SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

CONCERNING THE BILLS TO ESTABLISH

A MILITARY COURT OF AUSTRALIA

Introduction

1. This submission to the Senate Legal and Constitutional Affairs Committee, by the Australia Defence Association, relates to the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012.

2. Why the ADA is making a submission may be found on pages 1-2.

3. A summary of our submission may be found on pages 3-5.

4. The detail of our submission may be found from page 5 onwards.

Relevance of this issue to the ADA

5. Founded in Perth in 1975 by a former RAAF Chief, a leading trade unionist and the director of a business peak body, the Australia Defence Association (ADA) has long been the only truly independent, non-partisan and community-based public interest watchdog organisation covering strategic security, defence and wider national security issues.

6. The policies and public-interest watchdog activities of the ADA are supervised by a board of directors elected by the membership. This submission has been approved by the ADA Board and was prepared by a specialist working group of ADA members. This group combined members with extensive and senior experience in both civil and military law with those with similar levels of experience in command and military operations.

7. The ADA bases its public-interest guardianship activities on three key principles concerning Australia's strategic and domestic security:

- Our common defence and strategic security is the first responsibility of any Australian government.

- Ensuring our common defence is also a universal civic responsibility of all Australians. Not just, for example, current or former members of our defence force. At the very least all Australians need to think about these issues seriously.

- National unity, economic strength, free speech and robust public debate are essential and inter-linked components of Australia's national security, our democratic system and our whole way of life.

8. The ADA has long advocated that Australia needs a whole-of-government approach to our strategic and domestic security.

9. As a community-based, non-partisan, national public-interest watchdog organisation — with an independent and long-term perspective — we therefore seek the development and implementation of national security structures, processes and policies encompassing:

a. an accountable, integrated, responsive and flexible structure for making strategic security, defence and wider national security decisions over the long term;

b. a practical and effective balance between potentially competing needs for civil liberties, community security and budgetary priorities;

c. intellectually and professionally robust means of continually assessing Australia's strategic and domestic security situations;

d. the sustained allocation of adequate national resources to all our strategic security, defence and wider national security needs according to such means (rather than tailoring supposed "assessments" to the funding levels, bureaucratic fashions and partisan policies thought to be acceptable politically);

e. integrated and deterrent national security strategies based on the protection and support of our national sovereignty, strategic freedom of action and enduring national interests;

f. the development and maintenance of an adequate defence force capable of executing the defence aspects of such a national strategy; and

g. the development and maintenance of manufacturing and service industries capable of developing and sustaining defence force capabilities and operations.

10. Objectives 8a. 8b, 8e and 8f, relating to the constitutional accountability, civil rights balance, and the strategic and operational effectiveness of our defence force respectively, directly relate to the subject of this submission.

11. To assist informed public debate the ADA maintains a comprehensive website at www.ada.asn.au and publishes discussion and study papers, a national journal, *Defender*, and an electronic bulletin, *Defence Brief*. We are frequently consulted by the media for the background to issues and non-sectional commentary. We regularly contribute to public, academic and professional debates on strategic security, defence and wider national security matters.

Summary of our Submission

12. The ADA considers that the Bills to establish a Military Court of Australia have numerous procedural and practical flaws so serious that they negate the stated intention behind the proposed legislation.

13. Moreover, the concept underlying the Bill remains a fundamentally flawed answer to a problem that does not exist anyway, and one that ignores that a perfectly acceptable, time-tested and proven alternative already exists.

14. We consider that retention of the existing system of disciplinary tribunals, traditionally known as courts martial, is a time-tested and well proven alternative on operational, legal, constitutional and human rights grounds.

15. We also believe that the proposed establishment of a military court in place of these tribunals by legislation is simply a case of inertia where a course of action has been pursued merely because no-one in the ministry, or the bureaucracy, has been prepared to request that Cabinet reconsider its decision in light of the facts now known and the implications now involved.

16. We further note considerable background confusion stemming from mistaken perceptions about the two Senate Inquiries into the “military justice system” over the last 15 years. The ADA made detailed submissions recommending reforms to both inquiries, so our willingness to pursue genuine reform cannot be doubted.

17. Most of the problems uncovered in these two inquiries related to the extension and application of civil-based administrative law to the defence force in recent decades, rather than entrenched problems with the force’s statutory disciplinary code. It is our view that the rejection by governments of the Senate Committee recommendations concerning substantive reform of the administrative law applying to the ADF is a failure to drain the bathwater, and that the push for the MCA is a case of trying to throw the baby out instead.

18. Similarly, there has recently been much public confusion about the application of Commonwealth, State and Territory criminal law to ADF personnel in Australia. This has unfortunately often spilled over into mistaken concern about the validity of the separate disciplinary law applying to our defence force.

19. In recent years in particular there has been much inaccurate and sensationalist media reporting of misbehaviour, and worse, by some defence force personnel. As a consequence, many Australians seem to misunderstand two key aspects of the laws currently applying:

a. the distinction between criminal offences applying to everyone and Service offences that apply only to our defence force; and

b. within Australia, civil laws and civil police investigations automatically apply to serious criminal offences committed by ADF personnel (and that this situation has applied for many decades).

20. Development of the MCA Bill has also involved only cursory consultation at best with those to whom it would apply. The members of our defence force have not been consulted in any comprehensive, organised or reasonable fashion.

21. After extensive consultations over two years, the ADA has been unable to find any Australian judge, magistrate or senior lawyer with both civil and military law experience who supports the need for, or the creation of, a Chapter III military court as set out in the Bill. We note that the criticism of the Bill, and of the concepts underlying it, by the Military Law Panel of the Law Council of Australia also demonstrates this high degree of expert scepticism.

22. This is entirely consistent with the confidence in courts martial expressed by previous eminent jurists in our society who served in World War II as senior commanders or in more junior but operational roles, rather than as lawyers. Such as Sir Edmund Herring, Sir Henry Winneke, Sir Victor Windeyer, Sir Harry Gibbs, Sir Anthony Mason, Sir Ninian Stephen and Sir Ronald Wilson.

23. The ADA also notes the opinions of eminent counsel that the Bill's attempt to circumvent the general Constitutional right to trial by jury for serious offences would inevitably be the subject of an appeal to the High Court. We note commensurate opinion that such an appeal is more likely than not to succeed.

24. If the High Court strikes down this aspect of the legislation it would negate the principal pillar supposedly justifying having a Chapter III, judge-alone, court in the first place. Given the effectively trouble-free re-institution of courts martial as an interim measure, after the High Court struck down the previous Australian Military Court in August 2009, not only should further disruption to the DFDA and the ADF be avoided but the very need for the proposed MCA is invalid anyway

25. Finally, we believe that events since the Cabinet decision to establish the MCA was taken in May 2010 prove the perceptions and ideas behind the Bills remain largely inchoate or mistaken. Such a court is not only no longer required, it will cause more problems than it is supposedly intended to resolve.

26. In particular we note the telling example of recent legal proceedings involving alleged actions by commandos serving with the Special Operations Task Group in Afghanistan in February 2009. These were fortuitously but accidentally handled by the traditional disciplinary system reinstituted as an interim measure when the High Court struck down the Australian Military Court.

27. A key point here is that it is likely — had this or a similar matter proceeded to trial instead in the proposed new military court — that already aroused public opinion would become justifiably outraged. Particularly if, instead of the on-scene or other courts martial that have logically and successfully tried often complex and nuanced battlefield matters for over a century, charges of manslaughter stemming from alleged actions during combat in Afghanistan (rather than in peacetime Australia) would be tried by:

a. a civilian judge who need have no or only limited military knowledge or experience,

b. him or her presiding alone without a jury (as would normally occur for such serious charges in an Australian civil context), and

c. him or her sitting in peacetime Australia quite divorced from the relevant, complex and nuanced circumstances and moral quandaries of our soldiers fighting in war-torn Afghanistan.

Why Australia maintains a defence force

28. In the final analysis, Australia maintains a defence force to secure our national sovereignty by deterring, and if necessary winning, wars.

29. This requirement and its subordinate employments for our defence force, such as meeting our collective security obligations under the UN Charter, are not likely to change for the foreseeable future.

30. Unfortunately, the MCA Bills are largely oblivious to these contexts and applications.

What this means

31. The moral and legal requirements involved with maintaining and employing our defence force, under both Australian and international law, mean that the constitutional and practical accountability, party-political neutrality, structure, ethos and operations of the ADF must all be supported by the force being subject to a disciplinary code. In this case, the Defence Force Discipline Act (DFDA).

32. The DFDA is also not just an accountability measure. Nor is it just a disciplinary code governing responsibilities, compliance and individual or group behaviour. It is instead an integral component of the necessary civil control, military command, functional cohesion and operational effectiveness of our defence force. Acknowledgement of these relationships between control, command, cohesion and operations are not only missing from the MCA Bill, the philosophy underlying the Bill is inimical to them.

33. Moreover, being subject to the DFDA means that Australia expects some Australians, as members of the ADF, to accept legal requirements and obligations that do not apply to other Australian citizens. This situation also underlies the national expectation that ADF personnel may be required and therefore need to be authorised to apply lethal force in the national interest, subject to the provisions of the DFDA and other legislation domestically, and to the Laws of Armed Conflict (LOAC) and wider international humanitarian law internationally.

34. This national expectation and authorisation in turn incurs reciprocal obligations by every Australian to the members of our defence force.

35. One of these, surely, is a requirement to ensure that the ADF collectively, and its members individually, are properly supported as our national defence force. Another, equally as surely, is that the rights ADF members have as Australian citizens need to be protected to the maximum extent possible given the additional laws we subject them to.

36. The ADA's contention is that the proposed MCA, and the philosophy underlying it, compromise both these national obligations. We also contend that the process used to draft this legislation, and the lack of true consultation and understanding involved in doing so, has also failed to reflect the reciprocal obligations owed to our defence force personnel by the Australian government as the constitutional and practical representative of the Australian community.

Proposed abolition of trial by jury or court martial board

37. The MCA Bill deliberately excludes trial by jury or court martial board. The ADA contends that long historical experience, in often difficult circumstances, shows that:

a. Courts martial and subordinate summary hearings for Service offences are fundamentally a professional and disciplinary jurisdiction, not a criminal one.

b. Members of the ADF have long been regarded as better equipped to weigh evidence relating to the unique characteristics and circumstances of military service, especially in war, than other Australians without such professional responsibilities or expertise.

c. The existing system of court martial boards incorporating such collective knowledge and experience has been refined over a century or more to weigh such evidence effectively.

d. The effective independence from the ADF chain of command of the Judge Advocate General, the Director of Military Prosecutions and the Registrar of Military Justice, and from specifying the composition of court martial boards, has further strengthened the integrity and effectiveness of courts martial as disciplinary tribunals.

e. Juries cannot be used in courts martial because composition of a jury cannot be limited by, say, occupation or experience. However, court martial boards deciding guilt or innocence remain a proven alternative that ably balances the rights of the accused with the need to maintain discipline in the defence force as a whole.

f. Courts martial retain their credibility with the general public.

38. The proposed MCA means a judge, sitting alone without a jury (or court martial board), will be empowered to sentence offenders up to and including life imprisonment.

39. The proposed MCA Bill is an affront to the civil rights of ADF personnel as fellow Australian citizens. That some cannot recognise this, or excuse it as merely a necessary and clever legal drafting exercise, is outrageous.

40. As well as being significantly out of step with the standards of the civilian justice system throughout Australia, the MCA will also be out of step with the equivalent military justice systems employed by the comparable democracies that have been and remain Australia's allies in war.

41. The USA, Britain, Canada and New Zealand all retain courts martial. British and Canadian experiments with replacing courts martial (as disciplinary tribunals) with actual courts in some circumstances have not been successful. This has worked after a fashion in barracks and base environments but not at all in the field overseas.

42. A considerable irony not lost on members of our defence force who have studied the MCA Bill is that while Australian civilian courts are largely not subject to a human-rights jurisdiction, a system based on such an approach is to be imposed on our defence force (and without any consultation with those whose human rights would be affected).

43. Moreover, the clear result is that:

a. The MCA is being imposed by legislation without the members of the ADF being consulted, especially about the apparent loss of their rights as Australian citizens that is involved.

b. This is particularly so in that the MCA deliberately excludes the right to be tried by jury for serious offences — a right that generally applies to all other Australian citizens.

c. This significant and undoubted disregard for the human and civil rights of ADF personnel is airily dismissed by the theoreticians pushing the flawed concept and flawed practices embodied in the proposed MCA.

44. In New Zealand extensive consultations with the members of the NZDF were undertaken as a matter of course when their military justice system was revamped. Not least because it was widely recognised that they had a right to be consulted and the government and parliament no right to impose a new system without consultation.

45. An Australian does not somehow lose their general rights as a citizen when donning an ADF uniform. They accept the jurisdiction of military discipline because a defence force not subject to a disciplinary code has the potential to become ineffective operationally and, at the extreme, risks

eventually degenerating into the type of armed rabble that no parliamentary democracy can tolerate.

46. But Parliament's right to legislate is constrained by the provisions and conventions of our Constitution and the Westminster-system underlying both. It is also surely constrained by moral standards and the traditional covenant between Parliament and our defence force embodied in the principle of civil-control-of-the-military.

47. As noted above, our advice is that the High Court would be likely to strike down the MCA Bill's attempt (in Clause 64) to circumvent Section 80 of the Constitution requiring trial by indictment to be by jury.

48. The exclusion of trial by jury stems directly and only from the arcane legal mechanics of establishing such a specialist jurisdiction as a court under Chapter III of the Constitution, rather than continue with courts martial as disciplinary tribunals under the defence heads of power. Both the unfairness and probable constitutional invalidity involved surely mean the whole concept of a Chapter III court specifically for our defence force should not proceed on this ground alone.

Section 11(3) and 11(4)

49. The implementation of a Chapter III court produces even further problems in practice.

50. The proposed MCA essentially adopts the civil system of judicial decision-making with the court martial system nominally retained in a residuary role, and in reality not to be called on unless there is mishap to the new system. Or a comity problem whereby a foreign country objects to an Australian federal court sitting in that country — a problem that has never arisen with courts martial because they are disciplinary tribunals not courts.

51. The proposed MCA system is one of judges and magistrates oversighted by an appeal court in all likelihood consisting of Federal Court judges.

52. Given that judges and magistrates will make the decisions the appointment machinery and selection criteria for appointment become very important.

53. Sub-sections (b) and (c) of the appointment conditions specify that judges or magistrates of the MCA must not be appointed unless:

> *by reason of experience or training the person understands the nature of service in the Australian Defence Force; and*
>
> *the Defence Minister [sic] has been consulted in relation to the appointment.*

54. With regard to the latter requirement to consult the Minister for Defence (not “Defence Minister”), we note that the structure, nature and limitations or not of such consultations are not defined. The apparent intent and likely result of such consultations is no more than subsequent window dressing to try and assuage early critics of the MCA. As currently written, it offers no mechanism to replicate existing safeguards covering the appointment of judge advocates, with the necessary experience of both the law and military service, to act in a judicial capacity at courts martial.

55. As to the first sub-section, there is no standard or criterion as to what this experience or training is to consist of, or how the training or experience is to be attained, measured or indeed how long its duration needs to be.

56. In almost all cases, it could only be actual and effective service in the defence force which could possibly provide appropriate training or experience.

57. It will not be gained at a university or in the practice of civil or criminal law in the Australian community. Nor will it be gained from merely reading military history or from minor contact with military topics through administrative law proceedings. Neither will talking to ADF personnel or watching fictional and usually dramatised films and television programs provide adequate experience or training.

58. However, Section 11(4) excludes members of the ADF from appointment as judges or magistrates. The apparent intention is to entrench the independence of the MCA from the defence force as an institution. This in turn stems from the over-riding intention to create a court under Chapter III of the Constitution, in place of the existing disciplinary tribunals under the established defence heads of power elsewhere in the Constitution.

59. The ADF, however, is an institution created by statute and has no conflict of interests per se in a case before the Military Court. It is legislation which both upholds the court and protects the rights of servicemen and women. The pursuit of a Chapter III court as an end in itself is therefore unnecessary.

60. The Section 11(4) provision will also be unworkable in practice for the following reasons:

a. Members of the ADF are the candidates for appointment likely to be most familiar with the subject matter and may be the only suitable candidates.

b. The drafting of this section does not appear to reflect actual knowledge or appreciation of who a member of the ADF actually is. Legally they include permanent (full-time) members and (part-time) reservists of all kinds. The latter include standby reservists who continue to serve for a mandatory period of at least five years following permanent or active reserve service (although having no training or continuing service obligation unless reactivated).

c. Regulation 64 of the Defence Personnel Regulations and the five-year compulsory service obligation shows that it is not easy for a serving member to formally or practically leave the ADF, although many assume they have effectively done so when they become standby reserve members.

d. It would be most unfortunate if the practical effect is that commissioned officers, even standby reservists, have to seek to resign their commissions under regulation 94 before being able to accept appointment to the MCA.

e. Resignation is anyway a very slow and cumbersome process with the paperwork proceeding through the Service Chief to the Minister's office to the Governor-General. You would not want to, for example, have to appoint a judge or other official of the proposed Military Court in a hurry if they were former regular or reservist members of the ADF.

f. Moreover, the vast majority of candidates for appointment as judges (but perhaps not magistrates) are most likely to be defence force reservists who practise law as their civilian profession. They are likely to also be senior figures in both their military and civilian professions.

g. The question that needs to be addressed is why it should be necessary for long-serving officers to have to resign their military commissions (even if retired) anyway. Particularly if having to do so acts as a deterrent to candidature or appointment

61. A more viable solution would be Section 11(4) to exclude service as a permanent or active reservist member of the ADF but not as a member of the Standby Reserve. An ADF member on appointment as a judge could then be transferred to the Standby Reserve and still remain an ADF member and not be forced to resign.

62. But again this would clash with the intended constitutional purity of a Chapter III court and negate the very need for such a court in the first place. And despite the actual independence of such commissioned officers from the ADF chain of command being effectively absolute in practice.

Section 12

63. Section 12 provides that a Military Court Judge can be a member of another court but only if the court is constituted by the Parliament.

64. Section 2B of the Acts Interpretation Act 1901 provides that the use of the term 'Parliament' is interpreted to mean only the Parliament of the Commonwealth.

65. This excludes State Supreme Courts and means, in reality, that Military Court Judges must be either directly appointed to the Military Court or be Federal Court or Family Court Judges

66. We doubt if too many Family Court judges would be interested or suitable. So the Military Court will almost certainly finish up (even if not formally a division of the Federal Court) with Federal Court Judges cross-appointed as Military Court Judges.

67. This is also likely on financial grounds as double-hatting a Federal Court Judge would incur minimal additional costs directly. His or her supporting staff would probably be a different matter, especially where deployment overseas to war zones was involved.

68. The net effect is that we are headed for a legalistic Military Court system with no strong link to our defence force and no role for juries. Nor with the courts martial boards comprised of military officers that provide the relevant specialist knowledge needed to weigh evidence, prevent or minimise injustice, and preserve the disciplinary system any defence force needs.

69. The MCA is the civil system blindly transplanted into a military context without provision for the exigencies, nuances and complexities of that context. Especially regarding the provision of justice and discipline during the quite distinctly separate situation of Australia mounting warfighting operations overseas.

70. Moreover, the MCA would be particularly unsuited to large scale wars involving large numbers of Australians serving across the globe. Any military justice system should be structured so it works consistently, practically and efficiently in all types and scales of war. The proposed MCA fails this test.

Idiocy of effectively excluding State Judges

71. Currently judges from State Courts can and do participate in the military justice system either as Judge Advocates at courts martial or as members of the Defence Force Discipline Appeals Tribunal. This has long been the case.

72. Three particular advantages of this in practice have been:

a. State judges have traditionally been more likely than their Federal Court counterparts, when serving as defence force reservists, to do so in operational, not wholly legal, employments.

b. The pool of State judges reaching high rank in the defence force, including in senior formation command positions, has far exceeded that experienced by the Federal Court. The current senior reservist in the defence force, for example, is a NSW Supreme Court Judge. He is also a longtime infantryman in the Army Reserve and someone with command experience from platoon to brigade level.

c. State judges are far more likely to have experience in criminal law. This background has much greater relevance to the disciplinary and criminal law matters arising in defence force service than the predominantly civil law (and largely only "white-collar" criminal) jurisdiction of the Federal Court.

73. While former State judges and magistrates would be eligible to be appointed to the proposed MCA, it seems very unlikely that a State judge in particular would resign that State commission in order to do so.

74. It seems particularly short-sighted, conceptually illogical and practically contradictory that the judges with the most military experience, and certainly the most general military knowledge and expertise, will henceforth be excluded from Australia's military justice system if the MCA is instituted.

75. Including the end of the highly successful practice since World War II of such judges largely constituting the Defence Force Discipline Appeals Tribunal which is the civilian appeal mechanism reviewing military discipline convictions.

76. There is no doubt that a judge who … *by reason of experience or training … understands the nature of service in the Australian Defence Force* … is far more likely to be found in a State court than the federal one.

77. It is only the fixation on creating the MCA as a federal court under Chapter III of the Constitution that leads to this situation. This is yet another major reason why a first-principles re-think of the very concept underlying the proposed MCA is needed.

Military experience of existing Federal Court Judges

78. Some basic practical aspects also need consideration but have been largely ignored in the drafting of the Bills due to the fixation on a Chapter III court as the only possible solution. Similarly, there appears to have been little appreciation that war is also necessarily and predominantly an active and young person's activity.

79. Four current Federal Court Judges have served as officers in the ADF, and another one still serves as the (reservist) Judge Advocate General. In all five cases their military service has been as reservists in peacetime.

80. With three of them their military service has been only as legal officers and not involved general operational duties in the defence force. Two of these are aged over 60 and the third turns 60 in December 2012.

81. Only two current Federal Court Judges have served in the defence force in general duties or operational employments: One with the Australian Intelligence Corps and one with the Royal Australian Infantry. The first is aged 56 and the second 64.

82. Two further Federal Court judges have previously served as the Defence Force Advocate in proceedings of the Defence Force Remuneration Tribunal. This is a civilian industrial advocate position wholly concerned with the determination of pay and conditions, not the operational employment of the defence force and its many constituent supporting mechanisms and factors.

83. It is the ADA's contention that such industrial advocacy experience would not constitute *experience or training* that results in such an advocate understanding *the nature of service in the Australian Defence Force*. That those drafting the Bills thought it could be such experience again exemplifies an inadequate appreciation of what military service and war actually entail.

84. Certainly such industrial advocacy would not equip them to understand the circumstances and nature of disciplinary and criminal offences committed on the battlefield. In any event, both the judges concerned are aged over 60 and unlikely to be deployable overseas operationally anyway.

Deployability dilemmas and contradictions

85. Finally, there are a range of practical factors that have been largely ignored in the drafting of the Bills. Probably due to the fixation on achieving a Chapter III court at all costs.

86. The whole point of having a defence force is to deter and win wars. Such operations inevitably involve overseas deployments of some kind. Military deployments are inherently hazardous, especially where combat and the more fraught forms of peacekeeping or stabilisation operations are involved

87. The Federal Court, Federal Magistrates Court (FMC) (and strictly also the Family Court) are the target recruitment courts for the proposed Military Court (Sections 11 and 12 of the MCA Bill).

88. Section 51 of the MCA Bill contemplates that the proposed Military Court may need to sit overseas. The presiding judge or magistrate must decide whether this is possible according to criteria set out in that section. The MCA Bill also nominally acknowledges that the MCA may not be able to sit overseas because of either comity or hazard.

89. We note that the Bill further recognises, correctly, that a Chapter III judge cannot be ordered to deploy.

90. However, neither the MCA Bill nor the MCA Transitional Provisions Bill make provision for conditions of service when the court is deployed overseas.

91. More broadly, there is no recognition in either Bill of just how odd it is to propose basing Australia's military justice system around persons who cannot be ordered to deploy — and if deployed have uncertain or inferior conditions of service and protections under the Laws of Armed Conflict (LOAC) to the defence force they deploy to support.

92. There is surely no doubt that the proposed Military Court would exercise a unique jurisdiction and one which may entail unique hazards to the life, health and well being of its judges, magistrates and staff. But, despite being first raised by the ADA in 2010, the protection of MCA judicial officers and their staff under LOAC, and the medical or disability entitlements for them and their families if they are killed, wounded, injured or become ill, remains unclear.

93. Neither the MCA Bill nor its accompanying Transitional Provisions Bill make any provision for medical, death, funeral, wounding, or injury compensation and related entitlements for either the judge or an accompanying staff member (associate or EA) from the judge's other court. Or for their dependents in the event that the court sits abroad and death, wounding, injury or illness occurs.

94. In Section 32, the MCA Bill also envisages that ADF personnel may be seconded to the proposed Military Court by arrangement with the Chief of the Defence Force. If on duty in Australia or if deployed overseas, ADF personnel have medical, death, funeral, injury compensation and related entitlements under the *Military Rehabilitation and Compensation Act 2004*.

95. A judge deployed overseas with the proposed Military Court would not enjoy such cover. Accompanying civilian staff such, as an associate or EA, would presumably have cover under the *Safety Rehabilitation and Compensation Act 1988*, but this would be inferior to that applying to ADF personnel.

96. It is obviously desirable that, when deployed overseas on duty with the proposed Military Court, there should be harmonious medical, death, funeral, wounding, injury and illness compensation, and related entitlements, for the judge and his or her civilian court staff, seconded ADF court staff, and their dependents, subject to such further pension entitlements as the judge and dependents may have under the *Judges Pensions Act 1968*.

97. One way of achieving this may be via a determination made by the Defence Minister under Section 8 of the MRC Act.

98. As a consequence, however, being beholden to the Minister for Defence in this way is surely inconsistent with the treasured independence of the proposed court and with the Attorney-General's responsibility for the administration of the MCA legislation.

99. A deeming provision in the MCA Bill or the Transitional Provisions Bill might be preferable but there are other options.

100. Presumably, immediate medical treatment needs abroad would be the responsibility of the Commonwealth via the local ADF commander. This could be left perhaps to an arrangement between the Chief Justice of the proposed Military Court and the Chief of the Defence Force, but the present Section 32 of the MCA Bill is inadequately drafted to cover this type of arrangement.

Conclusion

101. As our submissions to both Senate military justice inquiries clearly show, the Australia Defence Association has long strongly supported the progressive improvement of Australia's “military justice” models to ensure that they remain fair, transparent and up-to-date with the expectations and standards of modern Australian society.

102. However, the proposed MCA is an unnecessary and flawed attempt to re-invent an already robust and time-tested disciplinary law system, while continuing to ignore that the vast bulk of “military justice” problems instead concern the application of administrative law to our defence force.

103. The proposed Military Court of Australia, as a Chapter III federal court, is unnecessary and mistaken. It would both hamper Australia’s national defence efforts as a whole and narrow the rights and protections our defence force personnel deserve.

104. There is also a great irony about these Bills. In preserving the court martial system for when the MCA considers that it is not “possible” for the court to sit overseas, the Bills recognise that courts martial will probably have to be used in wartime. Especially during large-scale, globally dispersed or prolonged wars.

105. At the very heart of these Bills is a deeply flawed, highly dangerous philosophy. This is the recognition of a necessary practice (courts martial) to still be undertaken in war, yet a deliberate decision not to practise it in peacetime or maintain the practised and consistent capacity to do so.

106. The lack of logic and detachment from reality in this approach is also demonstrated by, among other things, the absence of provisions setting out conditions of service for the people staffing the court when it might have to sit overseas.

107. More broadly, the flawed thinking behind the Bills is indicative of a wider and growing problem in Australian society. With the limited exception of national service obligations during the Vietnam War, most of the Australian community has had no personal or even family experience of military service or war since World War II.

108. Given the passage of time since that war, and the nearly seven decades of peacetime prosperity enjoyed by most Australians, even most extended families no longer include anyone with experience of military service or war. Australia now fights its modern wars with a very small, professional, all-volunteer defence force. Only some 15,000 of Australia’s 6.5 million families currently have a close family member serving overseas with the ADF each year.

109. The result of this situation is that knowledge of, and an informed perspective on, military service that previous generations widely had no longer exists. Most Australians no longer have an adequate understanding of their defence force, its operational requirements, what wars entail, or even their part as citizens in supporting our national defence efforts.

110. The ADA contends that the flawed philosophy underlying the MCA, and the pursuit of these Bills, despite so much informed criticism of the proposed court, are direct results of insufficient knowledge, false assumptions about military service and war, and little or no appreciation of the actual practicalities and needs of a defence force disciplinary system in a parliamentary democracy.

111. Even allowing for bureaucratic inertia, it is disgraceful that the MCA Bills have been progressed when their central idea has been so widely and comprehensively criticised by those with relevant and expert legal and military professional experience. Particularly when the legal criticism has come so universally and comprehensively from those civilian judges, magistrates and lawyers who understand both civil and military law, their inter-connectivity and the military operational contexts actually involved.

112. Few or none are necessarily or consciously at fault here. Unless, of course, the MCA is rammed through with continued disregard for the consequences as they affect the men and women of our defence force and the future efficiency of Australia's defence efforts.

113. This whole matter should give all Australians considerable pause for thought about needing to tackle growing difficulties with the informed, effective and fair exercise of civil-control-of-the-military by parliament on behalf of Australians generally.

114. The MCA Bills are so fundamentally flawed conceptually and practically that they should be withdrawn permanently.

115. If not permanently, at least until:

a. genuine consultations with all those affected occur;

b. a parliamentary or independent inquiry into the purported need for such a Chapter III court is undertaken;

c. the numerous flaws and contradictions throughout the Bills are addressed successfully; and

d. Cabinet reconsiders its hurried decision to opt for a court under Chapter III of the Constitution, instead of continued use of courts martial as the disciplinary tribunals needed in and by our defence force.