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

Dear Secretary

INQUIRY INTO THE MILITARY COURT OF AUSTRALIA BILL 2012

I write in support of the submission made by Mr David McLure dated 8 August 2012 that the subject bill should not be passed.

I am a lieutenant commander of the Royal Australian Naval Reserve, and have acted as an advocate (both as prosecutor and as defending officer) in Defence Force Magistrates' trials and Courts martial for over a decade.

In any consideration of 'reform' of the military justice system, it is important to appreciate the true function and purposes of the existing system. In this regard, as the High Court noted in a string of cases culminating in *Lane*, the system is principally designed for and essentially directed to the maintenance of discipline for its users: ie commanders and defence force personnel in the chain of command. It does not involve the exercise of the judicial power of the Commonwealth; nor does it purport to serve all of the objectives enshrined in the civilian administration of justice. This partly explains why, as something of a trade-off, defence members charged with offences under the DFDA that carry a maximum penalty of twelve months or more imprisonment do not have a right to trial by jury under the Constitution.

As Mr McLure points out in his submission, experience has long shown the value and efficacy of a system of courts-martial to act as a quasi-disciplinary tribunal of peers in administering discipline for service offences and those offences that bear upon the maintenance of discipline in the ADF. In addition to those offences that are strictly of a service kind (such as those contained in Part III, Divisions 1-5 of the *Defence Force Discipline Act*) there are service offences which, although counterpart to certain civilian offences, may (when committed) bear a particular significance in the service context than

they might in the domestic civilian context. Further, some conduct which would be proscribed under domestic law has particular service overtones. For example, theft of sailor's property on a warship at sea has always been regarded as particularly egregious because of the strenuous requirements of service at sea; the heightened need for trust between personnel in close proximity and the corresponding breakdown in morale once trust is betrayed. In other circumstances, courts martial may show greater sympathy and leniency for a defendant who is able to demonstrate the circumstances in which offences may have been committed (perhaps to escape convictions altogether or in mitigation of penalty). Thus, throughout history, defence personnel after some military disaster have often wished to state their case to a tribunal of peers; rather than, say, a Royal Commission headed by a civilian (ex-)judge.

As has been noted, although courts martial do not exercise the judicial power of the Commonwealth, they do exercise judicial power which (though amenable to internal and external review, and the Federal Court, albeit in a more limited fashion on questions of law) has direct and immediate effect upon the rights of service personnel, most obviously in connection with the adjudication of guilt of offence and the imposition of punishments. Serving personnel are entitled to expect that the tribunal of fact, equipped with such powers, has a full understanding of the exigencies of service life and its operations. That comes naturally to personnel with a depth of experience in the armed and naval forces. The true test for the proposed system is not for offences tried by a civilian magistrate that has an identical counterpart in domestic systems. In such case, trained judicial officers (and especially magistrates) are likely to have had a vast reservoir of civilian experience of dealing with 'summary' type offences and in that context, any limitation in defence force experience, though disadvantageous, is less likely to produce acute difficulties. Rather, the true test is at the pointy end of the hard cases concerning purely service offences involving deadly operations in the fog of war. It is difficult to conceive that an accused charge with a disciplinary offence in that context would prefer to have his or her liberty (for a substantial period) hang in the balance of a civilian judge with little real exposure to such activity.

The answer is not that, in recent times, there have been comparatively few courts-martial and more cases tried before defence force magistrates. Recently, there have been a number of high profile cases that have been, or were proposed to be, tried by courts-martial and, with an ever increasing volume of offences under international criminal law, there is the risk of offences being committed which, for reasons indicated, would be well suited for trial by court martial.

Once the power to discipline peers is taken away from a particular segment of the community for whose protection it exists, and transferred to a civilian judge, it can cause great resentment for that segment of the community. Although the analogy is imperfect, something similar was seen in the context of the civil system of justice concerning claims for damages against medical professionals. In that context, much angst and umbrage was caused when, in a number of judicial decisions (of the highest authority) the medical standard of care was taken away from doctors and placed into the hands of the courts. Partly as a result of that consternation, state and territory parliaments legislated to revive

a standard of professional care to that the standard which is widely accepted within the medical community. Disciplinary bodies and tribunals should work in a similar (and complementary) way: bringing to bear their experience and mores in determining questions of fact and adjudicating guilt and thereafter imposing punishment; whilst effectively having their decisions superintended by appropriate checks and systems of review.

As Mr McLure also points out, there are other mechanisms, such as ensuring the statutory independence of judge advocates (in alignment with the offices of the Director of Military Prosecutions and Registrar of Military Justice), which may secure an enhanced degree of independence or impartiality.

It has not been all that long ago since the demise of the Australian Military Court and it is likely that there will be constitutional challenge to the new Military Court. On the other hand, the current system was upheld as recently 5 years ago (after earlier re-affirmations) and it would be inconceivable that it could be successfully overturned.

In this author's view, there is a heavy onus upon proponents of change to prove how reform of an institution which predates federation will likely improve the lot of the users of the system. By the Bill's effective transfer of the power to adjudicate upon infractions of discipline, and (thereafter) the power to impose discipline, from command (through peer review) to civilian judicial officers, that onus has not been discharged.

Yours sincerely

Alister Abadee