



**CHIEF MILITARY JUDGE**

**AUSTRALIAN MILITARY  
COURT**

*Report for the period  
1 October to 31 December 2007*

Department of Defence

***Australian Military Court***

*Report for the period  
1 October to 31 December 2007*

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**CHIEF MILITARY JUDGE**

**AUSTRALIAN MILITARY COURT  
DEPARTMENT OF DEFENCE  
CANBERRA ACT 2600**

**The Hon. Warren Snowdon MP**  
Minister for Defence Science and Personnel  
Parliament House  
CANBERRA ACT 2600

Dear Minister,

As Chief Military Judge I submit the report herewith as required by section 196C of the *Defence Force Discipline Act 1982*, covering the period from 1 October to 31 December 2007.

Yours sincerely,

*I. D. Westwood*

**I.D. WESTWOOD AM**  
Brigadier  
Chief Military Judge  
Australian Military Court

7 April 2008

Enc.



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## CHIEF MILITARY JUDGE

### AUSTRALIAN MILITARY COURT

#### REPORT FOR THE PERIOD 1 OCTOBER TO 31 DECEMBER 2007

#### PREAMBLE

1. Section 196C of the *Defence Force Discipline Act 1982* (DFDA) obliges the Chief Military Judge (CMJ), as soon as practicable after 31 December each year, to prepare and furnish to the Minister for Defence, a report relating to:

- a. The operations of the Australian Military Court (AMC); and
- b. The operations of the Australian Military Court Rules (AMCR).

during the year ending on that 31 December.

2. The AMC came into existence on 1 October 2007 pursuant to the amendments to the DFDA effected by the *Defence Legislation Amendment Act 2006* (DLAA 06). The office of CMJ is created by DFDA s.188AA. In accordance with DFDA s.196C(3) this report relates to the period from the inception of the Court on 1 October 2007 until 31 December 2007.

#### **THE DEFENCE LEGISLATION AMENDMENT ACT 2006 PROVISIONS FOR THE AMC**

3. The DLAA 06 provisions for the AMC were summarised in the Judge Advocate General's (JAG) Report pursuant to DFDA s.196A(1) for the period 1 January to 31 December 2006<sup>1</sup>, but for ease of reference, I reproduce that summary here:

- a. Although not a court within the terms of Chapter III of the Constitution, the AMC will be a court of record and its hearings will, subject to some exceptions, be public. The AMC will be able to sit at any place in or outside Australia.
- b. The AMC will be headed by the CMJ appointed by the Governor-General for a term of ten years. In addition the AMC will comprise two permanent military judges and no more than

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<sup>1</sup> Paragraph 25.



eight reserve (part time) military judges. Military judges will also be appointed by the Governor-General for terms of ten years.

- c. CMJ and the military judges must be members of the Australian Defence Force (ADF) holding a rank not lower than brigadier (or other Service equivalent) in the case of CMJ and lieutenant colonel (or other Service equivalent) in the case of the military judges. The appointments by the Governor-General will be made following a selection process established under the legislation. The CMJ and the military judges will be automatically promoted by one rank on the five year anniversary of appointment.
- d. The remuneration of CMJ and the military judges to be independently fixed by the Commonwealth Remuneration Tribunal.
- e. Termination of appointment as CMJ or a military judge by the Governor-General for cause.
- f. A military judge will have the ability to try a Service offence on his or her own or with a military jury depending on the seriousness of the offence and the wishes of the accused.
- g. A military jury will comprise twelve commissioned officers for serious offences, or six commissioned officers for less serious offences. If the accused is not an officer, it will be possible for senior warrant officers to serve as military jurors.
- h. Majority verdicts by a military jury will be possible in circumstances where the jury is split, so long as there is a five-sixth majority in favour of conviction.
- i. The AMC will be able to receive evidence given by video or audio link.
- j. The CMJ will be empowered to make rules for the AMC and will report to Parliament on the operation of the AMC.
- k. Appeals against punishment or conviction from the AMC will lie to the Defence Force Discipline Appeal Tribunal (DFDAT) (and as at present, albeit currently in relation to conviction only, from there to the Full Court of the Federal Court and, with special

leave, to the High Court of Australia). The appeal against sentence is new and will replace the existing internal review.

## **CONSTITUTION OF THE AMC**

4. In accordance with selection procedures detailed at DFDA s.188AE (for CMJ) and DFDA s.188AS (for the military judges) the following inaugural appointments were made by the Governor General in Council:

- a. Chief Military Judge:
  - (1) Brigadier Ian Denis Westwood AM.
- b. Military Judges:
  - (1) Colonel Peter John Morrison RFD; and
  - (2) Lieutenant Colonel Jennifer Ann Woodward.

In accordance with DFDA s.188AC(2) (for CMJ) and DFDA s.188AP(4) (for the military judges) these appointments were made for terms of ten years commencing on 1 October 2007.

5. The biographical details of CMJ and the military judges were well publicised at the time of appointment. Briefly:

- a. I had served as a legal officer in the permanent force since 1983 and for some time in the Reserve forces prior to that. Immediately prior to the appointment as CMJ, I held the appointment of Chief Judge Advocate (CJA) created under the now repealed DFDA s.188A. I had sat as a judge advocate (JA) and Defence Force magistrate (DFM) under the provisions in force prior to the creation of the AMC.
- b. Colonel P.J. Morrison. Prior to his appointment to the AMC, Colonel Morrison had served in the Reserve forces as an infantry officer, and for the last 23 years as a legal officer. He practised privately in Townsville and, at the time of the appointment, was the managing partner of Roberts Nehmer McKee in Townsville. He had sat as a JA and DFM under the old arrangements since 2004.

- c. Lieutenant Colonel J.A. Woodward. Prior to her appointment to the AMC, Lieutenant Colonel Woodward had served in the permanent force as a legal officer before transferring to the Reserve in conjunction with taking up an appointment as a prosecutor with the Office of the Australian Capital Territory Director of Public Prosecutions. More recently, she occupied a number of positions within the Defence Legal Office as a member of the Australian Public Service.

6. While the Act contemplates up to eight part-time military judges<sup>2</sup>, no part-time appointments were made during the reporting period.

### **REGISTRAR OF THE AMC**

7. The legislation<sup>3</sup> provides for a Registrar of the AMC to assist CMJ by providing administrative and management services in connection with proceedings before the AMC. In addition, the Registrar has such other functions as are conferred by legislation and regulation<sup>4</sup>.

8. The inaugural Registrar of the AMC is Colonel Geoff Cameron CSC. When the legislation creating the AMC came into force, Colonel Cameron held the appointment of Registrar of Military Justice under the legislation as it existed prior to the establishment of the AMC. In accordance with the legislation, his appointment transitioned to that of Registrar of the AMC.

9. I will comment in more detail subsequently on the Registrar's duties during the reporting period, but briefly, his principal responsibilities are in connection with the listing of matters for trial and the associated administration of the proceedings, and with the appointment of military jurors. These responsibilities arise primarily under the AMCR.

### **AMC STAFF**

10. In addition to the statutory appointments to which I have already referred, the AMC had the following staff during the reporting period:

- a. Deputy Registrar – Commander Fiona Sneath;

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<sup>2</sup> DFDA s.188AP(3).

<sup>3</sup> DFDA s.188F.

<sup>4</sup> DFDA s.188FA.

- b. Business Manager – Mr Cameron Landers;
- c. Senior Paralegal and Executive Assistant to CMJ and the military judges – Ms Jennifer Mackenzie;
- d. Staff Officer to the JAG and CMJ – Major Lachlan Mead;
- e. Trial Administrator – Mr Simon Hall; and
- f. Trial Administrator – Mrs Bianca Joyce.

11. I formally record my gratitude to them all for their help and support in the establishment of the AMC.

### **ACKNOWLEDGEMENTS**

12. It is appropriate that this first report on the Court's operations should acknowledge the vision and support of the many people who were responsible for its creation. In particular, I note the work of the Senate Foreign Affairs Defence and Trade References Committee and its "Report on the Effectiveness of Australia's Military Justice System" [Military Justice Inquiry (MJ)].

13. Air Chief Marshal A.G. Houston AC AFC, the Chief of the Defence Force (CDF), and the three Service Chiefs supported the establishment of the AMC, and the concept of the ADF having a modern independent court.

14. Major General the Honourable L.W. Roberts-Smith RFD QC, in his capacity as JAG from 2001 to 2007, was also a staunch supporter of a standing military court. His vision is reflected in his submission of 16 February 2004 to the Senate Foreign Affairs Defence and Trade References Committee inquiry into the Effectiveness of Australia's Military Justice System<sup>5</sup>. In subsequent Annual reports, and in evidence to the MJJ, he expressed strong views as to the attributes which such a permanent court should have.

15. Rear Admiral M. Bonser AO CSC and his Military Justice Implementation Team were responsible for the implementation of the then Government response to the MJJ report.

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<sup>5</sup> Reproduced as Annex O to the JAG's Annual Report for 2003.

16. Finally, I record my gratitude to Defence Legal, and particularly the Directorate of Military Justice, for the intellectual rigour which they brought to the establishment of the AMC.

## **FUNDING**

17. Funding for the AMC for the period of this report was provided by the Secretary/CDF Group of the Department of Defence. My Business Manager and I have been most grateful to them for their advice and assistance in establishing the financial management procedures for the new Court.

## **RELATIONSHIP WITH THE JAG**

18. Prior to the establishment of the AMC, the position of CJA existed within the Office of the JAG to provide administrative assistance to the JAG<sup>6</sup>. With the repeal of the provision creating the position of CJA, there is no formal mechanism for the support of the JAG and Deputy Judge Advocates General (DJAG). This is, no doubt, attributable to the fact that no formal decision has been taken as to the retention, and if retained, as to the role, of the JAG following the establishment of the AMC. The then Government response to the MJJ (in connection with recommendation 18) was in the following terms:

“The appointment of new military judge advocates<sup>7</sup> would see the need to consider further, during implementation, the position of the Judge Advocate General. The remaining functions of the Judge Advocate General would be transferred to the Chief Judge Advocate<sup>8</sup> and the Registrar of Military Justice<sup>9</sup>.”

19. The position of the JAG following the creation of the AMC has been the subject of comment by the then JAG in his annual reports for 2005<sup>10</sup> and 2006<sup>11</sup>.

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<sup>6</sup> DFDA s.188B as it stood prior to the DLAA 06 amendments.

<sup>7</sup> Ultimately titled military judges.

<sup>8</sup> Ultimately titled Chief Military Judge.

<sup>9</sup> Ultimately titled Registrar of the AMC.

<sup>10</sup> Paragraph 70 et seq.

<sup>11</sup> Paragraph 46 et seq.

20. Pending a formal decision on the retention, and if retained, the role and function of the JAG, I have agreed with the current JAG, Major General The Honourable Justice R.R.S. Tracey RFD, that the AMC will provide administrative support. This support includes bidding for and maintenance of an appropriate budget allocation for the functions of the JAG and staff support in connection with the JAG's responsibilities for legal reports as part of the internal review process currently in place for summary proceedings, and in connection with the JAG's annual report.

### **THE TRANSITION TO THE AMC**

21. Prior to the establishment of the AMC, the superior military tribunals comprised courts martial and DFMs. DLAA 06 provided a legislative scheme for matters referred for trial under those arrangements, but not completed when the AMC came into existence, to transition to the AMC. In the event, only one part heard matter (before a DFM) in fact continued after 1 October 2007. A further 27 matters automatically transitioned to referrals to the AMC. To put this figure into perspective, it represented approximately half the total annual trials that had proceeded before court martial and DFM during each of the years 2004<sup>12</sup>, 2005<sup>13</sup>, and 2006<sup>14</sup>. There had been some 46 matters tried under the old arrangements in 2007 prior to the inception of the AMC.

22. The new Court did not commence sitting until 12 November 2007. This period was to accommodate the induction of the new military judges and to permit the making of the AMCR.

23. As at 31 December 2007, there were 37 matters referred to the AMC awaiting trial, including the 27 matters that transitioned. All of these matters relate to offences alleged to have been committed prior to the inception of the AMC. They were not referred for trial under the old arrangements, presumably because of the imminence of the transition to the AMC.

24. Statistics detailing the matters heard by the Court during the reporting period are at Annexes C-F. Six matters proceeded to finality. This means that for 2007 there were some 89 matters referred for trial before the

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<sup>12</sup> 42 matters

<sup>13</sup> 62 matters

<sup>14</sup> 54 matters

superior military tribunals. This is a significant increase on the matters referred in recent years<sup>15</sup> which had formed the basis for the assessment of the resources which the AMC would need. The other significant change which impacts resources is that section 132A gives an accused person a right to require a jury trial in all matters proceeding before the AMC<sup>16</sup>. Under the previous arrangements the nature of the trial was determined by the prosecuting authority and comparatively few matters proceeded to court martial as opposed to a DFM<sup>17</sup>. The jury trials are considerably more resource intensive both in terms of the administrative effort required to run the trial and in terms of the personnel taken from other duties for the trial itself.

## **PROCEDURAL AND PRACTICE ARRANGEMENTS FOR THE AMC**

### **Seal**

25. DFDA s.119 provides for the Seal of the AMC “to be determined in writing by the Minister”. With CDFs endorsement, a Seal based on the tri-Service emblem surrounded by the words “The Seal of the Australian Military Court” was approved by the then Minister.

### **Mode of Address**

26. The Court has directed that the form of address for military judges when sitting is to be “Your Honour”. This is consistent with the almost universal approach taken in the Australian civil courts. It also provides the advantage of a suitable honorific independent of the military judge’s rank.

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<sup>15</sup> Footnotes 12, 13 and 14 refer

<sup>16</sup> After the reporting period, the passage of the *Defence Legislation Amendment Act 2008* (DLAA 08) effects amendments giving the Director of Military Prosecutions (DMP) the power to require a trial by military judge alone in matters involving Class 3 offences, subject to a cap on the maximum sentence available in the event of a conviction. The number of jury trials is, however, likely to considerably exceed the number of matters proceeding to a court martial (as opposed to a DFM) in recent years.

<sup>17</sup> Two matters in 2004, six matters in 2005 and one matter in 2006

## Robes

27. I have issued a Practice Note providing that the military judges are to ordinarily wear a robe over the appropriate ceremonial uniform while sitting. This is consistent with the pre-AMC practice of JAs and DFMs. It reflects both the military judge's membership of the ADF (by virtue of the uniform) and the judicial nature of the function (by virtue of the robe). It emphasises that the judicial function is being performed independently of the rank of the military judge. The wearing of robes by a judicial officer is consistent with the almost universal practice in the Australian civil courts and with the practice in the military courts of our principal common law allies.

## Publication

28. In consultation with the other military judges and after discussion with the Service Chiefs, I have directed that an AMC website be established on the Defence intranet to publish the following information:

- a. **List of upcoming matters.** This will include the Service particulars and name of accused persons facing trial within the coming three months, date and location of the trial and the military judge who will preside.
- b. **Trial outcomes.** This will include details of trial outcomes for the previous month, including the name and Service particulars of the accused, findings, and, where imposed, punishments and orders.
- c. **List of decisions.** This will include a list of all findings, rulings and reasons for sentence.
- d. **General information.** This will include directives, practice notes and information to assist legal practitioners, military jurors, witnesses etc.

29. In my view, the publication of this information is consistent with military justice being open and transparent and the legislative provision that the proceedings be in public<sup>18</sup>. I also believe that the publication of this information is consistent with the fundamental purpose of the DFDA, being

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<sup>18</sup> DFDA s. 140.



the maintenance of discipline. It is important, from that perspective and considerations of general deterrence, that outcomes are promulgated.

30. The publication proposals are consistent with the approach taken by the civil courts and, at least so far as the trial outcomes are concerned, the long standing practice in the Services (until comparatively recently) of promulgating the outcomes of trials by court martial and DFM through vehicles such as routine orders.

31. I do not presently propose that this information be published on the wider internet because it is unclear, having regard to the AMC's status, as to whether or not this would be precluded by the operation of the Privacy Act. In any event, it seems to me that the more limited publication at least ensures that the proceedings of the Court are open to the scrutiny of the military community which the Court serves, while providing some limitation on the broader publication of proceedings which may relate only to disciplinary offences, such as disobedience of orders. If there was a desire by Parliament that the Court's results should be made available more widely, I believe that the requirement should be addressed in terms of the legislation, particularly in view of the provisions of the Privacy Act.

32. The AMC website was not established during the reporting period, but work is well in hand. In this regard I record my gratitude to Commander Sneath.

### **Australian Military Court Rules (AMCR)**

33. The AMCR 2007 (Select Legislative Instrument 2007 No 360) were made on 17 October 2007. They make provision for the following matters:

- a. Part 1 – Preliminary.
- b. Part 2 – Australian Military Court, and particularly the functions of the military judge.
- c. Part 3 – Functions of the Registrar and administration.
- d. Part 4 – Charge sheet and charges.
- e. Part 5 – Summonses.
- f. Part 6 – Mode of Trial – Jury or non jury.

- g. Part 7 – Disclosure of prosecution case and supplementary information.
- h. Part 8 – Witnesses.
- i. Part 9 – Military juries.
- j. Part 10 – Listing of hearing.
- k. Part 11 – Trial provisions.
- l. Part 12 – Documents and exhibits.
- m. Part 13 – Record of proceedings.
- n. Part 14 – Procedure for imposing punishment in case of breach of undertaking to be of good behaviour.
- o. Part 15 – Miscellaneous (including provisions for the issue of practice notes).

34. Where practicable, the AMCR adopted the procedures previously used before courts martial and trials by DFM in the now repealed Defence Force Discipline Rules 1985.

35. I refer subsequently to certain practical difficulties, including those with respect to the panelling of the new military juries. It is my intention to amend the AMCR to make different provision for the panelling of the military juries in light of the practical difficulties to which I refer subsequently. Other than in this respect, the AMCR have operated satisfactorily.

### **Venue**

36. Subject to issues of administrative convenience, matters will ordinarily be listed for trial at the accused's unit or supporting headquarters. This means that the AMC sits in all parts of the country so that there is a reasonably wide opportunity for members of the ADF to attend and observe the proceedings. I believe this is consistent with the purpose of the DFDA, being the maintenance of discipline. It also means that the proceedings of the AMC are more readily open to scrutiny by the wider military community than if the Court were to sit at only one or two designated locations. There are practical difficulties in ensuring appropriate segregation of military jurors

when the Court is sitting in ad hoc premises, particularly having regard to the fact that the new juries are much larger than the old court martial panels. However, the procedures for the Court must be sufficiently robust to operate effectively on active service. To that end I consider it desirable that, where practicable having regard to the likely complexity of the trial, the Court continue to sit regionally, even if the facilities are less than ideal.

37. The support staff for a trial are, ordinarily, drawn from the accused's chain of command. This support staff includes the clerk of court, the orderly, administrative officer, escorts (if required) and a jury officer (if required). This provides some efficiency in terms of resources (in that the Court does not have a large permanent staff travelling with the military judge) and also provides these persons with exposure to the proceedings of the AMC.

### **CANBERRA ACCOMMODATION**

38. The AMC is based in Canberra although, as I have just indicated, it sits to conduct business wherever required. A lease was signed during the reporting period for a Canberra headquarters for the Court. This will include not only appropriate office accommodation for the military judges and the Registry, but also a purpose built court room capable of handling complex jury trials beyond the scope of regional facilities as well as matters arising from the Canberra area. The Canberra facility will be able to receive video link evidence and will have the capability to hold trials involving classified material.

### **SCRUTINY AND ACCOUNTABILITY**

39. The military judges and I consider it essential that the proceedings before the AMC are open to public scrutiny, even if, for the privacy reasons to which I have already referred, this is primarily the "military public". This report to Parliament forms part of that accountability, along with public sittings around the country and, if necessary, in theatres of operations. It is my intention, going forward, to examine other ways in which these ends might be furthered.

### **PROFESSIONAL ASSOCIATIONS**

40. The National Judicial College of Australia (NJCA) has accepted the military judges into its membership. My intention is that the military judges and I will participate in the continuing legal education opportunities offered by the NJCA, and the opportunity to build professional networks.

## **STATISTICS**

41. Tables showing the matters which proceeded before the AMC during the reporting period are at Annexes C-F. To facilitate a comparison with the statistics previously furnished by the JAG in connection with courts martial and DFMs, I have adopted a corresponding format.

42. The total volume of trials is not large, but it reflects a sitting period from 12 November 2007 until mid-December whereafter it was impractical to list matters for trial because of the departure on leave of unit personnel and witnesses.

43. There were no matters taken on appeal to the DFDAT during the reporting period. Where such appeals are taken, I propose including statistical data in the Annual Report.

## **PRACTICAL DIFFICULTIES**

44. As with any undertaking of the scale of a new Court, there have been some practical difficulties of implementation. This was only to be expected having regard to the complexity of the task, and the imperative for the changes to be effected within a limited time frame.

### **Military Juries**

45. In the first of the AMCs trials to involve a military judge sitting with a military jury, a challenge was taken to the array (that is, to the entire panel of the military jury). The challenge was upheld. The matter remains before the AMC such that it is inappropriate to comment in specific detail on the issues that were raised. However, there is a live issue as to how military juries should be constituted and selected.

46. DFDA s.149A(b) provides that the CMJ may make rules providing for:

“Matters concerning a military jury, including the summoning, attendance, empanelling of, the right of challenge, polling and the discharge of the jury.”

Nonetheless, the approach to be taken to military juries is a matter of significant policy where the Services will have views both as to the constitution of the military juries, and the resources required for them. Quite aside from the legal authority to make provision for the military juries in the AMCR, I do not consider it appropriate that CMJ, through the Court’s Rules, determine significant ADF policy, particularly if there is no agreed

position amongst the Services. In my view, there is an urgent need for legislation to clarify what was intended by Parliament in connection with the constitution of military juries, having regard to the views of the Services. There is no difficulty in the AMCR then making provision for procedural and practical aspects of implementation. I also believe it would be highly desirable for the legislation to address issues of juror protection and to create offences concerning interference with jurors or misconduct by military jurors in the discharge of their duties.

47. In the interim, the Registrar has written to the Service Chiefs seeking their support for the panelling of military juries on a tri-Service basis. Those responses were not received during the reporting period, but I would anticipate that a workable resolution, to be reflected in the AMCR, will be achieved in the early part of 2008. However for the reasons to which I have alluded, I would see any such resolution through provision in the AMCR as an interim one pending appropriate legislation and policy consideration.

48. In the meantime, the ability to hold jury trials has been impacted. Trials by military judge alone have been unaffected, and matters proceeding to jury trial have continued to be set down for pre-trial directions hearings.

### **The Operation of DFDA Section 132A**

49. The AMC has not been required to rule specifically on the operation of DFDA s.132A. However, I think it is clear from the plain language of the section that it purports to offer an accused person an election (in the case of Class 2 and Class 3 offences) to trial by either military judge alone or by military judge and military jury. The section, at least arguably, provides that election on the basis of each individual charge rather than on the basis of multiple charges properly joined on the one charge sheet. If that is the correct operation of the legislation, it means that an accused person has the ability to force severance of charges that would otherwise have been properly joined.

50. In the case of Class 1 offences there is the corresponding issue of whether such offences can be properly joined with Class 2 and 3 offences on the one charge sheet having regard to the different provisions for the constitution of the military jury in each case.

51. These are issues which I believe require urgent legislative intervention<sup>19</sup>.

### **Commencement and Enforcement of Punishments and Orders**

52. All sentences imposed by the AMC take effect forthwith<sup>20</sup>. This raises practical difficulties so far as administratively effecting the prisoner's separation from the Defence Force in the event of a sentence of dismissal from the Defence Force (which may be imposed on its own account, and must accompany a sentence of civil imprisonment). There is also the issue that if a sentence of dismissal from the Defence Force were to be imposed in a theatre of actual operations, whether it is desirable that the accused's status should change from that of defence member to a civilian until such time as he or she has been repatriated to Australia<sup>21</sup>.

53. Prior to the establishment of the AMC, there were practical difficulties with the enforcement of breaches of recognizance release orders made under the provisions of the *Crimes Act 1914 (Clth)*. The creation of the AMC leaves the way clear for such breaches to be brought back before the AMC because it is now a permanent court. However, there remains the policy issue of whether it is desirable for the AMC to deal with such breaches when, of necessity, the offender will be a civilian at the time of the breach<sup>22</sup>. In my view, it would be desirable if this issue were addressed by legislation.

### **Custody of a Prisoner Before Sentence**

54. There is no specific provision in the DFDA for a military judge to order a convicted person into custody following conviction but prior to sentence. I believe it would be highly desirable that this power be included in the legislation, together with the authority to order the convicted persons conditional release if that were considered appropriate. So far as I am aware, there is a power in all civil courts of criminal jurisdiction to order a

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<sup>19</sup> After the reporting period, the passage of DLAA 08 addresses these issues.

<sup>20</sup> DFDA s.171.

<sup>21</sup> After the reporting period, the passage of DLAA 08 makes provision relevant to this issue.

<sup>22</sup> The recognizance release order can be made in connection with a sentence of civil imprisonment. If such a sentence is imposed, it must be accompanied by dismissal from the Defence Force by virtue of DFDA s.71(1).

convicted person into custody, subject to an order for release on bail, following conviction but prior to sentence. If such a power is not available, there are obvious concerns in connection with a convicted person who is a flight risk.

55. Arguably there is a command authority to order the convicted person into custody, but it would be much better, in my view, to put the matter beyond doubt.

## **REGISTRY OF THE AMC**

56. The administration of AMC proceedings is centralised within the AMC Registry. AMC proceedings are commenced with a referral of charge(s) by the Director of Military Prosecutions (DMP) to the Registrar. The Registrar then formally refers the charge sheet to the CMJ with a request for a military judge nomination to try the matter. Concurrently, trial documentation is dispatched by the Registrar's office to the accused who is given 30 days to elect trial by military judge alone or by military judge and military jury depending on the class of offence<sup>23</sup>. Where an accused does not make an election for mode of trial the default trial provisions as provided for within the Act apply. Case management processes are applied in order to assist the trial process and to provide certainty with trial dates. The Registrar liaises with the accused's chain of command regarding a suitable trial venue, personnel and administrative support for the efficient functioning of the AMC trial proceeding.

57. Where a military jury is required the Registrar undertakes the necessary administration for military jury appointments to be made. Military jury appointments will be made by the Registrar independent from command influence, the prosecution and the accused. The Registrar's military jury functions are aided by a CDF Directive (18/2007) that directs that AMC jury trials are manned with sufficient personnel in number and rank and provides protections and obligations in respect of appointed military jurors.

## **LOOKING AHEAD**

58. *Defence Legislation Amendment Act 2008* (DLAA 08) vests the AMC with an appellate jurisdiction in connection with summary matters. These

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<sup>23</sup>

AMCR 23 and 24.

provisions will come into force six months after Royal Assent<sup>24</sup>. It is difficult to anticipate the volume of work which this will generate for the AMC, but I would anticipate that it will be necessary to fill at least some of the part-time military judge appointments prior to the commencement of these provisions.

## **CONCLUSION**

59. While I have referred to some practical difficulty in the operation of the legislation establishing the AMC, I believe that the ADF now has a world class military court. It seems to me that the legislative difficulties which I have identified are amenable to comparatively straight forward resolution.

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<sup>24</sup> 20 September 2008.



**TABLE OF ABBREVIATIONS USED IN REPORT**

<b>Abbreviation</b>	<b>Description</b>
ADF	Australian Defence Force
AMC	Australian Military Court
AMCR	Australian Military Court Rules
CDF	Chief of the Defence Force
CJA	Chief Judge Advocate
CMJ	Chief Military Judge
DFDA	<i>Defence Force Discipline Act 1982</i>
DFDAT	Defence Force Discipline Appeal Tribunal
DFM	Defence Force Magistrate
DJAG	Deputy Judge Advocate General
DLAA 06	<i>Defence Legislation Amendment Act 2006</i>
DLAA 08	<i>Defence Legislation Amendment Act 2008</i>
DMP	Director of Military Prosecutions
JA	Judge Advocate
JAG	Judge Advocate General
MJI	Military Justice Inquiry
NJCA	National Judicial College of Australia
RFD	Reserve Forces Decoration

## **COMPLIANCE INDEX OF REQUIRED INFORMATION FOR STATUTORY AUTHORITIES**

**(Senate Hansard, 11 November 1982, pp. 2261 – 2262)**

Enabling Legislation	<i>Defence Force Discipline Act 1982</i>
Responsible Minister	Minister for Defence Science and Personnel
Powers, functions & objectives	Paragraphs: 1-4, 6-8, 20, 30-34, 58
Membership and Staff	Paragraph: 4-10
Information Officer	Jennifer Mackenzie Paralegal to Chief Military Judge Department of Defence F-TS-1L-AMC CANBERRA ACT 2600 Telephone: 02 6127 4261 Facsimile: 02 6127 4133
Financial Statement	Paragraphs: 17
Activities and Reports	Paragraphs: 21-24, 28-32, 41-43
Operational Problems	Paragraphs: 24, 35, 44-55
Subsidiaries	Not Applicable



## NATURE AND JURISDICTION OF THE AUSTRALIAN MILITARY COURT

### Generally

1. The AMC is a Service tribunal created for the purpose of trying a defence member or a defence civilian on a specific charge or charges, usually of a more serious nature. In certain circumstances, a military judge of the court may sit solely for the purpose of determining punishment in respect of a person who has been convicted by a summary authority.

2. The AMC replaces, with effect the 1<sup>st</sup> of October 2007, the previous superior military tribunals consisting of general and restricted courts martial and trial by Defence Force magistrate.

### Trial by Military Judge Alone or by Military Judge and Military Jury

3. DFDA s.3(1) and Schedule 7 provide for various classes of offences. Generally speaking, the most serious offences fall into Class 1, middle ranking offences into Class 2 and the least serious offences into Class 3.

4. Class 1 offences must be tried by a military judge and a military jury of twelve<sup>1</sup>. A Class 2 offence is to be tried by a military judge and military jury of six unless the accused person elects to be tried by a military judge alone<sup>2</sup>. A Class 3 offence is to be tried by a military judge alone, unless the accused person elects to be tried by a military judge and military jury<sup>3</sup>.

5. Regardless of whether the trial is before a military judge alone or a military judge sitting with a military jury, in the event of a conviction, the military judge will impose sentence.

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<sup>1</sup> DFDA s.132A(1)  
<sup>2</sup> DFDA s.132A(2)  
<sup>3</sup> DFDA s.132A(3)



**DEFENCE FORCE DISCIPLINE ACT**

**LIST OF SECTIONS USED IN STATISTICS**

<b>Section Number</b>	<b>Class of Offence</b>	<b>Description</b>
23	3	Absence from duty
24	3	Absence without leave
25	3	Assaulting a superior officer
26	3	Insubordinate conduct
27	3	Disobeying a lawful command
28	3	Failing to comply with a direction in relation to a ship, aircraft or vehicle
29	3	Failing to comply with a general order
30	3	Assaulting a guard
31	3	Obstructing or refusing to assist a police member
32	3	Offences while on guard or watch
33(a)	3	Assault on another person
33(b)	3	Creating a disturbance
33(c)	3	Obscene conduct
33(d)	3	Insulting or provocative words to another person
34	3	Assaulting a subordinate
35	3	Negligent performance of duty
36(1)	2	Dangerous conduct
36(2&3)	3	Dangerous conduct
36A	3	Unauthorised discharge of weapon
36B	3	Negligent discharge of weapon
37	3	Intoxicated while on duty etc
38	3	Malingering
39	3	Causing loss, stranding or hazarding of a service ship
40	3	Driving while intoxicated
40A	3	Dangerous driving
40C	3	Driving a service vehicle for unauthorised purpose
40D	3	Driving without due care or attention etc
41	3	Flying a service aircraft below the minimum height
42	3	Giving inaccurate certification
43	3	Destroying or damaging service property
44	3	Losing service property
45	3	Unlawful possession of service property
46	3	Possession of property suspected of having been unlawfully obtained

<b>Section Number</b>		<b>Description</b>
47C	3	Theft
47P	3	Receiving
48	3	Looting
49	3	Refusing to submit to arrest
49A	3	Assault against arresting person
50	3	Delaying or denying justice
51	3	Escape from custody
52	3	Giving false evidence
53	3	Contempt of service tribunal
54	3	Unlawful release etc of person in custody
55	3	Falsifying service documents
56	3	False statement in relation to application for a benefit
57	3	False statement in relation to appointment or enlistment
58	3	Unauthorised disclosure of information
59(1)	1	Dealing in or possession of narcotic goods
59(5, 6 or 7)	2	Dealing in or possession of narcotic goods
60	3	Prejudicial conduct
61	1, 2 or 3	Offences based on territory offences







**Details of Quashed Convictions**

<b>DFDA Sect</b>	<b>Rank</b>	<b>Short Summary of Offence</b>	<b>Reason for quashing</b>



**CONVICTIONS BY CLASS OF OFFENCE FOR MEMBERS OF THE NAVY  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	<b>CLASS 1</b>	<b>CLASS 2</b>	<b>CLASS 3</b>
<b>January</b>			
<b>February</b>			
<b>March</b>			
<b>April</b>			
<b>May</b>			
<b>June</b>			
<b>July</b>			
<b>August</b>			
<b>September</b>			
<b>October</b>			
<b>November</b>			
<b>December</b>			
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>



ARMY

OCTOBER-DECEMBER 2007

STATISTICS FOR TRIALS AND OUTCOMES FOR THE AUSTRALIAN MILITARY COURT

	JUDGE AND JURY (12)				JUDGE AND JURY (6)				JUDGE ALONE			
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED
		GUILTY	N.G.			GUILTY	N.G.			GUILTY	N.G.	
January												
February												
March												
April												
May												
June												
July												
August												
September												
October												
November	1								2	3		
December									3	8	21	
<b>TOTAL</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>5</b>	<b>11</b>	<b>21</b>	<b>0</b>

\*\*The Judge and Jury (12) trial held in November has not yet been finalised. This is why there are no figures against the charges tried column.

**CONVICTIONS FOR OFFENCES COMMITTED BY RANK FOR MEMBERS OF THE ARMY  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
<b>Sect 23</b>										
<b>24</b>										
<b>25</b>										
<b>26</b>										
<b>27</b>										
<b>28</b>										
<b>29</b>										
<b>30</b>										
<b>31</b>										
<b>32</b>										
<b>33(a)</b>										2
<b>33(b)</b>										
<b>33(c)</b>										
<b>33(d)</b>										
<b>34</b>										
<b>35</b>										
<b>36</b>										
<b>36A</b>										
<b>37</b>										
<b>38</b>										
<b>39</b>										
<b>40</b>										1
<b>40A</b>										
<b>40B</b>										
<b>40C</b>										
<b>40D</b>										
<b>41</b>										
<b>42</b>										
<b>43</b>										
<b>44</b>										
<b>45</b>										
<b>46</b>										
<b>47C</b>										
<b>47P</b>										
<b>48</b>										
<b>49</b>										
<b>50</b>										
<b>51</b>										
<b>53</b>										
<b>54</b>										
<b>54A</b>										
<b>55</b>										
<b>56</b>										
<b>57</b>										
<b>58</b>										
<b>59</b>										
<b>60</b>							7			
<b>61</b>										1
<b>TOTAL</b>	0	0	0	0	0	0	7	0	0	4

**Details of Quashed Convictions**

<b>DFDA Sect</b>	<b>Rank</b>	<b>Short Summary of Offence</b>	<b>Reason for quashing</b>



**PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE ARMY  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand										
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand										
Suspended fine										
Fine Less than 14 Days Pay							7			
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority							7			
Reduction in rank										
Suspended detention										1
Committed detention										2
Dismissal										
Imprisonment										
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>14</b>	<b>0</b>	<b>0</b>	<b>3</b>

**CONVICTIONS BY CLASS OF OFFENCE FOR MEMBERS OF THE ARMY  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	<b>CLASS 1</b>	<b>CLASS 2</b>	<b>CLASS 3</b>
<b>January</b>			
<b>February</b>			
<b>March</b>			
<b>April</b>			
<b>May</b>			
<b>June</b>			
<b>July</b>			
<b>August</b>			
<b>September</b>			
<b>October</b>			
<b>November</b>			3
<b>December</b>			8
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>11</b>



AIR FORCE  
JANUARY-DECEMBER 2002

STATISTICS FOR TRIALS AND OUTCOMES FOR THE AUSTRALIAN MILITARY COURT

	JUDGE AND JURY (12)				JUDGE AND JURY (6)				JUDGE ALONE			
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED
		GUILTY	N.G.			GUILTY	N.G.			GUILTY	N.G.	
January												
February												
March												
April												
May												
June												
July												
August												
September												
October												
November									1	2		
December												
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>2</b>	<b>0</b>	<b>0</b>



**Details of Quashed Convictions**

<b>DFDA Sect</b>	<b>Rank</b>	<b>Short Summary of Offence</b>	<b>Reason for quashing</b>

**PUNISHMENTS IMPOSED BY RANK ON MEMBERS OF THE AIR FORCE  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	Officer	Officer Cadet	WO1 WO WOFF	WO2 CPO FSGT	SSGT	SGT PO	CPL LS	LCPL	AB LAC	PTE SMN AC
Reprimand										
Conditional conviction without punishment										
Unconditional conviction without punishment										
Severe reprimand									2	
Suspended fine										
Fine Less than 14 Days Pay									2	
Fine More than 14 Days Pay										
Forfeiture of service for purposes of promotion										
Forfeiture of seniority										
Reduction in rank										
Suspended detention										
Committed detention										
Dismissal from ADF										
Imprisonment										
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>4</b>	<b>0</b>

**CONVICTIONS BY CLASS OF OFFENCE FOR MEMBERS OF THE AIR FORCE  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	<b>CLASS 1</b>	<b>CLASS 2</b>	<b>CLASS 3</b>
<b>January</b>			
<b>February</b>			
<b>March</b>			
<b>April</b>			
<b>May</b>			
<b>June</b>			
<b>July</b>			
<b>August</b>			
<b>September</b>			
<b>October</b>			
<b>November</b>		2	
<b>December</b>			
<b>TOTAL</b>	<b>0</b>	<b>2</b>	<b>0</b>





COMBINED OCTOBER - DECEMBER 2007

STATISTICS FOR TRIALS AND OUTCOMES FOR THE AUSTRALIAN MILITARY COURT

	JUDGE AND JURY (12)				JUDGE AND JURY (6)				JUDGE ALONE			
	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED	NUMBER OF TRIALS HELD	CHARGES TRIED		QUASHED
		GUILTY	N.G.			GUILTY	N.G.			GUILTY	N.G.	
January	0	0	0	0	0	0	0	0	0	0	0	0
February	0	0	0	0	0	0	0	0	0	0	0	0
March	0	0	0	0	0	0	0	0	0	0	0	0
April	0	0	0	0	0	0	0	0	0	0	0	0
May	0	0	0	0	0	0	0	0	0	0	0	0
June	0	0	0	0	0	0	0	0	0	0	0	0
July	0	0	0	0	0	0	0	0	0	0	0	0
August	0	0	0	0	0	0	0	0	0	0	0	0
September	0	0	0	0	0	0	0	0	0	0	0	0
October	0	0	0	0	0	0	0	0	0	0	0	0
November	1	0	0	0	0	0	0	0	3	5	0	0
December	0	0	0	0	0	0	0	0	3	8	21	0
<b>TOTAL</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>6</b>	<b>13</b>	<b>21</b>	<b>0</b>

**CONVICTIONS BY CLASS OF OFFENCE FOR MEMBERS OF THE ADF  
FOR AUSTRALIAN MILITARY COURT TRIALS**

	<b>CLASS 1</b>	<b>CLASS 2</b>	<b>CLASS 3</b>
<b>January</b>	0	0	0
<b>February</b>	0	0	0
<b>March</b>	0	0	0
<b>April</b>	0	0	0
<b>May</b>	0	0	0
<b>June</b>	0	0	0
<b>July</b>	0	0	0
<b>August</b>	0	0	0
<b>September</b>	0	0	0
<b>October</b>	0	0	0
<b>November</b>	0	2	3
<b>December</b>	0	0	8
<b>TOTAL</b>	<b>0</b>	<b>2</b>	<b>11</b>

**AUSTRALIAN MILITARY COURT**  
Report for the period 1 October to 31 December 2007