

# **FREQUENTLY ASKED QUESTIONS ON THE AUSTRALIAN MILITARY COURT**

## **OVERVIEW OF THE AUSTRALIAN MILITARY COURT**

### **What is the Australian Military Court?**

The Australian Military Court will meet the disciplinary needs of the ADF in maintaining and enforcing Service discipline by trying more serious or complex Service offences.

The Australian Military Court commenced on 1 October 2007, and will also provide the ADF with a fair and impartial military court, reflecting a world's best practice military trial system. The blend of jurisdiction, military judges, military juries and rights of appeal is not found in any other allied Defence Force discipline system. The best elements of these other systems have, however, been taken into consideration in the reform of our system.

The Australian Military Court is independent of the Service chains of command (to enhance its impartiality), and replaces and modernises the previous trials by courts martial (military line officer presiding with panel members and a judge advocate) and Defence Force magistrates (legal officer appointed by the command).

The Australian Military Court will deal with the same types of offences as those dealt with under the previous system of trials by courts martial and Defence Force magistrates.

### **Why has it been established?**

The Government's response to the 2005 Senate Foreign Affairs, Defence and Trade References Committee report into *'The Effectiveness of Australia's Military Justice System'* was tabled in Parliament on 5 October 2005. The Government agreed to establish a permanent 'Australian Military Court' under appropriate Defence legislation (the *Defence Force Discipline Act 1982*), that would satisfy the principles of impartiality, judicial independence and independence from the chain of command.

## **WHY HAVE A SEPARATE SYSTEM OF MILITARY JUSTICE?**

### **Why does the ADF need a separate system of military justice?**

The purpose of a separate system of military justice is to allow the ADF to deal with matters that relate directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.

Comparable military courts to the Australian Military Court have been established by Australia's common law allies. Military tribunals for the trial of military offenders have co-existed with the history of militaries.

Defence personnel are subject to civil law and military law at all times. Breaches of military discipline must be dealt with speedily and, sometimes, more rigorously than if a civilian engaged in such conduct and prosecuted under the civilian criminal justice system.

Some offences are considered far more serious (that is, impacting on discipline) when committed in a military context than if committed under the civil law – for example an assault on a superior or a subordinate, petty theft and drug offences. Such offences may have serious implications for Service discipline and morale, and may seriously undermine the authority of a commanding officer to maintain effective discipline.

Additionally, the *Defence Force Discipline Act 1982* provides for Service offences that are specific to the ADF and the conduct of military operations such as absence without leave, desertion, and mutiny for which there are no civilian equivalent offences.

It would not be practical nor meet the operational needs of the ADF for such offences to be determined by civil authorities. The need to maintain and enforce Service discipline within the ADF arises in all geographical locations no matter where the ADF is deployed, in peacetime, times of conflict and during peacekeeping operations.

The Australian Military Court has been created by Parliament under the defence power of the Australian Constitution. Military service tribunals are established under the *Defence Force Discipline Act 1982* for the specific purpose of maintaining and enforcing Service discipline. The High Court in a line of recent decisions has held that the defence power authorised the establishment of Service tribunals outside Chapter III of the Constitution.

### **When will matters be referred to the civilian courts?**

Where appropriate, and available, civilian criminal matters will continue to be referred to the civilian jurisdictions. The current provisions requiring the consent of the Commonwealth Director of Public Prosecutions for the institution of proceedings for certain serious offences that are committed in Australia, such as treason, murder, manslaughter and serious sexual offences, will also be retained.

## **KEY FEATURES OF THE AUSTRALIAN MILITARY COURT**

### **What are the key features of the deployable Australian Military Court?**

- Statutory appointment of military judges (qualified legal officers) by the Governor-General;
- Security of tenure (10-year fixed term appointments);
- Security of salary with remuneration set by the Commonwealth Remuneration Tribunal;
- Appointment and termination by the Governor-General;
- Sufficient para-legal support to be self administering; and
- Judges to sit alone or with a military jury in the case of more serious offences (military judges presiding).

### **Why is the Australian Military Court deployable?**

A principal factor of the Australian Military Court is its preparedness and ability to sit in an operational environment in order to meet the operational needs of the ADF.

The Australian Military Court must be deployable so as not to unnecessarily impede the conduct of military operations, by bringing all offences back to Australia for trial. This helps ensure operational effectiveness through the timely maintenance of discipline and morale.

The Australian Military Court can also provide a 'stand alone' disciplinary code where a civilian jurisdiction may either not apply or does not exist.

## **LEGAL FRAMEWORK**

### **What is the legal framework within which the Australian Military Court operates?**

The *Defence Legislation Amendment Act 2006* (the Act) to create the Australian Military Court was passed by Parliament on 5 December 2006 and received Royal Assent on 11 December 2006.

The Australian Military Court will only exercise jurisdiction under the *Defence Force Discipline Act 1982*, where proceedings can reasonably be regarded as substantially serving the purposes of maintaining and enforcing Service discipline.

The Act has also introduced enhanced rights of appeal, available by the accused and the Director of Military Prosecutions on both conviction and punishment to the Defence Force Discipline Appeals Tribunal (presided over by tribunal members who may be Federal Court, State or Territory Justices or Judges).

A Director of Defence Counsel Services has also been administratively established to manage the national pool of defence counsel from which an accused may select. Legal representation for the accused is provided at Commonwealth expense, at no cost to the accused.

As determined by various High Court rulings, jurisdiction under the *Defence Force Discipline Act 1982* for Service offences may only be exercised where proceedings 'can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline' – a purpose different from that served by the civilian criminal law system.

The Act has also introduced rights of appeal from decisions of the Australian Military Court to the Defence Force Discipline Appeals Tribunal (presided over by tribunal members who may be Federal Court, State or Territory Justices or Judges). In the case of the convicted person an appeal is available on both conviction and punishment or court order. In the case of the Director of Military Prosecutions an appeal is available for punishment or order only.

The Australian Military Court does not increase the jurisdiction beyond that of the Service tribunals it replaced. In respect of serious offences committed within Australia such as treason, murder, manslaughter and serious sexual offences, the consent of the Commonwealth Director of Public Prosecutions is still required.

### **How will the Australian Military Court ensure its impartiality and judicial independence?**

The Australian Military Court is a permanent statutorily established service tribunal, independent of the Service chains of command and executive, to enhance its impartiality. The Chief Military Judge reports to Parliament, not the Service chains of command.

Military judges are statutorily appointed by the Governor-General and have security of tenure (fixed terms) and remuneration set by the Commonwealth Remuneration Tribunal, further enhancing their independence from the Service chains of command.

The court has appropriate administrative support, led by the statutorily appointed Registrar, (replacing the administrative functions of Convening Authorities) so that it can function independent of the chain of command and executive.

All prosecutions before the court will be through the office of the statutorily independent Director of Military Prosecutions, replacing Convening Authorities from the chain of command.

## **KEY APPOINTMENTS, ROLES AND SELECTION**

### **What are the key appointments?**

The Australian Military Court is presided over by the Chief Military Judge and two permanent military judges, all of whom are ADF legal practitioners appointed by the Governor-General. The legislation also provides for a part-time reserve panel of up to eight military judges.

The Australian Military Court has a statutorily independent Registrar of the Australian Military Court for its administration and appointment of military jurors.

*\*See attached Media Release and Biographies\**

### **How were the Chief Military Judge and two permanent military judges selected?**

An independent merit selection process was used for the appointment of the Chief Military Judge and two permanent military judges. This merit selection process considered attributes such as experience, professional knowledge and expertise, and personal qualities and they were selected from current qualified Permanent and Reserve ADF legal officers and other persons that satisfied the statutory selection criteria.

Two of the principles underpinning the Government Response to the 2005 Senate Committee Report into *'The Effectiveness of Australia's Military Justice System'* are to improve impartiality and transparency in the military justice system. The independent merit selection process for recommending candidates for military judge appointments gave effect to these principles, which in turn helped to promote confidence in the system. The merit selection process allowed all eligible applicants an opportunity to be considered without discrimination or pre-determination.

### **How long will the fixed term appointments be for military judges?**

Military judges will be appointed for a 10-year term in order to provide security of tenure for the term of appointment and to provide an incentive for legal officers to regularly aspire to these highest positions. The 10-year terms also allow for one automatic promotion to a maximum rank at the mid term (5 year mark) of the appointment. This is an additional incentive for those aspiring to these positions.

The fixed term appointment caters for both judicial independence and the career progression of military legal officers to the few high ranking/highly remunerated positions that are available to them. This will further increase the levels of experience of the court, and the attractiveness of the positions for future military judges.

## **CONDUCT OF THE AUSTRALIAN MILITARY COURT**

### **How does the Australian Military Court work?**

The Australian Military Court conducts trials by military judge and military jury and in certain cases by military judge alone. The military judges are independent from the Service chains of command and executive in the performance of their judicial functions.

The military jurors perform a role akin to jury members in a civilian court system and determine on the evidence whether an accused person is guilty or not guilty of the Service offence.

If an accused is found guilty, punishment as provided for by the *Defence Force Discipline Act 1982* is imposed by the presiding military judge, taking into account the sentencing principles applied by civil courts and the need to maintain discipline in the Defence Force.

The trial procedures of the Australian Military Court are very similar to those of civil courts exercising criminal jurisdiction. The general principles and laws of criminal responsibility as provided for within the Criminal Code (Commonwealth) apply in respect of Service offences prosecuted before the Australian Military Court.

The presumption of innocence to the accused applies as it does in a civil court which means that the prosecution is obliged to prove the case against an accused beyond reasonable doubt.

All prosecutions will be conducted through the office of the statutorily independent Director of Military Prosecutions.

A new Director of Defence Counsel Services provides legal representation for the accused.

## **MILITARY JURIES**

### **What will be the composition of a military jury?**

The military jury provisions have been established to require a 12 person military jury for the most serious offences (these offences include those set out in *Defence Force Discipline Act 1982* section 61, which cannot be tried inside Australia without the consent of the Commonwealth Director of Public Prosecution under section 63, such as murder and manslaughter, serious sexual offences as well as other serious offences). The less serious service offences have a provision for a 6 person military jury, subject to an election for mode of trial (military judge alone or military judge and military jury) by the accused.

Additionally, the rigour of decisions has been enhanced by the legislation to provide for unanimous decisions, but where these cannot be achieved, special provision has been made for a majority verdict 10/12 or 5/6 decision, similar to a number of Australian civilian criminal jurisdictions provided certain conditions are met.

## **MILITARY OFFENCES**

### **What kind of offences will be tried by the Australian Military Court?**

The Australian Military Court will meet the disciplinary needs of the ADF in maintaining and enforcing Service discipline by trying more serious or complex Service offences. The Australian Military Court will only exercise jurisdiction under the DFDA where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline, including for offences committed outside of Australia. Where appropriate, and available, civilian criminal matters will continue to be referred to the civilian jurisdictions.

Some examples of offences that may be tried by the Australian Military Court include those committed while deployed on military operations in Australia and overseas, including assaults, theft, and offences concerning Service property, fraud, and drug offences.

The Australian Military Court has jurisdiction to try all offences committed by Service personnel overseas subject to host nation laws and Status of Forces Agreements and provided such proceedings can reasonably be regarded as maintaining or enforcing Service discipline.

### **What is the new service offence regime?**

The *Defence Legislation Amendment Act 2006* restructures the existing military offences into a new categorisation of Class One, Two and Three offences. The characteristics of the offence determine which class that offence falls within, with the more serious service offences being Class One offences. All Class One, Two and Three offences are outlined in the Act and replicate the current service offences in the *Defence Force Discipline Act 1982*.

### **What is a Class One, Two and Three offence?**

Class One offences include the more serious offences – such as offences relating to operations against the enemy and desertion and serious offences such as murder, manslaughter and serious sexual offences.

Class Two offences include certain drug offences, certain fraud offences and other offences that are neither Class One or Class Three offences.

Class Three offences will comprise the majority of service offences tried by the Australian Military Court. They will normally include more serious offences of theft, fraud, and assault, and other offences referred to the Court.

## **PUNISHMENTS AND OUTCOMES**

### **What outcomes can result from a trial at the Australian Military Court?**

An accused person may be acquitted or found guilty on the evidence heard and determined by the Australian Military Court. The *Defence Force Discipline Act 1982* provides that if found guilty, a range of punishments may be considered by the presiding military judge in exercising sentencing discretion, including the imposition of a fine or reduction in rank and in the more serious cases, imprisonment, detention and dismissal from the Australian Defence Force.

## **WHAT WILL HAPPEN TO CURRENT COURTS MARTIALS AND MATTERS UNDERWAY?**

### **What will happen to the trials by courts martial and Defence Force magistrates currently underway, now that the Australian Military Court has commenced?**

Trials by courts martial or Defence Force magistrate which have been commenced prior to 1 October 2007 and where the accused has already been asked to plead, will continue under the previous system until they are completed.

Where the Director of Military Prosecutions has requested imposition of a punishment by court martial or Defence Force magistrate and evidence has already begun to be heard, then these part heard matters will continue under the previous system until they are completed.

Other transitional arrangements are provided for in the Act which facilitate seamless trial disposal under the previous system and into the new.

## **LOCATION**

### **Where will the Australian Military Court be located?**

The Australian Military Court will sit in any location in Australia and overseas in order to meet the discipline needs of the Australian Defence Force.

The Australian Military Court HQ office will be temporarily located at the RG Casey building (DFAT) in Barton (Canberra) until their permanent accommodation is finalised in early 2008.

## **FAIR TRIALS**

### **How do you know ADF members will be given a fair trial?**

The general principles and laws of criminal responsibility as provided for within the Criminal Code (Commonwealth) apply in respect of Service offences prosecuted before the Australian Military Court. The onus and standard of proof in disciplinary proceedings before the Australian Military Court are generally the same as in proceedings before a civilian court. Trials with a military jury are akin to a civilian jury trial, but conducted within a military environment.

The selection of the Chief Military Judge and military judges was made through an independent merit process. They were selected from qualified Permanent and Reserve ADF legal officers and other persons who satisfied the statutory selection criteria. The Chief Military Judge and military judge appointments are made by the Governor-General.

Specific employment conditions have been put in place to ensure independence, impartiality and security of tenure of the military judges, including the Chief Military Judge.

The Australian Military Court proceedings will be open to the public except where the court decides it would be inappropriate to do so (for example, if it would be contrary to the interests of security or defence of Australia, the proper administration of justice or public morals).

The Australian Military Court is one of a range of enhancements to the military justice system being introduced by Defence, bringing the most significant changes since the current *Defence Force Discipline Act 1982* was introduced more than two decades ago.