(1)(d) will reflect this status and reinforce that it will be an offence to commit a contempt of the AMC.

52. Paragraph (40) inserts new item 49A into the Bill which will amend paragraph 53(4)(d) of the DFDA which is the DFDA equivalent of section 89 of the Defence Act
The proposed amendment to section 53 similarly reflects the intent discussed in paragraph 47 above.

**Minor technical corrections to the Explanatory Memorandum**

53. The following corrections are required to paragraphs 25, 26 and 27 of the original Explanatory Memorandum to the Defence Legislation Amendment Bill 2006:

- Paragraph 25. This paragraph refers to “the accused is an officer or defence member”. This latter reference should be to “defence civilian”;

- Paragraph 26. This paragraph refers to “If the accused is non-commissioned”. This should refer to “If the accused is an enlisted member”;

- Paragraph 27. This paragraph refers to “The introduction of non-commissioned officers (NCOs)”. This should more specifically refer to “The introduction of Warrant Officer 1 (E)”.
