

Attorney-General's Department submission

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

The Attorney-General's Department provides the following information to clarify the approach taken in the Bill on a number of issues raised in other submissions and evidence provided to the Committee at its hearing of 14 September 2012.

This submission was foreshadowed at the hearing and supplements the evidence given by the Department at the hearing and the response provided by the Department to questions on notice.

Discipline within the system for military justice

It has been suggested to the Committee that there is a distinction between the military discipline system (by which command enforces discipline) and a military justice system (which would be achieved by the Military Court).

The establishment of the Military Court is not intended to change the essential nature of the military justice system. The 2005 report of the Foreign Affairs, Defence and Trade Committee described the military justice system as including the discipline system (dealing with offences under the *Defence Force Discipline Act 1982*) and the administrative system (dealing with matters affecting administration, command and control). To describe a distinction between the Court dispensing military justice and command dispensing military discipline does not take into account administrative law mechanisms which are also part of the broader military justice system.

The discipline system, within which the Military Court would be established, is, and will continue to be, a single system to deal with service offences which are created for the essential purpose of maintaining and enforcing service discipline.

The system provides for the appropriate method of enforcing and maintaining discipline, depending upon the seriousness of the alleged offence. The Military Court of Australia will have jurisdiction over serious service offences. Less serious service offences will continue to be dealt with by summary authority.

All parts of the discipline system, whether it is summary authorities or the Military Court, are directed to provide fair and appropriate enforcement and maintenance of service discipline. All members of the Australian Defence Force charged with a service offence will have the right to elect to have their charge dealt with by the Military Court.

Judicial officers of the Military Court

The Military Court of Australia will be a permanent court established in accordance with Chapter III of the Constitution. The Court will be dedicated to the trial of serious service offences. The independence and expertise of judicial officers will be an important element of the Court's effectiveness in a permanent system of military justice.

The terms of appointment of judicial officers are in accordance with section 72 of the Constitution. Judicial officers of the Military Court of Australia will have tenure until age 70. Persons currently serving in the Australian Defence Force would not be eligible for appointment as a Judge or Federal Magistrate of the Military Court.

Recognising that the Military Court will be a specialist court dedicated to the trial of serious service offences, it is important that judicial officers understand the nature of service in the Australian Defence Force. This is reflected in the eligibility criteria for appointment.

It will be a matter for the Government to decide the number of judicial appointments based on anticipated workload of the Military Court. The number of military matters is expected to be very small in comparison to the significant volume of matters the federal courts hear each year. For cases that will be heard by Federal Magistrates in the General Division, this is anticipated to be between 50-100 cases annually. For cases that will be heard in the Appellate and Superior Division, this will only be a handful.

Dual commissions may be offered to existing federal court judges and Federal Magistrates who have experience and knowledge of the nature of service in the Australian Defence Force to provide flexibility in the management of the military caseload (cl 12). This would include the position of Chief Justice of the Military Court.

Powers of the Director of Military Prosecutions

Issue: the Director of Military Prosecutions should not be given power to prosecute civilian offences as if a military offence.

The Military Court cannot try criminal offences alleged against members of the Australian Defence Force. Service offences will remain distinct from criminal offences. The DFDA complements, and does not replace, Australian criminal law.

The DFDA provides that service offences with very serious criminal law equivalents, such as murder and sexual assault, require the Commonwealth Director of Public Prosecution's consent for prosecution in the military justice system (s 63).

An agreement between Australia's Directors of Public Prosecutions and the Director of Military Prosecutions provides for consultation and cooperation between these authorities to address any overlap between service offences and criminal offences.

When tried by a State criminal court, members of the Australian Defence Force who commit criminal offences continue to be tried by a jury in accordance with the civilian law system.

Issue: the Director of Military Prosecutions should not have power to prosecute any offence under s60 of the DFDA to expose ADF personnel to a criminal record for prejudicial conduct.

A conviction by the Military Court, when recordable and disclosable, will be shown as a conviction for a service offence, not a criminal offence (Item 157 of the Transitional Provisions & Consequential Amendments Bill).

The Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 amends the DFDA to clarify the character of service offences as offences against the law of the Commonwealth.

Punishments

Issue: Punishment for disciplinary offences of detention in excess of 30 days (up to 2 years detention)

It has been suggested that members of the ADF are subject to greater disciplinary punishment than can be imposed on prisoners of war (see Article 90 of the Geneva Convention – Prisoners of War: ‘*The duration of any single punishment shall in no case exceed 30 days*’).

The Military Court may impose the same punishments on a convicted person as those currently available under the DFDA, with the exception of reprimands.

It should be noted that a prisoner of war remains subject to their own disciplinary code and may be subject to punishments in excess of 30 days after post-conflict repatriation.

Jurisdiction of the Military Court

Issue: Removal of the jurisdiction of the Federal Court of Australia in relation to s75(v) of the Constitution under the Judiciary Act 1903

Section 39B(1) of the *Judiciary Act 1903* provides that the original jurisdiction of the Federal Court includes jurisdiction in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. New section 39C of the *Judiciary Act* removes this jurisdiction of the Federal Court in relation to decisions of Commonwealth officers to prosecute service offences in the Military Court (Item 36 of the *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill*).

The Military Court is established as a superior court of record by clause 9(2). As a superior court, it is appropriate that the Military Court has exclusive jurisdiction to hear judicial review matters that relate to decisions of Commonwealth officers to prosecute a person in the Military Court for service offences.

A decision of the Director of Military Prosecutions should be reviewable by the Military Court rather than the Federal Court.

Issue: Additional jurisdiction for the Military Court including war crimes

The Military Court is intended to be a specialist court that only has jurisdiction to hear service offences.

Appeals

Issue: adequacy of grounds of appeal

The current grounds of appeal were developed for appeal from quasi-judicial bodies.

The grounds of appeal in the Military Court are broadly consistent with the appellate systems of other federal courts. The Military Court must allow an appeal against conviction if satisfied that judgment should be set aside on the grounds of a wrong decision of any question of law or that there has been a substantial miscarriage of justice (cl 105(1)) and against sentence if the Court is satisfied that some other sentence (whether more or less severe) is warranted in law (cl 105(3)).

The Military Court will have the ability to allow any other appeal if satisfied that it is in the interests of justice to do so (cl 105(4)).

Transitional arrangements

The Attorney-General must declare a day to be the appeal proceedings completion day (Item 17(3) Part 4, Sch. 5 Military Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2012.

This day must be after all appeal proceedings before the Defence Force Discipline Appeals Tribunal or the Federal Court under the old law have been finally determined.

While appeals to the High Court are not specifically mentioned, it would be open to the Attorney-General to take into account any possibility of an appeal to the High Court under the old law in making a declaration of the appeal proceedings completion day.