

# CHAPTER 4

## Trial by jury

4.1 A key issue raised by the majority of witnesses and submissions was the effect of clause 64 of the Military Court Bill. Clause 64 provides that all charges of services offences are to be dealt with otherwise than on indictment.<sup>1</sup> These witnesses and submissions highlighted that clause 64 would effectively circumvent the protection in section 80 of the Constitution for trial by jury for indictable offences.<sup>2</sup> Witnesses and submissions outlined their concerns regarding the constitutional validity of this proposed arrangement and its fairness for those accused of service offences.

4.2 In her Second Reading Speech, the Attorney-General outlined two reasons for not including the option of trial by jury in the Military Court Bill:

First, service offences are created for the purpose of maintaining discipline in the ADF. The military justice system complements and does not replace the criminal law in force in Australia, and so need not mirror the civilian court process. However, when ADF personnel commit criminal offences within Australia, they will continue to be tried by jury within the civilian criminal law system. Second, where there is need to try a service offence overseas, a requirement to empanel a civilian jury would create significant practical barriers to the prosecution of offences.<sup>3</sup>

4.3 The Attorney-General also noted that the High Court 'has held that it is for parliament to decide which offences are to be tried on indictment and which can be tried other than on indictment'.<sup>4</sup>

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1 See, for example, Mr Alexander Street SC, *Submission 2*, p. 3; Ms Gabrielle Appleby and Professor John Williams, *Submission 3*, pp 4-5; Law Council of Australia, *Submission 4*, p. 2; Returned and Services League, *Submission 5*, p. 1; Associate Professor Alison Duxbury, Dr Rain Liivoja and Associate Professor Matthew Groves, *Submission 6*, pp 4-5; Inspector General Australian Defence Force, *Submission 8*, pp 1-2.

2 See Associate Professor Alison Duxbury, Dr Rain Liivoja and Associate Professor Matthew Groves, *Submission 6*, p. 4; Law Council of Australia, *Submission 4*, Attachment 1, p. 2; Returned and Services League of Australia, *Submission 5*, p. 1.

3 *House of Representatives Hansard*, 21 June 2012, p. 7414.

4 *House of Representatives Hansard*, 21 June 2012, p. 7414.

## Constitutional issues

### 4.4 Section 80 of the Constitution provides:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

4.5 In 1928, in the case of *R v Archdall*,<sup>5</sup> the High Court held that the parliament was not required to lay down an indictment procedure for an offence which carried a penalty of one year's imprisonment. In that case, Justice Higgins stated that 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment'.<sup>6</sup> Later High Court decisions have continued to apply this narrow interpretation of section 80 of the Constitution, however there have also been strong dissenting judgements made by High Court justices to this approach. In *White v Director of Military Prosecutions*, Justice Kirby noted that a 'persistent minority' had rejected 'this view as inconsistent with the function of [section 80] as providing a guarantee of jury trial which could not so easily be circumvented':

I favour what is presently the minority view. It is more harmonious with the language, constitutional context, purpose and function of the section. The contrary view renders trial by jury for the applicable federal offences optional in the hands of the very governmental agencies against whom jury trials can be a precious protection for the individual. That cannot be the meaning of the *Constitution*.<sup>7</sup>

4.6 Associate Professor Alison Duxbury, Dr Rain Liivoja and Associate Professor Matthew Groves pointed out that clause 64 of the Military Court 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. On the other hand, s 80 [of the Constitution] 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.<sup>8</sup>

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5 (1928) 41 CLR 128.

6 (1928) 41 CLR 128 at 139.

7 (2007) 231 CLR 570.

8 *Submission 6*, p. 4.

4.7 Several submissions noted that the current interpretation of section 80 of the Constitution has been subject to criticism because it enables the parliament to circumvent a fundamental constitutional protection. These submissions also highlighted the 'persistent minority' view within the High Court.<sup>9</sup>

4.8 For example, Mr Alexander Street SC provided the committee with his analysis of High Court decisions made in relation to section 80 of the Constitution.<sup>10</sup> Mr Street concluded that, in his opinion, the current interpretation of section 80 of the Constitution is based on 'unpersuasive and substantially unreasoned early High Court of Australia authority arising from legislation not consistent with the standards of our modern multicultural society'.<sup>11</sup> In particular:

To try and define discipline offences that give rise to exposure to imprisonment in excess of two years as not indictable offences within s80 is, in my opinion, bound to be held invalid. The Constitution is not a frozen fossil in the principles of interpretation.<sup>12</sup>

4.9 Mr Street also pointed out that section 73 of the Constitution creates an integrated court system, with the High Court at the apex, and that a Chapter III military court would sit within that system. He noted that 'it is very important to understand that there are significant advantages and protections which give rise to greater transparency, greater accountability and consequently...greater acceptability and greater confidence if one takes this step forward towards creating a chapter III court'.<sup>13</sup>

4.10 Some submissions also foreshadowed the circumvention of section 80 of the Constitution by clause 64 of the Military Court Bill as a likely basis for a constitutional challenge. For example, Associate Professor Duxbury, Dr Liivoja and Associate Professor Groves submitted:

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 [of section 80 of the Constitution] 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

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9 See Associate Professor Alison Duxbury, Dr Rain Liivoja and Associate Professor Matthew Groves, *Submission 6*, p. 5; Returned and Services League of Australia, *Submission 5*, p. 7, quoting Justice Kirby in *White v Director of Military Prosecutions* (2007) HCA 29 at 167; Mr Alexander Street SC, *Submission 2*, Appendix 1, pp 14-21.

10 *Submission 2*, Appendix 1, pp 14-21.

11 *Submission 2*, p. 7.

12 *Submission 2*, p. 7.

13 *Committee Hansard*, 14 September 2012, p. 16.

courts could be contrary to s 80. Put simply, it could be argued that such offences are an impermissible evasion of s 80.<sup>14</sup>

4.11 The academics went on to contend that a 'separate but logically related point' is that, if the Military Court of Australia fully complies with the requirements of Chapter III of the Constitution, then it may be argued 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'.<sup>15</sup> At the hearing, Associate Professor Groves commented:

[T]he High Court could look at the provision which deems offences not to be ones of indictment. The High Court could...say, 'Just because you say they are not does not mean in constitutional terms that we think otherwise.' The decision of the High Court in *Lane v Morrison* and also its recent migration decisions emphatically make the point that the words of the legislature are one thing; their constitutional meaning is quite another. And it is the second issue which is the province of the High Court and the High Court alone.<sup>16</sup>

### ***Departmental response***

4.12 At the public hearing, an officer from the Attorney-General's Department highlighted that the approach taken in the bills is consistent with the legal advice the government has received and follows a long line of High Court authority:

Some of the [witnesses appearing before the committee have] referenced the fact that there have been dissents in the past which have been quite powerful, but they consistently have been dissents. From our perspective we think it is a fairly settled area of law that it is for the parliament to decide what indictable offences are and hence trigger the need for a jury. In this particular case, the government has decided as a policy decision that they are not to be indictable offences.<sup>17</sup>

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14 *Submission 6*, p. 5.

15 *Submission 6*, p. 5. See also: Mr Alexander Street SC, *Submission 2*, p. 4; Returned and Services League of Australia, *Submission 5*, p. 16.

16 *Committee Hansard*, 14 September 2012, p. 22.

17 Dr Albin Smrdel, Attorney-General's Department, *Committee Hansard*, 14 September 2012, p. 41.

## Serious offences

4.13 The EM to the Military Court Bill emphasises that the Defence Force Discipline Act complements, and does not replace, the criminal law in force in Australia:

If conduct is to be prosecuted as a criminal offence, service personnel, like civilian citizens, will be afforded a trial by jury if prosecution is of a criminal offence by a civilian Director of Public Prosecutions on indictment.<sup>18</sup>

4.14 However, a number of submissions pointed to the seriousness of the offences that will be dealt with by the Military Court and argued that this factor means that trial by jury should be available to defendants. Others considered that the lack of trial by jury before the Military Court for serious service offences means that the existing system of service tribunals should be maintained. For example, the Law Council of Australia argued that 'given the serious offences considered by the Military Court and the capacity for the Military Court to impose sentences of life imprisonment, trial by peers should not be abrogated'.<sup>19</sup> The Australia Defence Association also noted that the provisions of the Military Court Bill would mean that 'a judge, sitting alone without a jury (or court martial board), will be empowered to sentence offenders up to and including life imprisonment'.<sup>20</sup>

4.15 Mr David McLure listed the serious offences which could be dealt with by a single judge of the Military Court:

A single judge of the [Military Court] will have the power to try members of the ADF for a number of [Defence Force Discipline Act] 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 [Military Court] will have the power to try civilian offences picked up by [Defence Force Discipline Act] 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).<sup>21</sup>

4.16 The Returned and Services League of Australia (RSL) provided the committee with its commentary on the 2010 legislation, which also did not treat service offences before the proposed Military Court as indictable offences. The RSL noted that nothing in any other areas of the law 'in any way discriminates members of

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18 EM, Military Court Bill, p. 29.

19 *Submission 4*, p. 2.

20 *Submission 13*, p. 7.

21 *Submission 11*, p. 3.

the [ADF] from other Australians in so far as their rights as citizens are concerned'.<sup>22</sup>  
Further:

In denying trial on indictment of any offence, more particularly a serious service offence, the legislation denies trial by jury of a kind envisaged in s.80 [of the Constitution]. In doing so, the [Military Court Bill] denies the service member the protection of a jury trial for the determination of charges of serious offences carrying on conviction penalties of potentially lengthy terms. The service member is denied the "protection" from having his/her guilt or innocence being determined by judge sitting alone.<sup>23</sup>

4.17 At the public hearing, Mr Street characterised the establishment of the Military Court as a change from an 'analogue' military discipline system to a 'digital' military justice system.<sup>24</sup> Mr Street drew a distinction between offences tried before a Chapter III court and those heard within the military discipline system:

Defence will always have to maintain a discipline system within the command structure; it is essential. That discipline system within the command structure is fundamental to the most important active duty in a war zone environment. In those circumstances, discipline in the field is something that command exercises every day. But command discipline is something quite different from what a court can do. A court does not exercise discipline. A court created under chapter III will resolve controversies...[and, in effect] criminal matters. That is a material difference in understanding the function being performed.<sup>25</sup>

4.18 Further, Mr Street argued that the Military Court 'does need a jury if you are going to give it, as it is currently proposed, the power to hear charges that, on their nature, are ones which have all the hallmarks of being indictable offences because then you are materially impacting on the rights that [accused persons] would otherwise have had in respect of those criminal offences'.<sup>26</sup>

#### *Departmental response*

4.19 The Attorney-General's Department highlighted the distinction between civilian criminal offences and the service offences which the Military Court would deal with:

Service offences are complementary to, and do not replace, the criminal laws in force in Australia. The Military Court has jurisdiction to hear service offences only. There are some instances where a service offence may be seen to be similar to a civilian criminal offence. However, this does

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22 *Submission 5*, p. 5.

23 *Submission 5*, p. 6.

24 *Committee Hansard*, 14 September 2012, p. 16.

25 *Committee Hansard*, 14 September 2012, p. 17.

26 *Committee Hansard*, 14 September 2012, p. 18.

not mean that serious service offences should be tried in an identical way to criminal offences without recognising the unique purpose of service offences to substantially serve the purpose of maintaining or enforcing service discipline.<sup>27</sup>

4.20 The Attorney-General's Department also advised that the 'establishment of the Military Court is not intended to change the essential nature of the military justice system':

The 2005 report of the Foreign Affairs, Defence and Trade Committee described the military justice system as including the discipline system (dealing with offences under the [Defence Force Discipline Act]) and the administrative system (dealing with matters affecting administration, command and control). To describe a distinction between the Court dispensing military justice and commend dispensing military discipline does not take into account administrative law mechanisms which are also part of the broader military justice system.

The discipline system within which the Military Court would be established, is, and will continue to be, a single system to deal with service offences which are created for the essential purpose of maintaining and enforcing service discipline.<sup>28</sup>

4.21 The Attorney-General's Department also noted the importance of the Military Court's capacity to prosecute serious offences committed by defence personnel overseas:

The Military Court will have jurisdiction in relation to serious service offences committed outside Australia by Australian Defence Force members. It is important for a military justice system to be capable of operating effectively overseas where required as well as in Australia. Other Australian courts have limited jurisdiction over offences committed outside Australia. In situations where the Military Court decided that there is a need to try service offences overseas, the requirement to empanel a civilian jury would impose significant practical barriers to the prosecution of service offences.<sup>29</sup>

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27 Response to questions on notice, provided on 24 September 2012, pp 1-2.

28 *Submission 15*, p. 1.

29 Response to questions on notice, provided on 24 September 2012, p. 2.

## Civilian juries

4.22 The capability and merits of civilian juries were raised in relation to the Military Court, and particularly service offences. Some submissions to the inquiry drew attention to the statement in the EM to the Military Court Bill that 'a civilian would not necessarily be familiar with the military context of service offences'.<sup>30</sup> Several witnesses and submissions disputed this argument as a reason for excluding trial by jury in the Military Court. For example, Ms Gabrielle Appleby and Professor John Williams argued:

[The] criminal justice system asks a lot of juries, and they are often required to understand complex evidence, often provided by scientific and medical experts. It does not seem congruent with our acceptance that juries are able to understand this, to argue that they will not have, or not be able to gain, an understanding of the context of service offences.<sup>31</sup>

4.23 Similarly, Mr Street commented:

There is, in fact no military discipline offence so called, in my opinion, that a civilian criminal jury could not determine. Other than the prejudicial conduct offence under s60...any suggested requirement for specialist military discipline knowledge for the constitution of the jury is, with the greatest respect, a myth.<sup>32</sup>

4.24 The RSL also highlighted that the Australian general public includes 'hundreds of thousands' of men and women who have served in the armed forces:

Many thousands of ex-servicemen and ex-servicewomen would in the past, and continue to be associated with the jury system. In terms of so called military context of service offence issues, there would be tens of thousands who by reasons of service or training understand or are able to understand the nature of service in the ADF and relevant issues.<sup>33</sup>

4.25 However, Associate Professor Matthew Groves listed a number of factors which complicate the use of trial by jury in relation to the military justice system. In particular, he indicated that 'there is a tension between potential trial by jury, which protects people but necessarily delays things, on the one hand, and, on the other hand, the need for the military to sort things quickly'. Further, he noted that the criminal law distinction between summary and indictable offences does not translate to the military

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30 EM, Military Court Bill, p. 2. See Ms Gabrielle Appleby and Professor John Williams, *Submission 3*, pp 4-5; Associate Professor Alison Duxbury, Dr Rain Liivoja, Associate Professor Matthew Groves, *Submission 6*, pp 2-3.

31 *Submission 3*, p. 5. See also: Professor John Williams, *Committee Hansard*, 14 September 2012, pp 21-22; Returned and Services League of Australia, *Submission 5*, p. 17.

32 *Submission 2*, pp 8-9.

33 *Submission 5*, p. 17.

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context and 'most people would agree that a civilian jury would be particularly ill-equipped to assess that particular context'.<sup>34</sup>

4.26 The importance of continued involvement by military officers, rather than civilian juries, in the trials of service offences was raised by several submitters and witnesses. Mr David McLure emphasised that the importance of 'the involvement of military officers in the military trials' has been previously recognised in earlier reforms to the military justice system. He noted that the EM to the 2006 legislation creating the Australian Military Court accepted that 'knowledge and understanding of the military context and culture is essential'; and observed that 'one of the ways [the previous Australian Military Court] system sought to engender credibility with, and acceptance of, the Defence Force was to involve military juries in the determination of serious offences'.<sup>35</sup> Mr McLure concluded that the 'reality is that the [currently proposed Military Court] 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 [defence force magistrate] system is not'.<sup>36</sup>

4.27 In contrast, Professor John Williams observed that civilian juries could also serve to provide an additional function for the Military Court by contributing to civilian oversight of the military. He stated that 'civilian oversight, input and moderation in the area of the criminal justice system or the military justice system is also something in this context we should be alive to'.<sup>37</sup>

4.28 At the hearing, the Chief of the Defence Force advised that the proposed bills remain faithful to the Senate Foreign Affairs, Defence and Trade Committee's 2005 report on military justice. He noted that the 2005 report 'was silent as to the requirement for juries' and that this 'implied that chapter III judges would be the trier of fact and law' in the Military Court.<sup>38</sup> Further:

Civilian and military juries and legal advice were considered along with a number of models when we worked with the Attorney-General's Department [on the development of the bills]. Only the model proposed provides the following: that the trier will understand the nature of service in the ADF; that it is a constitutionally guaranteed independence and impartiality; and written reasons for both verdict and sentence will be provided.<sup>39</sup>

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34 *Committee Hansard*, 14 September 2012, pp 23-24.

35 *Submission 11*, p. 8.

36 *Submission 11*, p. 10.

37 *Committee Hansard*, 14 September 2012, p. 21.

38 *Committee Hansard*, 14 September 2012, p. 40.

39 *Committee Hansard*, 14 September 2012, p. 40.

4.29 An officer from the Department of Defence also emphasised the unique character of service offences in relation to civilian juries:

Our view would be that a judge that meets the qualifications in the bill is better placed to understand the nature of service offending than a civilian jury. Service offences are not criminal offences. It is not a criminal jurisdiction like you would see in the civilian world. There is a range of service offences, such as disobeying a lawful command, disobeying a lawful general order and assault on a superior officer, that have a very strong discipline nexus to them that perhaps would not be readily apparent to a civilian jury...[T]he best way to address that issue is to have a judicial figure who is independent, who has the requisite training experience and who understands the nature of service offending—this is the best adjudicator of fact in the circumstances.<sup>40</sup>

### **Consistency with service tribunal system**

4.30 The consistency of the proposed Military Court with the previous service tribunal system, particularly courts martial, was raised. A number of submissions took issue with the characterisation of service offences being tried without a jury, as articulated in the EM to the Military Court Bill, as being 'consistent with the current determination of service offences under the [Defence Force Discipline Act], which also does not provide for a trial by civilian jury'.<sup>41</sup> For example, the Law Council of Australia noted that general and restricted courts martial guarantee all servicemen and women the right to a trial by their fellow ADF officers.<sup>42</sup>

4.31 Similarly, Mr Alister Abadee commented that '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'. He also noted that '[o]nce 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'.<sup>43</sup> Further:

Serving personnel are entitled to expect that the tribunal of fact...has a full understanding of the exigencies of service life and its operations...[T]he true test is at the pointy end of hard cases concerning purely service offences involving deadly operations in the fog of war. It is difficult to conceive that an accused charged with a disciplinary offence in that context would prefer to have his or her liberty...hang in the balance of a civilian judge with little real exposure to such activities.<sup>44</sup>

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40 Air Commodore Paul Cronan AM, Department of Defence, *Committee Hansard*, 14 September 2012, p. 51.

41 EM, Military Court Bill, p. 29.

42 *Submission 4*, p. 2.

43 *Submission 12*, p. 2.

44 *Submission 12*, p. 2.

4.32 Several submitters and witnesses argued that the roles played by members of a jury and members of a court martial panel are analogous in protecting the rights of the accused.<sup>45</sup> For example, the Hon Alan Abadee AM RFD QC, representing the RSL, told the committee:

[O]ffences under the Defence Force Discipline Act when they are tried by a military tribunal, that tribunal, or more accurately the court martial panel itself, plays the role somewhat akin to the role played by a civilian jury of 12 in respect of ordinary criminal offences tried in the ordinary criminal courts. What happens is, in terms of fairness, that not one person determines sitting alone guilt or innocence, but rather the issue in respect of serious service offences is determined by a panel of not fewer than five in the case of a general court martial or not fewer than three in the case of a restricted court martial. Indeed, in many ways the procedure that is adopted in respect of the current court martial system is very much the criminal procedure that is adopted in respect of trial of offences against the ordinary civil law in terms of the trial being conducted on indictment by an ordinary criminal court or civil court in Australia.

In terms of fairness in respect of an indictable offence, if I can use the expression, fairness is met very much by trials being conducted by 12 persons, multiple persons, acting together and reaching a unanimous decision.<sup>46</sup>

4.33 However, the Attorney-General's Department distinguished the role played by courts martial panels from that of civilian juries in criminal trials:

In the current court martial system, the role of the court martial panel is not akin to a jury but rather as superior officers in the chain of command reinforcing the service discipline aspect of a service offence. While a jury may be perceived as discharging a similar role, a jury would in effect be performing a role more consistent with its civilian criminal offence underpinnings, rather than reinforcing service discipline as a core element of the military justice system.<sup>47</sup>

4.34 At the public hearing, Associate Professor Alison Duxbury noted that 'there are a number of countries who have civilian judges in their military justice systems because, of course, the military justice system is part of the civilian system'.<sup>48</sup> Conversely, Mr David McLure argued that the Military Court Bill proposes a system 'out of step' with the civilian justice systems and the military justice systems of Australia's allies. He outlined that, with the establishment of the Military Court, Australia, in contrast to military justice systems in Canada, New Zealand, the United Kingdom and the United States, would be the only jurisdiction that 'limits the

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45 For example, see Mr Paul Willee QC, Law Council of Australia, *Committee Hansard*, 14 September 2012, p. 11.

46 *Committee Hansard*, 14 September 2012, p. 5.

47 Response to questions on notice, provided on 24 September 2012, p. 1.

48 *Committee Hansard*, 14 September 2012, p. 25.

trial of serious service offences to civilian judges without the option of a court martial panel or military jury'.<sup>49</sup>

4.35 Mr McLure also highlighted that the proposal to conduct trials for service offences without the involvement of military officers is not a policy decision:

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 [Military Court] 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.<sup>50</sup>

4.36 At the public hearing, Mr McLure stated that 'while it is true that involving a civilian judge who is independent from the military does add a veneer of respectability and credibility to the decision making [process], because such decisions are clearly not necessarily influenced by the desires of the military, what one loses at the expense of this is the experience that military officers and military judges can bring to bear'.<sup>51</sup> Mr McLure argued 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'.<sup>52</sup> He recommended that if 'the Parliament is determined to establish a Chapter III court...it should explore constitutional reform in order to permit a jury solely made up of military officers'.<sup>53</sup>

4.37 The Australia Defence Association also disputed the policy justifications for the establishment of the Military Court without a right to trial by jury for serious service offences:

The exclusion of trial by jury stems directly and only from the arcane legal mechanics of establishing such a specialist jurisdiction as a court under Chapter III of the Constitution, rather than continue with courts martial as disciplinary tribunals under the defence heads of power. Both the unfairness and probable constitutional invalidity involved surely mean the whole concept of a Chapter III court specifically for our defence force should not proceed on this ground alone.<sup>54</sup>

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49 *Submission 11*, pp 3-5.

50 *Submission 11*, p. 3.

51 *Committee Hansard*, 14 September 2012, p. 31.

52 *Submission 11*, p. 11.

53 *Submission 11*, p. 13.

54 *Submission 13*, p. 8.

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## Reasons for judgement

4.38 At the public hearing, witnesses from the ADF emphasised that an advantage of the Military Court is that judicial officers would be required to provide reasons for judgement and decisions. In particular, the Chief of the Defence Force stated:

Importantly, juries do not provide reasons for decisions; judges do. Providing reasons for findings enhances the maintenance of service discipline and far better supports the proposed appeal system.<sup>55</sup>

4.39 In addition, an officer from the Department of Defence commented:

[I]f somebody understands why they have been convicted because the judge gave extensive reasons—and those reasons would obviously go to the nature of the service offending, the service offence and the context in which the service offending occurred—all that would be on the public record and all of that would feed back into our discipline system across the Australian Defence Force. You would in fact build up a system of military law, military jurisprudence, that would address those issues, the reasons why conviction has occurred and the reason for the offending. You do not get any of that with a simple 'guilty' or 'not guilty' by a civilian jury. So we see real benefits in terms of the jurisprudence that comes out of this and the understanding of the service offending that occurs, and in our ADF members understanding that as well. We actually see this as being something that is ahead of the jury system; it is a real plus for us in terms of the maintenance of service discipline.<sup>56</sup>

4.40 Similarly, the Inspector General Australian Defence Force, described the requirement for reasons to be given for judgements by the proposed Military Court as a 'welcome change which in practice should help in addressing the concerns of those who are worried about the absence of a panel or jury equivalent in Military Court trials'.<sup>57</sup>

4.41 The Attorney-General's Department also advised:

Trial by a judge sitting alone means that service personnel will be provided with reasons for both conviction and sentence. This does not occur with current courts martial and would not occur with a jury trial. The provision of reasons provides greater transparency and fairness for service personnel, particularly in providing a clear basis for any appeal.<sup>58</sup>

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55 *Committee Hansard*, 14 September 2012, p. 41. See also: Mr David Fredericks, Attorney-General's Department, *Committee Hansard*, 14 September 2012, p. 39.

56 Air Commodore Paul Cronan AM, Department of Defence, *Committee Hansard*, 14 September 2012, p. 50.

57 Mr Geoff Earley AM, Inspector General Australian Defence Force, *Committee Hansard*, 14 September 2012, p. 33.

58 Response to questions on notice, provided on 24 September 2012, p. 2.

4.42 However, in a joint submission made following the public hearing, Mr David McLure and Mr Alister Abadee disagreed with the suggestion that providing reasons for judgements is an advantage of the Military Court which could not also be provided by the existing service tribunals. They noted that, while in practice, 'court martial panels in Australia usually do not give reasons for their decisions', in their experience 'it is not uncommon for panels to make some comment when announcing their decision on punishment'.<sup>59</sup> Mr McLure and Mr Abadee argued:

[I]t 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 [Defence Force Discipline Act], requiring court martial panels to give reasons.<sup>60</sup>

### **Committee view**

4.43 The committee welcomes the establishment of the Military Court, which had its genesis in the Senate Foreign Affairs Defence and Trade References Committee's report in 2005 into Australia's military justice system. The proposed Military Court substantially accords with the recommendations of that report and the committee agrees with the following finding:

Service members should still retain the right to access independent and impartial tribunals for the determination of their guilt or innocence. Their decision to serve and defend Australia should not mean that they sacrifice the basic right to a fair trial possessed by every Australian citizen. Where the military purports to exercise jurisdiction over Service offences...this should only be done through a court created under Chapter III of the Commonwealth Constitution.<sup>61</sup>

4.44 The bills also make a number of other worthwhile reforms to Australia's military justice system. In particular, the committee notes that the bills will modernise the existing provisions relating to persons found unfit for trial or persons acquitted on the basis of mental impairment. These persons will now be dealt with similarly to persons within the civilian criminal justice system. The provision for the statutory recognition and independence of the Office of Director of Defence Counsel Services is also a significant improvement. The proposed amendments reflect a commitment to the protection of the rights of ADF members involved in the military justice system.

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59 *Submission 14*, p. 2.

60 *Submission 14*, p. 3.

61 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 101.

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### ***Appointment requirements and appeals***

4.45 The committee acknowledges the concerns raised during the inquiry regarding the provisions for the appointment of judicial officers to the Military Court. In the view of the committee, these requirements strike the right balance between judicial independence and understanding of military service. In particular, the committee agrees that the appointment of serving ADF members or reservists to the Military Court would be inappropriate. Such a situation would risk a perception of a lack of independence and impartiality on the part of the court and, potentially, a constitutional challenge. Similarly, the appointment of serving state judicial officers to the Military Court could present practical and legal difficulties. The committee notes that former state judicial officers will be eligible for appointment to the Military Court. Concerns were also raised during the inquiry with other aspects of the Military Court's establishment, for example, in relation to appeal processes. The committee is satisfied, however, that these aspects are both justified and are not unprecedented within the federal court system.

### ***Residual use of courts martial and defence force magistrates***

4.46 The residual use of courts martial and defence force magistrates was a matter of concern for some witnesses and submitters. In the view of the committee, this is a pragmatic approach which will support the maintenance of military discipline, even in situations where the Military Court determines it is necessary, but not possible, for the Military Court to conduct trials overseas. Situations which require the residual use of courts martial and defence force magistrates are likely to be rare. Nonetheless, the committee is reassured that the ADF understands the need to continue to maintain the expertise and training within the ranks of the ADF to conduct trials in these service tribunals.

### ***Trial by jury***

4.47 The maintenance of military discipline in the ADF is a vital component of its effectiveness, both in times of peace and war. In the committee's view, defence personnel do not cease to have the rights and protections of Australian citizens, however, they do give up some rights by voluntarily enlisting in armed service and becoming subject to military discipline, including the service offences listed in the Defence Force Discipline Act. Even a 'defence civilian', a person other than a defence member who accompanies the defence force on operations, must consent in writing before becoming subject to defence force discipline.<sup>62</sup>

4.48 No right to trial by jury existed previously for those charged with serious service offences tried before courts martial or defence force magistrates. The committee does not agree with the comparisons made during the inquiry between trial by jury and trial before a court martial panel. In particular, a court martial does

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62 Section 3, Defence Force Discipline Act.

not provide a trial by peers as this service tribunal is entirely composed of officers of rank more senior than the accused.

4.49 The committee also notes that the Defence Force Discipline Act will continue to oblige the Director of Military Prosecutions to seek the consent of the Commonwealth Director of Prosecutions before commencing prosecutions for serious offences which may be brought within the military justice system. Further, arrangements between the Director of Military Prosecutions and the Australian Directors of Public Prosecutions will ensure that, where defence personnel are alleged to have committed offences in Australia with civilian criminal law equivalents, those trials will appropriately be held in civilian courts where trial by jury is available for indictable offences.

4.50 The committee acknowledges the legitimate concerns expressed by witnesses and submitters regarding the fairness of trials being held before a single judicial officer of the Military Court for ADF members accused of serious service offences. In particular, the committee recognises the longstanding work of the Returned and Services League of Australia and the Australia Defence Association in advocating for the interests of ADF members on this issue. However, in the view of the committee, the legal framework and the practical requirements of the military justice system complicate the introduction of trial by jury for serious service offences. These practical requirements will be highlighted when the military justice system is required to operate overseas, as a Military Court trial held in an operational setting would not be able to empanel a jury.

4.51 The committee considers that the establishment of the Military Court will have a positive impact on military discipline and confidence in the military justice system. The committee also notes departmental advice that the vast majority of service offences will continue to be dealt with summarily by ADF commanders. The Military Court will have a 'strong service character' as in most cases prosecutors, defence counsel and the defendant will be defence personnel. Further, the judicial officers of the Military Court will be required, by reason of experience or training, to understand service within the ADF. The judicial officers of the Military Court will also provide reasons for judgement which will clarify and support the application of military discipline in the future.

4.52 While the committee acknowledges that dissenting High Court views have been expressed regarding the character of section 80 of the Constitution, the literal interpretation of section 80 has been affirmed in a consistent series of High Court decisions. The current legal position is that it is for the parliament to determine which offences will proceed on indictment. There remains a risk of a constitutional challenge to the establishment of the Military Court as a Chapter III court without the option of trial by jury for serious service offences. Accordingly, the Australian Government should prepare a contingency plan in the event that this should occur. Nonetheless, the Australian Government is entitled to rely on its legal advice in relation to section 80 in establishing the Military Court under Chapter III of the Constitution.

### ***Explanatory memoranda***

4.53 As a final note, the committee expresses its concern that important components of the policy rationale for the provisions establishing the Military Court, and the other proposed reforms, were not included in the explanatory memoranda to the bills and were only provided by the Attorney-General's Department when specifically requested by the committee in questions placed on notice. This information would have been particularly useful in clarifying some of the legal, technical and practical issues surrounding the establishment and proposed operation of the Military Court, and in assisting the committee to finalise its deliberations and the content of its report at a much earlier stage than was ultimately the case. The committee considers that this additional information should be added to the explanatory memoranda of the bills to assist subsequent interpretation of their provisions.

### **Recommendation 1**

**4.54 The committee recommends that the explanatory memoranda of the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 be amended to incorporate the additional policy rationale for the provisions of the bills that was received in evidence from the Attorney-General's Department during the committee's inquiry.**

### **Recommendation 2**

**4.55 Subject to Recommendation 1, the committee recommends that the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 be passed.**

**Senator Trish Crossin  
Chair**

