Australian Government
Attorney-General's Department

Access to Justice Division

Military Court of Australia Bill 2012 and
Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012

Senate Legal and Constitutional Affairs Legislation Committee

Questions on notice

Senator Trish Crossin

[Question 1] Could the Attorney-General's Department (Department) provide a clear explanation and justification for the policy decision to exclude trial by jury before the proposed Military Court? Is it only that civilian juries will not adequately understand military service, could not be practically empanelled overseas and that judges are able to provide reasons for decisions (and juries are not)? Is there a specific policy justification for why trial by jury should not be available when an Australian Defence Force (ADF) member is tried for a serious service offence before the Military Court in Australia? Why should trial by jury not be available when an ADF member is tried before the Military Court for an ordinary civilian criminal offence?

As with the current courts martial system, trials in the Military Court of Australia will not be by civilian jury. The Government has decided that a Judge, with experience or knowledge of the nature of service in the ADF, sitting alone is the most appropriate means of hearing service offences before the court. This is not because there is a view that civilian juries would not adequately understand the nature of military service.

There are a number of policy reasons why trial by jury has not been proposed for the Military Court.

- In the current court martial system, the role of the court martial panel is not akin to a jury but rather as superior officers in the chain of command reinforcing the service discipline aspect of a service offence. While a jury may be perceived as discharging a similar role, a jury would in effect be performing a role more consistent with its civilian criminal offence underpinnings, rather than reinforcing service discipline as a core element of the military justice system.

- The Military Court will only try service offences and the use of civilian juries would blur the distinction between criminal and service offences. Service offences are complementary to, and do not replace, the criminal laws in force in Australia. The Military Court has jurisdiction to hear service offences only. There are some instances where a service offence may be seen to be similar to a civilian criminal offence. However, this does not mean that serious service offences should be tried in an identical way to criminal offences without recognising the unique purpose of service offences to substantially serve the purpose of maintaining or

enforcing service discipline. Jury trials would be available where service personnel are charged with criminal offences in accordance with the civilian system.

- Trial by a judge sitting alone means that service personnel will be provided with reasons for both conviction and sentence. This does not occur with current courts martial and would not occur with a jury trial. The provision of reasons provides greater transparency and fairness for service personnel, particularly in providing a clear basis for any appeal.

- Service discipline must be dispensed expeditiously and finally. The use of a judge alone trial allows the trials of service offences to occur quickly and reduces the possibility of retrial in situations where a jury has been unable to reach a unanimous verdict.

- The Military Court will have jurisdiction in relation to serious service offences committed outside Australia by Australian Defence Force members. It is important for a military justice system to be capable of operating effectively overseas where required as well as in Australia. Other Australian courts have limited jurisdiction over offences committed outside Australia. In situations where the Military Court decided that there is a need to try service offences overseas, the requirement to empanel a civilian jury would impose significant practical barriers to the prosecution of service offences.

[Question 2] What is the definition of the 'experience or training' required of judicial appointees to the Military Court to understand the nature of service in the ADF (subclause 11(b) of the Military Court Bill)?

Subclause 11(3) of the Bill provides for eligibility criteria for the appointment of judicial officers to the Military Court. Subclause 11(3)(b) of the Bill provides that a person must not be appointed unless, among other things, 'by reason of experience or training, he or she understands the nature of service in the Australian Defence Force'. The Military Court of Australia Bill 2012 does not include a definition of 'experience or training' for the purposes of subclause 11(3)(b) of the Bill.

Like any criteria for appointment, this would be applied on a case by case basis in relation to potential candidates for appointment. It is necessary to consider whether the candidate understands the nature of service in the Australian Defence Force by reference to experience or training. The criteria for experience and training could be met by demonstrating prior service in the Australian Defence Force (permanent, regular or reserve). However, the eligibility criteria do not require the person to have had prior service. If this were an eligibility requirement, this would reduce the flexibility of criteria for appointment and potentially have an impact on the perceived independence and impartiality of the Military Court.

There would be other ways that an applicant may gain the relevant experience or training which would make them suitable for appointment to the Court. However it is unlikely that academic study alone would be sufficient to satisfy subclause 11(3)(b). In the version of the Bill that was introduced in 2010 the criterion for appointment was expressed as 'experience or knowledge of the nature of service in the Australian Defence Force'. This has been changed in the version of the Bill as introduced in June this year. The new requirement for 'experience or training' is intended to incorporate a more practical basis for understanding the nature of service in the Australian Defence Force.

The Bill also requires appointments to the Military Court to be made in consultation with the Minister for Defence. Together, the criteria under subclause 11(3) of the Bill, including consultation with the Minister for Defence about proposed appointments to the Military Court, are designed to provide for appropriate consideration of the suitability of candidates in light of the role of the Court in the military justice system.

[Question 3] Is there any precedent for an Australian Chapter III federal court sitting in an overseas jurisdiction? Are there clear legal grounds for the position that the deployment of the Military Court to a foreign country will be determined to be constitutionally valid?

Division 2 of Part IIIA of the *Federal Court of Australia Act 1976* empowers the Federal Court of Australia to sit in New Zealand.

The Government has considered the constitutional position carefully, and does not consider there is any impediment to a Chapter III Court sitting outside Australia.

[Question 4] Are there any situations where an ADF member could be subject to both a civilian criminal court and the military justice system for the same offence? For example, a penalty imposed by a summary authority and a conviction for a civilian criminal offence for the same crime?

The Military Court of Australia (Transitional Provision and Consequential Amendments) Bill 2012 prevents a person being tried twice for a service offence in respect of an act or omission for which they have already been acquitted or convicted (Item 157 inserts a new s 190A into the *Defence Force Discipline Act 1982*). That prior acquittal or conviction can be either for a similar service offence, a civil court offence or an overseas court offence.

The question of whether a prosecution for a State or Territory criminal offence would be prevented from occurring because of a prior penalty imposed by a summary authority for a service offence would be an issue to be addressed by courts under relevant State or Territory law.

However, liaison arrangements between the ADF and civilian investigative and prosecution authorities minimise the potential for such circumstances to occur. The potential for double jeopardy in this regard has existed since the commencement of the *Defence Force Discipline Appeals Act 1982* in 1985. The Department of Defence has advised that it has never in practice presented a problem.

[Question 5] Mr Alexander Street SC has suggested appeals from the Military Court should be made to the Full Court of the Federal Court (Submission 2, p.10). Could the Department provide an explanation for why this approach was not taken in the Military Court Bill? Could you also outline the rationale for restricting appeals from the Military Court to the High Court (clause 113)?

Like the Federal Court of Australia, the Military Court of Australia will be a superior court of record: subclause 9(2) of the Military Court of Australia Bill 2012. The Military Court of Australia will hear appeals within its structure as follows:

- Appeals from a decision of a single Judge in the Appellate and Superior Division will be to a Full Court of the Military Court: subclause 98(1), and

- Appeals from a decision of a Federal Magistrate in the General Division will be to a Full Court of the Military Court or, if the Chief Justice considers it appropriate, to a single judge of the Appellate and Superior Division: subclause 98(2).

The Military Court of Australia will also hear appeals from the residual system of courts martial or Defence Force magistrates in the rare circumstances that these will operate. These rights of appeal are located within new Schedule 3B of the *Defence Force Discipline Act 1982* and are framed in accordance with the status of courts martial and Defence Force magistrates as non-judicial bodies.

In light of the status of the Military Court as a superior court of record, it is not necessary or appropriate for the Federal Court of Australia to hear appeals from the Military Court of Australia. The approach in the Bills is consistent with the approach for the Family Court of Australia, which is also a superior court of record. Appeals from the Family Court of Australia are not heard by the Federal Court of Australia.

The Bill allows dual appointments to the Military Court of judges of the Federal Court, which would enable access to the judicial experience of the general jurisdiction of the Federal Court of Australia. It is appropriate that appeals from the Military Court of Australia be heard by the High Court with special leave, similar to appeals from the Federal Court and Family Court.

The limitations on appeals to the High Court from the Military Court in clause 113 of the Military Court of Australia Bill 2012 are modelled on the limitations on appeals to the High Court from the Federal Court of Australia. Section 73 of the Constitution makes provision for Parliament to legislate for regulations and exceptions in relation to appeals to the High Court. These limitations are provided to ensure the efficient administration of justice. For example, the restriction on the right to appeal over a limited number of interlocutory decisions, which involve minor procedural matters, will reduce delays caused by appeals from these decisions. The requirement for special leave before certain appeals may be brought before the High Court has operated since 1976, and ensures that the High Court selects appropriate matters for determination by Australia's final appellate tribunal.

[Question 6] What types of programs are envisaged to ensure sufficient expertise is retained within the ADF to effectively operate courts martial and defence force magistrates trials overseas, should the need arise?

The Department of Defence has advised that a detailed program of proposed training cannot at this stage be supplied. However, it can be advised that:

- Defence is taking steps to capture the current expertise in the practice, procedures and functioning of the Registrar of Military Justice. This will enable that expertise to be available for convening authorities for when they are required to convene a court martial or refer a charge to a Defence Force magistrate.

- Defence is also developing procedural guidance for conducting courts martial and Defence Force magistrate trials which is intended to be incorporated into the Discipline Law Manual (a Defence publication). Defence has procedural manuals for use in courts martial and Defence Force magistrate trials from prior to the creation of the Registrar of Military Justice.

These manuals will be reviewed and amended to account for required changes made by the Military Court of Australia Bills.

- It is assessed that Prosecutors and Defending officers will not require any significant retraining in order to maintain the skills appropriate to effectively discharge their duties within a court martial or Defence Force magistrate trial.

- Defence does not currently supply training to court martial panel members on courts martial or Defence Force magistrate trials. It is not anticipated that that will need to change.

- Judge advocates are appointed after nomination by the Judge Advocate General and Defence Force magistrates are appointed by the Judge Advocate General. They are usually highly experienced lawyers who are familiar with trial procedures in civilian courts which do not differ greatly from the procedures in courts martial or Defence Force magistrate trials. Nevertheless, Defence accepts that it must be pro-active in developing policy, training and ensuring suitable appointments are made so that the expertise in courts-martial and Defence Force magistrate trials is retained at an appropriate level for use in the residual system of trials.

- The Judge Advocate General holds an annual conference for judge advocates and Defence Force magistrates and a mock-trial or similar training could be incorporated into that conference to ensure Defence retains a pool of judge advocates and Defence Force magistrates who are fit to deploy and familiar with the procedures to be employed.

[Question 7] Could the Department confirm that there are no substantial differences between the procedures for the current model of courts martial and defence force magistrates and the residual model proposed in the bills before the committee?

The Department of Defence has advised that there are no substantial differences in the procedures to be used during the trial by court martial or Defence Force Magistrate after the introduction of the Military Court of Australia. The residual system of courts martial and Defence Force magistrates will only operate where the Military Court of Australia has ruled that it is necessary to hear the trial overseas and that the Court is unable to sit overseas: see clause 51 of the Military Court of Australia Bill 2012. Some procedures before and after a trial have been revised and improved to allow for the introduction of the Military Court of Australia. These are outlined below.

Pre-trial

- Under new section 103C of the *Defence Force Discipline Act 1982*, the Director of Military Prosecutions either directs the superior authority to convene a court martial or directs the superior authority to refer the charges to a Defence Force magistrate: Item 73 of Schedule 1 of the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012. A 'superior authority' is a senior Australian Defence Force Officer appointed in writing by the Chief of the Defence Force or a Service chief. The superior authority is responsible for the administrative aspects of a court martial or Defence Force magistrate hearings. The superior authority will be responsible for matters such as selection of officers for the court martial panel and an adequate number of panel reserves, issuing summons for (or ordering)

witness's attendance and fixing the time and place of the court martial. These functions are currently performed by the Registrar of Military Justice, which appointment will not be necessary when courts martial and Defence Force magistrate trials are held in the limited circumstances outlined above.

- At any time prior to entering a plea the accused person can apply to be tried by the Military Court of Australia instead of the court martial or Defence Force magistrate on the basis that circumstances have changed since the Military Court of Australia made its ruling: see new paragraph 103C(2)(d) of the *Defence Force Discipline Act 1982* inserted by item 73 of Schedule 1 of the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012.

Trial

- Instead of the rules of evidence that apply in criminal proceedings in the Jervis Bay Territory as modified by the *Defence Force Discipline Regulations 1985*, courts martial/Defence Force magistrates will use the rules of evidence that apply for the Military Court of Australia, that is the *Evidence Act 1995* (Cth) and Parts 2, 4 and 4A of the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*.

- A number of modernised provisions, such as those relating to mental impairment at the time of the conduct alleged to constitute a service offence, will apply. Similar provisions will also apply to trials in the Military Court.

- The judge advocate/Defence Force magistrate can, during the trial, refer questions of law to the Military Court of Australia. This may be on their own initiative or at the application of the accused, the Director of Military Prosecutions, the Chief of the Defence Force or a Service chief. The judge advocate/Defence Force magistrate cannot proceed in a manner inconsistent with the opinion of the Military Court of Australia.

Appeal

- Appeals from a court martial or Defence Force magistrate are to the Military Court of Australia (rather than the Defence Force Discipline Appeal Tribunal).

- In addition to the accused's right of appeal, the Director of Military Prosecutions will have a right of appeal to the Military Court of Australia on punishments or in relation to reparation or restitution orders made.

- The Director of Military Prosecutions can, after the trial, refer questions of law to the Military Court of Australia in relation to a decision of the court martial/Defence Force magistrate or the reviewing authority. Any such referral cannot affect the acquittal of the person.

[Question 8] Is there sufficient justification for the residual use of courts martial and defence force magistrates given the likely problems which will likely arise when two systems of military justice operate simultaneously? Will those tried before courts martial or defence force magistrates be able to claim their cases are being heard in inferior forums?

The Military Court of Australia Bills do not provide for two systems of military justice to operate simultaneously. The residual system of courts martial and Defence Force magistrates would only operate in the rare circumstances where the Military Court determines that it is necessary, but not possible, for the Military Court to conduct a trial overseas.

It is expected that most cases would be heard by the Military Court sitting in Australia. If the Court determines that it is necessary to sit outside Australia, the Court will also need to determine whether it is possible to sit outside Australia having regard to the circumstances set out in clause 51(4) ie security consideration, any relevant Australian or foreign laws, and any relevant international agreements that may be in place between Australia and that country.

It is important that the courts martial and Defence Force magistrate system can be used as a fall-back option to ensure the maintenance of discipline in the Australian Defence Force when the trial of a service offence needs to take place overseas and the Military Court of Australia is unable to sit in that overseas place. If Australian jurisdiction under the *Defence Force Discipline Act 1982* was not able to be exercised, accused persons may be subject to the jurisdiction of foreign nations or international tribunals.

The residual courts martial or Defence Force magistrate system will include improved procedures outlined in the response to question 7 above.

Additional Question on Notice – Senator Crossin

Could the Attorney-General's Department elaborate on the rationale for the wording of clause 12(1) of the Military Court Bill, which appears to exclude serving state and territory judicial officers from appointment to the Military Court? This arrangement does not accord with subsection 6(5) of the *Federal Court of Australia Act 1976* which provides that a person may hold office at the one time as a judge of the Federal Court (other than Chief Justice) and as a judge of a supreme court of a state or territory.

Clause 12(1) of the Military Court of Australia Bill is intended to allow for the possibility of dual appointments to the Military Court and other federal courts. The number of cases heard in the military court is likely to be small (50-100 cases per year heard in the General Division by Federal Magistrates and less than 10 cases in the Appellate and Superior Division). Dual commissions will provide for flexibility in the management of the military caseload.

The Bill is silent on the issue of appointment of serving state or territory judges to the Military Court. The appointment of serving state or territory judges to the Military Court would raise practical and operational issues in terms of state and territory court responsibilities of those judges. These issues would need to be dealt with through agreements between relevant heads of jurisdiction regarding work arrangements as well as legislative changes to deal with remuneration.

An example of a dual appointment of State Judges to federal courts is the appointment of all Judges of the Family Court of Western Australia to the Family Court of Australia. Section 24 of the *Family Court Act 1997* (WA) removes the state salary and pension entitlements of WA Judges holding dual commissions and subsection 22(2A) of the *Family Law Act 1975* (Cth) support this particular arrangement.

Subsection 6(5) of the *Federal Court of Australia Act 1976* is intended to encourage the temporary transfer of Judges of the Federal Court, other than the Chief Justice, to state and territory courts. This provision was included in the Act in 2009 to encourage existing arrangements for Judges of the Federal Court to hear matters in superior State Courts. Temporary transfer of state and territory judges to a Chapter III court is not possible.