

Ref: LCA 1964

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
Canberra ACT 2600

Dear Dr Dermody,

DEFENCE LEGISLATION AMENDMENT BILL 2007

The Law Council of Australia is pleased to provide comments on the *Defence Legislation Amendment Bill 2007* (the Bill), which has been referred to the Senate Standing Committee on Foreign Affairs, Defence and Trade for examination and inquiry.

The following comments have been prepared by the Law Council's Military Justice Working Group. Due to the short consultation period, these comments are necessarily brief and focus on interlocutory appeals in trials before military courts. It is noted that there are some aspects of this legislation that may require closer examination and the Law Council would be pleased to provide more considered comments if further time is made available.

The principal concern the Law Council has identified with this Bill is the adequacy of the appeal provisions.

The Law Council notes that two distinct lines of authority have developed with respect to appeal provisions in criminal proceedings relating to matters arising while a trial is underway requiring the judge to make a ruling on a particular issue. Such issues tend to be very important in that they will be of the type which will ultimately affect the result of the trial to the extent that they will determine that result. For example whether or not prosecution evidence should be excluded and in the case where it is so excluded, leaving the prosecution with insufficient evidence to continue with the case. In the broad sense the two lines of authority or approach are

1. that the prosecution should have no rights of appeal which can affect any ruling in favour of the accused at any stage: the most that can be done is that there be a criminal appeal reference which will clarify an issue of law (for future trials in different matters) but will not interfere with a final verdict in the case in which the reference is brought. The policy reflects the position that there should be no unnecessary interference with the course of a criminal proceeding and that the defence is ultimately protected by a right of appeal. Such a policy does not recognize any countervailing remedy for the prosecution where because an incorrect ruling is unappealable it works unfairness against the prosecution.
2. that the prosecution be permitted to appeal interlocutory points and, indeed, to reverse a verdict of not guilty. The policy involved recognises that a jury verdict is sacrosanct, but that, as an element of the rule of law, judicial rulings during a trial should be subject to appropriate appellate review, albeit sometimes imposing a leave function to avoid undue disruption. This approach is favoured for example

in the State of New South Wales for example by the terms of Section 5F of the *Criminal Appeal Act (NSW)*, a copy of which is attached.

It is noted that provisions effecting the second approach do not exist under the current regime and are not proposed under the Bill. However, an example of why such provisions are so important can be found in the very recent Federal Court decision in *Commonwealth of Australia v Westwood* [2007] FCA 1282. In that case, Sackville J, sitting alone and performing the same function as a judge would in a jury trial outside the military context, ruled inadmissible a record of interview, without which the prosecution would not proceed. There was no right of appeal under any Act. It is noted that the ruling was of wider significance, particularly for the provisions of the Bill under consideration.

In *Westwood*, judicial review was tightly circumscribed as:

- the decisions under the *Defence Force Discipline Act* are excluded from the ambit of the *Administrative Decisions (Judicial Review) Act*;
- review under Section 39B of the *Judiciary Act 1903* is in practice limited to the capacity of the Commonwealth¹ to seek a declaration under s 39B(1A)(a) of the *Judiciary Act*. (The other avenues of jurisdiction in Section 39B were eliminated either because the matter was a criminal matter or related to a criminal matter (see for example sub-section 1A(c)) or because the error did not appear on the face of the record or because the error did not go to the Judge Advocate's jurisdiction.)

The Court accepted it had jurisdiction to grant a declaration under s.39B of the *Judiciary Act*, however, applying the observations of Brennan J in *Sankey v Whitlam* (1978) 142 CLR 1. According to Brennan J, "most exceptional" circumstances would need to be shown before the Court would interfere.

As Sackville J outlined in *Westwood* (from which, the Law Council understands, there will be no appeal), it is almost impossible to conceive of a situation where there would be "most exceptional circumstances", within the meaning of this test.

This is an important issue, but one which the Commonwealth Parliament has rarely had to consider in view of the terms of s 68(1) of the *Judiciary Act 1903* (Cth) which provides:

Jurisdiction of State and Territory courts in criminal cases

The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

...

the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

..., shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

¹ The court found the Director of Military Prosecutions was "the Commonwealth" for this purpose.

The Law Council does not favour any amendment to the Bill which would allow any overturning of a verdict of not guilty. However, the Law Council does favour the introduction of the following provisions similar to these, derived from s.5F of the *Criminal Appeal Act* (NSW):

(2) The Attorney General or the Director of Public Prosecutions [the Bill would refer to the Director of Military Prosecutions ('DMP')] may appeal to the [Court](#) of Criminal Appeal [The Defence Force Discipline Appeals Tribunal ('DFDAT')] against an interlocutory judgment or order given or made in proceedings to which this section applies [any Australian Military Court proceeding].

(3) Any other party to proceedings to which this section applies may appeal to the [Court](#) of Criminal Appeal [DFDAT] against an interlocutory judgment or order given or made in the proceedings:

- (a) if the [Court](#) of Criminal Appeal [DFADT] gives leave to appeal, or*
- (b) if the judge or magistrate of the [court of trial](#) [the military Judge] certifies that the judgment or order is a proper one for determination on appeal.*

(3A) The Attorney General or the Director of Public Prosecutions [DMP] may appeal to the [Court](#) of Criminal Appeal [DFDAT] against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.

The Law Council considers that these provisions derived from the NSW statute have the advantage of having been the subject of much appellate consideration and have a well settled meaning.

The Law Council also respectfully observes that the members of the Australian Military Court will have had very limited experience in relation to the conduct of criminal trials. None of those currently appointed have held civilian judicial office before and some members may have had almost no criminal or litigation experience. It is therefore particularly appropriate that there be the right to bring interlocutory appeals, as we have indicated above, to the Defence Force Discipline Appeal Tribunal, which is composed of experienced judges of superior courts around Australia.

The Law Council would be pleased to provide further submissions before any public hearings into the Bill. If there are any queries concerning this submission, please contact the Law Council Secretary-General, Peter Webb, on (02) 6246 3727 or peter.webb@lawcouncil.asn.au.

Yours sincerely



Tim Bugg
President

3 September 2007