Senate Legal and Constitutional Affairs Committee – inquiry into the Military Court Bills
Public hearing – 14 September 2012
Answers to questions on notice
Mr Paul Willee QC, Chair, Military Law Working Group, Law Council of Australia

Question 1.

> Senator JOHNSTON: The point is that there appear to be no proper threshold issues that determine the triggering of that separate jurisdictional model—that is, the court martial system. I would like you to comment on whether you think there need to be some proper justice related threshold issues before the superior authority directs that there be a court martial. Secondly, do you think that the 3B model for a court martial accurately reflects what is required, particularly with respect to juries?
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> Mr Willee: The pre-act model for the court martial?
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> Senator JOHNSTON: No. Schedule 3B sets out the court martial model to be employed when the DMP says, 'We want to go by way of court martial.' You can take this on notice if you feel so inclined, because it is a bit technical.

First I think it important that the exercise of the superior authorities functions in convening a court martial is it seems to me exercisable only in conjunction with the DMP or at the DMP's direction and in most cases where there has been an initiating factor preventing the Military Court from dealing with the matter or those situations where the original CM has been dissolved or otherwise prevented from concluding the proceedings and a fresh tribunal has to be convened.

In my view it would be unwise for the legislation to spell this out beyond what the legislation now provides in say the expression: "*if the charge is taken to have been withdrawn from the Military Court because the Military Court has determined that it is necessary, but not possible, for it to sit at a place outside Australia to hear and determine a proceeding, or a part of a proceeding, in respect of the charge*" (see Subparagraph 103C(2)(c)(i) for example). That might occur because of the normal exigencies of the service, or operational difficulties and dangers, or simply because a sovereign state in which operations are permitted but the country concerned objects on the grounds of sovereignty to another country's court sitting theirs (even those of an ally). There are so many of such exigencies that the legislation could not contemplate let alone deal with them all.

The obvious ones relate to the protection of the Military Court members and other civilian employees. Every defence force member (even a legal officer) is required to be trained to the extent that he or she can be an active component of any group proceeding in a dangerous area which may find itself under attack. Thus a Defence Force Magistrate (DFM) and a Judge-Advocate can be trained in the use of weaponry to that extent. So too the members of a court martial board. Not so members of the Military Court who so far as I can see may not even be compelled to sit anywhere they choose not to. Nor could they necessarily be trained to the required standard to be part of any group needing a defence from attack, not even if they had the required physical fitness. Nor could they be compelled to undergo such training.. So too there are occasions at sea where a Court Martial (CM) board or a DFM could be accommodated but it would be harder to assemble a military court

and its entourage. Moreover, it is much easier to defend military personnel than civilians and fewer persons than a larger number of non-combatants.

Different reasons apply to the choice between Courts Martial and DFM hearings. One DFM is easier to transport and protect than Restricted CM (JA plus 3) or General CM (JA plus 5) and a DFM or restricted CM is more easily assembled in the Naval context where ships are self-contained units operating in far flung areas in the oceans sometimes singly sometimes in groups than a General CM. There are other reasons too for choosing between DFM and CM hearings. For example DFMs may have expertise derived from their civilian experience in say complex fraud matters which members of a CM or a JA may not have. Or if they have had military experience in EOD they will be able to follow the evidence much more readily where explosive ordinance is concerned without the aid of an expert than a lay person or a supply officer or someone whose military experience is in another field. (I can recall two occasions where this has been useful in cases in which I have been the DFM).

Question 2.

> Senator JOHNSTON: The reason I raise the courts martial structure in schedule 3B of the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 is that I am not sure that, in terms of jury trials and any other matters, they accurately reflect the current courts martial structure exactly. Now, I do not expect you to answer that, because you have not come here ready to answer that—but could you have a look at it, because you have experience in courts martial and the provisions upon which they are built.
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> Mr Willee: I have, but there is a wealth of experience, and it will be before you when Air Commodore Cronan gives evidence. He has very good working knowledge of how courts martial currently work, so you might not have to wait until I have had a look at the matter and made some inquiries to get the answers. That is all I am saying. I am very happy to look at it and take it on notice.

I am unable to find any significant differences (other than attempted refinements) between it and the original procedure laid down in the DFDA. It also accords with my own memory of trial procedure as a judge-advocate and Defence Force Magistrate and with a recheck with the actual provisions of the DFDA where I had any doubt. Nonetheless, it is not difficult to miss something when trying to compare the truncated versions of the provisions of an amending act with an original version.