Submission by the Returned & Services League of Australia

to the inquiry by the

Senate Legal and Constitutional Affairs Committee

into

The Military Court of Australia Bill 2012

The Returned & Services league of Australia (RSL) includes in its membership thousands of serving men and women of the Australian Defence Force (ADF) including both permanent force and the reserve force members. The RSL seeks to represent the views of these personnel in its submissions to the Commonwealth Parliament and to stand up for their rights and entitlements as citizens.

Though these Australians voluntarily agree to go in harm's way in defence of the nation and to be subject to the legislated system of Military Justice, they retain the same rights and privileges of citizenship as do all their fellow countrymen and women.

The Military Court of Australia Bill 2012 (MCA Bill 2012) seeks to deny ADF personnel a fundamental right of citizenship and the consequent protection afforded by s.80 of the Constitution which holds that if a trial is on indictment, there must be a jury. The MCA Bill 2012 proposes a new court consisting of a Military Judge who is to act alone, without a jury, in trials of serious service offences.

The RSL is opposed to this concept because it removes rights and protections to which ADF members are as entitled as all other citizens.

We contend that the reasons for introducing the MCA Bill 2012 into Parliament in its current form are not compelling and do not justify the denial of constitutionally based rights and protections to members of the ADF.

The RSL advanced reasons for our opposition to the MCA Bill 2012 in a Submission to the then Attorney General about the earlier version of this legislation (MCA Bill 2010) on 7 October 2010. This is at Attachment A. More recently, after a meeting with Attorney General Roxon, we responded to an invitation to comment on the draft of the MCA Bill 2012 in a letter to a senior member of the staff of Attorney General Roxon. An abridged version of this document is at Attachment B.

We noted with relief that the egregious provision in the MCA Bill 2010 to give the Director of Military Prosecutions the right to appeal findings of not guilty by the new proposed military court had been removed and had no place in the MCA Bill 2012. The rest of the draft left much to be desired and did not address some of the fundamental issues we had earlier raised.

As has been acknowledged, the RSL is not opposed to new system of Military Justice but will continue to oppose any change denying rights and protections to the men and women of the ADF.

We recommend the MCA Bill 2012 be withdrawn from Parliament and that it be further revised in consultation with relevant stakeholders.

Attachments: A. RSL Submission of 7 October 2010

B. Abridged version of RSL National President letter of 1 May 2012

Attachment A

Military Court of Australia Bill 2010

A Submission

by

The Returned & Services League of Australia

Introduction

The Military Court of Australia Bill 2010, hereinafter referred to as the MCA Bill, was introduced into the 42nd Parliament on 24 June 2010, sent to the Senate Legal and Constitutional Legislation Committee shortly thereafter but lapsed when Parliament was dissolved on 19 July 2010. The MCA Bill may be reintroduced in the 43rd Parliament.

The MCA Bill establishes a Military Court of Australia under Chapter III of the Constitution. It is intended to be followed by consequential amendment to the *Defence Force Discipline Act 1982* and other legislation. It is also intended to replace interim measures put in place by legislation in 2009 which re-established the pre-2007 system of Courts Martial and Defence Force Magistrates.

These measures were put in place following the High Court's decision in *Lane v Morrison* (2009) HCA 29 which invalidated the Australian Military Court established under the *Defence Legislation Amendment Act 2006*. That earlier legislation provided inter alia for trial of serious offences by Military Judge and a Military Jury as defined in classes 1 and 2 of the 2006 Act.

Issues of Concern

The MCA Bill raises issues of concern.

One is that by providing that 'charges of service offences are to be dealt with otherwise than on indictment'[1], the legislation denies service members accused of serious service offences the right of trial by jury. This is at odds with the norms of contemporary Australian society which hold that service members are citizens and should enjoy all the privileges and rights of citizens including having the right of trial by jury when accused of serious service offences.

In the Findings and Recommendations of their 2005 Report on Military Justice, the Senate Committee on Foreign Affairs Defence and Trade wrote that "modern trends in governance emphasise greater openness, accountability, independence and impartiality where matters affecting citizen's rights are concerned. The Defence Force should not be exempt from this trend. Members of the ADF are subject to conditions of service unlike any other. It is therefore incumbent upon the Government and society as a whole to ensure that their rights and freedoms are protected to the fullest extent

[1] Clause 62.

possible."[2] Trial by Military Jury before a Military Court judge of serious service offences would be consistent with the lofty aim and object expressed by the Senate Committee.

Another issue of concern is that the MCA Bill postulates in effect "two systems" for the trial and punishment of offences under the *Defence Force Discipline Act 1982*. The MCA Bill allows Military Courts to deploy where it is necessary for a trial to be conducted overseas provided the deployment and any conditions required by Australia are acceptable to the host nation. If it is not necessary or possible for the Military Court to sit at a place overseas, the MCA Bill contemplates that a Court Martial or Defence Force Magistrate will provide a back-up system of military justice.[3]

Thus the second of the "two systems" may be implemented and the need for such arises when the stated conditions cannot be met. This is specified in the Explanatory Memorandum to the MCA Bill where it is stated that "If it is not necessary or appropriate for the Military Court to sit overseas, a Court Martial or Defence Force Magistrate will provide a back-up system of military justice."

Of particular concern is the provision in the MCA Bill that all matters in the Military Court will be tried otherwise than on indictment and therefore without a jury. The RSL argues that the sole reason for this advanced in the Explanatory Memorandum to the MCA Bill namely, "where there is a heed to try service offences overseas, the requirement to empanel a civilian jury would establish almost unsurmountable barriers to the prosecution of offences" is one that is inadequate, insufficient and does not stand up to close analysis for the reasons contained in this submission.

Further, the RSL raises concerns about the provisions in the *Jury Exemption Act 1965* (Cth) which presently exempts Defence Force members and Reserves who are rendering full time service from jury service in Federal and State Courts. That legislation denies[4] the chance or opportunity of having Defence personnel on a jury in all circumstances.

Background

In 2005 the Senate Committee on Foreign Affairs, Defence and Trade noted in its report on the effectiveness of Australia's military justice system that "it is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirement of a functional Defence Force and the rights of service personnel to the detriment of both." This and other factors gave rise to legislative action.

In 2006 the Parliament enacted the *Defence Legislation Amendment Act* amending the *Defence Force Discipline Act 1982*. The 2006 Act provided for the establishment of the Australian Military Court to replace the then current system of trials by Court Martial and Defence Force Magistrates under the *Defence Force Discipline Act 1982*. The Australian Military Court was to be part of the military justice system and to be a service tribunal under the *Defence Force Discipline Act 1982*. The *Defence Legislation Amendment Act 2006* inserted a new Division 3 in the *Defence Force Discipline Act 1982* which established the Australian Military Court and specified that this was not a court established under Chapter III of the Constitution. It also inserted a new Division 4 in the *Defence Force Discipline Act 1982* which established a Military Jury. This was a new concept with the legislation specifying that

[2] Senate Foreign Affairs, Defence & Trade Committee Report No 2232, *The effectiveness of Australia's military justice system,* 16.06.2005, p.98, para.5.82.

[3] See Explanatory Memorandum and general Outline and Clause 4.

[4] Also, it would, absent amendment, deny if the MCA Bill was to be amended to provide for trial by jury in the MCA.

there were to be 12 members of a Military Jury for a trial of class 1 offences and 6 members of a jury for a trial of a class 2 or class 3 offences.[5]

The *Defence Legislation Amendment Act 2006* did not change the interface and cooperation between Australian military and civilian courts. Where appropriate and available, civilian criminal matters continue to be referred to civilian jurisdictions by the ADF. Provisions requiring the consent of the Commonwealth Director of Public Prosecutions for the institution of proceedings for certain serious offences that are committed in Australia, such as treason, murder, manslaughter and serious sexual offences remain.[6]

The Australian Military Court was designed to meet "the disciplinary needs of the ADF in maintaining and enforcing Service discipline by trying more serious or complex Service offences."[7] It was to exercise jurisdiction under the *Defence Force Discipline Act 1982* where proceedings might reasonably have been regarded as substantially serving the purpose of maintaining or enforcing Service discipline, including offences committed outside Australia.

Class 1 offences were defined as offences relating to operations against the enemy and desertion and offences such as murder, manslaughter and serious sexual offences. Class 2 offences included certain drug offences, certain fraud offences and other offences that are neither class 1 nor class 3. Class 3 offences included the more serious offences of theft, fraud and assault.

As was implied by the legislation, trial by a Military Judge and Jury was to be "akin" to a trial by Court Martial and a trial by Military Judge alone was to be "akin" to a trial by a Defence Force Magistrate.

The *Defence Legislation Amendment Act 2006* also provided for determination of questions by a Military Jury. Where the service offence was to be tried by a Military Judge and Jury, the Jury was to be responsible for determining the guilt or innocence or unsoundness of mind of the accused. This legislation also provided for the trail of class 1, 2 and 3 offences and how they were to be dealt with by either a Military Judge or Military Judge and Military Jury. In the case of class 1 offences referred to in Schedule 7 of the *Defence Force Discipline Act 1982* and now generally replicated in Schedule 3 of the MCA Bill, class 1 was mandated to be dealt with by Military Judge and Jury. Trial by Judge and Jury might occur in respect of class 2 offences (some of which could be classed as serious service offences) except where the accused elected to be tried by Military Judge alone. For class 3 offences (some of which might be thought to be serious but not as serious as those in classes 1 and 2) the accused could elect for trial by Military Judge and Jury in limited circumstances.

In 2009 the High Court of Australia in *Lane v Morrison* explicitly held the provision of Division 3 of Part VII of the *Defence Force Discipline Act 1982* to be invalid. In so doing Chief Justice French and Justice Gummow observed that "the validity of the system of military justice established by the Act" (referring to the *Defence Force Discipline Act 1982*) "as it stood before the establishment of the Australian Military Court by the 2006 Act (the *Defence Legislation Amendment Act 2006*) was upheld in *White v Director Military Prosecutions* (2007) HCA 29" and questioned the foundation for the validity of the proposed "back-up" system under the *Defence Force Discipline Act 1982*.

The Australian Serviceman/Servicewoman and the Law

[5] For Classes of service offences see *Defence Force Discipline Act 1982, Schedule 7.*

[6] S63, DFDA.

[7] www.defence.gov.au/mjs/resources/AMFFAQs.pdf

There is nothing in law which in any way discriminates members of the Australian Defence Force from other Australians in so far as their rights as citizens are concerned. This is implicit in the judgement by Kirby J in *White v the Director of Military Prosecutions* which affirmed that "defence personnel are citizens."

As to the relationship between service and civilian offences, service as a defence force member involves additional responsibilities whose enforcement calls for more than the usual application of the general law by the civilian courts.

The case law suggests that it is a cardinal feature of English and Australian law that a serviceman or servicewoman enlisting in the regular armed force of the country does not thereby cease to be a citizen so as to deprive him or herself of any of his or her rights as to exempt him or her from any of his or her rights under the laws of the land. He or she does however in his or her capacity as a service person incur additional responsibilities for he or she becomes subject to at all times and in all circumstances, a code of military law. As Windeyer J noted in *Marks v The Commonwealth* (1964) III CCR 549, the relationship of members of the armed services to the Crown differs essentially from civil servants whose service is governed by regulations of the Public Service. Members of the Australian Defence Force are subject to a discipline that others are not; they have duties and obligations more stern then public servants; and rights and privileges they cannot claim.

Denial of a right to trial by jury as a jury trial proposed in the MCA Bill for serious offences has consequences beyond citizens who are members of the regular forces. The group is far larger since S3 of the *Defence Force Discipline Act 1982* defines a defence member not only as a member of the permanent Navy, Army or Air Force but also a member of the Reserve who is rendering continuous full time service or is on duty in uniform. Indeed the authority of the earlier Court Martial and Defence Force Magistrate is not restricted to a narrow group of citizens serving in the regular force or Reserves in the circumstances stated since it extends to include defence civilians as they are defined.

In his second reading speech on the MCA Bill the Attorney General stated that "the right to a fair trial for Australian Defence Force members like all other members of the community is a cornerstone of Australia's federal justice system." This statement contrasts with the observation that trial by jury for serious service offences is a vital and fundamental part of the concept of the same fair federal justice system "guaranteeing" fair trials for those who are accused of breaches of federal law.

The Senate Committee Report of June 2005 (and the High Court in *Lane v Morrison)* referred to above contains recommendations at paragraphs 18 and 19 that a permanent military court be created in accordance with Chapter III of the Constitution to ensure its independence and availability and that it be capable of trying offences then currently tried under the *Defence Force Discipline Act 1982* by a Court Martial. It might be argued that the offences listed in Schedule 3 of the MCA Bill are not only very serious offences but are offences that should be tried by judge and jury and not by judge alone as part of the fair trial notion. This perhaps is the fuller way of protecting the rights and freedoms of service members to the greatest extent possible or is more consistent with such rather than trial by judge alone of serious offences.[8]

Trial by Jury and S80 of the Constitution

[8] The 2005 Senate Committee in making recommendations was silent upon the manner of trial of serious offences (whether by jury or not) in its proposal to establish a permanent military court under Chapter III.

S80 of the Constitution guarantees trial by jury for any "*trial on indictment of any offence against any law of the Commonwealth."* Clause 62 provides that charges of service offences are to be dealt with otherwise than on indictment. No distinction is made between the different types of service offences whether serious, most serious or otherwise. There is a legislative denial of trial on indictment of any service offence. As the Explanatory memorandum to the MCA Bill makes clear (p.2), *"The Bill provides that all matters in the Military Court will be tried otherwise than on indictment and therefore without a jury. The Government can legislatively provide that service offences are not to be tried on indictment."* This statement, inter alia, reflects the current and received majority view of s.80. In denying trial on indictment of any offence, more particularly a serious service offence, the legislation denies trial by jury of a kind envisaged in s.80. In doing so, the MCA Bill denies the service member the protection of a jury trial for the determination of charges of serious offences carrying on conviction penalties of potentially lengthy terms. The service member is denied the "protection" from having his/her guilt or innocence being determined by judge sitting alone.

More significantly, in denying trial on indictment and thus denying trial by jury of a kind envisaged in s.80, the MCA Bill denies trial by jury of the serious offences prescribed in Schedule 3 of the MCA Bill which carry on conviction significant maximum punishments of imprisonment. The Schedule is not an exhaustive list of serious service offences under the DFDA (noting at the same time they are referred to in the Explanatory Memorandum, note 496, as being the "most" serious service offences), as some serious service offences could perhaps also be in the earlier Classes 2 and 3 referred to in the *Defence Legislation Amendment Act 2006*: see, for example, the offences of theft or receiving to be found in ss.47C(1) and 47P(1) of the *Defence Force Discipline Act 1982* (each carrying maximum punishments of imprisonment up to 5 years).

In explaining that a charge of a service offence will be dealt with otherwise than on indictment (and thus will not be tried before a jury), note 121 of the Explanatory Memorandum[9] states, *"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."* Though this statement is literally true, it is apt to be misunderstood without further explanation particularly when used as an argument or point supporting the denial of trial by civilian jury for serious service offences.

Under the *Defence Force Discipline Act 1982* a service member charged with a serious service offence such as listed in Schedule 3 of the MCA Bill, has no entitlement to trial by jury envisaged in s.80 essentially, because the court martial, whilst it is constituted in accordance with the *Defence Force Discipline Act 1982,* is not constituted in accordance with Chapter III and the form of trial is not trial by jury.

The point is made in *Re Tyler: Ex parte Foley* (1994) 181 CLR, *"the trial of service offences might be made by way of court martial and not by way of trial by jury since the former is not a trial on indictment and s.80 has no application."*

As Justices Brennan and Toohey also said, *"trial of a defence member for a service offence lies outside the judicial power of the Commonwealth and does not attract the operation of s.80.'*

On the other hand, the MCA Bill court is established under Chapter III. Parliament can legislatively thus provide for trial of a serious service offence on indictment by a "civilian jury" as envisaged by s.80. However it has chosen to "deny" trial by legislation trial of even serious offences on indictment and thus trial by a civilian jury.

[9] In relation to Clause 62 of the MCA Bill.

According to the High Court cases, the current and received view of s.80 makes clear that the constitutional requirement of trial by jury in s.80 in respect of federal offences only applies if there is an indictment. If there is an indictment there must be a jury – but there is nothing to compel a trial or indictment. Parliament is permitted to avoid s.80, by also refusing to classify an offence as an indictable one and it is for Parliament to decide what constitutes an offence for the purposes of s.80. Trial on indictment, pertinent to s.80, does not have a purpose other than that which it's literal meaning suggests.

As to the current received view of s.80, Justice McHugh observed in *Cheng v R* (2000) 203 CLR 248, *"s.80 is not a great guarantee of trial by jury for serious matters. It only guarantees trial by jury when the trial is an indictment. … Whether the offence is tried or triable depends in the first instance on Parliament's classification of the offence. Such conviction is unlikely to be acceptable to many civil libertarians or those who believe that serious criminal offences should be tried by juries …"*

In *Cheng's* case the majority declined to re-open the High Court case law *"which treat s.80 as not requiring a trial by jury in respect of offences which the Commonwealth law does not specify as triable or indictable."*

The current received literal view of s.80 has given rise as Justice Kirby has said to some of *"the sharpest decision of opinions in the history of the High Court."*

In the recent case of *White v Director of Military Prosecutions* (2007) HCA 29, Justice Kirby in discussing competing interpretations said at paragraph 167:

"In past cases, a majority of this Court has favoured the tautological view that s.80s guarantee of 'trial by jury' is limited to cases in which the Parliament and the Executive provide for the commencement of prosecution by filing an indictment. However, a persistent minority has reflected this view as inconsistent with the function of s.80 as providing a guarantee of jury trial which could not be so easily circumvented. With respect, I favour what is presently the minority view. It is more harmonious with the language, constitutional context, purpose and function of the section. The contrary view renders trial by jury for the applicable federal offences optional in the hands of the very governmental agencies against which jury trial can be a precious protection."

His Honour continued:

"… nor is it abstract to deny a defence member the protection of jury trial for the determination of charges for serious offences carrying, upon conviction, penalties of imprisonment."

These views of Justice Kirby perhaps reflect as well the earlier views of Justice Deane in his dissenting judgement in *Kingswell v R* (1985) 264 where His Honour said:

"… a constitutional guarantee of trial by jury is directed to no small extent in the protection of the citizen against being subjected to having criminal guilt or innocence determined by judge alone."

Whilst there may be some debate or difference of opinion as to what may constitute a "serious offence"[10], there appears to be no debate that at least the offence prescribed in Schedule 3[11] would answer the description of serious offences under the *Defence Force Discipline Act 1982.* Such

[10] See Justice Deane (*"Kingswell"),* Justice McHugh (*"Cheng"),* Justice Kirby *("White"),* and Chief Justice Gleeson in *Roach v Electoral Commissioner* (2007) HCA 43.

[11] Reflecting generally the Class 1 offences listed in Schedule 7 of the 2006 Act and to be tried by a "military court of 12 members."

Schedule is not necessarily an exhaustive list as some serious service offences perhaps could be in Classes 2 or 3 lists of offences contained in Schedule 7 of the *Defence Legislation Amendment Act 2006*.

All this said perhaps the last word has not been heard as regards the present received interpretation of s.80 of the Constitution which interpretation is relied upon to "support" Clause 62 and it application.

In *Cheng's* case, Chief Justice Gleeson and Justices Gummow and Haynes said at paragraph 43:

"If s.80 were to be interpreted as a constitutional requirement for trial by jury in the case of all serious Commonwealth offences, the occasion for doing so will be in a case, unlike the present, where there was a legislative denial of trial by jury and there arose in the conduct of the prosecution issues susceptible of trial by jury."

Whether such an "occasion" may arise in relation to "serious" service offences set forth in the prescribed list of offences in Schedule 3 (including s.61 items 19 to 21) perhaps is on for the future, absent relevant amendments to the MCA Bill.

The Jury and its role in the Justice system

In a paper titled "Out of Touch or Out of Reach" delivered at the Judicial Conference of Australia in 2004 by Chief Justice Gleeson it was stated that "the best way of seeing that the public are informed about the working of the criminal justice system is through the jury system… The maintenance of the jury system for the trial of serious crimes and especially crimes of violence is a vital means of keeping the public and criminal justice in touch." There seems no reason why this observation should not also apply to the military justice system.

Where there is a trial by jury, the jury is the trier of fact and decides issues of fact including that of guilt or innocence. This is the position in the civilian court system trying criminal cases. In so doing it applies community standards and values. The standard of what is "reasonable" is a common feature of the law including the criminal law and what is reasonable to be assessed by reference to community values, practices and expectations. What is "reasonable in a case must be influenced by community values. Indeed the standard of what is "reasonable" applies to many branches of the ordinary criminal law generally e.g. "reasonable belief", "reasonable excuse" or "reasonable foresee ability." In these caveats the relevant standard is ascertained against a background of community practices and expectations.[12]

Other examples include service offence provisions listed in Schedule 3 of the MCA Bill (particularly items 1 to 18) that go to the core of maintaining discipline and morale in the ADF (Explanatory Memorandum paragraph 497, p.70), for instance, the specific defence of "reasonable excuse for the relevant conduct" in these offences. Moreover "reasonableness" is not a matter of legal prescription. The jury system has the advantage of committing the judgement of "reasonableness" to the collective wisdom of a group of citizens chosen at random from the community who simply deliver an inscrutable verdict, [13]i.e. guilty or not guilty. The situation is otherwise when decisions are made by judges who give reasons for their decisions.

[12] *The Courts and Public Opinion, 2002, Sir* Anthony Mason.

[13] *Neindorf v Junkovic* (2005) HCA 75.

In its 2007 Report 117 titled "Jury Selection", the New South Wales Law Reform Commission summed up the position of the trial jury.[14] It said "The jury has long been regarded as an essential part of the criminal justice system – an institution which exists for the benefit of the community as a whole as well as for the benefit of the accused. Historically the jury has been perceived as the bastion of liberty against the excesses of executive and judicial power. In modern times its justification is found in the role it plays in ensuring a fair trial in case of serious criminal offences and the resulting confidence that this creates in the criminal justice system." The Commission quoted Justice Deane's judgement in *Kingswell* (albeit in dissent but not in the following analysis): "The nature of the jury as a body of ordinary citizens called from the community to try a particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgement of a judge or magistrate who may be portrayed as being over responsive to authority or remote from the ordinary affairs and concerns of people." In *Cheng v R*[15] Justice Gaudron observed that "trial by jury is so deeply embedded in our judicial process that its importance in protecting the liberty of the individual from oppression and in justice needs no elaboration." The Commission concluded that " the positive responses of those who have served as jurors shows that jury service does indeed bolster confidence in the administration of justice."[16] Deane J also referred to the practical benefits to the administration of criminal judgement including assisting the system of criminal justice being seen to be "impartial and just" and with the importance of the jury to the maintenance of the appearance as well as the substance of impartial justice in criminal cases.

As Justice Deane also observed in *Kingswell* when speaking of the traditional criminal trial by jury "the presence and the function of the jury in the criminal trial and well known tendency of jurors to identify and side with the fellow citizen who is in their view being denied a FAIR GO tend to ensure observance of the consideration and respect to which ordinary notions of FAIR PLAY enable an accused or witness where a properly instructed jury's verdict of guilty could be demonstrated to constitute a miscarriage of justice."

There are other benefits and advantages to be found in relation to the institution of trial by jury. Reference has been made to the "inscrutable verdict of the jury." In 1996 the High Court in *Mackenzie v R*[17]Justices Gaudron, Gummow and Kirby in speaking of the respect by appellate courts for verdicts of the jury in criminal proceedings observed "on the one hand there is the respect due to the jury as the constitutional tribunal for resolving factual questions. This principle is reinforced by the determination of the Courts not to permit interrogation of jurors as to their grounds for decision. The verdict accepted in open court sufficed. Of its nature it cannot and does not expose the reasoning of the jury. For reasons of history, institutional integrity and finality of trials, courts have long been reluctant to undermine jury verdicts as to infer from them that juries drawn from the community have done otherwise than their duty as required by law. The high respect paid to jury verdicts is reinforced by a general appreciation of the USUAL correctness.

Further there is recognition of the reality that "an appellate court may conclude that the jury 'took a merciful view of the facts' a function which has always been open to and often exercised by a jury. Their Honours referred to the "practical and sensible remarks" of Chief Justice King (in an earlier case in South Australia) acknowledging that "sometimes juries apply in favour of the accused what might

[14] P.4 &5.

[15] *Cheng v R* (2000) 203 CLR 248.

[16] Paragraph 15.3, p.256.

[17] *Mackenzie v R* (1996) 190 CLR 348.

be described their innate sense of fairness and justice in place of the strict principles of the law." Of course when this is done and the verdict is one of not guilty, that is normally the end of the matter.

As explained by the High Court in *Gilbert v R*[18] the system of criminal justice as administered by appellate courts requires the assumption that as a general rule, jurors understand and follow the directions they are given by the trial judge; and those juries are ordinarily asked to return a general verdict, i.e. guilty or not guilty. As Justice McHugh also observed "the criminal trial on indictment proceeds on the assumption that juries are true to their oath... and that they obey the trial judge's directions. Put bluntly unless we act on the assumption that criminal trial juries act on the evidence and in accordance with the direction of the trial judge there is no point in having jury criminal trials."

Thus a verdict of not guilty is ordinarily the end of the matter. Clause 91 of the MCA Bill deals with the consequence of not guilty verdicts in the case of trial by the Australian Military Court sitting without a jury. Division 2 of the MCA Bill deals with the matter of bringing appeals with Clause 97 providing that with one exception, either the accused person or the Director of Military Prosecutions can apply for leave to appeal or bring an appeal as appropriate. This latter provision may need to be addressed if trial by jury is to be introduced for trial of service offences under the MCA. Such may be necessary in order to protect/indeed respect any finding of a jury that an accused services members is not guilty of an offence covered by the charge sheet.

These remarks and observations are significant, relevant and applicable to the military justice system and call into question the intention of the MCA Bill which aims to establish a new Military Court of Australia under Chapter III of the Constitution providing for trial by Judge alone for even serious service offences.

Penalties

A single judge of the Appellate and Superior Division will hear very serious offences with very serious punishments. Serious service offences prescribed in Schedule 3 of the MCA Bill at page 2 of the Explanatory Memorandum include:

• offences essential to maintain discipline and morale in the ADF such as offences in relations to operations against the enemy like desertion;

• offences so serious in nature that they require the consent of the Commonwealth Director of Public Prosecution for prosecution in the military justice system e.g. murder, manslaughter, bigamy and various sexual offences (which would be tried on an indictment in the ordinary civil criminal courts by a jury of 12); and

• offences with very serious maximum punishments i.e. 10 years or more imprisonment.

Most of the offences listed in Schedule 3 of the MCA Bill carry punishments of 10 years imprisonment or more – though there are lesser penalties for desertion. A further point is that Schedule 3 establishes the serious service offences (including offences under the ordinary criminal law) to be tried by Judge of the Appellate and Superior Division alone. This is virtually identical with the list offences in Schedule 7 of the *Defence Legislation Amendment Act 2006* where such offences were to be tried by a Military Court comprised of by Military Judge and a Military Jury of 12 members.

The *Defence Force Discipline Act 1982* imparts an entire criminal statute with service offences under the Act including many offences constituted by conduct that would constitute an offence against civil

[18] *Gilbert v R* (2000) 201 CLR 414.

law and which would, if tried in the ordinary civil courts be tried on indictment by an ordinary jury. S.61 of the *Defence Force Discipline Act 1982* incorporates into the definition of service offence any conduct that would be an offence in the Jervis Bay Territory primarily under the *Crimes Act 1990* (Australian Capital Territory) and the *Criminal Code 2002* (Australian Capital Territory).

Whilst there may be some difficulty in maintaining a clear distinction between breaches of service discipline and breaches of the civil law, such may not be a matter of real significance or a distinction without real practical difference when one looks at outcomes; particularly the lengthy terms of imprisonment on conviction of a serious king listed in Schedule 3 of the MCA Bill.[19]

The point to be made is that as recently as 2006 Parliament thought that the very least the Schedule 3 offences now in the MCA Bill were important enough to be tried only by a military court judge and a jury of 12 members. Both the *Defence Legislation Amendment Act 2006* and the *Defence Force Discipline Act 1982* provided for decisions on serious service offences to be made by more than 1 person i.e. a Court Martial Board or military jury as the case maybe.

Two Systems of Enforcement of Military Discipline

In its report "Military Justice Procedures in the Australian Defence Force" 1999 the Joint Standing Committee on Foreign Affairs Defence and Trade at pages 123-126 discussed problems associated with the "two systems of military discipline". The ADF argued the need for one standard system. The MCA Bill recognizes the need for a "back-up system." Clause 49, paragraph 92 of the Explanatory Memorandum concerning the Place of Sitting deals with the situation where the Military Court decides not to hold a proceeding either inside or outside Australia and for a charge to be withdrawn. The Explanatory Memorandum notes "this allows the charge to be dealt with under the *Defence Force Discipline Act 1982* as a back-up system to the military court." Under the *Defence Force Discipline Act 1982* a court martial may deploy to a place outside Australia if necessary to hear determine the charge. The note at the conclusion of clause 49 reads "the charge may be dealt with under the *Defence Force Discipline Act 1982*."

Thus for the same offence that warrants trial by one Military Court judge, it will, in certain circumstances, attract a trial by a Court Martial comprised of at least 5 or 3 members if the back-up system need to be implemented.

The Composition of the Jury - *Jury Exemption Act 1965* (s4 and Schedule)

In order to ensure a fair trial in serious criminal cases it is important that a jury is composed in a way that avoids bias or apprehension of bias. Two important principle concepts and interrelationships are said to be involved. As the NSW Law Reform Commission Report 17 Jury Selection (pp8-18) makes clear that essential features of the institution was and is that the jury be a body of persons representative of the wider community and that the panel of jurors be randomly and impartially selected rather than chose by the prosecution or state.

In *Cheatle*[20] the High Court held that S80 of the Constitution guarantees trial by jury for any trial on indictment of any offence against any law of the Commonwealth and that such trial by jury carried with it a requirement that there be agreement or consensus of all persons constituting the jury at the time the verdict is pronounced a requirement of unanimity. The requirement of unanimity is thus an essential feature or requirement of the trial guaranteed by s80. As the NSW Law Reform Commission

[19] But not necessarily or exhaustively limited to Schedule 3 items.

[20] *Cheatle v R* (1993) 177 CLR 541.

makes clear representation is not about achieving representation by a particular group or groups on particular juries; and that there are defensible reasons for excluding certain membership i.e. justifiable exclusions from the "representative jury." That said there have been reductions in the categories of exemption. The NSW Law Reform Commission has in its 2007 report noted that it was generally agreed that the then current submission by those who provided categories of disqualification, ineligibility and exemption operate to exclude many who could serve as jurors (to perform jury service a civic duty) required revision. Indeed in NSW the NSW Parliament has recently amended the NSW Jury Act in relation to NSW to make provision to change the categories of persons inter alia ineligible to undertake jury service and inter alia to remove certain exemptions from jury service and enable instead a person to apply for an exemption from jury service for good cause.

The Law Reform Commission addressed the issue of special panels of jurors in some instances in relation to the trial by jury of state criminal offences. It recommended against it for reasons including the general lack of support for such an approach in other jurisdictions; the lack of relevant empirical evidence on the issue in NSW; and the potential conflict with s80 of the Constitution with regards to Commonwealth offences. It is also accepted that a jury under s80 of the Constitution be a body of persons representative of the wider community and that the representative nature of juries would preclude for example representation by particular groups such as members of the Defence Force to try serious charges of service offences. Nor could an s 80 jury be one mandated as being wholly or in part composed by members of the defence force i.e. a military jury.

The question is thus perhaps more a matter of addressing the situation as one concerning exemption by reference to a whole class or category of exemption rather than by reference to the position of an individual within the class or by reference to their individual jobs, duties or postings. In NSW under the Jury Act 1977 there are provisions that give the Sheriff powers to excuse an individual from attendance for jury service at any time before being summoned or excuse a person who may be summoned for jury service for the whole or part of the time that his or her attendance may be required. The issue is not one of eligibility to serve and perform a civic duty but rather for the eligible person to be excused for good cause if necessary. The Sheriff of the court who may also excuse could be able to consider allowing a deferral or allocation to a pan el for a short trial i.e. an argument against a blanket exclusion on the basis of ineligibility.

Thus a person is ineligible to serve as a juror if he/she falls with a number of occupational categories. Further, apart from state law ineligibility provisions, a person is also ineligible if he/she is exempted under the *Jury Exemption Act 1965* (Cwth).

It is relevant to make reference to this Act and perhaps to its significance particularly if there is to be a jury trial of serious offences under the MCA Bill. A jury is expected to be representative for those who are subject to the criminal justice system. Where service members (like other accused citizens) are charged on indictment in the ordinary civil and criminal courts they are currently deprived of the opportunity of having defence personnel on the jury to their cases.

Section 4 of the Commonwealth *Jury Exemption Act 1965* makes provision for certain persons not to be liable to serve as jurors. They are listed in the Schedule and include "members of the Defence Force other than members of the Reserves and Members of the Reserves who are rendering continuous full time service."

The point is that if the MCA Bill is to be changed to provide for a service member to be tried for a serious service offence by both Military Court judge and jury i.e. trial by jury, such a jury could not have as a member one of the above classes of Defence personnel. Perhaps more accurately under existing legislation it would even be deprived of the chance or opportunity of having defence personnel as its members.

Section 4 (1) of the *Jury Exemption Act 1965* provides explicit terms that "a person or persons within a class of persons referred to in the schedule of this Act is not liable, and shall not be summoned, to serve as a juror in a Federal Court, a court of a State of a court of a Territory." However if such exemption were to be removed to exclude defence personnel falling with the Schedule, such persons would be eligible to serve both in Federal and State Courts for trial of serious offences on indictment. Even if the exemption be not removed (and the NSW Law Reform Commission Report 117 at p.101-103 has independently encouraged the review of categories of exemption to Commonwealth Public Servants and Officers) it is still appropriate/preferable for trial by jury for serious service offences on indictment under the Criminal law in Federal and State Courts to have a representative jury of 12 persons.

Implementation of Trial by Jury in the Military Court

In terms of practical implementation of any decision to provide for trial on indictment of serious service offences by a jury under the MCA Bill, a precedent or model (with appropriate modifications as are necessary or appropriate) may perhaps be readily found in provisions of the Federal Court of Australia Act 1976. That Act has been extensively relied upon in the sense that many of the provisions in the MCA Bill are modelled on the provisions of the Federal Court of Australia Act. In relation to criminal matters the Federal Court of Australia inter alia has original jurisdiction. Procedures are set out to be followed during criminal proceedings relating to certain offences (see Part III Div 1 Subdivision A to F in particular). Provisions are made in relation to jury trials (see 2/3 DA to 23FK). The RSL is not aware of the extent to which, if at all, jury trials on indictment have taken place in the Federal Court of Australia. That said the precedent and procedure for such exists but would need some modification.

Discussion

There is no dispute that Parliament can legislatively provide that service offences are not to be tried on indictment and hence with a jury. The question is rather whether it should do and has disclosed good and valid reasons for such a view. Neither the MCA Bill Explanatory Memorandum nor the Second Reading Speech suggests there are legal reasons why service offences as a matter of law cannot or should not be tried on indictment. The reasons advanced for all service offences not being tried on indictment are that this aligns with policy or because of insurmountable practical barriers to the prosecution of service offences overseas.

The proposition is that because there are, or could be, practical reasons in prosecuting some serious offences overseas, there should be no prosecutions for the trial on indictment of serious service offences in Australia and by the Military Court sitting in Australia.

This raises two questions.

• Where are the greater number of serious service offences likely be committed?

• Does this in and of itself justify denial of the right of trial by jury to those charged with serious service offences?

Clause 49 of the MCA Bill provides that the Military Court of Australia is "to sit in a place in Australia to hear and determine proceedings unless ..." This provision is described in the Explanatory Memorandum as establishing a presumption that the Military Court will sit at a place in Australia to determine the proceedings, a presumption that may however be rebutted i.e. unless the Court decides that it is both necessary and not possible to sit outside Australia. The presumption and the

language suggest where the majority of the trials will take place i.e. in Australia – so why not with a jury?

Why should the difficulty of empanelling a jury for the trial of the few service offences overseas mean the denial of trial on indictment with a jury for the majority of offences capable of being tried by the Military Court of Australia?

In respect of service offences committed overseas and the need to try these service offences overseas, complications and difficult practical problems are overcome by the presence in the MCA Bill of provisions mirroring practices and procedures of the Federal Court including case management principles. These include rules of evidence including the use of audio and video links; issues concerning pre-trial matters including exploring the scope for narrowing the range of issues that will have to be dealt with at trial. This suggests that the need to try service offences outside Australia will be or should be very few. Further, in the matters in the MCA Bill is provision that allows the Military Court to order the examination of a person before the Military Court, a Judge, Federal Magistrate, an officer of the Military Court or other person at any place within or outside Australia. Nor should the matter of the availability of fast air transport to assist the Court to bring an overseas witness if necessary be a factor overlooked.

Under the MCA Bill defence members will have no entitlement to jury trial whether before a jury of fellow citizens of a kind envisaged in s80 of the Constitution for the reason or essentially the reasons that there would be a practical or policy reason or difficulty association with the trail of service offences "overseas" in the requirement to empanel a jury. This is the stated reason why "all matters will be tried other than on indictment" including serious or very serious offences imprisonment on conviction for up to lengthy and significant terms of imprisonment.

These arguments are not compelling and beg the question as to why as recently as 2006 the Parliament legislated to establish the Australian Military Court to try serious service offences before a Military judge and Military jury?

It is also specious to argue that because there was no provision for a Military Jury under the *Defence Force Discipline Act 1982* there is now no need for one under the MCA Bill. Though it is literally true that the *Defence Force Discipline Act 1982* did not include provision for a jury for the trial of serious service offences, such offences could not be tried by one person as is now provided for in the MCA Bill. Every Court Martial convened under the *Defence Force Discipline Act 1982* had to be comprised of at least 3 or 5 people and through it is true they did not comprise a jury as such, they acted jointly in making a decision on guilt or innocence under the Act performing in this sense a similar function to that of a jury.

The *Defence Force Discipline Act 1982* provided that a General Court Martial would be constituted of at least five officers one of whom would be the President sitting with a Judge Advocate[21]; or in the case of a Restricted Court Martial three officers, one of whom was President sitting with Judge Advocate. This Act made provision for the determination of certain questions by the Court Martial including that of guilty or not guilty of a service offence including that of unsoundness of mind. In other words, serious service offences were tried by either 5 or 3 persons, not 1 judge as proposed under the MCA Bill.

Perhaps the most worrying aspect of the MCA Bill is that it acknowledges the imperfection of the legislation by including in the Explanatory Memorandum a provision that allows for a reversion to

[21] s.114(2), 119 of the 1982 Act

Courts Martial convened under the *defence Force Discipline Act 1982* as a “back-up.” This raises the most unwelcome prospect of legislating for two separate systems of military justice and two systems of trial for those charged with serious service offences.

Conclusions and Recommendations

The RSL concludes that the MCA Bill and its Explanatory Memorandum:

• Does not comply with the norms of contemporary Australian society by denying the right of trial by jury to members of the Australian Defence Force charged with serious service offences. There is nothing in law which in any way discriminates members of the Australian Defence Force from other Australians in so far as their rights as citizens are concerned; and prime amongst those rights is that of trial by jury for serious offences.

• Establishes a “two tier” system of military justice without establishing compelling reasons for so doing.

• Does not reflect the circumstances that where members of the Australian Defence Force are charged on indictment in the ordinary civil and criminal courts they are currently deprived of the opportunity of having defence personnel serve on the jury to their cases.

The RSL recommends the MCA Bill be withdrawn and redrafted to take account of the issues raised in this submission.

Attachment B

In the RSL's submission to the Attorney General of 7 October 2010 about the earlier version of this legislation we listed our concerns but made no recommendation about the form a revision of that legislation should take. Our aim was to offer constructive comment and our stance has not changed. In a subsequent letter to the then Attorney General we made the following points:

"Our aim is to encourage the drafting of new contemporary Australian military justice legislation which will:

- be consistent with s.80 of the Australian Constitution with respect to trial by jury for serious service offences;
- structure a court protecting rights and freedoms to the fullest extent possible;
- ensure the rights of citizenship, including the right of trial by jury for serious service offences, for all members of the Australian Defence Force;
- enable members of the Australian Defence Force to be summoned to act as members of juries;
- provide that in respect of acquittals for service offences in Section 3 that there be no prosecution appeals; and
- align to the greatest extent possible with the norms and practices of the Australian justice system both Federal and State."

It is disappointing that with the exception of the matter of appeals by the prosecution in respect of acquittals, the exposure draft legislation forwarded under your recent letter does not meet these benchmarks. Nor is there a reasonable explanation as to why these issues have not been taken into account.

The RSL numbers among its members many who are serving in the Australian Defence Force (ADF) either as members of the permanent forces or as members of the Reserve. We make this submission on their behalf as well as on behalf of the ex-service community. In so doing we acknowledge there are grounds for revising and updating legislation for the Australian military justice system and that human rights, privacy legislation, jurisprudence and possibly other issues support this process. We also acknowledge the 2005 report by the Senate Committee for Foreign Affairs Defence & Trade titled *The effectiveness of Australia's Military Justice System* and the Department of Defence response to that report. But in making these acknowledgements we reflect on the wisdom of taking whatever time is needed to draft new legislation consistent with the Australian Constitution, with the norms of administration of justice throughout the nation and with the need to avoid any possibility of a repeat of the 2009 finding of the High Court in *Lane v Morrison* making null and void the 2007 military justice legislation.

Our primary concern remains that the revised legislation provides for ADF members charged with serious service offences to be tried by a single judge of the Military Court of Australia acting alone. The protection granted under s. 80 of the Constitution for trials on indictment having to be heard before a judge and jury is denied even though, as we have previously commented, each member of the ADF is a citizen with the full rights of a citizen to the protection offered by the Constitution.

Trial by judge and jury for serious offences is central to the administration of justice throughout Australia. In the largest state of New South Wales approximately 200,000 people had some interaction with the jury system in 2011. Jury trials remain the primary method of trial in the Supreme and District Courts of that state where the most serious offences are tried. Of all the defended hearings in those courts in 2009 and 2010 at least 92% were by jury.

In a recent speech[22] the Hon. T.F. Bathurst, Chief Justice of New South Wales said "Juries are an essential part of our participatory democracy and of the trust the wider community places not only in the criminal justice system but also in the ability of the legal system generally to protect individual's

[22] Address given by Bathurst CJ to the Law Society of New South Wales Dinner, 30 January 2012.

rights, family and property." The NSW Chief Justice acknowledged that jury trials "can be costly and highly secretive and sometimes produce what appear to be unreasonable verdicts" but argued that "we know why juries are good: they represent a check on state prosecutorial powers and maintain public trust and confidence in the administration of justice." He added that "whatever faults the system may have, it provides reassurance to the victims of crime, the accused and to the community generally that factual issues surrounding the guilt or innocence of an accused will be judged by a panel of people randomly selected..."

The RSL contends that the Military Court of Australia should be as consistent as is possible with the administration of justice in the Australian states and territories; and that this is capable of being achieved by carefully crafted legislation ensuring there is differentiation between the administration of criminal law and that of military law.

We do not accept the notion that it would be inappropriate for members of the general public to be empanelled as jurors for trials of members of the ADF charged with serious service offences because they would be incapable of understanding the issues canvassed in such trials. Jurors in many Australian courts are challenged on a regular basis to comprehend particularly complex, unfamiliar and difficult issues such as taxation and company law, specialist medical evidence and details about research at the forefront of the advance of technology. In each case it is incumbent on the judge and counsel for both prosecution and defence to ensure evidence presented to jurors is made clear and understandable. It is also worth noting that the general Australian public includes hundreds of thousands of men and women of all ages in all states and territories who at some time in their lives have served in the nation's armed forces. Many thousands of ex-servicemen and ex-servicewomen would in the past, and continue to be associated with the jury system. In terms of so called military context of service offence issues, there would be tens of thousands who by reasons of service or training understand or are able to understand the nature of service in the ADF and relevant issues.

Nor do we agree with the proposition that national security considerations is a sufficient reason to exclude consideration of members of the Australian public as jurors in trials before the proposed Military Court of Australia. Though we do not have access to relevant statistics we question the number of cases where national security would be an issue; and we observe that effective case management has the potential to ameliorate or even eradicate national security issues from the very few cases where this might be an issue.

A further issue is that there appears to be no valid reason in contemporary Australia why members of the ADF should not have the right of all other citizens to be empanelled as jurors in cases being tried before the Military Court of Australia or other Australian courts. The *Jury Exemption Act 1965* precludes or gives exemption to members of the ADF from serving as jurors even in respect of ordinary trials. We consider this legislation no longer reflects the norms of Australian society. Nor does it reflect the increased use of part time members of the ADF who are either members of the Reserve or former permanent members rendering occasional periods of full time service. Much more flexible work place arrangements allow citizens to mix ADF employment with civilian employment. Effective procedures are well established throughout the nation for relevant authorities to excuse citizens from all walks of life from jury duty for legitimate reasons. We contend that legislation excusing members of the ADF from jury duty is an anachronism and should be repealed.

The RSL notes that the interim arrangements for the administration of the Australian system of military justice put in place after the High Court *Lane v Morrison* decision have been tested as being constitutional and that they remain effective. Given these facts there appears to be no reason for urgency in placing new legislation about this vitally important issue before Parliament. We owe it to the men and women of our armed forces of today and the future to ensure they are afforded all the protections to which they have a right as citizens to be entitled.

The Australian people are entitled to expect that the nation's system of administering Australian military justice will be an exemplar of excellence in delivering effective, fair, just and reasonable outcomes. The draft legislation fails to meet that expectation.

We contend that the new Military Court of Australia envisaged as being established by the exposure draft legislation must make provision for serious service offences to be tried by judge and jury and that the reasons advanced opposing this proposition are of lesser consequence than the rights of members of the ADF for protection under s.80 of the Constitution.

We recommend that:

- the exposure draft legislation be withdrawn for further reconsideration and revision
- consultation with relevant stakeholders be integrated into the redrafting process