

12 July 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
BY EMAIL: legcon.sen@aph.gov.au

Dear Secretary

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

We write in general support of the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 (together, 'the Bills'), subject to our comments in this submission.

This submission outlines the main features of the current service tribunal system and its constitutionality. We then turn to the criticisms made of the service tribunal system and the attempt in 2006 to address these with the creation of the Australian Military Court ('AMC'). We then explain why this system was found unconstitutional by the High Court. Finally we turn to an explanation of the current Bills, which establish the Military Court of Australia ('MCA') and make consequential amendments to the service tribunal system, and our critique of them. We consider first the lack of trial by jury, second the removal of the potential for double jeopardy, third the Bills' compliance with Australia's international human rights obligations before turning to the constitutionality of the Bills.

Previous Position - The Service Tribunal System

Australian Defence Force personnel have historically been subject to discipline through a military justice system separate and different to the civilian criminal law. Since 1982 this has been implemented under the *Defence Force Discipline Act 1982* (Cth) ('DFDA').

This system tries and punishes offences not only of a distinctive military nature, but offences with equivalents under the civilian criminal law system.¹ There are three categories of offences under the military justice system: those that are unique military discipline offences, such as being absent without leave²; those that have a civilian equivalent but are specifically adapted to the military context, such as assaulting a superior officer³ or driving a service vehicle under the influence⁴; and those that are ordinary civilian criminal offences, which pick up the criminal law of the Jervis Bay Territory.⁵

¹ For further information on service offences, see DFDA, Part III.

² DFDA s 24.

³ DFDA s 25.

⁴ DFDA s 40.

⁵ DFDA s 61.

It is this final category of offences that have caused particular constitutional uncertainty, and concern over the potential for an individual to be subjected to two penalties under overlapping jurisdictions (that is, double jeopardy). In 1989 the High Court made it clear that the DFDA could not exclude the jurisdiction of the civilian criminal courts.⁶ The main area of subsequent constitutional controversy has been whether there are any criminal offences that are exclusively within the jurisdiction of the ordinary criminal courts. In general, the High Court has taken a wide view of the jurisdiction of the military justice system.⁷

The DFDA establishes a number of types of service tribunals that can be divided into three categories. The first is the courts-martial (a panel of serving officers more senior in rank than the accused, overseen by a Judge Advocate, who is a legal officer selected from the Judge Advocate panel, although the court-martial determines questions of guilt and the sentence in private as a jury would, even the Judge Advocate is excluded);⁸ the second a Defence Force Magistrate ('DFM') (a legal officer appointed from the Judge Advocate panel as a DFM, who hears matters alone, equivalent to a judge sitting alone);⁹ and the final type is the summary authority, a senior officer who can determine less serious service offences.¹⁰ In practice, this last type of service tribunal hears the large majority of cases.

Convictions and sentences of service tribunals are automatically reviewed by a reviewing authority,¹¹ who is furnished with a report on the proceedings by a legal officer.¹² The reviewing officer is appointed by the Chief of Defence Force or a Service Chief¹³ and essentially acts like a court of criminal appeal with similar powers (they can set aside a conviction or sentence, substitute any sentence or finding of guilt or order a new trial¹⁴). Further appeal lies to the Defence Force Disciplinary Tribunal on questions of law,¹⁵ and then also to the Federal Court, again on matters of law only.¹⁶

Constitutional Position

The High Court has previously accepted on several occasions that the service tribunal system is constitutional.¹⁷ This lies as an exception to the general principle of the separation of powers implied in the Commonwealth Constitution that requires judicial power of the Commonwealth to be exercised exclusively by courts established pursuant to Chapter III of the Constitution, with the safeguards of impartiality and independence that this grants. As Justice McHugh noted in *Re Aird; Ex parte Alpert*:

A trilogy of cases in this Court has held that, although a court martial tribunal exercises judicial power, it does not exercise the judicial power of the Commonwealth. That is because the power to make laws with respect to the defence of the Commonwealth under s 51(vi) of the Constitution contains the power to enact a disciplinary code that stands outside Ch III of the Constitution.¹⁸

Thus the trial of offences relevant to enforcing defence force discipline has generally been seen as either not strictly judicial (although perhaps judicial in nature) or judicial power that exists outside Chapter III as a necessary incident of the defence power in s 51(vi) of the Constitution. This has given rise to some constitutional uncertainty about when an offence will have the necessary connection to military discipline so as to fall within the exception. The High Court has generally taken a wide view of the necessary connection.¹⁹

Concerns with the Service Tribunal System and the First Australian Military Court

⁶ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

⁷ See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Taylor; Ex parte Foley* (1994) 181 CLR 18; *Re Aird; ex parte Alpert* (2004) 220 CLR 308; and *White v Director of Military Prosecutions* (2007) 231 CLR 570.

⁸ See further DFDA, Part VII, Division 3; Part VIII, Division 1.

⁹ See further DFDA, Part VII, Division 4; Part VIII, Division 2.

¹⁰ See further DFDA, Part VII, Division 2; Part VIII, Division 2.

¹¹ DFDA s 152.

¹² DFDA s 154.

¹³ DFDA s 150.

¹⁴ DFDA ss 158, 160, 161 and 162.

¹⁵ *Defence Force Discipline Appeals Act 1955* (Cth) s 20(1).

¹⁶ *Defence Force Discipline Appeals Act 1955* (Cth) s 52(1).

¹⁷ See cases references in footnote 7.

¹⁸ (2004) 220 CLR 308, [31], citing *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

¹⁹ See cases references in footnote 7.

Two previous Parliamentary Committee reports have considered the independence and impartiality of the service tribunal system. In 1999, the Joint Standing Committee on Foreign Affairs, Defence and Trade heard arguments that the system required reform to ensure service offences were heard before an independent and impartial tribunal pursuant to Australia's international obligations.²⁰ Some changes were made to the system, including the establishment of an independent Director of Military Prosecutions ('DMP') and some reforms to the selection of panel members of courts-martial. The Committee recommended a further review in 3 years.

In 2005, the Senate Foreign Affairs, Defence and Trade References Committee issued a report considering the 'effectiveness of Australia's military justice system'. It recommended major changes to increase independence and impartiality in the service tribunal system, ultimately recommending the establishment of a Chapter III court for the trial of service offences.²¹

The Government responded to the recommendations with a new system that compromised some independence and impartiality on the basis that there were legitimate reasons for maintaining a separate and different military justice system. These reasons were two-fold: first, there was concern that civilian judges would not have sufficient knowledge and understanding of military culture and context; and second there was concern that a Chapter III court would not be able to sit overseas and in theatre during military operations. The Government introduced the first Australian Military Court ('AMC'), which still remained a service tribunal, but had a number of court-like characteristics. The first AMC was created as a court of record, composed of military judges (appointed legal officers for a set term, without the possibility of reappointment), a military jury on some occasions, and the power to punish for contempt. The AMC could sit overseas during times of hostilities. Convictions and sentences of the AMC were no longer subject to review by reviewing authorities. The Court started operations on 1 October 2007.²²

The High Court struck down the provisions establishing the AMC in *Lane v Morrison*.²³ This was predominantly on the basis that the AMC now made final and definitive findings of guilt and passed sentence without review from within the military chain of command. As the joint judgment of Justices Hayne, Heydon, Crennan, Kiefel and Bell noted:

the AMC was intended to differ from earlier forms of service tribunal. It is independent from the chain of command. That independence is critical to the decision whether the AMC is to exercise the judicial power of the Commonwealth.²⁴

The Commonwealth's attempt to bring greater independence and impartiality within the service tribunal system had therefore been the cause of its demise. The High Court appeared to say that military justice either had to exist within the confines of the historical exception, or be exercised as judicial power by a properly constituted court under Chapter III of the Constitution. The constitutional separation of powers it seemed did not allow for flexible, modern compromises.

In the wake of the High Court decision, the Commonwealth Parliament passed legislation that in effect reinstated the service tribunal system as it previously stood before the introduction of the AMC.²⁵

The New Military Court of Australia

The Military Court of Australia Bill 2012 ('MCA Bill') establishes a Military Court that fits the requirements of a Chapter III constitutional court.²⁶ The MCA is composed of a Chief Justice, Judges and Federal Magistrates.²⁷ Judges and Magistrates cannot be removed from office except for in accordance with the procedure set down in s 72 of the Constitution.²⁸

²⁰ Particularly article 14 of the *International Covenant on Civil and Political Rights* ('ICCPR').

²¹ Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (2005).

²² *Defence Legislation Amendment Act 2006* (Cth).

²³ (2009) 239 CLR 230.

²⁴ *Lane v Morrison* (2009) 239 CLR 230 [65].

²⁵ *Military Justice (Interim Measures) Act (No 1) 2009* (Cth); *Military Justice (Interim Measures) (No 2) 2009* (Cth).

²⁶ MCA Bill, cl 9.

²⁷ MCA Bill, cl 9(3).

²⁸ MCA Bill, cl 16.

Under the new system, summary authorities will continue to hear the bulk of cases for less serious service offences. The decisions of these authorities will still be subject to review by a reviewing authority.²⁹ Appeals to the Defence Force Disciplinary Tribunal have been removed, but an accused Defence Force member can elect for trial by the MCA.³⁰

The MCA Bill has addressed the concerns that have previously been used to justify a separate and different system of military justice. Judges appointed to the court must, by reason of experience or training, understand ‘the nature of service in the Australian Defence Force’, and appointments are made in consultation with the Defence Minister.³¹ The Military Court sits in Australia, except where it is ‘both necessary and possible for it to sit at a place outside of Australia’.³² In determining whether it is necessary for the MCA to sit outside of Australia, the Court may take into account a number of factors, including the location of the alleged service offence and the location of the accused and witnesses.³³ In determining whether it is possible to do so, there is another list of factors the Court may take into account, including the security of the place.³⁴ If the MCA finds it is necessary but not possible for it to sit overseas, offences can be heard under the old system of courts-martial and DFM. The Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 amends the DFDA to allow these tribunals to be constituted for this limited purpose.

Critique of the MCA Bill

Trial by Jury

The new MCA will not hear matters with a jury, original jurisdiction being exercised by a Federal Magistrate or a Judge for more serious service set out in schedule 1, or where the Chief Justice directs.³⁵ While there is a guarantee in s 80 of the Constitution that all indictable Commonwealth offences will be heard by a trial by jury, the MCA has managed to avoid this because service offences ‘are to be dealt with otherwise than on indictment’.³⁶

The High Court has held that the Commonwealth may designate offences to be tried on indictment, and so this would appear to be constitutional. Whether it is appropriate is a separate question. The Attorney-General argued that trial by jury was not appropriate for two reasons. First, where ADF personnel commit criminal offences in Australia, they are still subject to the civilian criminal law system and may be tried within this system.³⁷ The Attorney-General explained that the current arrangements between the DMP and the Commonwealth DPP, which require consultation where there is overlap between the civilian criminal and military discipline jurisdictions will continue. Further, the DMP cannot bring prosecutions for serious offences, including treason and murder, without the permission of the Commonwealth DPP.³⁸ This will presumably ensure in practice that in appropriate circumstances an accused will be tried in the civilian courts with a jury. However, the Bill does not mandate this outcome.

Second, the Attorney-General explained that where a service offence is tried overseas, empanelling a jury would be impractical.³⁹ The explanatory memorandum further explains that a civilian jury as required by s 80 of the Constitution may not necessarily be familiar with the military context of service offences.⁴⁰

While we appreciate that in the vast majority of cases in practice, serious offences committed in Australia with a civilian equivalent will be tried in the civilian criminal jurisdiction, we note that there is nothing in the consultation and approval process that ensures this. We would also reject the arguments that a civilian jury is not necessarily familiar with the

²⁹ Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 cls 106 and 107, making consequential amendments to DFDA s 152.

³⁰ Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 cl 73, inserting new s 102A into the DFDA.

³¹ MCA Bill, cls 11(3) and (4).

³² MCA Bill, cl 51(1).

³³ MCA Bill, cl 51(3).

³⁴ MCA Bill, cl 51(4).

³⁵ MCA Bill, cls 65(1) and (2) and 66(1).

³⁶ MCA Bill, cl 64. See also Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 cl 31, inserting s 3A into the DFDA.

³⁷ Commonwealth Parliament, House of Representatives, *Parliamentary Debates* (21 June 2012) 1, Nicola Roxon.

³⁸ DFDA s 63(1); as amended by Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 cl 37.

³⁹ See footnote 37.

⁴⁰ Explanatory Memorandum, Military Court of Australia Bill 2012 (House of Representatives), 2 [10].

context of service offences. Our criminal justice system asks a lot of juries, and they are often required to understand complex evidence, often provided by scientific and medical experts. It does not seem congruent with our acceptance that juries are able to understand this, to argue that they will not have, or not be able to gain, an understanding of the context of service offences.

Moreover, a critical aspect of the regulation of the armed forces in a Westminster system is that they are subject to civilian control. Thus while s 68 of the Constitution states that 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative' it is beyond doubt that it is the responsible Minister that provides the civilian accountability. In similar terms the use of civilian juries injects an important aspect of community involvement into the military justice system. In *Kingswell v The Queen* Justice Deane highlighted the development of trial by jury in Australia and its underlying principle.

The guarantee of s.80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment. In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government.⁴¹

We would argue that the guarantee of trial by jury for indictable offences should not be excluded from the new MCA for serious offences. The particular aspects of the offences are not beyond the capacity of civilians to appreciate. The constitutional guarantees of the military accused should be the same as to other citizens. Moreover the involvement of civilians in the military justice system is consistent with the principle that the military is subject to civilian oversight.

Double Jeopardy

One significant area of concern under the service tribunal system is the possibility for an individual to be tried under both the military justice and civilian criminal jurisdictions. A double jeopardy clause that attempted to oust the jurisdiction of a civilian court where an accused had been tried for an offence under the military justice system was found by the High Court to be unconstitutional.⁴² In practice, the possibility of double jeopardy arising has been largely, although not completely, allayed by the arrangements between the DMP and the Commonwealth DPP.⁴³

The creation of a Chapter III court to hear and determine service offences substantially meets these concerns more definitively. A conviction or acquittal by the new MCA will, beyond any doubt, prevent any other Chapter III court from hearing the same matter, leaving the potential for confusion only where a Defence Force member is tried by a service tribunal (that is, by a summary authority or, on rare occasions under the new regime, by a court-martial or DFM).

Compliance with International Human Rights Obligations

The general move towards a Chapter III specialist military court brings Australia into line with many of its international obligations, most particularly the right to a trial before an independent and impartial tribunal. Internationally, and particularly in Europe, courts-martial have been seen as lacking the requisite independence from the Executive, the possibility of partiality because of influence, conscious or not, from the military chain of command, and the review of decisions by a non-independent body.⁴⁴

The move to the MCA established pursuant to the requirements of Chapter III of the Constitution addresses these concerns, and we commend the Commonwealth for this important reform.

⁴¹ (1985) 159 CLR 264, [47].

⁴² Previously DFDA s 190(5), found unconstitutional in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

⁴³ See further discussion of this issue in practice in Andrew Mitchell and Tania Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27 *Federal Law Review* 499, 503; Richard Tracey, 'The Constitution and Military Justice' (2005) 28(2) *University of New South Wales Law Journal* 426, 432. Contra *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 349 (Kirby J).

⁴⁴ See, for example, *Van de Hurk v The Netherlands* (1994) 18 EHRR 481 ECHR; *Findlay v United Kingdom* (1996) 21 EHRR 221, ECHR; *R v Boyd* [2002] UKHL 31; *Brumarescu v Romania* (2001) 33 EHRR 35 ECHR; *Morris v United Kingdom* (2002) EHRR 1253 ECHR; *Cooper v United Kingdom* (2004) 39 EHRR 171 ECHR, 172; *Grievs v United Kingdom* (2004) 39 EHRR 51 ECHR;

Constitutionality

However, the establishment of a Chapter III court raises a potential constitutional challenge on the basis of s 68 of the Constitution. There is an argument that this removes the Governor-General's command of the armed forces vested by this section. However, we believe this argument is unlikely to be successful.

First, there is evidence that the framers believed that it was possible for military justice to be administered by the Commander in Chief within the chain of command (pursuant to s 68 of the Constitution, as occurs with the traditional service tribunal model), or by a 'properly constituted military court'.⁴⁵ The term used, 'properly constituted military court', is distinct from the use of the term courts-martial, used elsewhere in the debates. The notion of the court being 'properly constituted' may be a reference to a court constituted under Chapter III, although this is not made clear in the debates.

Second, several members of the High Court have indicated that the military justice system could be administered by a Chapter III court.⁴⁶

Conclusion

In conclusion, we write in general support of the Bills. We believe there are strong arguments that they will be constitutional, and we commend the Commonwealth government for implementing reforms to bring Australia in line with its international human rights obligations. The Bills also remove considerable uncertainty for an accused who may have been liable to prosecution under two systems under the service tribunal regime. We note with concern the lack of guarantee for a civilian jury trial for serious criminal offences.

Yours sincerely

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⁴⁵ See *Official Record of the Debates of the Australasia Federation Convention*, Melbourne, 10 March 1898, 2259, Richard Edward O'Connor.

⁴⁶ See comments by Gummow, Hayne, and Crennan JJ in *White v Director of Military Prosecutions* (2007) 231 CLR 570, 593, that no party denied this proposition; Kirby J in *White* (at 619) commented the was no discernible reason for the proposition not to be correct; French CJ and Gummow J in *Lane v Morrison* (2009) 239 CLR 230, [59] expressly dismissed an argument that the exercise of the Governor-General's command could not be regulated, the remaining judges in *Lane* avoided answering the question; contrast Deane J in *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518, 585; Callinan J in *White* (at 648).