Law Council
OF AUSTRALIA

From the Office of the President

Catherine Gale

13 April 2012

The Hon Nicola Roxon MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

CONFIDENTIAL DRAFT MILITARY COURT OF AUSTRALIA BILL AND MILITARY COURT (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL

Thank you for offering the Law Council of Australia an opportunity to consider these Bills.

The following comments have been prepared with the advice and assistance of the Law Council's Military Justice Working Group. The Working Group's members have extensive experience in and around the Australian Defence Force (ADF) military discipline system and comprises two Queen's Counsel, one Senior Counsel and two lawyers, all of whom possess over 20 years legal experience and have served as ADF members or reserve officers.

The Working Group greatly appreciated your decision to delay introduction until June, as the original timeframe for consultation, introduction and passage was unworkable. Nevertheless, the Working Group has had a short period to consider these lengthy bills and these comments are therefore not conclusive or as detailed as the Working Group might have preferred.

The Working Group has recently also been provided with the Explanatory Memoranda which has greatly assisted their task. Regrettably, the Working Group was denied the opportunity to speak to the Judge Advocate General (JAG) and his deputies who, as serving judges, might be expected to have expert views of importance. The Law Council understands the JAG's views have been sought by the Department of Defence and hopes they will be carefully considered.

The Law Council recognises that there is apparently bi-partisan support for the concept of a Chapter III military court and that its objection to this model may therefore be academic. However, there are a number of issues of principle to be considered, which are enumerated as follows:

1. <u>Necessity</u>

   No compelling reason has been shown to dispose of the Courts Martial system, which has existed for as long as the ADF and has withstood numerous High Court challenges. The 2005 Review of the Effectiveness of Australia's Military Justice System did not find fault with the Court Martial system; the concern identified was with perceived undue influence by the chain of command in military discipline

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matters. Those concerns have largely been resolved by appointment of statutory independent Director of Military Prosecutions (DMP) and the proposed statutory appointment of the Director of Defence Counsel Services.

The risk of establishing this new edifice is that it will be subject to constitutional challenge on any number of grounds. A successful challenge would be very damaging to the ADF.

2. Trial by jury

The loss of trial by peers remains an issue of some concern. A General or Restricted Court Martial guarantees all servicemen and women the right to a trial by their peers. The fact it is trial by three or five members rather than 12 jurors is not to the point.

Trial by jury (TBJ) for serious offences, be it either by one's military peers or a civilian jury, has been an absolute cornerstone of the legal system for centuries. Even in those States where trial by judge alone is permitted, it is only by consent of the accused. There is no doubt that the proposed Military Court will have the power to deal with very serious offences indeed. Under the provisions of the Bill, it will have the power to sentence to imprisonment for life (clause 150) and unlike the previous regime where the conviction is limited to a defence purpose and not characterized as truly criminal in this legislation, conviction by the Military Court will be for a criminal offence.

It is one thing to remove rights to TBJ in respect of purely service offences. It is quite another to do so for a serious criminal offence.

3. Consent required for trial of serious offences

The Law Council notes the Military Court may be regarded as 'inferior' to all other superior Chapter III courts because it will have to obtain the Commonwealth Director of Public Prosecutions' (CDPP's) consent to trial of certain serious offences. The rationale for this is unclear. It appears to suggest that judges of the Military Court may be incompetent to deal with such offences. That requirement should be taken out of the proposed legislation. If it is retained, then at least in respect of serious offences the accused ought to have the right to insist that he or she could elect to have the DMP hand the matter over for prosecution by the CCDP or a State DPP and so retain the right to TBJ.

4. No trial on indictment

The status of the Military Court may also be diminished by the consideration that a newly-created superior criminal court cannot try on indictment, in contrast with other criminal courts in the common law system. Renaming of an indictment (the traditional way of dealing with serious offences such as those warranting life imprisonment) as a ''charge" may be regarded as nothing more than an attempt to circumvent the right to a TBJ (see *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556, at 582; and *R v Nicola* (1987) 79 ALR 469 at 474-476).

5. Two or three tiered process

The Law Council understands that a residual power will exist to convene a Court Martial in circumstances where the Military Court is unable to be deployed. The expectation is clearly that Courts Martial will be rarely used. This may lead to

circumstances where there are very few officers with experience of Courts Martial, meaning few if any officers will understand how to mount one, much less conduct one.

It also appears that replacement of the Courts Martial system with a Chapter III court is a repudiation of the former model as inferior. Accordingly, any person who is subject to Court Martial may have due cause for complaint that they have been subjected to a second-rate judicial process.

A third issue arises out of the potential for charges to be referred to a civilian court, which again raises questions about consistency for those who might be dealt with under any one of three separate judicial constructs in respect of the same charge.

The Law Council is concerned that any new Chapter III court may have constitutional flaws, particularly where the accused may face civil trial, military trial or Court Martial.

If these points are conceded, the Law Council makes the following general comments about the model now proposed and the Bills themselves:

(a) The Law Council considers the bills provide a logical and appropriate model of military justice, in language which is admirably clear. The drafters deserve commendation.

(b) The Law Council is pleased that the pool of military judges will be drawn from the Federal Court and Federal Magistrate's Court. Not only are such persons well qualified jurists, their appointment will allow the use of existing Court facilities, already built and maintained by the Commonwealth. Although the exigencies of military service may require particular trials to be held on military establishments or at remote locations, it will raise the standard of military justice for such trials to be heard in federal court rooms.

(c) A single court with two divisions is a sensible way of ensuring that serious and indictable matters are dealt with by judges and less serious matters by Federal Magistrates.

(d) Decisions by judges alone will mean that reasons will be given for verdicts, and a body of jurisprudence, informed by the general criminal law rules on admissibility of evidence, procedure, guilt and sentence will emerge, enhancing the standard and reputation of military justice. However, the need for the approval by the CDPP for matters, including sexual and drug offences which are not in the 'most serious' category, should be reconsidered. The Director of Military Prosecutions should have more discretion to deal with a wider variety and seriousness of matters, subject perhaps to veto by the CDPP.

(e) The Law Council supports the retention of the Judge Advocate General and his deputies in the system of petitions, which has worked well.

(f) The extension of military legal aid to the accused from trials to appeals is a welcome step, as is putting the Director of Defence Counsel Services on a statutory basis, comparable to the Director of Military Prosecutions.

(g) The modernisation of the mental impairment provisions is particularly welcome.

The Law Council makes the following further observations about specific provisions of the Bills:

(a) The proposed section 68 preventing the Military Court from making costs orders is out of step with civilian courts, except in respect of indictable offences. It had some basis when most individuals were represented at the summary level by members of the panels, however there is little provision made for those who may to choose a civilian lawyer to represent them in the Chapter III environment.

(b) Paragraph 202 of the draft Explanatory Memorandum for the Military Court of Australia Bill 2012, in respect of Clause 74, is misleading. The last sentence of that paragraph appears to imply that there is a right for service members to obtain a civil trial for any serious offence with which they are charged within Australia. No such right appears to exist within the Bill.

(c) Clause 87(1)(c)(ii) should be stated in terms of what the witness is expected to say, otherwise it may bind the witness to commit perjury. That division of the act does not seem to clearly require the prosecution to disclose to the defence the prior convictions of any witness it intends to call and it should. The defence will not be able to access the records of prior convictions of witnesses at either State or Federal level.

(d) With respect to clause 91, the Law Council considers removal of litigation privilege from the Defence in such a general way is dangerous. The Law Council considers that client legal privilege is a fundamental common law right and advises strongly against its abrogation – partial or otherwise – in any context, unless absolutely necessary to protect the administration of justice. It is not clear that a sufficient case is established to limit the privilege enjoyed by defendants in proceedings before the Military Court.

(e) The Law Council is concerned that the Military Court Bill requires that a punishment cannot be given without a conviction being recorded. This is contrary to the current position of all other civilian criminal courts where, at least for minor infractions, the Court has discretion to not record a conviction. There are sound reasons for this. The consequences of a recorded conviction may be far more significant than the actual penalty imposed, potentially impacting on employment (particularly where a security clearance may be required), entry into other countries, admission to certain professions, etc. While it is understood that the "conviction" in the Military Court will be recorded as a service offence, such offences will remain offences against a law of the Commonwealth. It also places a further restriction on the sentencing powers of the Court, which will be more limited in terms of the punishments it can issue, in any event. The Law Council also understands that convictions are to be imposed as a deterrent to avoid unnecessary election for trial by Military Court rather than by summary authority. However, this appears to be a particularly blunt instrument for that purpose and may have longer term ramifications for ADF members who are subject to trial in the Court (particularly as many offenders may be too young to appreciate such ramifications).

(f) Military personnel will be appointed to assist the Registrar of the Military Court, who will be subject:

i. only to the Public Service Code and not the DFDA; and

ii. the direction of the Chief Judge and Registrar and not to Military Command.

It appears that this provision is designed to further the perception of independence from the chain of command, which is essential. However, one concern that arises is that there may be some confusion as to the consequences of a breach of the Public Service Code. It is unclear what review rights will be available to the officer if a breach has occurred and some form of administrative penalty is imposed, whereas the consequences of a penalty under the DFDA are subject to clear rights of review. Further, for more serious breaches (such as, for example, unauthorised dealing with security classified or confidential material), what will be the implications in relation to the person's standing in the ADF?

The Law Council intends to make further submissions to any Senate inquiry established to consider these important bills.

Thank you for the opportunity to consider these Bills. If there are any queries, the Law Council contact for this matter is Mr Nick Parmeter

Yours sincerely,

Catherine Gale