The Alliance of Defence Service Organisations

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The Hon Robert McClelland MP
Attorney-General
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Dear Minister,

RE THE MILITARY COURT OF AUSTRALIA BILL 2010

The Alliance of Defence Service Organisations ("ADSO")[1] has some significant concerns in relation to the Military Court of Australia Bill 2010 ("the Bill"). The Bill, when enacted, will establish the Military Court of Australia ("the MCA") to try serious service offences alleged against members of the Australian Defence Force, in place of the present system of trial by court martial and Defence Force Magistrate. The trial of other service offences by "summary authorities" will continue as before under the *Defence Force Discipline Act 1982* ("the DFDA").

The MCA will be a federal court under Chapter 3 of the Constitution and will therefore not meet the same fate of invalidity as did the former Australian Military Court ("the AMC") which was established under *the Defence Legislation Act 2006* and declared by the High Court to be unconstitutional (*Lane v Morrison [2009] HCA 29*). It will be constituted by judges and federal magistrates who cannot be members of the ADF although the Bill allows for some ADF personnel to carry out administrative duties in the court.

ADSO's primary concern is that the bill proposes to remove from an ADF member charged with a serious service offence the right to have his/her guilt or innocence determined by a jury of

[1] The Alliance of Defence Service Organisations was formally constituted in July of 2010. It was formed as result of the constituent organisations desire to work in a more cooperative and coordinated manner. It comprises Defence Force Welfare Association (DFWA) with its affiliated organisations (Australian Army Apprentices' Association; Defence Families of Australia; Defence Reserves Association and the Totally and Permanently Disabled Soldiers Association-Qld), Naval Association of Australia, RAAF Association, Royal Australian Regiment Corporation and the Australian SAS Regiment Association.

his/her peers as is the right of every Australian citizen charged on indictment with a serious criminal offence in a Federal, State or Territory court as is prescribed by s.80 of the Constitution.

The Appointment of Military Court Judges and Magistrates

The provisions of the Bill appointing Judges and Federal Magistrates to the MCA should satisfy the requirements of s.72 of the Constitution, which was the fundamental flaw in the establishment of the AMC. In addition to requiring, as a condition of appointment, that a judge or federal magistrate shall have had previous judicial/legal experience and qualification, s.10 of the Bill also requires that the Governor-General be satisfied that the person to be so appointed has experience or knowledge of the nature of service in the ADF and that the Defence Minister has been consulted in relation to the appointment.

"Experience or knowledge of the nature of service in the ADF" does not appear to be a very high hurdle for a judge or federal magistrate to clear before being appointed. It is most unlikely that anyone so appointed will have undertaken any full time service in the ADF or that any who have been members of the Reserves would have seen any full time service in operational areas. The days when the judicial benches of Australia had upon them a good number of men who saw active service in World War II are now, sadly, behind us and hopefully the future will not provide such a pool of talent again. The fact that there may be some difficulty in fulfilling the requirement of "experience or knowledge of the nature of service in the ADF" was no doubt in the mind of the Attorney-General, when in clause 19 of the Explanatory Memorandum to the Bill it is stated:

> *"the requirement for judicial officers to have experience or knowledge of the nature of service in the Defence Force should be interpreted broadly".*

Despite the assurance in the Bill that MCA judges and federal magistrates must have experience or knowledge of the nature of service in the ADF it is most unlikely that any judge or magistrate will have had first hand experience of front line operations of the ADF in theatres such as Afghanistan. In the event that the MCA was to try an ADF member on a serious offence allegedly committed during such an operation the judge or magistrate, with all due respect to their experience or knowledge of ADF service, would have no real understanding or appreciation of the dangers, stress and fluidity of such situations. The matter of 3 ADF soldiers facing charges arising out of an operation in Afghanistan in February 2009 is a good case in point. If those 3 soldiers were to be tried in the MCA, is it really expected that the judge or federal magistrate presiding would be able to bring to bear any personal understanding or appreciation of the whole range of military detail, and operational practice and procedure that such an operation involves as well as the physical danger to the personnel involved and the speed with which difficult and dangerous situations can arise and change? To the outside

observer, a pronouncement by a MCA judge or magistrate of guilt of the accused would, it is believed, appear to be much less solid or reliable than if the same finding was reached by a panel of serving ADF officers with operational experience and a sound understanding of and familiarity with military discipline. ADSO has no doubt that, if these 3 soldiers were in the position to be able to choose whether their guilt or innocence was to be determined by a MCA judge or magistrate alone, or by a panel of their military peers, each one of them would choose the latter option.

The Military Court sitting outside Australia

Under s.49(2) of the Bill the MCA may sit at a place outside Australia to hear and determine a proceeding under the Act. Many of the places where ADF personnel are currently serving and are likely to be serving in the future can fairly be described as unstable with domestic and political conditions that might well provide substantial difficulties in allowing the conduct of a trial in the same peaceful and secure environment that we enjoy in Australia. In addition to the MCA judge or magistrate appointed to hear the matter overseas there will also be the obvious requirement for the prosecutor (presumably from the Director of Military Prosecutions office) and the defence counsel to travel with the court. How many other persons (e.g. MCA administrative staff) would the MCA require to travel with it and what knowledge or experience of ADF service, especially in relation to overseas operational conditions, would such persons have? And what level of security would the hosting ADF unit be required to provide for them in addition to that required for the MCA judge/magistrate?

The MCA would no doubt wish to try in Australia a serious service offence alleged to have been committed overseas by an ADF member if the circumstances of the matter permit, but this would no doubt also raises problems. The accused member and important witnesses (especially ADF personnel) would need to be brought to Australia and that would create a manpower shortage in the ADF units involved prior to, during and after the trial. The authorized use of facilities such as audio/video link between the MCA in Australia and the overseas location might overcome this difficulty to some degree but it is believed that in the interests of justice it is preferable for witnesses to be physically present in the court during the trial to permit more effective examination, cross examination and re-examination.

Some witnesses required to give evidence may be foreign nationals and this obviously would be subject to the scrutiny of the Department of Immigration, and give rise to problems as to accommodation for and supervision of such witnesses during their time in Australia. There is also the possibility that claims for asylum might be made by some witnesses whilst here.

Removal of Right to Trial by Jury (Peers)

The Bill is lengthy and detailed and many of its provisions are replicated in the *Federal Court of Australia Act 1976* and the DFDA, so to that extent ADF personnel who appear before the MCA will be no worse off than they are now (under the DFDA) or than a civilian being tried in the Federal Court. The major innovation of the Bill is to leave the determination of the guilt or innocence of an ADF member charged with a serious service offence solely to the judge or magistrate hearing the case. This is widely seen in the ex-Service community as a backward step and a deprivation from ADF members of a long established rule of the English common law i.e. the right of the accused to be tried by a jury of his/her peers.

In most, if not all, States and Territories of the Commonwealth, serious criminal offences are tried on indictment before a jury, although most jurisdictions allow the accused to elect to be tried by judge alone, subject to certain conditions. In the Bill, Parliament proposes to deny this right to a member of the ADF charged with a serious service offence, simply by providing (in clause 62) that *"charges of service offences are to be dealt with otherwise than on indictment."*

In his 2nd Reading Speech on the Bill on 24 June 2010 Attorney-General McClelland said:

> *"The right to a fair trial for ADF members, like all other members of the community, is a cornerstone of Australia's federal justice system. Timely and fair trials in the Military Court will enhance Defence Force personnel's access to justice."*

He also said:

> *"All matters in the Military Court will be tried other than on indictment. This is consistent with the current court martial system, which does not provide for trial by jury…….There are strong policy reasons for not having a civilian jury to determine service offences for the Military Court. For example, where there is a need to try a service offence overseas, a requirement to empanel a civilian jury would be a practical barrier to the efficiency and effectiveness of prosecutions."*

And in the Explanatory Memorandum to the Bill it is stated (para 121), inter alia:

> *"This* is consistent with the determination of service offences under the Defence Force Discipline Act 1982, which does not provide for trial by civilian jury either."*
>
> * (i.e. the trial of service offences in the MCA without a jury)

Both of the two latter statements are misleading and ignore the fact that, under the DFDA, a general court martial consists of a President and not less than 4 other members and a restricted court martial consists of a President and not less than 2 other members, so that the question of the accused's guilt or innocence is determined by a panel of his/her peers, in the same way that a civilian jury determines the guilt or innocence of a member of the public charged with a

serious criminal offence. The fact that the President and members of a court martial are not civilians is beside the point, which is that in a court martial the accused receives the equivalent of a "trial by civilian jury".

Nowhere in the Bill's Explanatory Memorandum or in the 2nd Reading Speech is there given any legal reason for withdrawing the right to jury trial for an ADF member charged with a serious service offence. Accepting, for the sake of argument, that Parliament does have the constitutional power to legislate that service offences shall not be tried on indictment, it is surely incumbent upon Parliament to explain the reasons for overturning a military justice practice of such long standing, especially where, only 4-5 years previously (in the *Defence Legislation Amendment Act 2006* which established the AMC) it favoured the concept of military juries. Even though the Attorney-General stated in his 2nd Reading Speech:

> *"The High Court has repeatedly held that the prerogative of parliament is not limited or constrained in its legislative determination of which offences are or are not to be tried on indictment."*

there are several persuasive expressions of dissent to this view by Justices of the High Court of Australia. These have been set out at length in the submission dated 7 October 2010 to the Committee by the Returned and Services League of Australia and ADSO commends them to you.

Thus the only reason propounded by the Attorney-General for the removal of this right is that there would be difficulty in empanelling a civilian jury where a trial is to be held outside Australia, a difficulty which has not been considered worthy of too much concern to the ADF in the past when convening a court martial overseas. Furthermore, is that reason sufficient to deny an ADF member his/her right (as an Australian citizen) to have a "jury" determine a charge against him/her of a serious offence, especially as a majority of trials in the MCA of serious service charge are likely to be held in Australia?

A jury applies community standards

There is much documented support for the view that the best means of ensuring that the public are informed about the workings and efficacy of the criminal justice system is through the system of trial by jury. Not only do the members of the jury, representing the broad community, see for themselves the working of that system first hand, but they are able also to apply community standards and values to their task of deciding the guilt or innocence of the accused. Criminal actions are often to be determined by reference to whether they were "reasonable" in the circumstances (e.g. use of reasonable force, having a reasonable excuse for committing an act or omission) i.e. conforming to community standards, and there is no reason to believe that the legal qualifications and experience of the presiding judge gives him/her any

better insight into or evaluation of community standards than members of the jury. Indeed, some people might well believe that the jury members are the better qualified in this regard. The concept of "reasonableness" is not restricted to the "civilian" criminal law, but applies with equal force to military law. For example s.11(2) of the DFDA (dealing with offences of negligent behaviour) requires a Service tribunal to have regard to the standard of care of a reasonable person (emphasis added); s.14 (dealing with an act or omission in the execution of law etc.) provides, inter alia, a defence to such a charge that the accused did not know and could not reasonably be expected to have known [that the order was unlawful]; s.15 (dealing with abandoning or surrendering a post etc.) provides a defence if the accused proves that he or she had a reasonable excuse for the relevant conduct. The same defence of "reasonable excuse" is also available to charges of offences detailed in ss.15A-G (inclusive), 16, 16A, 17 and 23. In fact the word "reasonable" appears 131 times in the Bill.

For the same reason that in "civilian" criminal trials the members of the jury are able to bring their knowledge and experience of community or reasonable standards to bear in the performance of their duty, so a "jury" of ADF officers would be able to bring to bear their military community and operational experience in determining whether the standard of behaviour or conduct of the accused was reasonable in the circumstances. It is suggested further in this regard that the members of a "military jury", because of the narrower breadth of their "community" and their common membership of it, would be much more capable of determining the reasonableness or otherwise of the accused's conduct relevant to the offence charged.

Arguments in favour of retaining trial by jury

(Extracts from the NSW Law Reform Commission Discussion Paper 12 (1985): The Jury in the Criminal Justice System)

Juries are traditionally used to assess and determine the facts in a criminal trial because they are considered to be able to do this better than a judge. It is believed that juries are the best judges of the credibility of witnesses and that they are best able to accurately characterize behaviour as reasonable or unreasonable and so on. This is so because they bring to their task a range of backgrounds and experiences of necessity far broader than that possessed by a single judge.

The Law Reform Commission of Canada has suggested that the Jury has a number of unique features which together make it accurate as a fact-finder, and reliable in its assessment and characterization of behaviour. They are:

- a jury brings to bear on its decision a diversity of experiences;
- because the jury deliberates as a group, it has the advantage of collective recall; and

- the jury's deliberative process contributes to better fact-finding because each detail is explored and subjected to conscious scrutiny by the group.

It can be argued that the more representative a jury is the better it is able to perform its fact-finding task.

> *"... among the twelve jurors there should be a cross-section of the community, certainly not usually accustomed to evaluating evidence, but with varied experiences of life and of the behaviour of people*." *(Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at p.84.)*
>
> *It is felt that such a group is "better able to understand and appraise conduct than one who lives the remote life of a judge". (Ibid.)*

As well as being best suited to determine facts, the jury is able, unlike the judge, to give weight to the broad equities in the individual case. While a judge is bound by precedent and statute, the jury can take into account the "human" factor. It is in this way that each jury verdict can bring to bear the broad community conscience. Where precedent and statute set down the law in a general sense, the jury can adjust the law to the merits of each case.

> *"Is it not better that juries should be swayed by sympathy than that judges should be swayed by purely technical or legal considerations? Jurymen will do a little wrong in order to do a great right. They endeavour to do justice without regard to strict law. A judge, bound by precedent, must tread the straight and narrow path." (A. Jacobs, "Trial by Jury - Its Origin and Merits" (1948) 21 Australian Law Journal 462, at p.463.)*

The jury's equitable power, it is argued, ensures that the criminal justice system continues to have the support of the public and of the direct participants, especially accused people.

> *"The jury represents the conscience of the community from which it is drawn. It is able to do justice, and because the finding of a jury creates no precedent, it is able to decide a case equitably without making bad law. "(P.A. Jacobs, "A Plea for Juries" (1932) Australian Law Journal 208, at p.209.)*

As the Supreme Court of the United States has acknowledged:

> *.."in differing from law-bound conclusions, juries serve some of the very purposes for which they were created, and for which they are now employed."(. Duncan v. Louisiana 391 U.S. 145 (1968), at pp.156-157)*

The jury system is sustained not only by its effectiveness as a dispenser of justice in individual cases but also by its practical and symbolic function as a democratic institution. This function may conveniently be discussed under two broad headings:

- the jury system legitimises the criminal justice system by providing a link between that system and the community;
- the jury system is the ultimate protection of the individual citizen and, indirectly, of society as a whole against oppressive laws and the oppressive enforcement of laws.

The jury system ensures a measure of accessibility in the criminal justice system. Because the jury is the ultimate decision-maker, each case must be presented in a manner, language and broad value framework which juries of lay people both understand and accept. This compels both lawyers and judges to present the law comprehensibly and to reveal some of the underlying principles of the law and in his justice system, which in time decreases the mystique generally associated with the courts.

> *"The importance of the jury lies in the fact that, lawyers and judges know that their arguments must be pitched on a level that the man in the street can understand. Juries (counter the centrifugal tendencies of authorities." (M.D.A. Freeman, "The Jury on Trial" [1981] Current Legal Problems 65, at p.89).*

It is also claimed that the jury system is a bastion against oppression. This feature incorporates the reluctance of juries to apply the law in cases where an unjust, unfair or harsh result will occur. It also sees the jury system more broadly as a continuing check on the "rightness" of the law, on criminal investigation practices and prosecutorial policy,

[The NSW Law Reform Commission] is firmly of the opinion that trial by jury should be retained in serious criminal cases. The jury is an effective institution for the determination of guilt. It has the added benefit of possessing the ability to do justice in the particular case. The jury system is, moreover, an important link between the community and the criminal justice system. It ensures that the criminal justice system meets minimum standards of fairness and openness in its operation and decision-making, and that it continues to be broadly acceptable to the community and to accused people. The participation of laypeople in the system itself validates the administration of justice and, more generally, incorporates democratic values into that system.

<u>The Bill still allows for a "military jury"</u>

Although the Bill seeks to have all serious service offences tried by judge or federal magistrate alone, there are circumstances where a member of the ADF charges with such an offence, may be tried by a court martial and thus have his/her guilt or innocence determined by his/her peers. Clause 49(6) of the Bill provides that where the MCA has decided, under the circumstances governed by that clause, that it is not possible or necessary for it to sit in or outside Australia for the purpose of hearing and determining a proceeding, that proceeding is taken to have been discontinued and the charge withdrawn. Presumably this would envisage a

scenario where an ADF member serving in warlike operations overseas is charged with a serious service offence and the various factors set out in that clause satisfy the MCA that it would be unsafe for the judge or magistrate to try the offence in the overseas location. Notwithstanding that the MCA in such circumstances has decided not to proceed to try the charge it is still open for the charge to be tried by court martial convened overseas under the DFDA in which case the accused would have the equivalent of a jury trial, the members of the court martial being ADF officers. There can be no doubt that the experience and knowledge of the nature of service in the ADF of those court members would be vastly more comprehensive and relevant than that possessed by judges and magistrates of the MCA. If the Parliament is prepared to allow this exception to the general rule of "no jury" trials for the ADF, is not its fundamental objection to trial by jury in the MCA undermined and weakened?

ADF members sittings as members of a jury in the MCA

If the Parliament were to accept that the Bill should be amended to require that a trial of an ADF member for a serious service offence should be by a jury, the provisions of the *Jury Exemption Act 1965* would require amendment as the MCA will be a Chapter III court under the Constitution. S.4(1) of that Act and the Schedule to it provide, inter alia, that Members of the Defence Force other than members of the Reserves who are rendering full time service, are not liable and shall not be summoned to serve as a juror in a Federal court, a court of a State or a court of a Territory. Without such amendment serving ADF personnel would not be eligible to sit as members of a jury in a trial in the MCA, but to rectify that problem would seem to be simply a matter of legislating an amendment to the *Jury Exemptions Act.*

The machinery, practice and procedural provisions contained in the Bill are based in large part on corresponding provisions in the *Federal Court of Australia Act 1976*. That Act also contains comprehensive provisions governing trials by jury in the Federal Court and it would seem reasonable to expect that those provisions could also be used as a basis for incorporating provisions for jury trial in the Bill.

Comparison with other countries

In other countries having a legal system derived from the English common law, specifically the U.K., U.S.A., Canada and New Zealand, the trial of serious service offences in the defence forces is by court martial, the verdict being decided by a board or panel of members being officers (and Warrant Officers depending upon the rank of the accused).

United Kingdom. Under the UK Armed Forces Act 2006 there is a permanent standing court known as the Court Martial. A trial of a serious service offence in the Court Martial is presided over by a Judge Advocate and there is a jury (called a "Board") of between 3 and 7 officers (and Warrant Officers depending upon the rank of the accused). The verdict in the trial is decided by

the Board on a simple majority decision and the Board, joined by the Judge Advocate, determines the sentence.

U.S.A. Under the U.S. Uniform Code of Military Justice there are 3 types of court martial:

- a Summary Court Martial which deals with minor service offences which are heard and determined by a single Judge Advocate;

- a Special Court Martial which deals with the intermediate level of service offences and which consists of a military judge and a minimum of 3 officers sitting as a panel of court members or jury.

- a General Court Martial which tries charges of serious service offences. It comprises a military judge and a panel or jury of not less than 5 officers. The verdict is decided by the panel whose decision must be unanimous where the penalty for the offence is death and in other cases the verdict must be decided by a two-thirds majority.

Canada. Under the National Defence Act, the Code of Service Discipline and the Queen's Regulations and Orders for the Canadian Forces, there are established 2 types of court martial:

- the Standing Court Martial which is conducted by a military judge sitting alone who is responsible for the verdict on the charges and imposing a sentence if the accused is found guilty;

-the General Court Martial which tries serious service offences and which comprises a military judge and a panel of five officers (when the accused is an officer). When the accused is a non-commissioned member, the panel must include two non-commissioned members at or above the rank of warrant officer or petty officer first class. The panel is responsible for the verdict (i.e. guilty or not guilty) and the military judge makes all legal rulings and imposes the sentence.

New Zealand. Under the Court Martial Act 2007 there was established a court of record called the Court Martial of New Zealand which is comprised of a Chief Judge and at least 6 other Judges. A trial of a serious service offence in the Court Martial is held before a Judge and 3 – 5 Military Members (the number depending on the severity of the sentence which may be imposed on conviction of the offence charged) who must be officers or Warrant Officers (depending on the rank of the accused). The verdict is decided by a unanimous vote of the Military Members and sentence is determined by the Judge and the Military Members together.

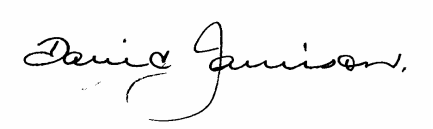
All of the above countries have retained the practice of trial of serious service offences by court martial incorporating a board or panel of military officers who determine the guilt or innocence

of the accused. Especially in the cases of UK (Armed Forces Act 2006) and New Zealand (Court Martial Act 2007) it is assumed that their respective military justice systems were reviewed before those Acts were enacted and that the parliaments of both countries saw no need to dispense with the concept of a "military jury" in the trial of serious offences.

Conclusion

ADSO strongly opposes the provisions of the Bill which provide for the trial of serious service offences in the MCA by judge or federal magistrate alone. As noted above, the right to a trial by jury is the right of every Australian citizen, conferred by s.80 of the Constitution. Members of the ADF are citizens of Australia and are no less entitled to receive fair treatment in the justice system simply because of the nature of their profession. Such a fundamental right should not be permitted to be stripped away at the stroke of a legislative pen. The fact that, in ADSO's view, no real or substantial reason which can withstand close scrutiny has been given by the government for the withdrawal of this right, should suggest to the Committee that the Bill should not proceed in its present form, but should be redrafted to provide that trials in the MCA should be before a judge/federal magistrate and a military jury.

Yours Sincerely,



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CC:

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