INQUIRY INTO THE

MILITARY COURT OF AUSTRALIA BILL 2010

SUBMISSION OF ALEXANDER STREET SC

Introduction

1. I listened with great interest to the events on 24 June 2010 including the Second Reading Speech of the Bill as it was a most unique and historical day. I have now reviewed the material on the website.

2. The new Military Court of Australia as a Chapter III court will provide protections to the members of the Australian Defence Force befitting the role of those who serve to maintain and protect the Commonwealth of Australia under the legislative regime created through the proper exercise of the defence power, itself subject to the Constitution including the entrenched sovereignty of the rule of law. As it was the unification of the people of the Commonwealth of Australia that was substantially motivated by concerns of defence of this great sovereign State it is essential that obvious constitutional flaws or weaknesses are not entrenched in the new Military Court of Australia.

3. Just as members of the Australian Defence Force are expected to maintain best practice in the lawful discharge of their duties, it is appropriate that best practice be applied to ensure the new military discipline and criminal system meets the expectation of defence members and all Australians, namely that the new Military Court of Australia complies with the requirements of Chapter III of the Constitution. The new Chapter III court should be consistent with the development of constitutional principle through the jurist's eyes of 2010 and not as if blinkered by the constraints in 1900 of communication, transportation, society, human values, warfare and legal doctrine, nor as if the interpretation of the Constitution was frozen in 1900. There are a number of potentially contentious provisions in the Bill, like s113, s164 and s179(2), however there are, in my opinion, four obvious constitutional flaws.

4. The four important issues that I would seek to raise are as follows:

Right to trial by jury

5. *First*, the Bill should accommodate s80 trial by jury rights for serious indictable offences. Whilst it is true that there are old existing High Court of Australia authorities that suggest the constitutional right to trial by jury found in s80 can be circumvented merely by the Parliamentary pen as to what is or is not an indictable offence, these authorities do not accord with constitutional principles as to the construction of the guarantees found within the Constitution, are the subject of powerful dissecting views by the High Court of Australia, do not accord with modern High Court of Australia authority as to the constitutional supremacy of the rule of law including the work done by Chapter III, will inevitably be the subject of a constitutional challenge if incorporated within the framework of the Bill and will, in my opinion, inevitably be overruled as being contrary to the proper constitutional interpretation of s80.

6. The prospects of invalidity of a system that seeks to characterise serious indictable offences (probably being offences carrying a penalty of two or more years imprisonment) is not saved by an optional process given to the Director of Public Prosecutions as the constitutional right to trial by jury, properly construed, is a right of the accused. I should note in this regard that the creation of a Chapter III Court with vested jurisdiction for offences against laws of the Commonwealth will no longer permit any parallel alleged disciplinary system that re-characterises serious criminal offences as being disciplinary service offences outside s80. The vested jurisdiction of a Chapter III Court as is proposed by this Bill cannot be taken away by executive or administrative act. Nor can the constitutional rights of the kind found in s80 be taken away as a matter of principle by legislative, executive or administrative act.

Exhaustive nature of Chapter III Court

7. *Secondly*, deployability overseas of a trial process for serious indictable offences through the *Defence Force Disciplinary Act 1982* otherwise than by the new Military Court of Australia will inevitably encountered the same constitutional problems and challenge as explained above.

Justice and Court misnomer

8. *Thirdly*, the description of any Chapter III justice appointed under s72 of the Constitution to this new Chapter III Court as a "*Magistrate*" is a misnomer, is incompatible with the constitutional status of a Chapter III justice, is in the international arena a likely source of confusion and diminution of the true status of the new Court, and is domestically misleading or likely to mislead as to the true nature of judicial office held and should not be entrenched by this legislation. Indeed, the anomaly in the misnomer of the Federal Magistrates Court of Australia has in itself grave problems in appellation and arguably is incompatible with s71 and Chapter III. The description of the Federal Magistrates Court of Australia should urgently be renamed with an appellation appropriate to the status of s72 justices and the status of a s71 court preferably with a name such as the "*Federal District Court of Australia*". It is entirely appropriate and indeed, most important, that the international stature of the Military Court of Australia is not itself diminished by the use of a term for Chapter III justices appointed to that new Court that is utterly incompatible with their true status. The international significance of those appointed to the Military Court of Australia cannot be understated as, for example, prisoners of war under the third *Geneva Convention* have rights to be dealt with by the same procedure as in the case of members of the armed forces, see Articles 88, 102, 103 and 106.

9. Further, international acceptance of the authority of the Military Court of Australia by the exercise of the judicial power of the Commonwealth is of considerable importance and the profile and stature of the new Chapter III Court should not be diminished by any continuing misnomer in the use of the name "*Magistrate*" for a s72 justice.

Independence for life

10. *Fourthly*, an inherent requirement of Chapter III is judicial independence of Chapter III justices for life and the amendments made to the Constitution as a result of the *1977 Referendum* did not remove the requirement that terms of tenure must accommodate independence for life. There is a material distinction

in this regard between the pension entitlements of Chapter III justices appointed to the Federal Court of Australia and Chapter III justices appointed to the Federal Magistrates Court of Australia. The failure to ensure that all s72 justices have independence for life by appropriate pension is likely to be the subject of a constitutional challenge unless redressed. In this regard, it is most important that all justices appointed to the new Military Court of Australia have terms of tenure that comply with the constitutional requirement for life time independence. This requires appropriate judicial pension for all Chapter III justices serving on the Military Court of Australia, whether or not serving on the misnamed Federal Magistrates Court of Australia. The disparity of terms of appointment as between Chapter III justices is itself a matter that might give rise to constitutional disquiet. However, it would be more than unfortunate if a serious trial before the new Military Court of Australia was to be derailed by the failure to ensure that all justices appointed to that new Court have pension entitlements for life befitting and essential for judicial independence entrenched by Chapter III.

11. I warmly commend all those who have worked on advancing the new Chapter III Court, and it is an enormous credit to all those involved that the birth of a new Chapter III court is imminent. I wish to express my appreciation to the Committee for the privilege of being invited to make this submission.

CHAMBERS

1 July 2010 **A W STREET SC**