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8 August 2012

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

The purpose of this submission is to advance reasons why the Military Court of Australia Bill 2012 (**the Bill**) should not be passed.[1]

Summary of this submission

If the Bill is passed, the trial of all charges before the Military Court of Australia (**the MCA**) will be conducted by a single judge or Federal magistrate, without a military jury or court martial panel. The MCA will have the power to impose punishments of up to and including life imprisonment. This will put in place a system that is significantly out of step with the standards of the civilian justice system in Australia and the military justice systems employed by Australia's closest allies.

The primary justification for the existence of a separate military justice system in Australia is that such a system maintains discipline in the Australian Defence Force (**ADF**) and thereby enhances its capacity to be an effective fighting force. A system that excludes military officers from the determination of serious offences is less likely to achieve that effect.

A system having the flexibility to allow the trial of serious offences to be conducted by a judge advocate with a court martial panel or military jury is superior to a system that is limited to trials by a single civilian judge or Federal magistrate sitting alone. Reasons for this include that: (a) a court martial panel is better equipped to assess evidence relating to the

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unique characteristics of military service; and (b) a system incorporating military officers is more likely to have credibility with members of the public and the ADF.

The system currently existing under the *Defence Force Discipline Act 1982* (**DFDA**) enables the trial of serious offences by a court martial constituted by a judge advocate and a panel of military officers. The benefits of this aspect of the existing system substantially outweigh the benefits to be obtained from appointing judges and Federal magistrates to the MCA under Chapter III of the Constitution.

The benefits associated with appointing judges and Federal magistrates to the MCA under Chapter III of the Constitution could be substantially introduced into the existing DFDA system by providing for the statutory independence of judge advocates, in the same way that such independence has already been provided to the Director of Military Prosecutions and the Registrar of Military Justice. Such enhancements would not contravene the High Court's observations in *Lane v Morrison* so long as the process for internal review of court martial convictions remained in place.

It is inevitable that there will be a challenge to the constitutional validity of the MCA. If successful, the ADF would again suffer substantial disruption to its disciplinary processes. The safer and better course is to retain and improve the existing system of military justice.

The Bill proposes trial by single judge or magistrate, without a court martial panel or military jury

Since Federation, Australia's military forces have employed a disciplinary system which has, at its apex, the trial of serious offences by court martial.[2] In a trial by court martial, the judge advocate and the panel of military officers perform substantially the same function as a judge and jury in a civilian criminal trial.[3] That is to say, the judge advocate decides all questions of law and gives the panel directions of law with which they must comply.[4] The panel is the sole judge of the facts and decides the ultimate question of whether the accused is guilty or not. If the accused is found guilty, the panel determines the appropriate punishment.[5] This aspect of the military justice system has served the ADF well, especially since the introduction of a statutorily independent Director of Military Prosecutions (**DMP**) and Registrar of Military Justice in 2005.[6]

The Bill proposes a system that does away with courts martial and entirely removes the involvement of military officers in determining whether ADF members should be found guilty of serious offences and if so, how they should be punished.

Clause 64 of the Bill provides that charges of service offences brought before the MCA are to be dealt with otherwise than on indictment. The purpose of this provision is to avoid the requirement under s 80 of the Constitution that the trial on indictment of any offence against a law of the Commonwealth shall be by jury. The effect will be that all trials before the

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[2] See *Lane v Morrison* (2009) 239 CLR 230, [38] – [45].
[3] There are also significant differences, eg. it is a trial by the accused's superiors, not his/her peers.
[4] DFDA s 134(4).
[5] DFDA ss 132 – 134.
[6] *Defence Legislation Amendment Act (No. 2) 2005* (Cth).

MCA will be conducted by a single judge or federal magistrate sitting without a jury or court martial panel.

The distribution of the MCA's business will depend on the maximum punishment applying to the offence charged. The Superior Division of the MCA (constituted by a single judge) will deal with offences of a military character having a maximum penalty of between 5 years and life imprisonment.[7] The Superior Division will also deal with offences against s 61 of the DFDA, picking up the civilian criminal law in force in the Jervis Bay Territory, where the maximum punishment is between 10 years and life imprisonment.[8] The trial of all other offences will be dealt with by Federal magistrates in the General Division.[9]

The proposal to conduct trials by a judge or federal magistrate sitting alone is not the product of a policy decision[10] that it would be better to exclude military officers from the role they currently play in a court martial panel. Rather, as clause 10 of the Explanatory Memorandum (**EM**) makes clear, 'a jury in a Chapter III court could not be restricted to Defence members and a civilian [jury] would not necessarily be familiar with the military context of service offences'. It can be seen from this that the proposal to conduct trials by a judge or federal magistrate sitting alone without a military jury or court martial panel is the price to be paid for the choice to establish the MCA under Chapter III, based on the recognition that it would be inappropriate for a military court to be constituted by a civilian judge and civilian jury. This gives rise to two questions:

1. What are the advantages of a military justice system having the flexibility to try serious offences by a court martial panel of military officers?

2. What are the advantages of constituting a military court under Chapter III of the Constitution and, do those advantages justify the loss of the option to try serious offences by a court martial panel of military officers?

The Bill proposes a system that is out of step with the civilian justice system and the military justice system of Australia's closest allies

A single judge of the MCA will have the power to try members of the ADF for a number of DFDA offences punishable by life imprisonment, such as s 15B aiding the enemy whilst captured, s 15C providing the enemy with material assistance, s 16B offence committed with intent to assist the enemy and s 20 mutiny. No civilian court will have the jurisdiction to deal with those offences. Additionally, a single judge of the MCA will have the power to try civilian offences picked up by DFDA s 61 which are also punishable by life imprisonment, such as murder (*Crimes Act 1900* (ACT) s 12) and numerous offences in the *Criminal Code 1995* (Cth). In most cases where such an offence was committed by an ADF member on operations overseas, a civilian court would not have jurisdiction to deal with the matter.[11]

[7] Military Court of Australia Bill 2012, schedule 1, items 1 – 18.
[8] Ibid, items 19 – 22.
[9] Ibid s 65.
[10] At least not one that is disclosed in the Explanatory Memorandum or the Second Reading Speech.
[11] One obvious exception is the war crimes offences contained in division 268 of the Criminal Code. See also *Crimes (Overseas) Act 1964* (Cth) s 3A(10).

The system proposed by the Bill will be out of step with the civilian criminal justice system. Under Commonwealth law, offences punishable by imprisonment for a period exceeding 12 months are generally indictable offences and therefore tried by a judge and jury. Offences punishable by imprisonment for a period not exceeding 12 months are generally summary offences and are tried by a magistrate.[12]

A number of Australian states and territories have legislative regimes allowing for the trial of indictable offences by a judge alone. Initially, a trial by judge alone was permitted only at the election of the accused. More recently, a number of states[13] and the ACT have allowed for a judicial discretion to order a trial by judge alone. It is beyond the scope of this submission to analyse those regimes in detail,[14] however, it may be observed that one of the primary uses that has been made of judge alone trials is where there has been highly prejudicial media reporting of a matter leading to a fear that a fair jury trial could not be secured. No Australian state or territory has adopted a system of mandatory judge alone trials for serious offences.

The Bill proposes a system that is out of step with Australia's key allies and leading common law nations

Australia's right to choose a military justice system that best suits its circumstances is beyond question. However, it is useful to compare how Australia's key allies and leading common law nations have approached the question whether the trial of serious offences should be conducted without the involvement of military officers on a court martial panel or military jury.

Canada

In Canada there are two types of courts martial: (i) a General Court Martial (GCM); and (ii) a Standing Court Martial (SCM). A GCM consists of a military judge and a panel of five officers.[15] A SCM consists of a military judge alone.[16] A GCM must be convened for offences punishable by life imprisonment. A SCM must be convened for offences punishable by imprisonment for less than two years or by a punishment that is lower in the scale of punishments. Save for these mandated circumstances, the accused may elect whether to be tried by GCM or SCM.[17] There remains a summary jurisdiction administered by commanding officers.[18]

It is worthy to note that in 2003, the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, conducted a review of the Canadian military justice system. He noted that at the time, the Canadian DMP had sole discretion to decide whether the mode of trial would be by GCM or SCM. He found that there was no military justification for disallowing an accused charged with a serious offence the opportunity to choose between a

[12] *Crimes Act 1914* (Cth) ss 4G, 4H.
[13] New South Wales, Queensland and Western Australia.
[14] For a helpful analysis of the state regimes, see Jodie O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35 *Criminal Law Journal* 154.
[15] *National Defence Act* s 167.
[16] *National Defence Act* s 174.
[17] *National Defence Act* s 165.191 – 165.193.
[18] *National Defence Act* s 163.

trial by military judge alone and a military judge and panel, other than expediency. He thought that the Parliament should '*strive to offer a better system than merely that which cannot be constitutionally denied*'. He concluded that an accused charged with a serious offence should be granted the option to choose between trial by military judge alone or military judge and panel.[19] That recommendation was subsequently adopted by the Canadian Parliament in 2008.[20]

New Zealand

In New Zealand, a court martial consists of a judge and either 5 military members if the proceedings relate to an offence for which the maximum penalty is 20 years or more, or 3 military members in any other case.[21]

United Kingdom

In the United Kingdom, a court martial is made up of a civilian judge advocate and a panel of 3, 5 or 7 service members depending on the seriousness of the offence charged.[22] Rulings on matters of law are made by the Judge Advocate alone, whilst decisions on the facts are made by a majority of the members of the court, not including the Judge Advocate, and decisions on sentence by a majority of the court, including the Judge Advocate.[23] There remains a summary jurisdiction administered by commanding officers.

United States

In the United States there are three types of courts martial: General, Special and Summary. Except in capital cases, a general court-martial consists of a military judge and not less than five members. A special court martial consists of a military judge and not less than three members.[24] An accused may elect for trial by military judge alone.[25] A summary court martial consists of one commissioned officer.[26]

It can be seen from the above analysis that if the Bill is enacted, Australia will be alone among its closest allies and leading common law nations in having a system that limits the trial of serious service offences to a civilian judge without the option of a court martial panel or military jury.

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[19] The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-25* (3 September 2003) 38 - 40.
[20] *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act* (the Act formerly known as Bill C-60).
[21] *Court Martial Act 2007* (NZ) s 21.
[22] *Armed Forces Act 2006* (UK) s 155.
[23] *Armed Forces Act 2006* (UK) ss 155, 160.
[24] Rules for Courts-Martial r 501.
[25] Rules for Courts-Martial r 903.
[26] Rules for Courts-Martial r 1301.

Will the Bill achieve the objectives that justify a separate military justice system?

In *Re Tracey; ex parte Ryan*,[27] Brennan and Toohey JJ reviewed the development of the British military justice system from around the time of the reign of Charles I. Their Honours noted that at the time, the regulation of a standing army was needed for:

> …the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline…[28]

ADF doctrine embraces the importance of maintaining discipline, not merely for the purpose of protecting the civil population from an undisciplined army, but as an integral element of establishing an effective fighting force.[29] A disciplined and well-led defence force is one that is likely to possess the skill, morale and dedication required to undertake the hazardous duties expected of its members both on operations and in training.

In the Senate Foreign Affairs, Defence and Trade Committee's 2005 report, the Committee adopted the following statement from the then CDF, General Cosgrove:

> The ADF has a military justice system to support commanders and to ensure effective command at all times. It is vital to the successful conduct of operations and to facilitate its activities during peacetime, including the maintenance of operational preparedness. Establishing and maintaining a high standard of discipline in both peace and on operations is essential for effective day-to-day functioning of the ADF and is applicable to all members of the ADF. The unique nature of ADF service demands a system that will work in both peace and armed conflict. Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible. Without an effective military justice system, the ADF would not function…Discipline is much more an aid to ADF personnel to enable them to meet the challenges of military service than it is a management tool for commanders to correct or punish unacceptable behaviour that could undermine effective command and control in the ADF. Teamwork and mutual support of the highest order are essential to success. Obedience to lawful direction is an intrinsic requirement expected from the most junior to the most senior members of the ADF.[30]

The need for a disciplined and law-abiding defence force is obvious, but what is the benefit of achieving that effect in a separate military justice system? Theoretically, there is nothing that the military justice system does that the civilian legal system could not be empowered to do. If it was thought expedient to do so, the jurisdiction to investigate, prosecute and try any offence against the DFDA could be vested in the civilian police, prosecuting authorities and courts. The point of distinction is that a military justice system that is effectively

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[27] (1989) 166 CLR 518.
[28] Ibid 557.
[29] Australian Defence Doctrine Publication 00.1 *Command and Control* (2009) 1-2. Australian Defence Doctrine Publication 00.1 *Leadership* (2007).
[30] Senate Foreign Affairs, Defence and Trade Committee, *The effectiveness of Australia's military justice system* (2005) 7.

administered and participated in by military officers enhances the authority of commanders which in turn, contributes to the effectiveness of the organisation as a fighting force. It is submitted that for this reason, the Senate Committee concluded in its 2005 report that a discipline system internal to the ADF was essential to the effective command of the ADF and had not been challenged during the Committee's inquiry.[31] There is no reason for a different view to now prevail.

What is the advantage of trying serious offences by a court martial panel?

While the vast majority of the activity in the ADF military justice system is conducted in summary hearings before commanders, the relatively fewer hearings of more serious charges before courts martial are no less (and in some cases, more) important. In the Judge Advocate General's report to Parliament for 2010, Major-General the Honourable Justice Tracey said:[32]

> ...courts martial do ensure the involvement of general service officers in the maintenance of discipline, and they may be particularly appropriate in those cases involving significant "jury" questions or where, in the event of a conviction, the general service knowledge of the president and members may be particularly relevant to the question of sentence. The utility of general service knowledge would be of benefit, for example, where some dereliction of duty has adversely affected operations.[33]

In the Director of Military Prosecution's report to Parliament for 2011, Brigadier McDade referred to the JAG's remarks and said:

> ...matters which are 'manifestly injurious to service discipline' are appropriately referred for court martial.[34]

This was a reference to the DMP's reasoning for preferring trial by court martial rather than by Defence Force Magistrate (**DFM**) in certain cases.

The Senate Committee accepted views to this effect in its 2005 report.[35]

In the United States consideration has previously been given to removing the role of military officers on a court martial panel in determining the punishment to be imposed upon convicted members. In 1984 an Advisory Commission reported to Congress that:

> We believe that if sentencing by military judge alone is adopted this very important source of feedback will be lost, and another bonding link between the military justice system and the command may be severely weakened. Moreover, having lost the

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[31] Senate Foreign Affairs, Defence and Trade Committee, *The effectiveness of Australia's military justice system* (2005), [2.7] – [2.12].
[32] Major-General the Hon Justice Tracey, *Report for the period 1 January to 31 December 2010*, [23]
[33] These comments were made in the context of considering the cost associated with courts martial. His Honour went on to say that it is somewhat less readily apparent that courts martial are more appropriate in the case of fraud, theft and assaults.
[34] Brigadier L McDade, *Report for the period 1 January to 31 December 2011*, [61]
[35] Senate Foreign Affairs, Defence and Trade Committee, *The effectiveness of Australia's military justice system* (2005), (xxxv) [49].

> feedback from the military community, military judge sentences may become more disparate as time passes and prior experience patterns are lost or become out-dated.[36]

Those observations are equally apposite to the ADF.

Recognition of the importance of the involvement of military officers in the conduct of military trials is to be found in the reforms undertaken since the 2005 Senate Committee report. In the Explanatory Memorandum to the bill introducing the now defunct AMC, the then Government said that the philosophy underpinning its approach to the design of the AMC was that:

> A knowledge and understanding of the military culture and context is essential. This includes an understanding of the military operational and administrative environment, the unique need for the maintenance of discipline of a military force in Australia and on operations and exercises overseas. The AMC must have credibility with, and acceptance of, the Defence Force.[37]

It is clear that one of the ways the AMC system sought to engender credibility with, and acceptance of, the Defence Force was to involve military juries in the determination of serious offences. Under that system, the mode of trial depended upon the seriousness of the offence.[38] In relation to the most serious class of offences (class 1 offences), the Explanatory Memorandum stated that:

> These offences are the more serious military offences, comparable to civilian indictable offences, for which waiver of trial by jury is not possible. The Government response to the Senate report specifically identified some offences that require trial by a military judge and jury. These include, mutiny, desertion, commanding a service offence and offences committed with the intent of assisting the enemy. As these offences have a particular Service flavour, in that they go to the very core of maintaining discipline and morale, commission of any of these offences would result in a lessening of that discipline and morale. Trial by military judge and jury will therefore be mandatory.[39]

The force of the observations referred to above has not been diminished by the demise of the AMC following the High Court's decision in *Lane v Morrison*.[40]

The central proposition that emerges from the above discussion is that a military justice system in which commanders participate at all levels is better than one in which they do not.

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[36] The Military Justice Act of 1983 Advisory Commission Report, 14 December 1984, 20
[37] Explanatory Memorandum to the Defence Legislation Amendment Bill 2006, [4].
[38] DFDA ss 132A – 132E (in force after the *Defence Legislation Amendment Act 2006*).
[39] Ibid [34].
[40] (2009) 239 CLR 230.

The involvement of military officers in the military justice system adds to its credibility and therefore enhances its ability to achieve its objective – a disciplined and effective fighting force

The value of involving in the justice system members of the community it serves is one of the reasons for the existence of juries in criminal trials. The Supreme Court of the United States has observed:

> …the essential feature of a jury obviously lies in the inter-position between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.[41]

The question whether a person charged with a serious criminal offence should have the right to trial before a judge and jury has been continuously considered by law reform commissions around the common law world. In its last comprehensive examination of the issue, the New South Wales Law Reform Commission considered a number of arguments in favour of the right to trial by jury. In particular, the Commission noted that:

> 2.21 The jury acts as a two-way link between the community and the legal system. One of its functions, arguably the most important function it performs, is to make sure that the legal system does not become distinct from, and alien to, the community. Individual citizens have, however briefly, a direct influence on the process of criminal justice and its values. The use of juries keeps the criminal justice system in step with the standards of ordinary people. Because "they represent current ethical conventions" juries "are a constraint on legalism, arbitrariness and bureaucracy". The other important function is to ensure that community support for the criminal justice system is maintained.
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> 2.22 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.[42]

The Commission ultimately concluded that:

> The 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

[41] *Williams v Florida* 399 US 78 (1970), 100.
[42] The New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12 (1985).

> the system itself validates the administration of justice and, more generally, incorporates democratic values into that system.[43]

Many of these factors have resonance for a military justice system. The involvement of military officers in a court martial ties the system to the community it serves, namely, the ADF. Decisions in which military officers have participated are more likely to attract acceptance and be credible to members of the ADF. Participation in the military justice system encourages a shared sense of responsibility for the maintenance of discipline, in a way that an externally imposed system will not. The reality is that the MCA will be viewed by many if not most members of the ADF as an externally imposed system in a way that the court martial and DFM system is not.

What is the benefit and cost of establishing the Military Court of Australia under Chapter III of the Constitution?

The key benefit of establishing the MCA under Chapter III of the Constitution is that the judges and Federal magistrates will enjoy the independence attached to such an appointment and thereby stand apart from any command influence. Possibly of lesser importance will be that the Parliament will be prevented from conferring on the MCA jurisdiction that is incompatible with the exercise of the judicial power of the Commonwealth.[44]

As discussed above, the price to be paid for these benefits is the loss of the ability to try serious offences with a court martial panel or a military jury.[45] The question is: is that price too high?

The ADF currently has two permanent judge advocates and utilises the services of a number of reserve judge advocates. Although one would necessarily place great weight on the views of those officers, it is difficult to see how in theory or in practice the conduct of their duties is improperly influenced by ADF commanders. Following the Abadee report[46] and the Burchett report[47] the Parliament introduced a number of amendments to the DFDA to ensure the independence of judge advocates and Defence Force magistrates from command influence. Judge Advocates are appointed to the judge advocates' panel on the nomination of the Judge Advocate General (**JAG**), who is a judicial officer appointed by the Governor General. Judge Advocates are not appointed to particular cases by commanders, but by the Registrar of Military Justice. DFMs are appointed to a case upon nomination by the JAG.[48] Some small modifications could be made to the terms of their appointment that would put the issue beyond doubt. A model for these enhancements, such as tenure and guaranteed promotion after a set period, could be adopted from the AMC provisions pertaining to military judges[49] and the existing provision providing the Director of Military Prosecutions with independence from command.[50] Such modifications would not transgress the High

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[43] The New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986), [2.1].
[44] *Kable v Director of Public Prosecutions (DPP)* (NSW) (1996) 189 CLR 51.
[45] *Cheatle v R* (1993) 177 CLR 541 at 560.
[46] Brigadier Hon A.R Abadee, *A Study into Judicial System under the Defence Force Discipline Act* (1997)
[47] James Burchett QC, *'Report of an Inquiry into Military Justice in the Australian Defence Force'* (2001).
[48] DFDA ss s 119, 129C, 179, 196.
[49] See DFDA ss 188AC and 188AJ as amended by the *Defence Legislation Amendment Act 2006* (Cth).
[50] DFDA ss 87(1)(c), 103 and Part XIA.

Court's ruling in *Lane v Morrison*,[51] as the other aspects of internal command review[52] could be left in place.

Judicial independence in the military, as in the civilian sector, is not an end in itself. Rather, it is a measure to enhance the prospect of the system arriving at just results according to law. In the United States, where this topic has been the subject of debate, one Judge Advocate considered that if military judges were replaced by civilian judges, 'the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively'.[53]

The Bill attempts to ameliorate the loss of the ability to try serious offences with a court martial panel by confining appointments to the MCA to persons who, by reason of experience or training, understand the nature of service in the ADF.[54] While this is a valuable measure and an admirable ideal, the reality is that there will be very few candidates for judicial appointment who have had recent command experience and fewer still with operational experience. To say so does not cast any doubt on the skills or dedication of the judicial officer who might be appointed to the MCA. Rather, it is submitted that a system in which military officers participate in the trial of serious offences with the assistance of a legally qualified judge is likely to be a better one, both in terms of the accuracy of decision-making[55] and the credibility of such decisions in the perception of the public and members of the ADF.

Major General the Honourable Justice Brereton[56] recently reflected on the benefits of a court martial panel in the context of a prosecution that generated considerable controversy. His Honour said:

> The pre-occupation of some with the supposed benefits of a Ch III court in this context is, I suggest, misconceived. The military justice system, though something of a hybrid, is fundamentally a disciplinary, not a criminal, jurisdiction. Most of our professional disciplinary systems have tribunals which are dominated by members of the relevant profession, with a legal advisor or chair, for instance in New South Wales, the Medical Tribunal for medical practitioners, and the Legal Services Division of the Administrative Decisions Tribunal (and its various predecessors) for legal practitioners. They bear many similarities to the court martial, from which they might well be historically derived. There is a risk that retrospective forensic analysis of an incident that required an immediate decision and response by soldiers in the urgency, danger and fog of battle, undertaken years later over days in a courtroom, may give insufficient weight to the pressures of the circumstances in which the soldiers were operating. I do not think there is much risk of that in a court martial, in which the tribunal of fact is a panel of military officers, who will bring their specialist knowledge, understanding and experience to the task – just as do the doctors to the Medical Tribunal. For my part, I would suggest that such a court martial is better equipped to judge prosecutions for

[51] (2009) 239 CLR 230, [12], [49] – [51], [62], [98].
[52] DFDA ss 152 – 155.
[53] Fansu Ku, 'From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century' (2009) 199 *Military Law Review* 52 – 53.
[54] Bill clause 11.
[55] Ie. findings of fact and decisions on guilt and punishment based on the panel's specialised military knowledge and experience.
[56] Major General Brereton is a justice of the Supreme Court of New South Wales and an experienced commander in the Army.

> service offences than a judge of a Ch III court without operational military experience.[57]

The case that motivated Justice Brereton to make these comments arose from an incident in Afghanistan in February 2009. Two members of the 1st Commando Regiment were charged by the Director of Military Prosecutions with manslaughter and dangerous conduct by negligence. The charges alleged that the soldiers had negligently used excessive force during a gun battle with an Afghan national in a night compound clearance. The charges were ultimately dismissed on the grounds that they were wrong in law.[58] If the charges had proceeded to trial, they would have been heard and determined by a judge advocate sitting with a general court martial panel of seven officers. The key factual dispute would have been whether the combat tactics employed by the soldiers were appropriate for an environment in which civilians might have been expected. These are issues that a court martial panel was best suited to reliably and credibly determine. The members of a court martial panel would have been able to utilise their military experience to assess the evidence in a way that others may not have been able. Although this author contends that a conviction was not a realistic prospect,[59] it may confidently be said that a conviction by a civilian judge sitting alone would not have attracted anywhere near the same level of acceptance by the public or by the members of the ADF, had such a decision been reached by seven military officers.

Another recent case demonstrating the value of a court martial panel is one where a Lieutenant Commander in the Royal Australian Navy was charged with nine counts of having committed an act of indecency without the consent of the complainant, an Able Seaman. The charged conduct for some of the incidents involved the accused directing the complainant to pull down her pants and lie across his knees while he spanked her on her bare bottom. On other occasions he allegedly directed her to take off her top or remove her outer garments. The court martial panel found the accused guilty of seven acts of indecency and imposed punishments including dismissal from the ADF and imprisonment for concurrent terms of 12 and 18 months. 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.[60]

Although one must be cautious about making inapt comparisons, it may be said that conduct of the kind found by the court martial panel in this case, had it occurred in an ordinary civilian workplace, would be unlikely to attract a sentence of imprisonment from a civilian court (or at least not a sentence as severe). What the court martial panel was equipped to do was determine the punishment that took into account the abuse of the accused's rank in comparison to the complainant, the nature of the working environment on an Australian warship and the effect that such conduct would have on the discipline and morale of the ship's company.

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[57] Justice Paul Brereton, 'The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law' (2011) 85 *Australian Law Journal* 91.
[58] The Judge Advocate's decision may be accessed at http://www.defence.gov.au/foi/docs/disclosures/321_1011_20May11.pdf.
[59] The author of this submission was the defending officer of the accused known as SGT J.
[60] *Jones v Chief of Navy* [2012] ADFDAT 2.

Recommendations

For the reasons given above, it is submitted that the advantages of the court martial system outweigh the potential advantages of constituting a Chapter III court to try serious service offences by a single civilian judge. The existing system could be improved by making further provision for the independence of judge advocates in the manner discussed above.

If the Parliament is determined to establish a Chapter III court, then it is submitted that it should explore constitutional reform in order to permit a jury solely made up of military officers. This is obviously an ambitious proposal. There are a number of ways that reform could be achieved, such as by making specific provision for such a tribunal under s 51(vi), or by amending s 80 to allow for juries (or perhaps only juries in military courts) to be constituted in such manner as the Parliament prescribes. It is well understood that constitutional reform would consume time, cost and would not be guaranteed of success. In relation to this a few observations may be made:

- Firstly, the nation generally and the members of the ADF specifically deserve the best military justice system that experience can conceive and the law can provide. Functionally, the AMC was an excellent system, but for its constitutional invalidity. If it is in the interests of the nation to have a military justice system of the standard achieved by the AMC (which I submit it is), it is equally in the interests of the nation to pursue constitutional reform to achieve that objective.

- Secondly, now would be an ideal time to pursue such constitutional reform, having regard to the other reforms the major political parties have under consideration.

- Thirdly and finally, having regard to the bipartisan approach the Parliament took to the AMC reforms, one would earnestly hope that constitutional reforms designed to achieve the AMC's objective would similarly attract bipartisan support.

There is a further good reason to adopt the recommendations set out above. In his submission to this Committee, Mr Alexander Street SC has set out arguments in favour of the proposition that vesting the MCA's jurisdiction in single judges without a jury will contravene section 80 of the Constitution and will be invalid. Additionally, others may wish to argue that the constitutional validity of DFDA s 61, in its superimposition of the civilian criminal law to the conduct of ADF members in Australia, depends on the parallel military justice system being within the 'historical stream'.[61] It is inevitable that a challenge will be made to the validity of the MCA on these and possibly other grounds. Even if doubt may attend them, there are arguments of substance to be made. It would be deeply inconvenient if the ADF had to undergo a repeat of the disruption caused by the High Court's decision in *Lane v Morrison.*[62] The safer and better course is to utilise the existing system most recently approved by the High Court in *White v Director of Military Prosecutions*.[63]

[61] *Lane v Morrison* (2009) 239 CLR 230 [61] – [63].
[62] See DMP's submission to the Committee dated 13 July 2012
[63] (2007) 231 CLR 570.

Consultation

I note that the second reading speech states that there has been 'extensive consultation with stakeholders within the defence and legal communities'. Whatever that consultation may have involved, it did not to my knowledge extend to the large number of reserve ADF officers who almost exclusively undertake the work of defending members before DFMs and courts martial. It is submitted that valuable input could be obtained from these key stakeholders, many of whom are very experienced trial and appellate lawyers.

It is submitted that consideration of the Bill should be deferred until there has been a process of formal consultation with reserve ADF officers, being the practitioners who are likely to undertake most of the work of defending members before the MCA.

Conclusion

The purpose of this submission is not to advocate a system that is better for the prosecutor or better for the accused. Rather, it is submitted that a military justice system that has the flexibility to permit the trial of serious offences by a court martial panel is better than one that does not.

Equally, this submission does not contend for a system that excludes the trial of offences by a Defence Force magistrate sitting alone. As the Senate Committee noted in its 2005 report, trial by DFM would often be more appropriate where the charge involves an ordinary civilian criminal offence.[64]

The Bill proposes a system where charges are preferred by the DMP who is statutorily independent of command, to be heard and determined by civilian judges in a Chapter III court. The almost complete disengagement of military officers from this layer of the military justice system undermines its objective of maintaining a disciplined and effective fighting force. For these reasons, it is submitted that the Bill should not be passed and the existing system retained and improved.

Yours sincerely

David McLure

[64] Senate Foreign Affairs, Defence and Trade Committee, *The effectiveness of Australia's military justice system* (2005), (xxxv) [49].