Submission to the Senate Standing Committee on Legal and Constitutional Affairs

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

The purpose of this submission is to examine four key objections which have been raised to the establishment of a permanent military court in Australia in the form of the Military Court of Australia. The submission is not intended to be comprehensive, but rather seeks to consider some of the legal issues which arise in relation to these four objections.[1] The authors do not consider that the first three objections are legitimate bases to reject the establishment of the Military Court of Australia, but are concerned that the fourth objection (the lack of jury trial) may give rise to a future constitutional challenge.

The four objections to the establishment of a permanent military court which have been raised are as follows:

1. **The establishment of a permanent court is unnecessary given that the current system is not defective**

   This objection is based on the idea that if the system is not broken it does not need fixing. The current system of courts martial and Defence Force magistrates (reintroduced after the High Court struck down the Australian Military Court in *Lane v Morrison*[2]), has certainly survived a number of constitutional challenges in the High Court – although often with strong dissents. The strength of those dissents, the continued shifts of opinion within the High Court, and the absence of a clear and coherent consensus within that Court on the extent to which the specific constitutional powers relied upon by the Commonwealth[3] can support a military justice system operating outside Chapter III of the *Commonwealth Constitution*, means that the validity of the current system is assumed rather than assured.

   Moreover, while compliance with the Constitution is important, it is not sufficient.[4] Although Australia has not adopted either a legislative or a constitutional Bill of Rights, international human rights standards are relevant when considering reforms to military justice in Australia.[5] Such international human rights standards include Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR), which provides that '[i]n the determination of any criminal charge … everyone shall be entitled to a fair and public hearing

[1] This submission is based in part on the following article: Alison Duxbury, 'The Curious Case of the Australian Military Court'(2010) 10 *Oxford University Journal of Commonwealth Law* 156.

[2] *Lane v Morrison* (2009) 239 CLR 230.

[3] These are the defence, incidental and executive powers, which are respectively located in ss 51(vi), 51 (xxxix) and 61 of the *Commonwealth Constitution*.

[4] Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (2005), 91 ('*Senate Committee Report 2005*') quoting a report by the Rt Hon Antonio Lamer into Canada's military justice system, in which he stated that '[c]onstitutionality is a minimum standard'. See also Andrew Mitchell and Tania Voon, 'Justice at the Sharp End - Improving Australia's Military Justice System' (2005) 28 *University of New South Wales Law Journal* 396, 422.

[5] *Senate Committee Report 2005*, 101.

by a competent, independent and impartial tribunal established by law.'[6] The United Nations Human Rights Committee has confirmed that Article 14 of the ICCPR applies to military courts and tribunals.[7] Australia is bound by Article 14(1) as a matter of international law as a state party to the ICCPR, although it is not directly enforceable in domestic courts.

In a number of cases, the European Court of Human Rights has expressed concern about features of military justice systems in Europe, in particular the system of courts martial in the United Kingdom, in light of the requirement for a fair trial contained in the *European Convention of Human Rights and Fundamental Freedoms*.[8] Cases in Canada have also raised similar concerns in relation to the Canadian military justice system in light of the *Canadian Charter of Rights and Freedoms*.[9] These cases were discussed in the *Senate Committee Report 2005*. Some of the issues raised in the Canadian and European cases concerned the pre-trial phase of military justice, for example, the separation of the role of the convening officer (the person who convenes the court martial) and the role of the person who confirms (and has the power to vary) the decision after proceedings have concluded. To the extent that such concerns were relevant to Australia's military justice system at the time of the 2005 Senate Committee inquiry, they have largely been dealt with by the introduction of the roles of the Director of Military Prosecutions and the Registrar of Military Justice.

However, cases on military justice systems in other jurisdictions have raised issues directly relevant to the establishment of a permanent court – notably the preference for the involvement of civilians in military justice systems and the preference for some form of permanency in military courts. The European Court of Human Rights views the presence of civilians as contributing to the independence and impartiality of a military justice system.[10] Such civilians must have the ability to influence the process.[11] In addition, in *Morris* and *Cooper* the presence of a permanent full-time president with 'no effective fear of removal'[12] and *de facto* security of tenure was found to be a significant guarantee of independence.[13] Although judges of the predecessor of the proposed Military Court of Australia, the Australian Military Court, had a degree of security of tenure under the relevant legislation (10 years) they did not have the necessary security of tenure for the purposes of exercising judicial power under the *Commonwealth Constitution*.[14] The establishment of the Military Court of Australia will address both concerns articulated in these cases: judges will be

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[6] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

[7] United Nations Human Rights Committee, *General Comment 32* (2007) [22].

[8] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

[9] Canada Act 1982 (UK) c 11, sch B pt I.

[10] *Grieves v United Kingdom* (2004) 39 EHRR 2 [78] ('*Grieves*'). In *Grieves* the relevant civilian was the Naval Court Administration Officer (responsible for making arrangements for courts martial).

[11] *Martin v United Kingdom* (2007) 44 EHRR 31[52] ('*Martin*').

[12] *Cooper v United Kingdom* (2004) 39 EHRR 8 [118] ('*Cooper*') quoting Bingham LJ in *R v Spear and Others* (2002) 3 WLR 437, 443.

[13] *Morris v United Kingdom* (2002) 34 EHRR 52 [69] ('*Morris*').

[14] The appointment of acting judges was held to be constitutionally valid in *Forge v ASIC* (2006) 228 CLR 45, although it is unclear whether the central findings in that case, which were about short term appointments to a State Supreme Court, would apply to the 10 year appointments that were to be made to the AMC.

civilians and will also have the requirements of tenure recognised by international human rights law, and most importantly, the *Commonwealth Constitution*.

2. It is inappropriate for matters relating to Defence Force personnel be adjudicated by civilian judges

It has been suggested that it is inappropriate for a civilian courts to try military personnel as civilian judges are unfamiliar with the operational environments in which Defence Force personnel must work and the relationship between discipline and military command. Such criticisms ignore three important points:

- The vast majority of military offences are minor ones, which are determined on a summary basis by military commanders. The Military Court of Australia will not disturb that practice. That means the 'everyday' face of military justice will continue to be administered by officers who are uniquely placed to maintain discipline by informal, prompt responses that are usually required for minor disciplinary infractions;

- The use of civilian courts in military justice systems in other jurisdictions. Many states rely on the ordinary civilian justice system for the trial of military offences (although some retain the possibility of constituting military courts in time of war). For example, since the end of World War II, criminal acts committed by members of the German and Swedish armed forces have been tried by civilian judges sitting in ordinary courts without any major difficulty. Also, a number of states have more recently undertaken a civilianisation of their military justice systems either by transferring military cases to civilian courts (for example, the Netherlands as of 1991), or making military courts permanent and staffing them with civilian judges (the United Kingdom and New Zealand both as of 2009). The authors of this submission are not aware of any reports suggesting that these reforms have resulted in detrimental effects on the 'quality' of justice rendered or the discipline of the armed forces involved;

- There are provisions in the Military Court of Australia Bill 2012 designed to ensure a degree of military knowledge among those judges appointed to the court. Clause 10(3)(b) of the original Military Court of Australia Bill 2010 provided that judges appointed to the Military Court of Australia must have 'experience or knowledge of the nature of service in the Australian Defence Force'. Clause 11(3)(b) of the Military Court of Australia Bill 2012 strengthens this requirement by providing that a person appointed to the Military Court of Australia must 'by reason of experience or training' understand 'the nature of service in the Australian Defence Force'. A requirement of consultation with the Defence Minister in relation to such appointments was included in both the 2010 and 2012 versions of the Bill. Although informal consultation is now common for Commonwealth and State judicial appointments, it is significant that this requirement is a legislative one for the Military Court. It is noteworthy that the other specialist federal court, the Family Court of Australia, also includes a legislative requirement for specific qualifications in a subject area prior to appointment.[15] In addition, a consultation process can provide an

[15] *Family Court Act 1975* (Cth) s 22(2)(b) provides that a person shall not be appointed to the Family Court unless 'by reason of training, experience and personality, the person is a suitable person to deal with matters of family law'.

informal means of assuring members of the Defence Force that the appointment process is rigorous and transparent (as far as is possible for judicial appointments).

3. The court will not be deployable and therefore will not be functional

This objection overlooks several important factors:

- Even though courts martial, as currently provided for in Australian law, can sit overseas, they seldom do so. There are several reasons: first, the security situation in places where the Defence Force is deployed is often not conducive to holding trials; second, the time taken to investigate serious offences may mean that the accused has already been posted back to Australia by the time proceedings get to the trial stage. A separate but related point is that the more serious offences, which the court would typically hear, can be heard more effectively and quickly in Australia. These benefits are important in light of the criticisms made in the *Senate Committee Report 2005* of the delays and complexity in some aspects of military justice.

- The need to sit overseas for the purposes of examining witnesses is now considerably mitigated by the availability of video-conferencing facilities. The Military Court of Australia would be able to make use of such facilities by virtue of cl 170 of the Military Court of Australia Bill 2012.

- The Military Court of Australia would be permitted to sit overseas as per cl 52(2) of the Military Court of Australia Bill 2012 and would thus also be as deployable.

- In any event, under the Military Court of Australia Bill 2012, courts martial would be retained as a residual backup mechanism in the event that it is deemed necessary, but not possible, for the Military Court of Australia to conduct a trial overseas.

4. The Bill to establish the Military Court of Australia does not include the right to trial by jury

Clause 64 of the Military Court of Australia Bill 2012 provides that 'charges of services offences are to be held otherwise than on indictment'.[16] Clause 64 effectively deprives defendants of trial by jury as located in s 80 of the *Constitution*. This aspect of the Bill touches on a wider tension in constitutional law. On the one hand, several members of the High Court recently stated that a useful starting point for questions about the constitutional validity of the military discipline system was the assumption that members of the military retained the normal rights and obligations of civilians.[17] On the other hand, s 80 is currently regarded as a very weak right. The High Court has held that the Commonwealth Parliament can effectively circumvent s 80 by specifying that the trial of an offence (however serious) is not to be on indictment.[18] This interpretation of s 80 is encapsulated in the comments of Higgins J in *R v Archdall and Roskruge* when he stated that 'if there be an indictment there

[16] A service offence is defined in s 3 of the *Defence Force Discipline Act 1982* (Cth).

[17] *White v Director of Military Prosecutions* (2004) 231 CLR 570 at [70] (Gummow, Hayne and Crennan JJ).

[18] See *R v Archdall and Roskruge* (1928) 41 CLR 128; *Kingswell* v R (1985) 159 CLR 264; *Cheng, Cheng and Chan v The Queen* (2000) 203 CLR 248; *The Queen v LK* [2010] 17, [24] (per French CJ).

must be a jury; but there is nothing to compel procedure by indictment.'[19] The Explanatory Memorandum states that cl 64 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.'[20] It indicates that the reason for removing trial by jury in the Military Court of Australia is that a jury 'would create practical barriers to the prosecution of offences' if the trial was held overseas.[21]

The High Court's interpretation of s 80 has been criticised by judges and commentators on the basis that it enables Parliament to remove a fundamental constitutional protection.[22] Alexander Street SC, in a submission to the initial parliamentary committee charged with reporting on the Military Court of Australia Bill 2010, commented that the attempt to remove trial by jury 'will inevitably be the subject of a constitutional challenge if incorporated within the framework of the Bill'.[23] The authors of this submission share the concern that if there is a constitutional challenge to the Military Court of Australia, it is most likely that it will be based (at least in part) on s 80 of the *Constitution*. While there are now many non-indictable offences under federal law that do not require a trial by jury, offences under military law can be uniquely serious. For example, if a charge of manslaughter was brought against a member of the Defence Force (in relation to events occurring in Australia) the charge could only be heard by the Military Court of Australia (under the proposed system) with the permission of the Commonwealth DPP.[24] Otherwise, the case would be heard in a State or Territory court, where a defendant would be entitled to a jury trial. The lack of a jury trial in the first situation, and the possibility of a civilian jury trial in the second indicates the dilemma that the High Court may be faced with when dealing with a potential s 80 case in relation to the Military Court of Australia.

If this issue is not corrected, the trial of very serious offences in a military court without the use of an indictment (and the associated right to a trial by jury) could provide a tempting vehicle for the High Court to reconsider the arguably literal interpretation that currently prevails. If the High Court approached the question as one of substance rather than form, the trial of very serious offences in military courts could be contrary to s 80. Put simply, it could be argued that such offences are an impermissible evasion of s 80. A separate but logically related point arises from the status of the Military Court of Australia. If that court fully complies with the requirements of Chapter III of the *Constitution*, an argument may arise that the apparent evasion of s 80 essentially threatens the institutional integrity of the Military Court of Australia, which is incompatible with its status as a Chapter III court.

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[19] *R v Archdall and Roskruge* (1928) 41 CLR 128, 139-40.

[20] *Military Court of Australia Bill 2012 – Explanatory Memorandum* [135].

[21] Ibid [10].

[22] See *Kingswell* v R (1985) 159 CLR 264, 307 where Deane J dissented, holding that all serious offences – that is, offences with a potential sentence of at least one year's jail – should be indictable. This view has not received support by a majority of the High Court, though it found favour with Kirby J in *White v Director of Military Prosecutions* (2004) 231 CLR 570, 631-2. See also George Williams, *Human Rights under the Australian Constitution* (1999) 107.

[23] Alexander Street SC, 'Inquiry into the Military Court of Australia Bill 2010' [5].

[24] *Defence Force Discpline Act 1982* (Cth), s 63.

Conclusion

In conclusion the authors do not believe that the first three objections are legitimate bases for rejecting the establishment of the Military Court of Australia as a Chapter III court. However, they are concerned that cl 64 may create renewed doubts about the validity of Australia's military justice system by denying Defence Force members the right to a trial by jury. The denial of that basic right introduces the very potential for constitutional challenge that the Bill was intended to prevent.

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