



Law Council  
OF AUSTRALIA

Professor (Emeritus) Sally Walker  
Secretary-General

12 July 2012

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary,

**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE MILITARY COURT OF AUSTRALIA BILL 2012 AND MILITARY COURT OF AUSTRALIA (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2012**

The Law Council of Australia appreciates the opportunity to make a submission to the Senate Legal and Constitutional Affairs Inquiry into the *Military Court of Australia Bill 2012* and *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012*.

The Law Council has assisted in the development of the Bills, commenting on exposure draft legislation in March 2012 and meeting with representatives from the Australian Defence Forces and the Attorney-General's Department. Concerns expressed with the exposure draft legislation are outlined in the letter attached and should be of assistance to the Committee.

The Law Council's Military Issues Working Group, comprised of presently-serving and recently-retired officers from all three services, have reviewed the Bills and support their introduction. In particular, the Law Council expresses thanks to the Attorney-General for making a series of amendments to the draft exposure legislation based upon the feedback provided. These amendments include:

- providing discretion for the Military Court to award costs in respect of appeals;
- clarifying the operation of section 19B of the *Crimes Act 1914* in relation to the Military Court of Australia, enabling the Military Court to deal with a matter without proceeding to conviction;
- clarifying the processes applying where an ADF member providing administrative or liaison assistance to the Military Court breaches the APS Code of Conduct under the *Public Service Act 1999*, including the way in which the *Defence Force Discipline Act 1982* will operate; and
- removing the proposed partial abrogation of litigation privilege in pre-trial disclosures.

While the Law Council appreciates the amendments, some concerns raised on the draft exposure legislation remain. This includes a potential for abrogation of loss of trial by jury

Although the explanatory memorandum states that 'neither military nor civilian juries have traditionally been used in the military justice system', a General or Restricted Court Martial guarantees all servicemen and women the right to a trial by their fellow ADF members.

The Law Council is confident that judges from the Federal Court and Federal Magistrate's Court will be able to adjudicate cases before the Military Court. It is noted that all charges will be tried without a jury, however given the serious offences considered by the Military Court and the capacity for the Military Court to impose sentences of life imprisonment, trial by peers should not be abrogated.

The Law Council also notes the operation of the Court with no trial on indictment. This is an issue where we perceive there would be a challenge to the validity of the Court.

Section 63 of the *Defence Force Discipline Act 1982*, as amended, provides that proceedings may only be instituted in a service tribunal (which includes a Court Martial) or the Military Court for the more serious criminal offences with the consent of the Director of Public Prosecutions. The Law Council notes that this is at odds with other Chapter III courts. One effect is that it may restrict the court to dealing with less serious offences because there will be no imperative to educate military lawyers to the standard required to deal with the most serious criminal offences. Additionally this may also inhibit the recruitment of military lawyers who wish to achieve a higher standard of training and practice than the service environment can provide. The Law Council is of the view that there should be an increase in the power of the military director of prosecutions, at least to the equivalent of those of the Commonwealth director of public prosecutions.

Aside from the above issues, the Law Council supports the Bills and their passage, recognising the bipartisan support they hold.

As with the consultation process for the exposure draft legislation, the Law Council again expresses disappointment at the limited amount of time provided for feedback. The Bill was introduced into Parliament on 21 June 2012, the Senate Inquiry was announced on 28 June 2012 and submissions are due by 13 July 2012. Given the complexity and scale of the measures the time provided is insufficient to give detailed commentary. Due to time constraints this submission has not been considered by the Directors of the Law Council of Australia.

The Law Council contact for this matter is Mr Simon Henderson

Yours sincerely,

**Professor Sally Walker**  
**Secretary-General**

Attachment:

- Letter to The Hon Nicola Roxon MP, Attorney-General, 'Confidential Draft Military Court of Australia Bill and Military Court (Transitional and Consequential Provisions) Bill, 13 April 2012.