



CDF/OUT/2012/601

**MS J. DENNETT**  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Ms Dennett,

Thank you for your letter of 3 July 2012 inviting me to make a submission to the Senate Legal and Constitutional Affairs Committee on the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 (the Bills). I am responding on behalf of the Australian Defence Force (ADF).

The ADF strongly supports the Bills and Defence has been closely involved with their development.

The Bills will provide welcome and long-term certainty for the ADF concerning the trial of serious service offences. The highest standards of judicial impartiality and independence will provide confidence for ADF personnel in the fairness of the military justice system.

A dedicated court with specialised jurisdiction reflects the importance of discipline to operational effectiveness and will assist in the expeditious trial of charges. Allowing for judicial officers to be dual-appointed to other courts and making use of existing Federal Court of Australia resources and registry services is the most flexible and efficient way to provide for a court with a small and fluctuating caseload.

I am pleased that the Military Court of Australia will possess a strong service character as this will assist ADF members in identifying with its important role. ADF officers will prosecute and defend matters before the Court, while provision is made to allow ADF personnel to support the Court in certain administrative and ceremonial roles. The Court will be able to sit overseas in operational theatres and will be able to sit in Australia at ADF bases. Most importantly, in order to qualify for appointment to the Court as a Judge or Federal Magistrate, a person must by reason of experience or training understand the nature of service in the ADF. This will ensure that the justice delivered by the Court will be sensitive to the maintenance and enforcement of discipline within the ADF, thereby contributing to the ADF's operational effectiveness.

I am also pleased that the Bills will enact a number of other significant military justice reforms. For example, the Bills will modernise the *Defence Force Discipline Act's* unfitness for trial and mental impairment provisions, bringing them into line with other Commonwealth legislation. They will also provide for statutory recognition of the role and functional independence of the Director of Defence Counsel Services. Most importantly, all ADF personnel charged with a service offence that is to be dealt with summarily will have the option to elect that the charge be heard by the Military Court of Australia, if they so choose.

The Bills will broaden appeal rights, particularly for the Director of Military Prosecutions (DMP). Under present arrangements, the DMP has no appeal rights from the decisions of courts martial or Defence Force magistrates. The Bills remedy this by allowing the DMP to refer a question of law to the appellate jurisdiction of the Court while not affecting a person's acquittal. Additionally, any judgement or decision of the Court will be appealable, and this will enable an accused or the DMP to challenge a wider range of judicial determinations, such as interlocutory and bail decisions.

The Bills also balance accountability and fairness in clarifying the status of a conviction for a service offence. The Bills provide that a service offence is an offence against a law of the Commonwealth, but the record of that conviction will note that it is a conviction for a service offence not a criminal offence. Convictions imposed by summary authorities and by the Military Court of Australia for certain offences of a purely disciplinary character (such as absence without leave) will be disclosable for service purposes only. This will ensure that ADF members convicted of less serious service offences are not prejudiced unfairly in their civilian lives by the fact of having been convicted of an offence against a law of the Commonwealth. Conviction by the Military Court of Australia for a serious service offence will, by contrast, be disclosable to civilian prosecuting and law enforcement authorities. This will ensure that those guilty of having committed a serious service offence are held fully accountable for their actions. Indeed, the Bills expressly empower the Service Chiefs to report this information to civilian agencies and organisations where necessary.

Lastly, I wish to emphasise that the Bills provide for circumstances in which the Military Court of Australia finds it is necessary to sit overseas but is unable to do so by preserving a residual system of courts martial and trials by Defence Force magistrate. This means that the Bills retain a fully deployable military justice capability, able to meet the needs of the ADF across the full spectrum of current and possible future operational environments.

In closing, I note that commanders will continue to deal summarily with the overwhelming majority of service offences (approximately 96% of charges for service offences are disposed of summarily). Nevertheless, the changes proposed by the Bills will mean that the Australian people and the ADF can have confidence that the trial of ADF personnel charged with serious service offences will conform to the highest standards of independence, impartiality and fairness.

Yours sincerely,

D.J. HURLEY AC, DSC  
General  
Chief of the Defence Force

16 July 2012