David McLure

Alister Abadee

Seven Wentworth Chambers
34 / 126 Phillip Street
SYDNEY NSW 2000

7/180 Phillip Street
SYDNEY NSW 2000

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Dear Secretary

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

We have been invited by the Committee to provide a further submission in light of the evidence given by other witnesses at the hearing on 14 September 2012.

Summary of this submission

It has been submitted on behalf of the Government that an advantage of the system proposed by the Military Court of Australia Bill 2012 (**Bill**) is that judges of the Military Court of Australia (**MCA**) will be required to give reasons for their decisions.

Under the existing system provided by the *Defence Force Discipline Act* (**DFDA**), summary authorities and Defence Force Magistrates give reasons for their decisions. This accounts for approximately 98% of all matters dealt with under the DFDA.

Under the existing system, court martial panels are not required to give reasons for their decisions, although in practice they often do so when imposing punishments.

There is no legal or practical barrier to requiring court martial panels to give reasons for their decisions. A simple amendment to the DFDA could make this mandatory. Many officers serving on court martial panels have been trained to act as summary authorities and to prepare reasons for their decisions. An alternative model would be to empower judge advocates to consult with court martial panels during their deliberations and to assist them with preparing a statement of reasons.

Abandoning the existing system of trials by Defence Force Magistrates and courts martial in favour of a Chapter III court constituted by civilian judges is not justified by a desire that all service tribunals should be required to give reasons for their decisions. This is simply an area in which the existing system could be improved.

Submission in detail – the current system

At the Committee's hearing conducted on 14 September 2012, evidence was given on behalf of the Government that under the arrangements proposed by the Military Court of Australia Bill 2012 (**Bill**) "reasons for verdict and sentence [will be] provided to ADF personnel for the first time".[1] In our view, this overstates the degree of change proposed by the Bill.

Under the existing system, officers sitting as summary authorities are required to give reasons for their decisions. Rule 35 of the *Summary Authority Rules* provides as follows:

> 35 Reasons for finding of guilty and conviction
>
> (1) If a summary authority finds an accused person guilty and convicts the accused person, the summary authority must give reasons for the conviction.
>
> (2) If the summary authority makes any other order in relation to the accused person after finding the accused person guilty, the summary authority must give reasons for the order.

There is no express requirement in the DFDA for Defence Force Magistrates to give reasons for their decisions, however, invariably they do so.

There is no express requirement in the DFDA for court martial panels to give reasons for their decisions. The question whether there is a common law obligation for court martial panels to give reasons has not been judicially determined in Australia. In the United Kingdom, it has been held that in some circumstances, a court martial panel may be under a duty to provide reasons for its decisions.[2]

In practice, court martial panels in Australia usually do not give reasons for their decisions, however in our experience, it is not uncommon for panels to make some comment when announcing their decision on punishment. A recent example of this is the matter of LCDR Jones, who was charged with having committed an act of indecency without the consent of the complainant, an Able Seaman. In sentencing the accused to imprisonment the court martial panel stated:

> The Court has determined that no other sentence is appropriate because of a gross abuse of authority and position – deleterious effect on the victim, recognition of Australian Defence Force and community standards and high moral culpability of the convicted.[3]

It follows from the above that under the existing system, the only type of service tribunal that does not routinely provide reasons for its decisions are courts martial.

The value of court martial panels giving reasons for decisions

We agree that the giving of reasons by all service tribunals (including courts martial) would be a valuable measure which would enhance the transparency of the process and would

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[1] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Canberra, 14 September 2012, 39.
[2] *R v Ministry of Defence, Ex parte Murray* [1997] TLR 670. See also *Findlay v United Kingdom* (1997) 24 EHRR 221.
[3] *Jones v Chief of Navy* [2012] ADFDAT 2.

further the aim of maintaining service discipline. Equally, we recognise that there are various advantages of a system that does not require civilian juries or court martial panels to give reasons. Whatever view is ultimately taken on that issue, it is clear that it is not necessary to abandon the existing system and create a Chapter III court in order to introduce a requirement that all decisions be supported by a statement of reasons. This could be achieved by a simple amendment to the DFDA, requiring court martial panels to give reasons.[4] There is no legal barrier to requiring court martial panels to give reasons for their decisions.

Practically, it would not be difficult for court martial panel members to provide reasons for their decisions, as many ADF officers receive training in relation to how to conduct hearings and how to give proper reasons for their decisions when acting as a summary authority. An alternate model (which is employed in the United Kingdom in the punishment phase[5]) would be for the judge advocate to confer with the panel as a non-voting member to assist them with formulating a statement of reasons.

The question whether civilian juries should be required to give reasons for their decisions has been the subject of considerable judicial and academic discussion.[6] In *AK v Western Australia*, Heydon J noted that jurors have not traditionally been required to provide reasons because it may have been thought impracticable for them to do so.[7] In the same judgment, Heydon J noted the remarks of a UK inquiry into trial processes that some jurors may be "unaccustomed to severe intellectual exercise or to protracted thought".[8] Even if that proposition is accurate with respect to civilian jurors who are randomly drawn from the entire community, it would not be accurate with respect to officers of the ADF.

To require court martial panels to give reasons for their decisions would bring the ADF's military justice system into line with international norms. In *Taxquet v Belgium* the European Court of Human Rights held that the conviction of a man for murder violated the defendant's right to a fair trial under Article 6 of the European Convention of Human Rights because the jury did not give reasons for its verdict.[9] The Grand Chamber of the European Court affirmed the decision on different grounds.[10] In reaching its decision, the Grand Chamber conducted a comparative analysis of jury practice by member countries. Relevantly, it was noted that:

- In Belgium a professional judge may be invited to the deliberation room to provide the jury with clarifications on a specific question, without being able to express a view or to vote on the issue of guilt.

- In Norway the jury may summon the presiding judge, but if the jury considers that it needs further clarifications as to the questions to be answered, the legal principles applicable or the procedure to be followed, or that the questions should be amended or

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[4] See for example, s 120(2) of the *Criminal Procedure Act 2004* (WA) which provides that in a criminal trial by a judge alone, the judgment must include the principles of law that the judge had applied and the findings of fact on which the judge had relied. See also s 33(2) of the *Criminal Procedure Act 1986* (NSW).
[5] *Armed Forces Act 2006* (UK) ss 155, 160.
[6] Stephen C. Thaman *Should criminal juries give reasons for their verdicts?: The Spanish experience and the implications of the European Court of Human Rights decision in Taxquet v. Belgium* (23 June 2011).
[7] (2008) 232 CLR 438 at [99].
[8] (2008) 232 CLR 438 at [91].
[9] *Taxquet v Belgium*, App. No 926/05, (Eur Ct HR, 13 Jan 2009)
[10] *Taxquet v Belgium* (GC), App No 926/05, (Eur Ct HR, 16 Nov 2010)

new questions put, it must return to the courtroom, so that the matter can be raised in the presence of the parties.

- In the Canton of Geneva the presiding judge attends the jury's deliberations to provide assistance, but cannot give an opinion on the issue of guilt. A registrar is also present to make a record of the decisions taken and the reasons given.

- In Spain the jury's verdict is made up of five distinct parts. The first lists the facts held to be established, the second lists the facts held to be not established, the third contains the jury's declaration as to whether the accused is guilty or not guilty, and the fourth provides a succinct statement of reasons for the verdict, indicating the evidence on which it is based and the reasons why particular facts have been held to be established or not. A fifth part contains a record of all the events that took place during the discussions, avoiding any identification that might infringe the secrecy of the deliberations.[11]

Conclusion

We maintain our principal submission that the existing military justice system under the DFDA is effective and superior to the system proposed by the Bill. An amendment to the DFDA to require court martial panels to give reasons for their decisions may be a worthy enhancement, but not a justification for the abandonment of the existing system.

Yours sincerely

David McLure Alister Abadee

[11] *Taxquet v Belgium* (GC), App No 926/05, (Eur Ct HR, 16 Nov 2010), [54] – [55], [57].