QUESTIONS ON NOTICE – COMMITTEES

Senate Legal and Constitutional Affairs Committee Public Hearing – Military Court of Australia Bills – 14 September 2012 (Question 1: Cost of Appeals)

Senator **FAWCETT** asked (Hansard page number 52): Again, the example you quote is where the serviceman chooses to appeal. The concern raised by Mr Street is where the Commonwealth chooses to appeal. As I read that, it appears to be an incredibly unfair burden to potentially place on a service man or woman.

Mr Fredericks: I don't think there is anything useful we can add. At the end of the day that will be a discretion exercised by a judge. That is really the position that would be put.

Senator **FAWCETT**: The concern is that this is a stepped change from the existing situation, where a service man or woman will not be up for costs when dealing with service offences unless, as you cite in the recent case, they choose to appeal to an external court.

Air Cdre Cronan: I would have to confirm that. I will have to take that on notice. I think that is the case, but I will need to confirm it.

Response:

The discretion of the Military Court of Australia (the Court) to award costs is in keeping with the power of civilian courts, including other Chapter III courts, to make costs orders. The Court's discretion to make costs orders assists in controlling the conduct of all parties and ensures efficient use of court resources. Clause 58 of the Military Court of Australia Bill 2012 prohibits the Court from making costs orders except as provided for in clause 109. This provision was adopted as a result of consultation with the Law Council of Australia following its comment that having no discretion for the Military Court to make cost orders 'is out of step with civilian courts'.

There will be a possibility that the Military Court of Australia could award costs against an accused who has not appealed. The Director of Military Prosecutions can only appeal a decision or judgment in limited circumstances. The Director of Military Prosecutions cannot appeal against an acquittal of the accused or orders relating to unfitness to be tried or mental impairment (clauses 96(2) and (3)). It is appropriate, however, for the Court to have power to award costs against the respondent in a prosecution appeal, for use in the rare circumstances where the conduct of the defence at trial or the respondent's case on appeal has unnecessarily lengthened the hearing of the trial or the appeal, particularly if there has been a failure on the part of counsel for the accused or the respondent to disclose material required to be disclosed (e.g. alibi evidence) or to comply with an interlocutory or other order of the Court.

While not directly related to Senator Fawcett's question, it should be noted that the Bills do promote the financial interests of Australian Defence Force members in one clear respect. This is because the amendments contained in the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill also provide that the Director of Defence Counsel Services may supply an Australian Defence Force legal officer to represent the Australian Defence Force member at no cost to the Australian Defence Force member in the appeal process. Currently, there is no provision allowing for an Australian Defence Force legal officer to represent an Australian Defence Force member in an appeal to the Defence Force Discipline Appeal Tribunal.

Senate Legal and Constitutional Affairs Committee Public Hearing – Military Court of Australia Bills – 14 September 2012 (Question 2: Double Jeopardy)

Senator **FAWCETT** asked (Hansard page number 53): I have one more question, which I am happy for you to take on notice, given the time. In its submission, Adelaide university looked at the issue of double jeopardy. It recognised that with this now being a chapter III court it essentially precludes the issue of double jeopardy, but it notes that, given that a parallel system will still exist, the potential for double jeopardy is still there, despite the agreement that has been struck between the DPP and the DMP. Are you satisfied about the protections there are to avoid that situation for a serviceman?

Air Cdre Cronan: Really, nothing has changed. Going back a little bit to 1989 in Re: Tracey; Ex parte Ryan in the High Court, there used to be a double jeopardy provision in the Defence Force Discipline Act, which stopped a member being charged in a civilian criminal court who had been convicted of a DFDA offence. The High Court struck that provision out as being unconstitutional. We still have service offences, and the nature of those service offences does not change, regardless of whether they are heard in a chapter III court or in a court martial system. I think also that testimony this morning from a range of witnesses was that over the last 27 years that has not proved an issue of concern for either the individual or the Defence Force. I don't know that we have ever had a case of a member being charged twice.

Senator **FAWCETT**: I accept that. It is just that if it is something that we can preclude now through smarter legislation it is a better way to go than by trying to redress the situation if it were to happen in 10 years time. It would be great if you could perhaps directly address what Adelaide university raised, when you articulate your response.

Air Cdre Cronan: Will do.

Response:

The Military Court of Australia Bills do not change the nature of service offences, or the fact that the prosecution of service offences remains complementary to the civilian criminal laws.

The position in the Bill is consistent with legal advice obtained by the Government.

Prosecutions for criminal offences will often occur under State or Territory law. The question of whether a prosecution for a State or Territory criminal offence would be prevented from occurring because of a prior conviction or acquittal for a service offence will, in theory, remain an issue to be addressed by courts under relevant State or Territory law.

The treatment by a civilian criminal court of a conviction or acquittal for a service offence is a matter for that civilian criminal court in accordance with the relevant State or Territory law. It would, in large part, depend on the actual charges which were prosecuted as service offences, the offences charged in the relevant civilian criminal jurisdiction and the similarity of the conduct constituting both the service offence and the civilian criminal offence.

The University of Adelaide written submission made the following observation (footnotes omitted) concerning the issue of double jeopardy:

'One significant area of concern under the service tribunal system is the possibility for an individual to be tried under both the military justice and civilian criminal jurisdictions. A double jeopardy clause that attempted to oust the jurisdiction of a civilian court where an accused had been tried for an offence under the military justice system was found by the High Court to be

unconstitutional. In practice, the possibility of double jeopardy arising has been largely, although not completely, allayed by the arrangements between the DMP and the Commonwealth DPP.

The creation of a Chapter III court to hear and determine service offences substantially meets these concerns more definitively. A conviction or acquittal by the new MCA will, beyond any doubt, prevent any other Chapter III court from hearing the same matter, leaving the potential for confusion only where a Defence Force member is tried by a service tribunal (that is, by a summary authority or, on rare occasions under the new regime, by a court-martial or DFM).'

Defence agrees with the written submission of the University of Adelaide that the arrangement between the Director of Military Prosecutions and the Directors of Public Prosecutions has largely allayed any potential issues of double jeopardy arising with respect to the current prosecution of service offences by court martial or Defence Force magistrate. These same arrangements will continue to apply to the prosecution of service offences before the Military Court of Australia.

Amendments in the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 also strengthen the protections in relation to double jeopardy.

New clause 190B of the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill will amend the *Defence Force Discipline Act 1982* by repealing the current sub-section 3(15) and clarifying the status of a conviction for a service offence. Clause 190B makes it clear that a conviction for a service offence (other than a purely disciplinary service offence listed in Schedule 7) by the Military Court of Australia, a court martial or a Defence Force magistrate must be recorded as a conviction for a service offence and is a conviction for an offence against a law of the Commonwealth.

The Bill modifies but maintains the existing *Defence Force Discipline Act 1982* provisions against double jeopardy before service tribunals in favour of an accused person. The Bill will repeal the current provision relating to previous acquittals or convictions of service offences under section 144 of the *Defence Force Discipline Act 1982*, and will insert a new provision relating to previous acquittals and convictions. New clause 190A prevents prosecution of a service offence in respect of an act or omission, where the person has been acquitted or convicted of that service offence or a service offence similar to that service offence, in respect of that act or omission, or where the Military Court of Australia, or a court martial or Defence Force magistrate, has taken the service offence into consideration with respect to a person convicted of a service offence.

New clause 190A also prevents prosecution of a service offence where the service offence is substantially the same as a civil court or overseas offence of which the person has been acquitted or convicted.

While double jeopardy concerns have not been a practical problem in the 27 years of operation of the *Defence Force Discipline Act 1982*, the potential for double jeopardy to be a problem adversely affecting the rights of an Australian Defence Force member is only likely to be further reduced if the conviction or acquittal of a service offence were imposed by a Chapter III court, not a service tribunal.