A PROPOSED NEW MILITARY JUSTICE REGIME FOR THE AUSTRALIAN DEFENCE FORCE DURING PEACETIME AND IN TIME OF WAR

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THESIS DECLARATION

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ABSTRACT

Only infrequently since Federation has the High Court of Australia been called upon to examine the constitutionality of the Australian military justice system and consider whether the apparent exercise of the defence power under s51(vi) of the Constitution to establish service tribunals may transgress the exercise of the judicial power of the Commonwealth under Chapter III of the Constitution.

Since World War II, the High Court of Australia has maintained a line of authorities supporting a doctrine of constitutional '*exceptionalism*', whereby service tribunals do not exercise the judicial power of the Commonwealth under Chapter III of the Constitution but constitute an '*exception*' to Chapter III based upon a construction of the defence power which is "necessary not only from a practical, but also from an administrative view".[1] However, Gleeson CJ has more recently summed up the problem that this '*exceptionalist*' approach poses to the High Court when he observed that "history and necessity combine" to compel the conclusion that the defence power, rather than a strict reading of the Constitution itself, authorises the current disciplinary system of the Australian Defence Force (**ADF**).[2]

The current ADF military justice system established under the *Defence Force Discipline Act* 1982 (Cth)(**DFDA**) commenced its operations on 3 July 1985. It made fundamental changes to the scope and coverage of military discipline in terms of personnel and the legal framework. In 2005, the Senate's Report on "*The Effectiveness of Australia's Military Justice System*" prompted the Government to announce significant reforms to the military justice system. The principal change was the establishment of a non-Chapter III permanent Australian Military Court (**AMC**) to replace the *ad hoc* convened courts martial and Defence Force Magistrates' (**DFM**) trials. In *Lane v Morrison* (2009) 239 CLR 230, the High Court of Australia unanimously declared that the AMC was unconstitutional as it breached Chapter III.[3] As a consequence of the striking down of the AMC, in 2009 the Parliament restored the court martial system

1 *Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, per Starke J at 468. See also *Stenhouse v Coleman* (1944) 69 CLR 457; *R v Cox; Ex parte Smith (*1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *McWaters v Day* (1989) 168 CLR 289; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570; *Lane v Morrison* (2009) 239 CLR 230.

2 *White v Director of Military Prosecutions* (2007) 231 CLR 570, [14].

3 Declaration: Division 3 of Part VII of the DFDA was invalid.

(inclusive of trials before DFMs) as an 'interim measure' which had been in existence under the DFDA before the establishment of the AMC. This also means that the recommendations of the 2005 Senate Report have yet to be implemented (although partial attempts were made in 2010 and then again in 2012).[4]

This thesis concludes by proposing the establishment of:

- a specialist Chapter III military court to sit in Australia in which more serious service offences are to be charged on indictment requiring a trial before a Chapter III military court judge and civilian jury; and
- a new form of service tribunal to address the problem where a Chapter III military court cannot, and, or will not, sit outside Australia in war or war-like operations, to hear trials of service offences herein called the Australian Court Martial Tribunal (**ACMT**). The ACMT will be presided over by a military presidential member sitting with a military jury of either six or 12 members (depending on the seriousness of the service offence).

4 Military Court of Australia Bill 2010 (Cth) and subsequently Military Court of Australia Bill 2012 (Cth) were introduced to establish a properly constituted Chapter III military court to try service offences under the DFDA but both these bills lapsed on the proroguing of the respective Parliaments.

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I also gratefully acknowledge the assistance of my old school friend and colleague at the Bar, Dr Richard Manly QC, who himself completed his PhD in 2019, and has valuably reviewed my drafts and given me useful guidance in how to write more effectively during those times when I had come to a halt. I also express my gratitude to Bruna Pomella for proof-reading this thesis and bringing her clarity of grammar to this work. I also wish to acknowledge the assistance I have received from Helen Christie at Blue Wren Books in accepting my draft of this thesis and turning it into this beautifully presented manuscript.

I must conclude my acknowledgements with two more mentions.

The first, SSGT Desmond Ryan who, in 1989, entrusted me to be his Defending Officer when he was charged with service offences under the new DFDA which were triable before DFM MAJ Richard Tracey, QC (as he then was). I was (and remain) a practising barrister and then held a commission as a Legal Officer in the Australian Army Legal Corps (Reserve), having previously attended the Royal Military College, Duntroon, Monash University Regiment (from which I was commissioned as an officer), the Royal Regiment of Australian Artillery and finally to the Australian Army Legal Corps (Reserve). This is how I came to act for SSGT Ryan (and from which this thesis was set to arise).

Therefore, the second mention is of Brind Zichy-Woinarski QC with whom I read when I was called to the Bar and to whom I turned for guidance in the High Court of Australia in the constitutional challenge to the DFDA which was to become *Re Tracey, Ex parte Ryan* (1989) 166 CLR 518. Woinarski's advocacy was then, and remains now, an exemplar of how to be prepared and persuasive before seven High Court justices and 15 opponents at the Bar Table representing the governments of the Commonwealth and every State and Territory of the nation. My learned opposite, as junior counsel for the Commonwealth, was Stephen Gageler (now a justice of the High Court) and, like him, this case and its consequences have caused me to '*gnaw at the file*' but for me this has now been

30 years.[5] Although the High Court challenge ended in a series of judgments without a discernible *ratio decidendi,* it clarified some areas of the breadth of the DFDA whilst leaving little guidance in other areas. It was successful in declaring certain parts of the DFDA as being invalid insofar as it sought to expunge the operation of State and Territory criminal law. Fortunately, and given the trust he had placed in me, on the matter being remitted for trial before the DFM, SSGT Ryan was acquitted of all charges.

So, for 30 years I have gathered cases, articles and snippets, and jotted down thoughts about possible better solutions for the ADF's military justice system. Therefore, this thesis represents the culmination of my 'gnawing' and it has been such a delight to write, not as part of my legal practice, but for enjoyment and academic satisfaction.

I trust this thesis will, in fact, prove to be a further '*grain of sand on the beach of knowledge*' as a thesis should be.

Finally, I acknowledge this research was supported by an Australian Government Research Training Program (RTP) Scholarship.

DAVID H DENTON, RFD QC

5 Stephen Gageler, Gnawing at a File: An Analysis of *Re Tracey; Ex parte Ryan*, (1990) 20 *University of Western Australia Law Review* 47.

AUTHORSHIP DECLARATION: SOLE AUTHOR PUBLICATIONS

This thesis contains the following sole-authored work which has been published.

Details of the work:

David H Denton, "The Australian Military Justice System: History, Organisation and Disciplinary Structure" (2016) 6(1) *Victoria University Law and Justice Journal 26*.

Location in thesis:

Some of the arguments in chapter 2 of this thesis have been developed through publication of the above work during the course of my candidature.

Signature: 

Date: 16 September 2019

PART A

The Foundations of Military Justice

1 THESIS: INTRODUCTION

The assertion however that no such thing as martial law exists under our system of government, though perfectly true, will mislead anyone who does not attend carefully to the distinction between two utterly different senses in which the term 'martial law' is used by English writers.

Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of an invasion, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England.[6]

1.1 Australian Military Justice Disciplinary System

The ADF military justice disciplinary system is designed to support the command and organisational structure of the ADF. All ADF members are subject to the DFDA and its disciplinary system. According to the most recent annual Defence Report,[7] as at 30 June 2018, the ADF's total strength was 58,475 members, comprising permanent and reserve members. Of these, 189 were star-ranked officers, that is, officers with the rank of Brigadier (one-star general or equivalent), or above.[8] By any description, it is a very large organisation to command.

The ADF military justice system has two main elements: a discipline system which provides for the investigation and prosecution of disciplinary and criminal offences under the DFDA, and an administrative system which aims to improve ADF processes such as complaint handling. This thesis examines only the disciplinary system of the ADF and the way it may be improved to operate independently and impartially in times of both peace and war.

Mitchell and Voon[9] have stated that offences under the DFDA can be grouped into three categories. The first category comprises offences peculiar to the ADF,

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6 AV Dicey, *The Law of the Constitution*, ed JWF Allison, (Oxford University Press, 2013) 161.

7 Australian Government, Department of Defence, *Annual Report, 2017–2018*, Chapter 7, Table 7.3, 82.

8 *Ibid.,* 86.

9 Andrew Mitchell and Tania Voon, 'Justice at the Sharp End — Improving Australia's Military Justice System', (2005) 28(2) *University of New South Wales Law Journal* 396, 398.

such as endangering of morale,[10] absence without leave,[11] and disobedience of a command.[12] The second consists of offences which are similar or identical to ordinary civil offences[13] except that they relate only to service equipment or personnel or have an extraterritorial application, such as destruction, damage to or unlawful possession of service property[14] and dealing in narcotic goods.[15] The third category includes offences imported directly from the general civilian criminal law, under s 61 of the DFDA. Importantly, no service offence is subject to a territorial limitation as the DFDA applies to ADF members both inside and outside of Australia.[16] In this respect, General Cosgrove, as a former Chief of the Defence Force (**CDF**),[17] stated in a submission to the Senate Committee:[18]

> *The importation of a range of civilian criminal offences as disciplinary offences is of particular utility and importance when forces are deployed overseas, where ADF members may otherwise either not be subject to any criminal law or to host country law — neither of which may be desirable.*

The ADF disciplinary system is contained in the DFDA. The DFDA provides for seven different authorities before whom a charge of a service offence may be heard.[19] These range from hearings before a Discipline Officer[20] at the lowest end of severity, to a General Court Martial[21] which concerns the most severe of charges. All of these authorities (save for the Discipline Officer) are 'service tribunals' under the DFDA. The service tribunals which can hear charges involving allegations of criminality at the lower end of the scale of severity are collectively called 'summary authorities'.[22] Summary authorities cannot sentence to imprisonment a person who is found guilty. More severe allegations are heard before a DFM,[23] Restricted Court Martial[24] or General Court Martial; these are the only entities within the military justice system which can sentence

10 DFDA, s 18.
11 DFDA, s 24.
12 DFDA, s 27.
13 A comparative table covering many service offences with civilian equivalents is contained in Appendix 10.
14 DFDA, s 44.
15 DFDA, s 59.
16 DFDA, s 9.
17 Chapter 2.9.
18 PJ Cosgrove, Submission No P16 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Effectiveness of Australia's Military Justice System,* 16 June 2005, [2.19].
19 Chapter 2.7.
20 Chapter 2.7.2.
21 Chapter 2.7.6.1.
22 Chapter 2.7.1.
23 Chapter 2.7.3.
24 Chapter 2.7.6.2.

a convicted person to imprisonment. Currently, it is the Registrar of Military Justice (**RMJ**)[25] who decides which forum will hear service offence charges. It is accepted for the purposes of this thesis that minor disciplinary infringements currently heard before summary authorities should continue to be dealt with internally, that is, within the 'chain of command'[26] much in the way that a civilian employer deals with a civilian employee.

However, unlike civilian employment, it is important to understand that the DFDA provides for punishments ranging from a 'reprimand' to 'imprisonment for life', including a number of punishments that are unique to the military, such as 'stoppage of leave' or 'extra drill'.[27] The ADF military justice system has such an array of punishments available that care needs to be exercised when analysing its bases and the operations of its service tribunals.

This thesis traces and examines the history, development and organisation of the ADF military justice system from its English historical roots, through to its development during Australia's colonial era, passing through Federation and into the present time. It then proposes reforms of the ADF military justice system so that it may operate, constitutionally, in times of peace in Australia and in wars overseas.

1.2 Methodology: Doctrinal and Reform-Oriented Research Approaches

This thesis adopts doctrinal and reform-oriented research approaches based upon primary and secondary sources of legislation, case law, legal texts and articles. Doctrinal research is described by Pearce *et al,*[28] as one which '*provides a systematic exposition of the rules governing a particular legal category, analyses of the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments*'. Whereas, reform-oriented research is described as research '*which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting*'.

Hence, the research data analysed in this thesis includes primary source material from multi-jurisdictional case law and statutes, together with secondary source material including texts, journal articles, conference presentations and

25 Chapter 5.6.2.

26 Chapter 2.9.

27 DFDA, s 68; see also Appendix 7 and Appendix 8.

28 Dennis Pearce, Enid Campbell, and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) 312.

seminar papers. Some of this research was utilized for a law journal article[29] in which several of the arguments presented in this thesis were developed, providing the basis for chapter 2.

Adopting these research methodologies, this thesis argues that the ADF's military justice system must be seen as a culmination of Australia's development from its English military justice roots originating in medieval times through to the establishment of British colonies in Australia and then through Federation until the introduction of the DFDA. Hence, the current system is the outcome of historical and local circumstances. This thesis analyses the current ADF military justice system and examines the previous attempts made by governments to introduce reforms to military justice legislation. The thesis then advocates a reform-oriented outcome.

1.3 Structure of the Thesis

This thesis comprises seven chapters. It is divided into four parts:

- Part A — *The Foundations of Military Justice*;
- Part B — *Reformation of the Military Justice System in Australia*;
- Part C — *Appendices;* and,
- Part D — *Bibliography, et al.*

In brief, Part A (chapters 1, 2 and 3) contains an introductory chapter which provides a brief overview of the issues canvassed in the thesis and explains the chosen research methodologies. This Part also examines the genesis of military justice in England from the Middle Ages and the historical and traditional legal bases of courts martial in England and Australia. Part B (chapters 4, 5, 6 and 7) examines previous attempts at reform of the Australian military justice system and provides the context in which the thesis argues the need for a new military justice system in Australia that is capable of implementation both in peace time and during war. Turning now to examine each Part in a little more detailed outline, the thesis provides as follows:

29 David H Denton, 'The Australian Military Justice System: History, Organisation and Disciplinary Structure' (2016) 6(1) *Victoria University Law and Justice Journal* 26.

PART A – THE FOUNDATIONS OF MILITARY JUSTICE

Chapter 2 — The Australian military and its justice system: Development, organisation and disciplinary structure.

An understanding of the military justice system of the ADF requires knowledge of the development of Australia's naval and military forces (collectively called the 'military') since the commencement of colonisation in 1788. This chapter briefly examines the historical development of each stage of military discipline from colonial times to the present.

This chapter argues that the 'chain of command' is not only crucial to the enforcement of military discipline in general, but it is the prevailing management concept utilized within the ADF. This concept is examined through the genesis of formal structures of military justice, the development of Australian military structures and disciplinary regimes, and the importance of the chain of command within the military justice system.

Chapter 3 — Legal foundations of the ADF military justice and appellate systems

Throughout the course of English history from the Middle Ages onwards, courts martial were considered 'courts of law' as they exercised the judicial power of the sovereign in military matters. This historical or traditional classification is relevant to the Australian context as the High Court of Australia has held[30] that recourse may be had to historical or traditional classifications of a body to fully understand what function that body performs. Notwithstanding that, it is argued the High Court of Australia has chosen to give little weight to this important classification when it has considered the constitutional basis of courts martial in Australia.

The validity of the current courts martial system in Australia, established under the DFDA, has now been directly challenged before the High Court on seven occasions (**the Peacetime Cases**).[31] In six instances (in the seventh the AMC was declared unconstitutional), the High Court held that the exercise of judicial-like powers by a non-Chapter III court, in respect of defence disciplinary matters, did not contravene Chapter III of the Constitution due to the constitutional doctrine of 'exceptionalism'. That is, although military service

30 *R v Davison* (1954) 90 CLR 353.

31 **The Peacetime Cases:** *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *McWaters v Day* (1989) 168 CLR 289; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570; *Lane v Morrison* (2009) 239 CLR 230.

tribunals exercise judicial power, the High Court has held that they do not exercise 'the judicial power of the Commonwealth' under Chapter III; rather, they exercise an 'exceptional' power, and this power is conferred by s 51(vi) of the Constitution — that is, the defence power.

A properly constituted system of military justice requires an appellate justice system which is fair and operates independently of the chain of command. Since 1955, the ADF has had an appellate tribunal system in the form of the Defence Force Discipline Appeals Tribunal (**DFDAT**). The DFDAT is not a Chapter III court; however, it does operate outside the chain of command and its function and purpose have been well accepted by the ADF for over 60 years.

The objectives of a properly functioning system of military justice are independence and impartiality. This chapter will analyse the issues of independence and impartiality so as to better understand whether the ADF has achieved, or can achieve, these objectives.

PART B – REFORMATION OF THE MILITARY JUSTICE SYSTEM IN AUSTRALIA

Chapter 4 — Sporadic reviews of the operation of the DFDA

This chapter critically analyses the ADF disciplinary system. Between 1997 and 2001, the ADF military disciplinary system was the subject of five separate inquiries. Each of these inquiries is examined. All these inquiries resulted in 'civilianising' recommendations for the reform of the military disciplinary system to align it with, and to ensure its close resemblance to, the Australian civilian criminal justice system, thereby increasing its impartiality and independence from the military chain of command. Specifically, this chapter identifies the recommendations made by these inquiries and the military's generally negative responses to them, indicating consistent resistance to reform. The recommendations of the respective inquiries are contained in Appendices 1–5.

Chapter 5 — The 2005 Senate report into the ADF military justice system

This chapter analyses the pivotal report of the Senate Foreign Affairs, Defence and Trade Committee, titled "*The effectiveness of Australia's military justice system*" June 2005 (**2005 Senate Report**) which scathingly criticised the ADF for its hesitancy and refusal to embrace a 'civilianisation' of the ADF disciplinary system. This chapter also examines the investigation by the Senate Committee which found that there were significant failures in the military justice system

which were endemic to the system and included flawed investigations and prosecution decisions. These endemic failures, together with unreasonable denial of access to justice by defence members, engendered defence members' distrust in the ADF military justice system. The Senate Committee also found that the failure to establish a Director of Military Prosecutions (**DMP**) had contributed to an unsatisfactory military disciplinary system. As a result of its review, the Senate Committee concluded that the ADF military justice system was inherently unfair to defence members and recommended the establishment of a permanent Chapter III military court to ensure impartiality and independence from the chain of command. The recommendations of the 2005 Senate Report are contained in Appendix 6.

Chapter 6 — Government attempts to create a military court for the ADF

This chapter examines the Government Response to the 2005 Senate Report which recommended the establishment of a permanent Chapter III court with jurisdiction to deal with serious military service offences. It also examines the Government's refusal to implement the Senate's recommendation by establishing, instead, the Australian Military Court (**AMC**), relying on the defence power in s 51(vi) of the Constitution. Also discussed are the implications of this action. The legality of the establishment of the AMC as a 'court' in a breach of Chapter III of the Constitution was later successfully (unanimously) challenged in the High Court of Australia in *Lane v Morrison*.[32] As a result of the decision in *Lane*, the AMC ceased to exist. As a matter of urgency, the Australian Government then introduced interim remedial legislation to preserve the judgments of the AMC (prior to the *Lane* decision) and reintroduced the military disciplinary structure which had previously existed under the DFDA. This stop-gap 'interim measure' remains in place to this day and is an impetus for the proposals for reform contained in this thesis.

In 2010, and again in 2012, the Australian Government introduced Bills into the Parliament to establish a permanent Chapter III '*Military Court of Australia*'. However, due to the proroguing of Parliament in 2013, and a further change of government in that year, no further steps have ever been taken to consider a Chapter III military court.

Currently, ADF disciplinary matters are dealt with under the old DFDA procedures, reintroduced as 'interim remedial legislation' in 2009. The thesis argues that those 'interim' measures appear to have now become a permanent

32 *Lane v Morrison* (2009) 239 CLR 230.

regime by default as a result of the failure of successive Australian Governments to consider any response to the 2005 Senate Report.

Chapter 7 — A proposed new military justice regime for the ADF to operate in peace and in war

This chapter analyses the solutions proposed by this thesis. The analysis is in two parts: firstly, it considers the essential elements of a properly constituted military court created under Chapter III of the Constitution; secondly, it considers the establishment of a new permanent modified court martial system as a new service tribunal under the DFDA, called the *"Australian Court Martial Tribunal"* (**ACMT**),[33] which is to operate only overseas, in circumstances where a Chapter III military court determines that it will not exercise its jurisdiction, or that it cannot sit.

This chapter argues that the Australian Government (and the ADF) must take the necessary steps to reorganise the ADF military justice system. To do so in a manner consistent with the recommendations of the 2005 Senate Report, a specialist Chapter III military court needs to be established, that provides for both impartiality and independence from the chain of command and that is established within the strictures of the constitutional constraints contained in Chapter III.

This chapter also examines the matters that will need to be covered in the enabling legislation for the establishment of such a specialist court. The thesis acknowledges that much of the preparatory work for the establishment of a Chapter III military court was undertaken in the Military Court of Australia Bill 2010 (Cth) (**MCAB 2010**) and especially by its replacement, the Military Court of Australia Bill 2012 (Cth) (**MCAB 2012**). The MCAB 2012 is used as a model for reform with amendments as recommended in this chapter. However, it is noted that since 2012, no Government has been prepared to support the necessary reform of the ADF military justice system called for by the 2005 Senate Report.

The chapter argues that there should be few obstacles hindering the establishment of a Chapter III military court, while acknowledging that there will be serious issues confronting a military court in deciding whether to sit overseas during times of war or in war-like situations requiring peace-keeping operations. To deal with such situations, the chapter argues for the

33 Discussed further in chapter 7.11. The residual role of the ACMT will need to be provided for in Transitional Provisions and Consequential Amendments legislation. See also MCAB 2012, cl 51.

establishment of a new service tribunal designed to operate only overseas where a military court cannot or will not sit. The ACMT would provide a new system of military justice (with a structure bearing similarities to that of the failed AMC) which requires review and confirmation of its orders, within the chain of command, in order to avail itself of its 'apparent exceptionalism' from Chapter III of the Constitution.

PART C – APPENDICES

Appendices 1 to 5 contain the recommendations of the reviews examined in chapter 5 and the responses of the ADF and the Government to the review recommendations. They reveal a significant hesitancy by the ADF to embrace any form of civilianising of the military justice system.

Appendix 6 contains the recommendations and Government responses to the all-important 2005 Senate Report.

Appendices 7 and 8 list the totality of 144 service offences that may be brought against a defence member before service tribunals and sets out the corresponding punishments and sentences that may be imposed by those service tribunals.

Appendix 9 contains the classifications of service offences used under the AMC regime in order to determine the composition of (now defunct) military juries but which this thesis argues should be adopted (in amended form) to constitute military juries in the ACMT. Consequently, Appendix 9 is relevant to the establishment of the proposed ACMT.

Appendix 10 contains a table which equates service offences with civilian offences. The table draws attention to the number of equivalent offences which in civilian criminal law would be indictable and triable before a judge and jury. This appendix also gives a better understanding of the nature of the dual obligations of defence members under the DFDA and to the general civilian criminal law.

Appendix 11 is a table of recommendations for reform of the DFDA and the military justice system made by Judge Advocate Generals (**JAG**) since 2009, all of which remain unimplemented at the time of writing this thesis in 2019.

Appendix 13 contains a bibliography of books, articles and journals.

Appendix 14 contains a table of cases.

Appendix 15 contains a table of legislation and instruments.

Appendix 16 contains a list of definitions and acronyms used throughout the thesis. The military has a passion for acronyms and to better access this appendix it has been placed last for ease of reference.

1.4 The goal of the thesis: To examine whether it is possible to establish for the ADF a new and constitutional military justice system to operate in times of peace and war

In order to achieve the goal of this thesis, the chapters and appendices outlined above form the basis of the examination of the legal and historical origins of courts martial in England which were inherited into Australia's colonial naval and military forces and transferred into the nascent Australian naval and military forces at the federation of the nation in 1901. It was not until the passage of the DFDA, which came into effect in 1985, that the ADF had its own autochthonous code of military justice.

The High Court of Australia has by a series of cases (examined in chapter 3) determined that 'service tribunals' under the DFDA (other than the ill-fated AMC examined in chapter 6) do not exercise the judicial power of the Commonwealth but that they operate under an apparent 'exception' to Chapter III through recourse to the defence power under s 51(vi) of the Constitution.

The 2005 Senate Report (examined in chapter 5) recommended the establishment of a specialist military court under Chapter III of the Constitution; the last attempt by a Government to implement this recommendation was by the introduction of the MCAB 2012 which lapsed on the proroguing of the parliament (examined in chapter 6).

In this thesis, the MCAB 2012 has been used as a platform to examine whether it may be amended in order to better provide the ADF with a new and constitutional military justice system which can be used in Australia in peacetime and overseas during times of war.

This thesis argues that work remains to be done to determine: the form of any military court that may be established under Chapter III; whether service

offences should be charged before a military court on indictment or otherwise; and whether a military court should or can sit overseas, and if it cannot or should not, then what form of service tribunal needs to be established for the ADF in its overseas deployment (examined in chapter 7).

After considering the matters canvassed in chapters 1 to 6, in chapter 7 this thesis proposes reforms to the military justice system which, if implemented, will provide for the ADF a new and constitutional military justice system which can be used in Australia in peacetime and overseas during war.

1.5 Overall Outcome

Overall, taking doctrinal and reform-oriented research approaches, this thesis concludes with the recommendation of a novel reform of the ADF military justice system. The outcome relies upon the law as developed by the High Court of Australia on what is required to establish a valid Chapter III court and how the proposed '*Australian Court Martial Tribunal*' may be established as a service tribunal under the defence power, s51(vi) of the Constitution, relying upon the doctrine of 'exceptionalism' of Australian military service tribunals from the requirements of Chapter III of the Constitution, provided the ACMT operates within the chain of command.

2 THE AUSTRALIAN MILITARY AND ITS JUSTICE SYSTEM: DEVELOPMENT, ORGANISATION AND DISCIPLINARY STRUCTURE

Military power underlies the integrity of the state and the existence of government.[34]

Overview

To understand the military justice system of the ADF, knowledge is required of the development of Australia's naval and military forces (collectively called the 'military') since the commencement of colonisation in 1788. This chapter briefly examines the historical development of each stage of military discipline from colonial times to the present day.

This chapter argues that the 'chain of command' is not only crucial to the enforcement of military discipline in general, but it is the prevailing management concept utilized within the ADF. This concept is examined through:

- the genesis of formal structures of military justice,
- the development of Australian military structures and disciplinary regimes, and
- the importance of the chain of command within the military justice system.

2.1 Historic Genesis of Military Justice

Systems of military justice have existed since the first armies were raised in ancient times. One of the earliest recorded military courts was convened in Ancient Greece in 330 BC, when a military tribunal condemned to death General Filotas, the commander of cavalry, for not reporting a conspiracy against Alexander the Great.[35] Later, during the Roman Empire, records reveal that formalised troop discipline was maintained by enforcing the principle of '*who gives the orders sits in judgment*', ultimately presided over by the *Magister*

34 W F Finlason, *Commentaries upon Martial Law, with Special Reference to its Regulation and Restraint*, (Stevens, 1867) 74.

35 "Military Jurisdiction Seminar, 10–14 October 2001 at Rhodes Report", *International Society for Military Law and the Law of War:* <http://www.soc-mil-law.org/seminar%20Rhodos%20Report.htm> (website 23 November 2015, link now removed).

Militum.[36] The Roman philosopher, lawyer and politician, Marcus Tullius Cicero, used the phrase '*silent leges inter arma*" ('*the laws are silent amidst arms*')[37] to describe the *sui generis* relationship which existed between civil law and the ways of the military.

However, the fact that armies have almost always existed does not mean they have been accompanied by formal structures of military justice. In Europe "*it seems that it is not possible to talk about military justice existing before the 15th and 16th centuries*".[38] From that period on, as Gilissen has observed, *"where there is an army, there is military justice*".[39] Although its historical accuracy has been disputed,[40] that expression implies that military courts or tribunals existed as a natural consequence of the existence of the military itself.

There have been a number of attempts to classify different types of military justice systems. Gilissen[41] suggests a means of classification based on the three main existing systems of law: the common law system, the Roman law system and the socialist system. Alternatively, it is argued by John Stuart-Smith, Francis Clair and Klaus[42] that a more useful approach to appreciating military justice systems is a classification based on the jurisdictional powers of military courts. They distinguish four different systems: one in which military courts have general jurisdiction; one in which they have general jurisdiction on a temporary basis; one in which jurisdiction is limited to military offences; and one in which they have jurisdiction solely in time of war.

Regardless of the means of classification, there are significant differences between systems of military justice based on common law (Anglo-Saxon tradition) and civil law (continental European tradition). Generally, the common law systems are based on *ad hoc* military tribunals which are convened on a

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36 This position was held by the senior military officer of the Roman Empire subservient only to the Emperor.

37 Contained in a speech made by Cicero in 52BC entitled *Pro Tito Annio Milone ad iudicem oratio (Pro Milone)* on behalf of his friend, Milo, who had been accused of murdering his political enemy, Pulcher. In its more modern usage, the phrase has become a warning about the erosion of civil liberties during wartime and civil unrest: Cicero, *Pro Tito Annio Milone ad iudicem oratio (Pro Milone),* English translation, Rev John Purton, (Cambridge University Press, 1886), Latin phrase 4, translation 43.

38 John Gilissen, Evolution Actuelle de la Justice Militaire, Rapport general, in Huiteme Congress International, Ankara, 11–15 October 1979, *L'Evolution Actuelle de la Justice Militaire,* Rescueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre, VIII, Volume 1, Brussels, 1981, 48. (French original, free translation).

39 Gilissen, *ibid.*, 39.

40 Dini Dewi Heniarti & Agus Ahmad Safei, Developing Trends of Military Justice System, *The International Journal of Social Sciences*, Vol 5 No 1, 15 December 2012, at p 9 <http://www.tijoss.com/5th%20Volume/Dr.%20Dini%20Dewi%20Heniarti.pdf>.

41 Gilissen, *ibid.*, 48.

42 *Ibid.*, 44 ff.

case-by-case basis,[43] whereas standing military courts operate within civil law systems.[44] Since the turn of the 21st century, some common law countries have moved towards a system of standing military courts.[45] One of the main reasons for this move is to increase the independence of the military justice system from the chain of command.

In common law countries, most military justice systems are based on the exclusive jurisdiction of military disciplinary tribunals or courts over offences committed by military personnel. Notably, in some European countries,[46] where the civil law system is applied, the civilian courts have jurisdiction over military personnel and those countries have abolished standing military courts in peacetime. Consequently, those civil law countries have no peacetime standing military courts. However, administrative (disciplinary) tribunals operate to deal with service offences, while civilian courts concentrate on crimes.[47]

Whether a military force operates under a common law system or a civil law system, and irrespective of the classification of its jurisdictional powers, the military has at its core a chain of command and its own disciplinary code.

2.2 Historical development of the military law regime in England

2.2.1 Courts Martial

Briefly put, courts martial were originally known as 'general' and 'regimental' courts martial in the *Regulations for the Musters*, 5 May 1663, and in the *Articles of War 1673* by the Commander-in-Chief, under the authority of Charles II.[48] The general or governor of the garrison who convened the court ordinarily sat as president; the power of the court was absolute; and sentences of execution

43 For example, in Australia and in the United States of America.

44 For example, in Cyprus, Bulgaria, Luxembourg, Greece, Spain and Italy.

45 For example, in New Zealand and the United Kingdom. Australia purported to do so with the establishment of the Australian Military Court (discussed in detail in chapter 6.4).

46 Germany, Austria, Norway and Sweden.

47 Federico Andreu-Guzman, *Military Jurisdiction and International Law*, Military Courts and Gross Human Rights Vol 1, International Commission of Jurists, (Colombian Commission of Jurists, 1990), 158. However, their Constitutions still allow for the creation of such a system in wartime.

48 Eugene R Fidell, Canadian courts martial; a vestige of the past or a lost cachet? *Global Military Justice Reform*, (website 15 October 2018), <https://globalmjreform.blogspot.com/2018/10/canadian-courts-martial-vestige-of-past.html>

were carried without confirmation.[49] In this thesis, the development of the role and functions of courts martial are examined in more detail in chapter 3.1.

2.2.2 Judge Advocate

Until the late nineteenth century, it was the dual function of the Judge Advocate (**JA**) of a naval court-martial to act as 'assessor' to advise the court martial on all points of law and practice and, when no prosecutor was appointed, to conduct the proceedings in support of the charge before the court martial on behalf of the public.[50] In a debate in the House of Lords concerning the conduct of a Deputy Judge Advocate in the unfortunate court martial of an officer brought to England to be tried for matters alleged to have taken place in India, Lord Cranworth had this to say about the role of the JA:[51]

> *The noble Lord who has brought this subject forward may rest satisfied with this good result, if no other—that the whole question connected with the office of Judge Advocate has been brought under the consideration of the Government. I believe the error into which some persons have fallen as to the nature of this office arises from its name. It has been thought that the Judge Advocate is to perform the double duty of Judge and advocate. That, however, is an entire mistake. He is judex advocatus—a Judge called to assist the Court. He has no duties towards the parties at all, and the inconsistent duties which have been supposed to be cast upon him have originated in the mistake I have pointed out. It may be said, in a limited sense, that the Judge Advocate does perform the duties of a prosecutor. As to the preparation of the prosecution, that often forms part of the functions of the Court.*

The role of the JA was to change over time to the role now performed in the ADF.[52]

2.2.3 Articles of War (Imp)

In the time of the Commonwealth of England, Scotland and Ireland,[53] for the first time, rules of discipline were laid down for the New Model Army and by the Commissioners at the Navy Office who produced an ordinance and

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49 United States Department of Defense, *Report of the Response Systems to Adult Sexual Assault Crimes Panel, An Historical Summary of Development of Discipline in the Armed Forces Part 2 — Historical Introduction to Military Discipline (to 1955)*, 27 June 2014, unpublished chapter, (website 29 July 2019) <http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/uk-mj-sys/06_Hist_Sum_of_Dev_of_Discipline.pdf>

50 *Ibid*.

51 Re Court Martial on Colonel Crawley — The Deputy Judge Advocate Question, *Hansard* (UK), 26 February 1864, Lord Sitting, Vol 173 cc1161–79 at 1172.

52 Chapter 2.7.4.

53 1649 to 1660.

articles concerning martial law for the government of the Navy.[54] Later, after the Restoration, *Rules and Ordinances of War*, which later became known as *Articles of War*, were issued under prerogative powers by the King at the start of every war or campaign. These *Articles of War* were not superseded until early in the 19th century.[55] The *Articles of War* were severe and sanctioned death or loss of a limb for almost every crime.[56]

2.2.4 The Mutiny Acts (Imp)

In March 1689, in a debate in the House of Commons regarding the proper regulation of the Army,[57] leave was given to bring in a bill to punish mutineers and deserters. This resulted in the first *Mutiny Act*,[58] which was prefaced as follows:

> *(a) The raising or keeping a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law and*
> *(b) No man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm.*

Mutiny and desertion were punishable by death or such other punishment as awarded when committed by persons in service in the army. Power was given to the Crown or the General of the army to grant commissions for summoning courts martial. Successive *Mutiny Acts* were passed annually from 1690 until 1878.[59]

Until 1712, the *Mutiny Acts* did not extend to the dominions of the Crown abroad, and the principal offences punishable under them were mutiny and desertion. England was at war during almost the whole period and the main body of the army was on active service and was governed by the *Articles of War* issued by the Crown.

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54 United States Department of Defense (n. 49).

55 Chapter 2.2.6.

56 The *Rules*, or *Articles* were the basis of a code of military law. The Ordinance or *Articles of War* issued by Charles II in 1672 laid the groundwork for the *Articles of War* issued in 1878 which were consolidated with the *Mutiny Act* in the *Army Discipline and Regulation Act* 1879 (Imp) which was in turn replaced by the *Army Act* 1881 (Imp).

57 This followed a message from King William and Queen Mary seeming to suggest the suspension of *Habeas Corpus*.

58 1 Will. & Mary, ch 5.

59 From 1698 to 1702, England was at peace and the *Mutiny Act* was allowed to lapse.

2.2.5 Naval Discipline Act 1866 (Imp)

The *Naval Discipline Act* 1866 (Imp) brought the system of naval justice closely into line with the procedures of English criminal law. It remained in force for 91 years, although it underwent numerous amendments over time. The functions of the JA were made more judicial and he was available to assist either defence or prosecution on points of law. Summary trials were still in the hands of the Captain who was able to mete out ninety days imprisonment as a maximum punishment.

2.2.6 Army Act 1881 (Imp)

The Crown, through the *Mutiny Act* and the *Articles of War* established under the *Mutiny Act*, gradually acquired a complete statutory power for the governance of the Army in time of peace, whether at home or in the colonies. This existed alongside the prerogative power of governing troops in foreign countries during a time of war by use of the *Articles of War* made under the prerogative.[60]

In 1803, a change was made extending the *Mutiny Act* and the statutory *Articles of War* to the Army, operating both within and outside the dominions of the Crown. The prerogative power of making *Articles of War* in time of war was finally superseded by a statutory power. The passing of the *Army Discipline and Regulation Act* 1879 (Imp) brought together the military code which had previously been contained within both an act of Parliament and *Articles of War*. This was then repealed and re-enacted two years later, with some amendment, in the *Army Act* 1881 (Imp). This Act was to have a profound influence on the Australian colonial naval and military forces and the new nation of Australia from 1901 (dealt with in chapter 2.3 below).

Given this English military justice background, Australia has had an interesting history in the development of its military justice systems from its colonial times to the present, which will now be examined.

60 *Barwis v Keppel* (1766) 2 Wilson's Reports 314, 95 ER 831, it was held that neither the *Mutiny Act* nor the *Articles of War* made under the Act applied to the army when engaged in war abroad.

2.3 Australian Military Justice – Background

2.3.1 Development of the Australian Colonies

This chapter considers the legal development of the Australian colonies and involves a process of legal theorising understood as "positivism".[61] Positivism embraces, first, law as a species of empirical fact; and, second, law which is to be distinguished from morality, in particular, so as not to confuse the law which we now have in modern Australia with the law that we would have liked it to be.[62] Indeed, different traditional theoretical approaches to law represent varying emphases of different aspects of legal machinery and their relationships to government, society and the individual. 'Positivist theory'[63] in the Australian context has been used to describe the distribution of power in society, and by this, in this thesis, it is meant to describe the distribution of legal authority in society as developed in each Australian colony.[64]

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61 David Lyons, 'Founders and Foundations of Legal Positivism', 82 *Michigan Law Review* 722 (1984). Lyons has posited that these two elements are connected by the notion that whatever facts determine what is to have become the law, they leave an open question as to whether a given system of law or particular laws within it, merits respect.

62 The opportunity has been taken in this thesis to deal positively with sources of law in each Australian colony and federated Australia and with statutory interpretation. Throughout the thesis it deals with continuing developments and offers a method of analysis of proposed future fundamental changes to the military justice system. Consequently, a major part of this thesis gives such an account of the development and present state of Australian legal institutions. Such an analysis necessarily concerns a treatment of relevant functions of the United Kingdom, colonial and Commonwealth Parliaments and of the corresponding executives. The decisions of the High Court of Australia are also necessarily examined.

63 In this understanding, ideas of a positive nature were given their first systematic development by Jeremy Bentham (1748–1832) and John Austin (1790–1859). These theorists had specific conceptions of law and morality from which later positivists have diverged. Lyon, (*ibid.*, 722) argues contemporary positivists generally have rejected the notion advanced by Bentham and Austin that "law is to be understood as a set of coercive commands". Some later positivists seem to have regarded moral judgments as incapable of justification, accordingly, departing from the Bentham-Austin view that sound moral principles can be identified and that they are capable of grounding warranted criticism and reform of legal institutions. Rather this thesis has theorised on how Australian law, as it now is, became authoritative.

64 WL Morison, *The System of Law and Courts Governing New South Wales*, (Butterworths, 1980), 33. Morison theorises that authority is totally allocated under a legal system through the systems apparatus of secondary rules, and especially through its recognition rule. It is these rules which enabled the distribution of authority to be systematic, especially in so far as they enable those subject to rules to determine which are to have priority over others and what acts are to have legal effect in priority to others. This thesis does not otherwise consider the competing theorises discussed in detail in such works as HLA Hart, Essays on *Bentham: Studies in Jurisprudence and Political Theory*, (Oxford: Clarendon Press, 1982) and W L Morison, *John Austin*, (Stanford: Stanford University Press, 1982). Further consideration on these theories on positivism are outside the scope of this thesis.

Morison has described the process of transition from British colonies to an independent Australian nation as, 'at first the legal system of the colony is a subordinate part of a wider system characterized by the ultimate rule of recognition that what the Queen in Parliament enacts is law for (*inter alia*) the colony. But, at the end, the ultimate rule of recognition has shifted.'[65] What this chapter theorises upon is the shift from the legal authority of the Parliament in Westminster to the authority of the colonial legislatures and ultimately to the Parliament of a newly federated nation, the Commonwealth of Australia. Accordingly, this chapter theorises in a positivist manner, on how it was that the system of law first brought with the First Fleet and then established in each of the colonies and which lead to Federation, became authoritative in its own right upon society.

It is recognised that for at least 65,000 years,[66] the indigenous peoples of Australia occupied this continent without external disturbance. However, from the perspective of its European colonisers, Australia's constitutional history only commenced in 1770 when Lt James Cook RN took possession of the eastern part of the Australian continent on behalf of the British Crown.[67] In 1786, the King-in-Council designated New South Wales as a place to which British convicts might be transported in the future.[68] Two years later, Governor Arthur Philip, representing the authority of the British Crown and commanding the First Fleet, arrived to establish the penal colony of New South Wales.[69] Also in this year, 1788, the thirteen British colonies in America which had united to declare their independence from the United Kingdom ratified the Constitution of the United States of America.

Governor Phillip was authorised to establish a judicial system for the colony and did so in stages. First, the office of Justice of the Peace was established. Justices were to sit as a court and decide charges of petty offences and minor civil disputes and, in more serious cases, to remit the case to a higher court for trial. On 2 April 1787, a higher court exercising criminal jurisdiction was

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65 *Ibid*., 33–34.

66 C Clarkson, Human Occupation of Northern Australia by 65,000 years ago, 'Nature' *International Journal of Science*, Vol 547 Issue 7663, 20 July 2017, pp 306–310.

67 See generally RD Lumb, *The Constitutions of the Australian States*, (University of Queensland Press 4th Edition 1977), Chapter I. See also, Robert French, *'Australia's Constitutional Evolution*', an address to the John Fordham Law School Constitutional Master Class, (New York, 20 January 2010), (website) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20jan10.pdf>.

68 Declaration by Order in Council in 1786 pursuant to 24 Geo Ill c 56 (1784).

69 Derived from 27 Geo III c 2 (1787) providing that the Governor should have authority from time to time to constitute a Court of Civil Justice; *quaere*, whether it allowed for the establishment of a civil government.

created by a separate instrument provided to the Governor, made under the *New South Wales Act* 1787 (Imp).[70] The *Court of Criminal Jurisdiction* consisted of a Judge-Advocate of the colony and six officers of the naval and military forces or the marines, convened by the Governor. The Judge-Advocate of the colony was a military or marine officer who, nevertheless, lacked legal qualifications. The Court of Criminal Jurisdiction had jurisdiction to try and punish '*all such outrages and misbehaviours*'[71] which, if committed in England, according to English law, would be taken to be treason, a felony or a misdemeanour. Given the constitution of its members and the persons, that is, convicts, over whom it predominately had jurisdiction, the court may be considered as Australia's first military court.

By 1809, just over two decades from its founding, the composition of colonial society in New South Wales was changing due to the emancipation of convicts and the immigration of small numbers of free settlers. The Court of Criminal Jurisdiction had become somewhat anachronistic due to its military appearance and court martial-based procedures. In December 1809, Governor Lachlan Macquarie arrived in the colony. He was accompanied by Ellis Bent, a civilian lawyer, who had been appointed deputy Judge-Advocate with authority which extended to permitting him to act as a judicial member of the Court of Criminal Jurisdiction. This was the first occasion that this role had been occupied by a lawyer.[72]

In 1819, in response to complaints about the exercise of autocratic power by Governor Macquarie, King George III appointed John Thomas Bigge, formerly Chief Justice of Trinidad, as a Commissioner of Inquiry, to inquire into various matters relating to the colony.[73] In 1822, Bigge reported on those

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70 An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and the Parts adjacent, 27 Geo. III c.2, here *New South Wales Act* 1787 (Imp), 27 Geo. III c.2.

71 *Ibid*.

72 Ellis Bent and his elder brother, Jeffrey Hart Bent, who became a judge of the Supreme Court of Civil Judicature, both feuded with Macquarie over judicial independence. Ellis resisted Macquarie's authority even though his commission made him subject to the Governor's orders. Against Macquarie's wishes, Jeffrey refused to open the Supreme Court for over 4 ½ months until it suited him and when he finally did open it, he refused to allow emancipist lawyers to practise before him. See: Helen Cumming, *The Governor: Lachlan Macquarie 1810 to 1821*, (State Library of New South Wales, 2010), 22.

73 His Royal Commission, issued on 5 January 1819, authorised an investigation of 'all the laws regulations and usages of the settlements', notably those affecting civil administration, management of convicts, development of the courts, the Church, trade, revenue and natural resources. In three letters of additional instructions, Bathurst suggested the criteria on which the inquiry should operate. Transportation should be made 'an object of real terror' and any weakening of this by 'ill considered compassion for convicts' in the humanitarian policies of Governor Lachlan Macquarie should be reported. Where existing

matters and the Imperial Parliament passed the *New South Wales Act* 1823 (Imp)[74] which gave effect to his recommendations.[75] This Act may be regarded as the first constitution for New South Wales and signified the first steps in the normalisation of the political and judicial institutions of the colony, now that the colony had a sizeable free population.[76] The Act enabled the appointment of a Legislative Council and vested legislative power in the Governor, acting upon the advice of the Council. However, only the Governor could propose legislation. As there was now a local colonial legislature with power to make laws authorising, *inter alia*, the raising of local armed forces and the power to raise armed forces was, thereafter, omitted from the commissions of subsequent Governors.

The *New South Wales Act* 1823 (Imp) authorised, by Letters Patent issued by the King,[77] the establishment of a Supreme Court vested with power to try criminal charges before a judge and jury. The jury was not the traditional English jury of twelve men, but a unique body consisting of seven commissioned naval or military officers and, in that respect, it was adapted from the Court of Criminal Jurisdiction which had been established in 1788 but abolished by the *New South Wales Act* 1823 (Imp). When the bill for the *New South Wales Act* 1823 (Imp) was before the Imperial Parliament, it became known in England that there was disagreement in the colony about some matters in the bill and the Parliament inserted a sunset clause providing for the Act to expire at the end of the next session of the Parliament after 1827.[78] The Act also empowered the Governor to establish Courts of General Session and Courts of Quarter Session. Governor

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administration was too lenient, the commissioner could recommend the establishment of harsher penal settlements. He was also to disclose confidences of the private or public lives of servants of the Crown and leading citizens and officials 'however exalted in rank or sacred in character': *Australian Dictionary of Biography,* (Melbourne University Press, 1966), Volume 1, entry: Bigge, John Thomas (1780–1843).

74 4 Geo. IV c. 96.

75 Bigge prepared three reports which were printed by the House of Commons: The State of the Colony of New South Wales, 19 June 1822 (448); The Judicial Establishments of New South Wales and of Van Diemen's Land, 21 February 1823 (33); and The State of Agriculture and Trade in the Colony of New South Wales, 13 March 1823 (136). These collectively prompted the insertion in the New South Wales Act (4 Geo. IV, c. 96) of clauses to set up limited constitutional government through a Legislative Council, to establish Van Diemen's Land as a separate colony, to enable extensive legal reforms and to make new provisions for the reception of convicts from England. *Australian Dictionary of Biography* (n. 73).

76 The free white population increased from about 2000 in 1800 to about 13,000 in 1820.

77 *Charter of Justice,* 13 October 1823, Royal Charter (Imp). The Charter took effect in New South Wales on 17 May 1824. It provided for the creation of a Supreme Court with a Chief Justice and other judges, if necessary. It also provided for the appointment of court officers, for the admission of barristers and solicitors, and for trial by jury.

78 Alex Castles, *An Australian Legal History*, (Law Book Company, Sydney, 1982).

Brisbane established these courts and although the *New South Wales Act* 1823 (Imp) made no express provision for juries in those courts, he authorised that they be able to have trial before juries.

In 1825, the King established an Executive Council[79] which reduced the Governor's autocratic powers as he was required to consult the new Council before exercising executive authority and had to act upon its advice, except in certain circumstances. In 1842, a partly elected legislative body was created for New South Wales under the *Australian Constitutions Act* 1842 (Imp), which provided for the establishment of a Representative Legislative Council for New South Wales and Van Diemen's Land.[80]

In 1825, Van Diemen's Land[81] was established as a separate colony from New South Wales.[82] However, it was not until 1854 that representative government was actually extended to Van Diemen's Land as the transportation of convicts from the United Kingdom had continued. In 1854, the Legislative Council of Van Diemen's Land enacted a Constitution Act, in terms authorised by the *Australian Constitutions Act* 1850 (Imp),[83] and established a bi-cameral legislature.[84] On 23 October 1854, by petition to the Queen, the Legislative Council of the colony sought to change the name of the colony to Tasmania. The name change was proclaimed with effect from 1 January 1856.[85]

In 1828, the Imperial Parliament passed the *Australian Courts Act 1828* (Imp)[86] which extended the date of expiry of the *New* South *Wales Act* 1823 (Imp) to the end of 1829. This Act may be regarded as a further constitution for New South Wales. Importantly, this Act provided that all laws and statutes in force within the realm of England on 25 July 1828 be applied in the administration of justice in the courts of New South Wales and Van Dieman's Land '*so far as the same can be applied within the said colonies*.' Accordingly, both the English common law and statute law, as they stood in 1828, were declared to be the law

79 Commission of Governor Lt General Ralph Darling, Letters Patent issued 16 July 1825 which provided for the creation, by prerogative act, of an Executive Council which was to operate in addition to the Legislative Council created by the *New South Wales Act* 1823 (Imp). The Governor was thereby directed to consult with and act upon its advice.

80 5 & 6 Vict c 76 (1842); French (n. 67).

81 Renamed 'Tasmania' in 1856, Order-in-Council, 21 July 1855.

82 This occurred by Order-in-Council pursuant to s 44 of the Act of 1823 which authorised separation of Van Diemen's Land from New South Wales.

83 The *Australian Constitutions Act* 1850 (Imp) granted the Colonies control over their own waste lands.

84 18 Vict No 17.

85 Order-in-Council, 21 July 1855.

86 9 Geo. IV C.83.

of the two eastern colonies, New South Wales (including what was to become Victoria and Queensland) and Tasmania (as it was to become).[87]

In 1829, Western Australia was established as a colony by the Imperial Parliament.[88] However, it was not until the passage of the *Constitution Act* 1889 (WA) and its adoption by the Imperial Parliament[89] in 1890 that the colony achieved representative government. That Act established a bi-cameral legislature, including a nominated Legislative Council which, in 1893, was replaced by an elective Legislative Council.[90] The *Constitution Act* 1899 passed by the Western Australian Parliament consolidated its previous enactments.

In 1834, by Imperial statute,[91] South Australia was created as a convict-free province which authorised the King-in-Council to take necessary steps to establish a legislative body whose enactments were to be the subject of disallowance by the Governor. In 1842, that Act was repealed and replaced by another Imperial statute[92] which authorised the establishment of a bi-cameral legislature. In July 1851, a Legislative Council with representative government was established in South Australia. In 1856, a Constitution was passed by the South Australian Legislature and received royal assent.[93]

In 1850, following a report by a committee of the Privy Council[94] which inquired into the constitutional position of the Australian colonies, the *Australian Constitutions Act* 1850 (Imp)[95] was passed. This statute allowed colonial legislatures to enact and alter their own constitutions. It also provided for the separation of Victoria from New South Wales which took effect in January 1851.

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87 Victor Windeyer, 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia', (1962) *Tasmanian University Law Review* 635.

88 French (n. 67), 4.

89 *Constitution Act* 1890 (Imp), Royal Assent, 15 August 1890. Because Western Australia had not been included under the provisions of the Australian Constitutions Act 1850 which had granted the Colonies control over their own waste lands, the *Constitution Bill* 1889 (WA) had to be referred to Britain for ratification by the Imperial Parliament before it could receive the Royal Assent: the Constitution itself was included as a Schedule to the *Constitution Act* 1890 (Imp).

90 *Constitution Amendment Act* 1893 (Imp), 57 Vict No 14.

91 'An Act to empower his Majesty to erect South Australia into a British province or provinces, and to provide for the colonisation and government thereof, 4 and 5 Will, IV c 95.

92 5 & 6 Vict c 61.

93 *South Australian Constitution Act (No 2)* 1855–56; French (n. 62), 4.

94 Report of the Committee of her Majesty's Privy Council for Trade and Plantations, on the subject of the proposed bill for the separation of Port Phillip and New South Wales, and the extension of representative institutions to Van Diemen's Land and South Australia, Colonial Office, May 1849; French (n. 67), 7.

95 13 & 14 Vict c 59.

In 1855, common-form constitutions were established in New South Wales and Victoria.[96] Both constitutions exceeded the powers conferred by the *Australian Constitutions Act* 1850 (Imp) in respect of the waste lands of the Crown and required express statutory authorisation by the Imperial Parliament. As a matter of convention, responsible government in New South Wales and Victoria was adopted within the framework of those constitutions.

The creation of Queensland, as a colony separate from New South Wales, had been authorised by the *Australian Constitutions Act* 1842 (Imp).[97] In 1859, the separation was effected by Letters Patent and an Order-in-Council[98] which established the constitution of the colony in terms similar to those of the New South Wales Constitution.

In the latter part of the 19th century, the movement to create a federation of the Australian colonies made considerable progress. Conventions of colonial representatives met to discuss and draft an Australian Federal Constitution. The concerns which brought them together were in regard to foreign affairs, immigration, trade and commerce and industrial relations, and the need for mutual defence. In the 1880s, the Australian colonists were aware that the great European powers of France and Germany had been active in their expansion in the Pacific. The French had begun to colonise New Caledonia and (what is now) Vanuatu. Germany had colonised parts of New Guinea, in spite of an abortive attempt by the Premier of Queensland to annex it, an attempt disclaimed by the government of the United Kingdom.[99]

In 1883, following an Intercolonial Convention held in Sydney, a significant step was made toward a federation of the colonies when the Imperial Parliament established the Federal Council of Australasia.[100] The Federal Council formally comprised each of the Australian colonies, and the colonies of New Zealand and Fiji. However, the Council ultimately failed as neither New South Wales nor New Zealand attended any of its meetings and Fiji attended only one meeting. South

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96 French (n. 67), 3.

97 On the petition of householders, for the area of land above the 30 degrees of south latitude.

98 Order-in-Council empowering the Governor of Queensland to make laws, and to provide for the Administration of Justice in the said Colony, Colonial Office, 6 June 1859.

99 In March 1883, the Queensland Government, under the Premier, Sir Thomas McIlwraith, sent Mr H.M. Chester, the Police Magistrate at Thursday Island, Queensland, to Port Moresby to annex that part of New Guinea and adjacent islands not then claimed by the Dutch, in the name of the British government. On 4 April 1883, Chester duly raised the British flag in Port Moresby and formally annexed eastern New Guinea to Queensland. However, it was not until 6 November 1884, that the British Government declared that part claimed by Queensland to be part of the British Protectorate. On 4 September 1888, this Protectorate together with certain adjacent islands became the colony of British New Guinea; French (n. 67) 7.

100 *Federal Council of Australasia Act* 1885 (Imp), 48 & 49 Vict. c 60.

Australia participated briefly between 1889 and 1891. The Federal Council's authority was limited as it had no executive and no revenue. Sharwood branded it "as a Victorian invention foisted on the other colonies."[101]

In 1889, Sir Henry Parkes, then Premier of New South Wales, dismissed the Federal Council as "a rickety body" and proposed an Intercolonial Conference with the aim of drafting a federal constitution.[102] In February 1890, a conference of the Australian and New Zealand colonies was convened in Melbourne which, whilst making advances towards an agreement to federate, decided to meet again in 1891 to begin work on drafting a constitution. Although a Constitution Bill was adopted by the 1891 Convention, it failed to gain significant acceptance by the legislatures of the colonies. Quick and Garran record: "it soon became clear that neither the parliaments nor the people would accept the work of the Convention as final."[103]

In 1891, with the resignation of Parkes as Premier of New South Wales, the momentum to federate slowed. In 1893, the Federation Leagues (formed to work for a united Australia) and the Australian Natives Association held a conference at Cowra on the banks of the Murray River, where Quick proposed a three-step process to achieve a federal constitution.[104] Subsequently, in 1897–1898, an Australasian Constitutional Convention was held in Adelaide, attended by ten elected delegates from each colony, except Queensland which did not attend.[105] The Convention was held over 82 days, comprising three sessions in three cities. On 23 April 1898, a "*Draft of a Bill to Constitute the Commonwealth of Australia*" was adopted by the Convention which was then to be submitted to the electors of each of the colonies. Referenda were subsequently held in Victoria, Tasmania and South Australia where it was approved by the necessary majorities. However, New South Wales failed to attract the required minimum number of voters.

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101 Robin Sharwood, 'The Australian Federal Conference of 1890', Greg Craven (ed) *The Convention Debates — Commentaries, Indices and Guide* (Legal Books, 1986) Vol 6, 41–42.

102 French (n. 67), 8.

103 Dr John Quick and Sir Robert Garran, *The annotated Constitution of the Australian Commonwealth,* (Sydney: Angus and Robertson; Melbourne: Melville & Mullen, 1901) 144.

104 Corowa Federation Conference, 1893 at 27: motion put and passed: "That in the opinion of this Conference the legislature of each Australasian colony should pass an act providing for the election of representatives to attend a statutory convention or congress to consider and adopt a bill to establish "a federal constitution for Australia, and upon adoption of such bill or measure it be submitted by some process of referendum to the verdict of each colony".

105 In 1897, Queensland was involved in serious internal political debate about whether the colony should itself be divided into three parts: Southern, Central and Northern.

In January 1899, at a Premiers' conference held in Melbourne where all six colonies were represented, amendments were accepted. Further referenda were held, and the Bill was approved by electors in New South Wales, Victoria, South Australia and Tasmania. In September 1899, the voters in Queensland approved the Bill. Western Australia did not proceed to referendum at that time. The five colonies which had approved the Bill submitted it to the Imperial Parliament together with addresses from their respective legislatures.[106] Subject to changes required by the Imperial Parliament to cover clauses 5, 6 and 74 of the proposed Bill (relating to appeals to the Privy Council from the High Court of Australia), the Bill was passed by both the House of Commons and the House of Lords on 9 July 1900. The *Commonwealth of Australia Constitution Act* 1900 (Imp) (**Constitution**) received Royal Assent and on 17 September 1900, Queen Victoria proclaimed that the Commonwealth of Australia was to come into existence on 1 January 1901. On 29 October 1900, Queen Victoria signed the Letters Patent constituting the Office of Governor-General of Australia. A new nation was about to emerge and, with that, Australian naval and military forces were to be established.

The next section examines the development of the naval and military forces of the colonies prior to Federation.

2.3.2 Development of Australia's Colonial Naval and Military forces

The development of Australia's colonial naval and military forces commenced on 18 January 1788, when the First Fleet[107] under the command of Captain Arthur Phillip landed at Botany Bay in the new colony of New South Wales. The fleet comprised: two Royal Navy ships, HMS *Sirius* and HMS *Supply*; three store ships; six non-naval convict vessels carrying convicted persons; four companies of Royal Marines; 20 officials including their families; and, the officers and crews of the vessels constituting the fleet.

From 1788, the naval and military disciplinary regime for the crews of the naval ships stationed in the new colony were those then prevailing in England for the Royal Navy and for Marines, being the *Naval Discipline Act* 1749 (Imp).

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106 Western Australian passed its Enabling Act in June 1890 and its referendum was conducted on 31 July 1900 when the electors approved the proposed constitution. Addresses to the Queen, urging that Western Australia be included as an original State of the Commonwealth in the proclamation of the Constitution, were passed on 21 August 1890; French (n. 62), 14.

107 A total of 756 convicts (564 males, 192 females), 550 officers, marines, shop crew and their families: David Collins, *An Account of the English Colony in New South Wales: With Remarks on The Dispositions, Customs, Manners, etc. of the Native Inhabitants of that Country*, (London, 1798 republished Project Gutenberg, 2004 at <http://www.gutenberg.org/files/12565/12565-h/12565-.htm>).

At all other times whilst on shore, the Marines were subject to the *Marine Mutiny Act* 1755 (Imp) [108] and the *Articles of War*.

Governor Arthur Phillip had been authorised in his commission of 2 April 1787 from King George III, to raise and maintain an armed force in the new colony:[109]

> *Full power and authority to levy arm muster and command and employ all persons whatsoever residing within our territory and its dependencies under your government and as occasion shall serve to march from one place to another or to embark them for resisting and withstanding of all enemies pirated and rebels both at sea and land.*

During the period 1790–1792, the Royal Marines were withdrawn from the colony in stages and replaced by the New South Wales Corps which, despite its name, was a regiment of the British army. The name reflected the fact that it had been raised specifically for service in the colony. At all times while in the colony, the soldiers of the New South Wales Corps were subject to the then prevailing *Mutiny Act* (Imp) and the *Articles of War*.

It was not until 1859 that the British government decided to boost the Royal Navy's presence in the Australian region. It did so in response to a considered proposal from the Tasmanian government.[110] The Royal Navy's Australian command was to be separated from the East Indies Station[111], and named the Royal Navy Australia Station,[112] to encompass Australia, New Zealand and the south-west Pacific Ocean. Two Royal Navy ships (instead of one) were to be regularly stationed at Sydney and the senior officer was promoted from captain to commodore.[113]

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108 28 Geo 2 c 11. The *Mutiny Acts* were a series of annual acts of the Parliament at Westminster. The first Act was in 1689 and governed the conduct and discipline of the British Army. The Act made desertion, mutiny, and sedition of officers and soldiers' crimes triable by court martial and punishable by death. Because the *Bill of Rights* prohibited the existence of a standing army during peacetime without the consent of Parliament, the *Mutiny Act* was expressly limited to one year's duration. As a result, Parliament was asked annually to approve a new mutiny act for the coming year: See William Winthrop, *Military Law and Precedents*, 2d ed., Government Printing Office 1920, p19. The Articles of War, published by the Crown, governed British military forces when serving overseas: See Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, (1975) Mil. L. Rev. Bicent. Issue 14, 15.

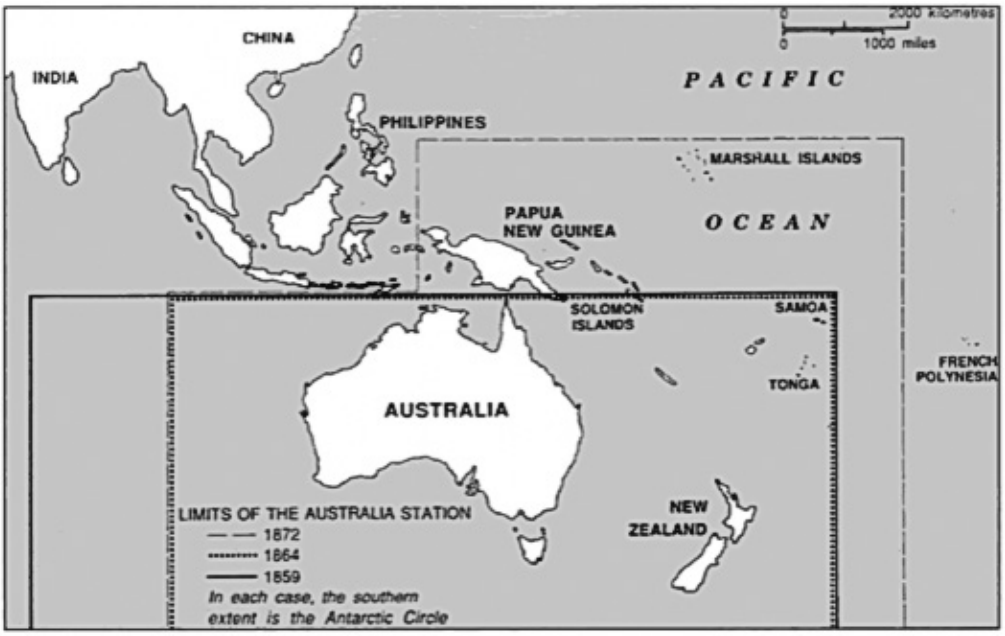
109 Migration Heritage Centre (NSW) 1787 *Draught Instructions for Governor Philip* (2010) <http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/draughtinstructions/index.html>.

110 *Defences of the Colony,* Report of Captain F B Seymour RN, of HMS *PYLORUS* in regard to the Defences of the Colony; together with a report on the efficiency of HMCSS *VICTORIA*, (Government Printer, Victoria,1859).

111 Headquartered in Ceylon (now Sri Lanka) from 1813 until 1958.

112 Command was established in Port Jackson, Sydney.

113 GL Macandie, *Genesis of the Royal Australian Navy*, (Sydney, Government Printer, 1949) 17.



Map 2-1: Boundaries of the Royal Navy Australia Station, 1859–1872.
(Boundaries were changed in 1893 and then again in 1908) [114]

In 1869, Earl Granville, Secretary for the Colonies, informed the Australian colonies of a further reduction in the number of British troops stationed in the colonies to a single regiment of infantry and two batteries of artillery.[115] The time for the Australian colonies to take control of their own defences was imminent.

In the 19th century, the system of military justice which applied to the Royal Navy and the British Army underwent reform. The *Naval Discipline Act* 1866 (Imp) and the *Army Act* 1881 (Imp) provided naval and military personnel with a wider range of rights and aligned the laws of military discipline more closely with the acceptable societal standards of the day.[116]

114 Jeffrey Grey, *A Military History of Australia*, (3rd Ed, Cambridge University Press, 2008) 23.

115 The subject was discussed at an intercolonial conference of the Australian colonies in June and July 1870 at which it was agreed that the colonies, for various reasons (mainly financial), could not accept the terms of the offer. The British troops were promptly withdrawn in August 1870.

116 See chapters 2.2.5 and 2.2.6.

Between 1855 and 1890, each of the Australian colonies had attained responsible government. Notwithstanding, the Colonial Office in London retained control of some colonial affairs. The governor of each colony was required to raise that colony's own colonial militia and, to implement this, governors were granted the authority of the British Crown to raise naval and military forces. Nonetheless, until 1870, the actual defence of the Australian colonies had been provided by British Army regular forces and the Royal Navy.[117] In August 1870, this protection was removed when the last of the British troops stationed in Australia were withdrawn to Great Britain and other parts of its Empire.[118]

With the withdrawal of British troops, the existing Australian colonial naval and military forces could provide only a very limited military defence of the colonies. The various forces consisted of unpaid volunteer militia, some paid citizen soldiers, and a small permanent component. They were mainly infantry, cavalry and mounted infantry, and were neither housed in barracks nor subject to full military discipline. Even after significant colonial reforms in the 1870s, including the expansion of the permanent forces to include engineer and artillery units, the forces remained too small and unbalanced to be considered as armies in the modern sense. [119]

117 However, by 1870, a total of 25 British infantry regiments had served in the Australian colonies since 1788, as had a small number of artillery and engineer units.

118 The withdrawal of troops had been brought about by the decision by the Government of the United Kingdom in Westminster to withdraw British naval and military forces to other areas of more immediate concern to British interests: namely, India, Suez, Malta and other of its possessions.

119 Jeffrey Grey (n. 114) 9; G Walsh, 'The Military and the Development of the Australian Colonies, 1788–1888' in M McKernan and M Browne, (eds), *Australia: Two Centuries of War & Peace*, (Australian War Memorial, 1988) 44; Sarah Dawson (ed), *The Penguin Australian Encyclopaedia*, (Viking, 1990) 135; Australian Bureau of Statistics, 'Military system in Australia prior to Federation', *Year Book Australia*, 1909; Arndell N Lewis, *Australian Military Law*, (Hobart, 1936); Frank B Healy, 'The Military Justice System in Australia' (2002) 52 *Air Force Law Review* 93.

From the outset, after the establishment of each colonial naval and military force,[120] Australian colonial legislation followed a pattern of adopting United Kingdom statutes, in varying circumstances and with minor changes, to provide for the discipline of colonial forces. In the latter part of the 19th century, each of the Australian colonies passed *Defence Acts*, all of which remained in force until Federation.[121] The consequence of these acts was that courts martial in the colonial naval and military forces[122] continued to be governed by s 45 of the

120 The colony of New South Wales was the first to establish its own permanent military force in 1871 with a battery of artillery and two companies of infantry. It also established 28 volunteer (militia) rifles (infantry) companies and nine batteries of volunteer artillery. The colonies also operated their own navies. In 1856, Victoria received its first naval vessel, HMCSS *Victoria*. Following its arrival, the vessel was placed under the control of the police department. The functions of the police department included the administration of the pay and allowances and other conditions of service of the police and the acquisition of uniforms, equipment and stores, and it had the capacity to provide a similar service for the Victoria and its crew. Victoria became the most powerful of all the colonial navies, with the arrival of the ironclad HMVS *Cerberus* in service from 1870. New South Wales formed a Naval Brigade in 1863. The Queensland Maritime Defence Force was established in 1885, while South Australia operated a single ship, HMCS *Protector*. Tasmania had also a small Torpedo Corps. Western Australia's only naval defences included the Fremantle Naval Artillery.

121 **Pre-Federation Colonial Defence Legislation:** *Defences Act* 1895, Act No. 643 (SA), *Defences and Discipline Act* 1890, Act No.1,083 (Vic), *Defence Ac*t 1884 (Qld), *Defence Act* 1885, Act 49 Vict. No. 16 (Tas), *Defence Act* 1889, Act 53 Vict. No. 36 (Tas), *Defence Act* 1893, Act 57 Vict. No. 18 (WA), *Defence Act* 1900 (Tas), *Discipline Act* 1870 (Vic), *Federal Garrison Act* 1893, Act 57 Vict. No. 1 (Federal Council of Australia), *Military and Naval Forces Regulation Act*, Act 34 Vict. No. 19 (NSW), *Military and Naval Forces Regulation Act* 1871 (NSW), *Naval Discipline Act* 1884, Act No. 307 (SA), *Safety of Defences Act* 1892, Act 56 Vict. No. 4 (WA), *Volunteer Force Regulation Act* 1867, Act 31 Vict. No. 5 (NSW).

122 By 1885, colonial forces numbered approximately 21,000 men. Although those soldiers and sailors could not be compelled to serve overseas, many volunteers subsequently did serve in a number of conflicts of the British Empire during the 19th century, with the colonies raising contingents to serve in Sudan, South Africa and China during the Boxer Rebellion. In 1900, just prior to the formal commencement of the Commonwealth of Australia on 1 January 1901, there existed eight battalions of the Australian Commonwealth Horse which had sailed to South Africa during the Boer War. As it transpired, only four battalions returned after the conclusion of the Boer War. See: G Walsh (n. 119).

Naval Discipline Act 1866 (Imp)[123] and s 41 of the *Army Act* 1881 (Imp)[124] when

123 *Naval Discipline Act* 1866 (Imp), 29 & 30 Vict. c.109.
Offences punishable by ordinary Law.
45. Every Person subject to this Act who shall be guilty of Murder shall suffer Death:
If he shall be guilty of Manslaughter he shall suffer Penal Servitude, or such other Punishment as is herein-after mentioned:
- If he shall be guilty of Sodomy with Man or Beast he shall suffer Penal Servitude:
- If he shall be guilty of an indecent Assault he shall suffer Penal Servitude or such other Punishment as is herein-after mentioned:
- If he shall be guilty of Robbery or Theft he shall suffer Penal Servitude or such other Punishment as is herein-after mentioned:
- If he shall be guilty of any other Criminal Offence which if committed in England would be punishable by the Law of England he shall, whether the Offence be or be not committed in England, be punished either in pursuance of the First Part of this Act as for an Act to the Prejudice of good Order and Naval Discipline not otherwise specified, or the Offender shall be subject to the same Punishment as might for the Time being be awarded by any ordinary Criminal Tribunal competent to try the Offender if the Offence had been committed in England.

124 *Army Act* 1881 (Imp), 44 & 45 Vict. c.58, Offences punishable by ordinary Law 41.
Offences punishable by ordinary law of England.
Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, *shall commit any of the offences in this section mentioned shall be deemed to be guilty of an* offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows; that is to say,
(1) If he is convicted of treason, be liable to suffer death, or such less punishment as is in this Act mentioned; and
(2) If he is convicted of murder, be liable to suffer death; and
(3) If he is convicted of manslaughter or treason-felony*, be liable to suffer penal servitude, or such* less punishment as is in this Act mentioned; and
(4) If he is convicted of rape, be liable to suffer penal servitude, or such less punishment as is in this Act mentioned; and
(5) If he is convicted of any offence not before in this Act particularly specified which when committed in England is punishable by the law of England, be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to hemin pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England.
Provided as follows: —
(a) A person subject to military law s*hall not be tried by court-martial for treason,* murder, manslaughter, treason-felony, or rape committed in the United Kingdom, and shall not be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in any place within Her Majesty's dominions, other than the United Kingdom and Gibraltar, unless such person at the time he committed the offence was on active service, or such place is more than one hundred miles as measured in a straight line from any city or town in which the offender can be tried for such offence by a competent civil court.
(b) A person subject to military law wh*en in Her Majesty's dominions may be tried* by any competent civil court for any offence for which he would be triable if he were not subject to military law.

the colonies federated in 1901.[125]

2.3.3 The Colonies of Australia Federate

On 1 January 1901, the Commonwealth of Australia came into existence as a federated nation; however, the Commonwealth Parliament did not immediately legislate for the establishment of a naval and military force. This did not occur until the passage of the *Defence Act* 1903 (Cth) which formally established a Department of State for Defence which provided for the naval and military defence of the new nation. Section 6 of the *Defence Act* 1903 (Cth)[126] provided that the various State Acts and the Act of the Federal Council of Australasia ceased to apply to the naval and military forces of the Commonwealth so that members then were subject to the new *Defence Act* 1903 (Cth).[127]

On 1 March 1903, the commands of each State's naval and military forces were formally transferred to the Commonwealth. Victoria had been the only State with a Defence Department and this consisted of only 12 public servants. These personnel were transferred to the Commonwealth together with the total of the States' forces being a combined 1750 permanent naval (250) and military (1500) forces, and approximately 28,000 militia forces (Navy, 2,000; Military, 26,000).[128] In 1911, the Commonwealth Government established the Royal Australian Navy, which absorbed the Commonwealth Naval Force.[129] In 1912, the Army established the Australian Flying Corps which, in 1923, separated from the Army to form the Royal Australian Air Force.

It is to be observed (and dealt with below) that from 1903 until 1975, notwithstanding two World Wars and major Wars in Korea and Vietnam, none of the Army, Navy or Air Force services was linked by a single chain of command. Each service reported to its own Federal Minister. Furthermore, each

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125 In a sign of a failure to seek any review of the now federated Australian military justice system, these British provisions by virtue of the *Defence Act* 1903 (Cth), continued to govern the new nation's naval and military forces from 1901 until 1985 when the *Defence Force Discipline Act* 1982 (Cth) came into effect.

126 Pre-Federation Colonial Defence Legislation in force as at 1 January 1901 (n. 121).

127 *Ibid*.

128 The State departments of posts, telegraphs, and telephones and of the naval and military defence were transferred to the Commonwealth on 1 March 1901. *Commonwealth Gazette*, No 8, 14 February 1901, 19 and 20 February 1901, 21. As at 1 March 1901 the actual strength of the Australian Military Force was 28,886: See Australian Bureau of Statstics (n. 119).

129 The Royal Navy remained the primary naval force in Australian waters until 1913 when the Australia Station of the Royal Navy ceased operation and responsibility transferred to the Royal Australian Navy which then consisted of a battlecruiser, HMAS *Australia*, 3 light cruisers and 3 destroyers: A MacDougal, *Australians at War: A Pictorial History*, (Five Mile Press, 1991) 23.

service had separate administrative arrangements within its own department. There was no co-ordination of services' activities. The military justice system was antiquated, and change was to come ever so slowly.

2.4 Australian Military Disciplinary Structure since Federation

Rather than write a new naval and military justice code for the new Commonwealth forces, the Commonwealth Parliament passed the *Defence Act* 1903 (Cth),[130] which continued to apply the *Army Act* 1881 (Imp) and the *Naval Discipline Act* 1866 (Imp) to the naval and military forces of the Commonwealth while members were on active service. Specifically,[131] the military discipline of the nascent Australian Army was regulated in Australia by the *Army Act 1881* (Imp) as applied under the *Defence Act 1903* (Cth) and subsequently, by the *Australian Military Regulations & Orders*. The *Australian Military Regulations & Orders* 1916 provided for, in a form adapted from the *Army Act 1881* (Imp) and *Regulations*, a series of military offences and a regime for the conduct of courts martial and summary proceedings. That scheme remained in place but was subject to a significant revision by the *Australian Military Regulations* 1927 (Cth).[132] The overall situation was summarised in the *Manual of Military Law:*[133]

> *Certain provisions of the Army Act [1881 (Imp)] have been applied by the law of the Commonwealth, save so far as they are inconsistent with the Defence Act and the*

130 *Defence Act* 1903 (Cth), ss 55 and 56. The naval regime was continued by the *Naval Defence Act* 1910 (Cth) s104 which applied s 45 of the *Naval Discipline Act* 1866 (Imp) as if "Australia" were inserted in lieu of "England". (See n. 123).

131 Part VIII (ss 86-100) of the *Defence Act* 1903 (Cth), as originally enacted, provided that the Governor-General may convene courts-martial, appoint officers to constitute courts-martial, and "[a]pprove, confirm, mitigate, or remit the sentence of any court-martial". Those powers could be delegated. Section 88 of the *Defence Act* 1903 provided that, except so far as inconsistent with the Act, "the laws and regulations for the time being in force in relation to the composition, mode of procedure, and powers of courts-martial" in the Imperial forces ("the King's Regular Naval Forces" and "the King's Regular Forces") were to apply to the naval and military forces of the Commonwealth.

132 R Creyke, D Stephens and P Sutherland (eds), *Military Law in Australia*, (Federation Press, 2019) [2.3]

133 Military Board (Cth), *Australian Edition of Manual of Military Law 1941: (Including Army Act and Rules of Procedure as Modified and Adapted by the Defence Act 1903–1939 and the Australian Military Regulations*), (Government Printer, 1941) 387. The *Australian Military Regulations & Orders* 1914 (Cth) (and amended in 1916) which provided, in a form adapted from the *Army Act* 1881 (Imp) and Regulations, a series of military offences and a regime for the conduct of courts martial and summary proceedings. That scheme remained in place but was subject to a significant revision and re-write by the *Australian Military Regulations* 1927 (Cth) which repealed the *Australian Military Regulations* 1916 (Cth).

Regulations made thereunder … The law in relation to the composition, procedure and powers of courts-martial contained in the Army Act and the regulations and under that Act have been applied by the law of the Commonwealth except so far as they are inconsistent with the Defence Act and the regulations made under the Defence Act to the Australian Military Forces wherever serving at all times.

Initially, the Australian Navy was subject to the Imperial statutes until the passage of the *Naval Defence Act* 1910 (Cth)[134] which provided for the continued application of Imperial law as modified by the *Defence Act* 1903 (Cth). In 1917, *the Defence Act* 1903 (Cth) was amended[135] to provide that the powers given to the Governor-General did not affect the powers conferred by the *Naval Discipline Act* 1866 (Imp) or the *Army Act* 1881 (UK) "of convening courts-martial and confirming the findings and sentences of those courts".

In 1923, the Royal Australian Air Force came into existence as a separate service and its members were subject to the *Air Force Act* 1923 (Cth), and the provisions of the *Air Force (Constitution) Act* 1917 (Imp)[136] were applied with modifications.

This 'Imperial' network of adopted legislation continued to serve as the foundation for the disciplinary regime of the Australian services from 1901 through to 1985 with the coming into effect of the *Defence Force Discipline Act* 1982 (Cth) and Regulations.[137] That is, until 1985, Australia's military services were regulated by no less than 11 separate sources of authority being variously: United Kingdom Acts and regulations; and, Commonwealth Acts and regulations.[138]

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134 The *Naval Defence Act* 1910 (Cth) made particular provisions for the Naval Forces of the Commonwealth. Section 5 provided that a number of provisions of the *Defence Act* 1903 (Cth) (including the provisions of Pt VIII concerning courts-martial) continued to apply in relation to the Naval Forces of the Commonwealth. Section 36 provided that, subject to the Naval Defence Act, the Naval Discipline Act "and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces" applied to the Naval Forces of the Commonwealth.

135 *Defence Act* 1903 (Cth) s 86 conferred authority on the Governor-General to convene courts-martial, and to approve, confirm, mitigate or remit the sentence of any court-martial. The decisions (not only whether to hold a court-martial, but also whether and how effect should be given to a finding by a court-martial of guilt) were matters for confirmation or review by higher authority within the respective chain of command. They were matters for the Governor-General as Commander in Chief of the naval and military forces of the Commonwealth, or an officer designated by or on behalf of the Commander in Chief as a convening or confirming authority under the applicable Imperial legislation.

136 7 & 8 Geo 5, c 51.

137 Currently the *Defence Force Discipline Regulations* 2018 (Cth).

138 As at 1985 — **All services**: *Defence Act* 1903 (Cth): **Army**: *Army Act* 1881 (Imp), *Rules of Procedure* 1947 (Imp), *Australian Military Regulations* (Cth); **Air Force**: *Air Force Act* 1917 (Imp), *Rules of Procedure (Air Force)* 1933 (Imp), *Air Force Act* 1923 (Cth), *Air Force Regulations* (Cth) *King's Regulations* and *Air Council Instructions* (Imp); **Navy**: *Naval*

By 1985, a change to the governance of the disciplinary system of Australia's military forces was well overdue since the Imperial Acts under which Australian forces were operating, had long ceased to apply to British forces.[139]

2.5 The establishment of the modern Australian Defence Force

In 1976, a single Department of Defence was created which covered all three services as well as the Department of Supply.[140] The reorganisation maintained the individual existence of each service but integrated their command structure[141] so that on 9 February 1976, the "*Australian Defence Force*" was established.[142]

Until 2016, the Minister for Defence was responsible for the general 'control and administration' of the ADF under the *Defence Act* 1903 (Cth) and provided for the appointment of different service Chiefs: the Chief of the Defence Force (**CDF**), the Vice Chief of the ADF (**VCDF**), and a Chief for each of the Navy (**CoN**), Army (**CoA**) and Air Force (**CoAF**) services.[143] From 1 July 2016, the ultimate command of the ADF was placed in the CDF and the role of the VCDF were formally established.[144] From that date, the separate statutory authority of each Service Chief to command, was removed; hence, the CDF and VCDF now have ultimate command of the ADF.

In order to regulate the military and civilian personnel within the Department of Defence, the *Defence Act* 1903 (Cth) established the 'Australian Defence Organisation', consisting of the ADF and the civilian Department of Defence personnel supporting the ADF. The CDF and the Secretary of the

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Discipline Act 1957 (Imp), *Queen's Regulations and Admiralty Instructions* 1953 (Imp). Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) [44]–[59].

139 Replaced by the *Army Act* 1955, 3 & 4 Eliz 2, c 18; *Air Force Act* 1955, 3 & 4 Eliz 2, c 19; *Naval Discipline Act* 1957, 5 & 6 Eliz 2, c 53.

140 The amalgamation of the services took place as a result of a recommendations contained in a report by the then Secretary of the Department of Defence, Sir Arthur Tange, *Australian Defence: Report on the Reorganisation of the Defence Group of Departments*, (Australian Government Publishing Service, Canberra, 1974). This report was adopted by the Government which then introduced the *Defence Force Reorganisation Act* 1975 (Cth).

141 *Defence Act* 1903 (Cth), s 17 provides that the Australian Defence Force consists of three service arms, namely, the Australian Navy, the Australian Army and the Australian Air Force.

142 The reorganisation was given statutory effect on 9 February 1976 with the introduction of the main provisions of the *Defence Force Reorganisation Act* 1975 (Cth).

143 *Defence Act* 1903 (Cth): CDF s 9(1); VCDF s 9(3); CoN s 18(1)(a); CoA s19(1)(a); CoAF s 20(1)(a)

144 *Defence Legislation Amendment (First Principles) Act* 2015 (Cth), *Defence Regulations* 2016 (Cth), rr 12,13

Department of Defence jointly administer the ADF[145]. The joint leadership of Defence by the CDF and the Secretary of Defence, both of whom are subject to Ministerial control, is referred to by the military as the '*diarchy*',[146] responsible for the administration of the ADF, and answerable to the Minister.[147]

The CDF is responsible for command issues and is the Minister's principal adviser on military issues. The Secretary is the principal civilian adviser to the Minister and is Chief Executive Officer of the Department of Defence. The Secretary's responsibilities include policy, departmental management and resource management matters. The CDF delegates the command of each service to its respective Service Chief.

DEFENCE ORGANISATIONAL STRUCTURE CHART

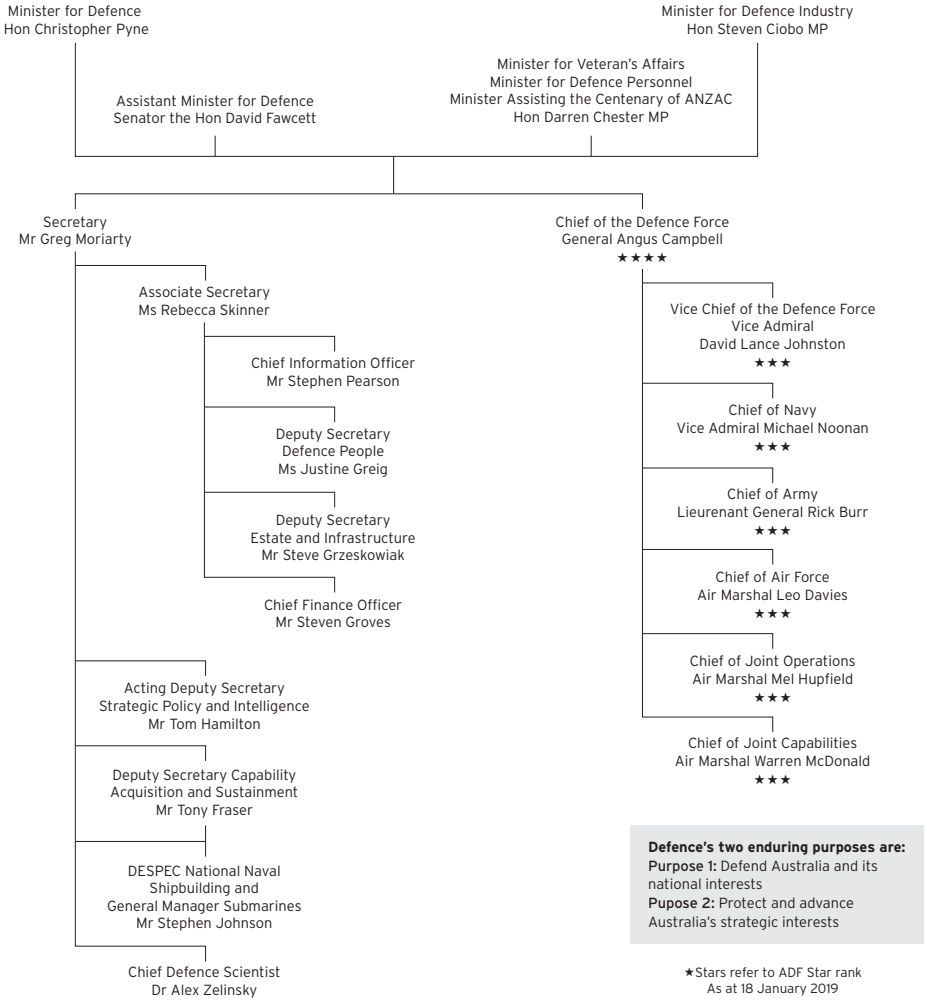


Table 2-1: Organisational Structure of the ADF – The Diarchy[148]

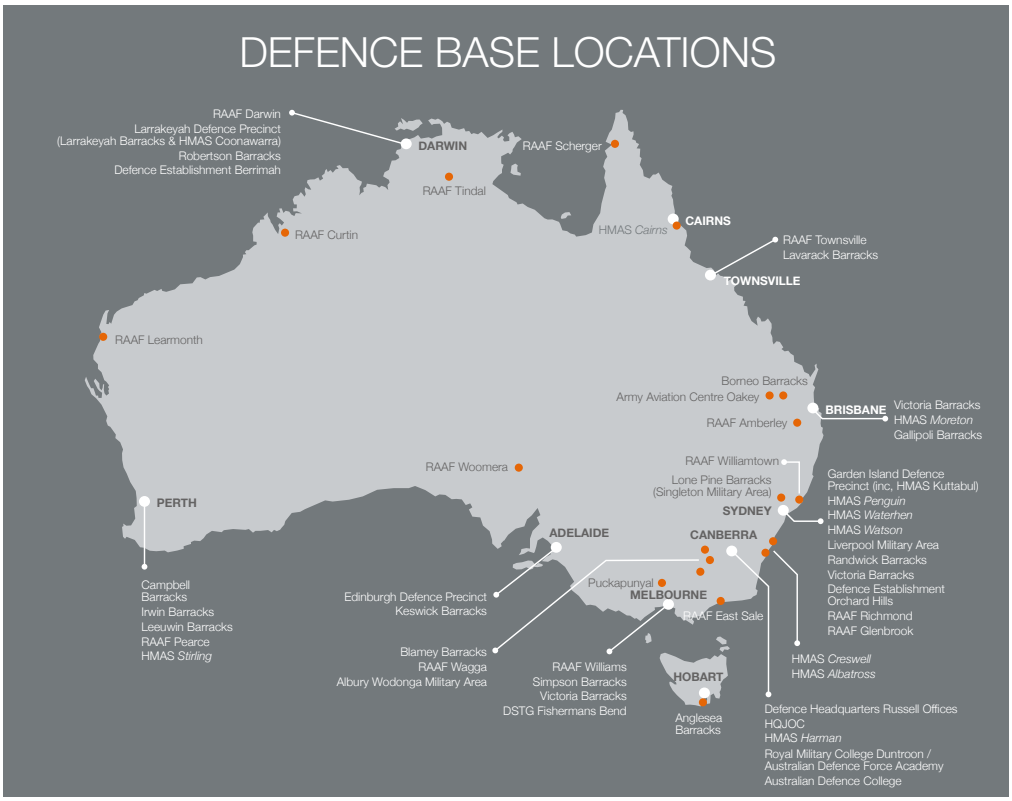
145 *Defence Act* 1903 (Cth), s 10(1).

146 Department of Defence (Cth), *The Diarchy*, <www.defence.gov.au/cdf/diarchy.asp>.

147 *Defence Act* 1903 (Cth), s 8(2).

148 Department of Defence, website 18 January 2019 <http://www.defence.gov.au/Publications/Docs/DefenceOrgChart.pdf> Stars refer to general or equivalent ranking.

For the year 2018–19, the Department of Defence had a budgeted estimate of 76,167 military personnel, comprised of 59,794 Permanent ADF members (Navy: 14,689; Army: 30,180; Air Force: 14,295) and 19,850 Active Reserve members, all supported by a permanent public service staff of 16,373.[149] ADF members are stationed at ADF bases set out in Map 2–2 below.



Map 2-2: ADF Bases in Australia 2019[150]

2.6 Australian Military Justice System: the DFDA regime

In 1982, the DFDA was passed by the Commonwealth Parliament and came into force in 1985; since then, it has provided the legislative framework for the Australian military disciplinary system.[151] The DFDA has created service tribunals with jurisdiction to try members of the ADF on charges of 'service offences'[152] against the Act and provides these tribunals with powers to try

149 Commonwealth of Australia, *Portfolio Budget Statements 2018–19: Budget Related Paper No. 1.4A*, Defence Portfolio (2018), 25

150 Department of Defence, *Annual Report, 2017–2018*, iii

151 The disciplinary system is analysed in detail in chapters 3 and 4.

152 Appendix 7.1 contains a list of 144 service offences. DFDA, s 3 definition service offence means:
(a) an offence against this Act or the regulations;
(b) an offence that:

civilians who accompany the ADF on military operations. Section 142 of the DFDA provides for 'alternative offences' to be laid in appropriate circumstances (see Appendix 7.4).

The DFDA divides the Australian military justice system into two sub-systems:

- The Discipline System, which provides for the investigation and prosecution of disciplinary and military 'criminal' offences under the DFDA; and,
- the Administrative System, which aims to improve ADF processes mainly in the handling of complaints.

Both systems are designed to support the chain of command[153] and organisational structure of the ADF.

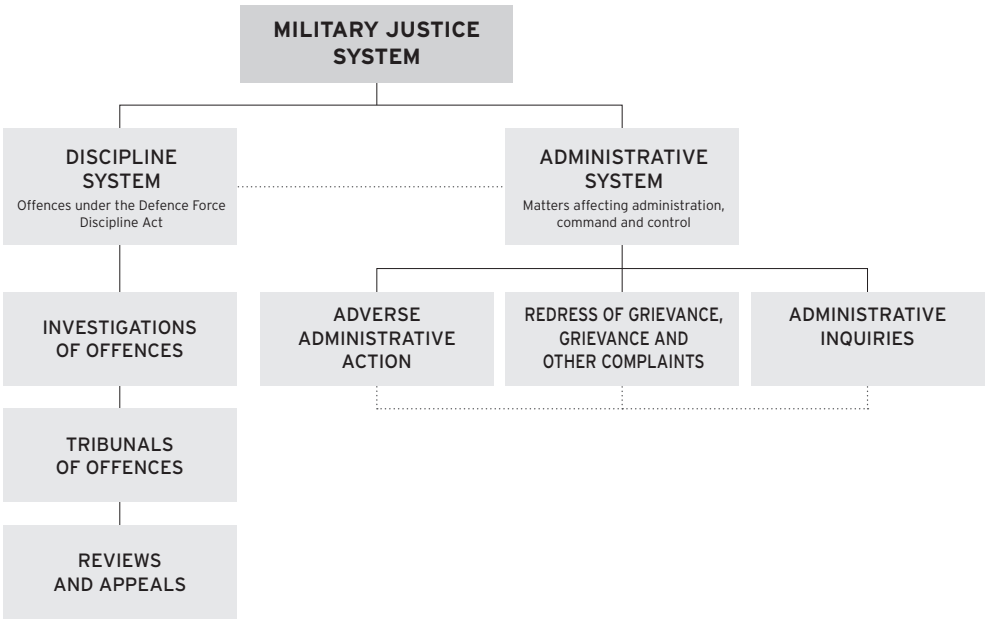


Diagram 2-1: Australian Military Justice System [154]

(i) is an ancillary offence in relation to an offence against this Act or the regulations; and

(ii) was committed by a person at a time when the person was a defence member or a defence civilian.

Note: A service offence is an offence against a law of the Commonwealth: see section 3A.

153 Chapter 2.9.1.

154 Parliament of Australia, Senate Standing Committee on Foreign Affairs, Defence and Trade, *The Effectiveness of Australia's Military Justice System* (2005) 8. Note: the solid lines on this diagram represent the framework of the military justice system. However, all parts of the system may interact, and this interaction is represented by the dotted lines.

The Discipline System[155] is analogous to the civilian criminal justice system. It combines the investigation of allegations which, if proven, constitute an offence contained in the DFDA; the laying of charges; the conduct of the trial; sentencing; and, finally, custodial detention (if ordered). These are steps which would be conducted in the civilian system by the police, a Director of Public Prosecutions (DPP), a criminal court judge and jury (or magistrate) and Corrective Services, respectively.

The Administrative System[156] enables factual inquiries to determine what went wrong in an incident, and therefore hopefully prevent the recurrence of the same problem. For example, it may inquire into whether a commander's negligence led to the grounding of a vessel, or it may inquire into the circumstances of a death. It is analogous to a civilian coronial inquiry.

Taken as a whole, the DFDA provides for a unified disciplinary regime applicable to all members of the ADF, whatever the service to which they belong, and includes 'defence civilians'.[157] Command is always involved in deciding the guilt of a person charged, in imposing punishment, and in reviewing[158] the conduct and sentences of trials before courts martial or DFMs. The DFDA creates a regime where 'service offences' may be seen to fall into one or more of three categories of service offending: disciplinary offences; equivalent offences; and, Territory offences. '*Disciplinary offences*' are those offences which are purely disciplinary for which there is no civilian equivalent, and include absence without leave, conduct to the prejudice of military order, disobedience of a lawful order. '*Equivalent offences*' are similar to those under the civilian criminal laws, such as theft of military property or assault of another member of the

155 Offences by ADF members are prosecuted under the DFDA, within the military justice system, when the offence substantially affects the maintenance and ability to enforce Service discipline in the ADF. Otherwise, criminal offences or other illegal conduct are referred to civil authorities, such as the police.

156 *Defence (Inquiry) Regulations* 2018 (Cth) prescribe for inquiries concerning the ADF, being either a Commission of Inquiry or an Inquiry Officer Inquiry. A Commission of Inquiry is used for complex and sensitive matters. An Inquiry Officer Inquiry is used to inquire into routine matters. These Regulations have now replaced the former *Defence (Inquiry) Regulations* 1985 (Cth) which allowed for five separate forms of inquiry: General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry, CDF Commissions of Inquiry and Inquiry Officer Inquiries.

157 '*defence civilians*' are persons who are properly authorised to be 'defence civilians' and who accompany a part of the ADF that is outside Australia or on operations with the enemy and has agreed in writing to subject him or herself to military jurisdiction while so accompanying that part of the ADF. DFDA, s 3 'defence civilians'.

158 Chapter 2.9.2.

service. '*Territory offences*', by operation of s61[159] of the DFDA, subject members to the criminal laws of the Australian Capital Territory as it applies in Jervis Bay.

Whatever the category of service offence, be it disciplinary, equivalent or Territory, the determination of that service offence will take place before a 'service tribunal'. A service tribunal may be one of two bodies: a summary authority, or, a court martial or alternatively a DFM.

2.7 Disciplinary Agencies of the ADF

2.7.1 Summary Authorities

There are three different levels of summary authority: 'superior summary authorities', 'commanding officers' and 'subordinate summary authorities'. [160] The CDF and the Service Chiefs appoint[161] superior summary authorities[162] who are commanders (generally without legal qualifications). Under the DFDA, all commanding officers[163] are able to exercise disciplinary powers. In turn, commanding officers appoint subordinate summary authorities[164] who are generally of a lower rank.

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159 DFDA, s 61: "A person, being a defence member or a defence civilian, is guilty of an offence if: (a) the person does or omits to do, in the Jervis Bay Territory, an act or thing the doing or omission of which is a Territory offence; (b) the person does or omits to do, in a public place outside the Jervis Bay Territory, an act or thing the doing or omission of which, if it took place in a public place in the Jervis Bay Territory, would be a Territory offence; or (c) the person does or omits to do (whether in a public place or not) outside the Jervis Bay Territory an act or thing the doing or omission of which, if it took place (whether in a public place or not) in the Jervis Bay Territory, would be a Territory offence." Territory offence is defined in s3 to mean: "(a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; (b) an offence punishable under the *Crimes Act* 1900 of the Australian Capital Territory, in its application to the Jervis Bay Territory, as amended or affected by Ordinances in force in that Territory; or (c) an offence against the *Police Offences Act* 1930 of the Australian Capital Territory, in its application to the Jervis Bay Territory, as amended or affected by Ordinances from time to time in force in the Jervis Bay Territory". The Jervis Bay Territory is an internal, non-self-governing Territory of the Commonwealth of Australia. It is generally subject to the laws of the Australian Capital Territory.

160 Director-General ADF Legal Service, *Overview of the Australian Military Discipline System*, (Defence Legal, Department of Defence, 2 August 2013). See Appendix 8.3 for the punishments able to be ordered by each level of summary authority.

161 DFDA ss 3(1) and 105(1).

162 '*superior summary authority*' is defined in DFDA, s 3(1).

163 '*commanding officer*' is defined in DFDA s 3(11).

164 '*subordinate summary authority*' is defined in DFDA ss 3(1) and 105(2).

2.7.2 Discipline Officer Scheme

Although not a summary authority, the *Discipline Officer Scheme* was established[165] as a special summary procedure confined to the determination of minor charges levelled against officer cadets and ranks below non-commissioned officers. Such matters proceed to determination where the charge is in respect of a minor disciplinary infringement,[166] the defence member admits the infringement and consents to the operation of the scheme. An advantage to the offenders in proceeding under the scheme is that minor infringements will not appear permanently on their service record, as such records are kept for only 12 months.

The success of the scheme has resulted in an expansion of jurisdiction to include officer cadets and midshipmen and subsequently to also cover warrant officers, officers of the naval rank of Lieutenant, Captain in the army and Flight Lieutenant in the air force.

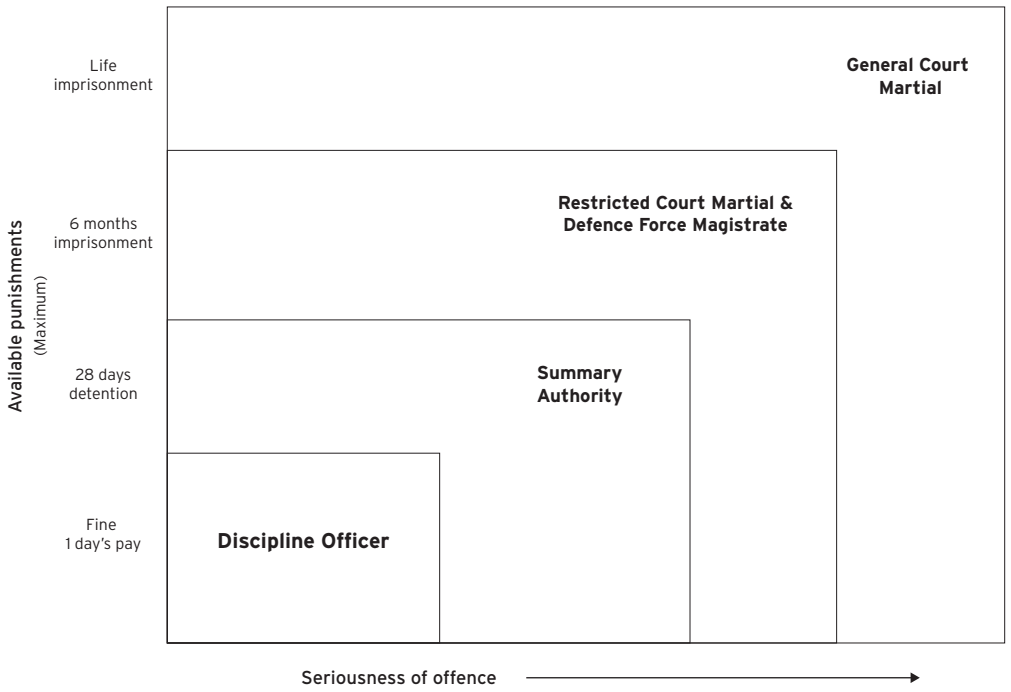

Diagram 2-2: The relative breadth of jurisdiction of the Discipline Officer Scheme and Service Tribunals [167]

165 DFDA, Pt IXA, Special provisions relating to certain minor disciplinary infringements, s169B.

166 Being DFDA: s 23, absence from duty; s 27, disobeying a lawful command; s 29, failing to comply with a general order; s 32(1) being absent, asleep or intoxicated when on guard or on watch; s 35, negligence in performance of duty; s 60, prejudicial conduct; or s 24, absence without leave (for less than 3 hours).

167 Director-General ADF Legal Service, Defence Legal, Department of Defence, *Response Systems to Adult Sexual Assault Crime Panel*, Overview of the Australian Military Discipline System, (2 August 2013) [7].

2.7.3 Defence Force Magistrates

If a charge is to be heard before a DFM, that qualified legal practitioner officer decides matters of both fact and of law. DFM trials[168] are similar to a judge exercising summary jurisdiction under the general criminal law, in that they are constituted by a DFM sitting without a jury or court martial panel. The powers of punishment of a DFM are the same as those of a restricted court martial.[169] A DFM hears charges generally not suited to being heard before a summary authority or court martial, such as complex fraud cases. The procedure adopted by DFMs is less militaristic than that which applies in a court martial and more closely accords with procedures operating in the civilian criminal courts.

The *Court Martial and Defence Force Magistrate Rules*[170] (**CM & DFM Rules**) provide the functions of a DFM at any proceeding to ensure the proceeding is conducted in accordance with the DFDA and the CM & DFM Rules in a manner befitting a court of justice, and that an accused person who is not represented does not in consequence of that fact suffer any undue disadvantage. The DFM must ensure that a proper record is kept of the proceeding and that this record and any exhibits are properly safeguarded.

A principal difference between trials before DFMs and those conducted by courts martial is that a DFM provides reasons both on the determination of guilty or not guilty outcomes and on sentence, whereas courts martial are not required to do either.

2.7.4 Judge Advocate

When a court martial is convened to determine a charge, a JA[171] is appointed to sit in the court martial from the panel of JAs. The JA does not preside at the court martial as that is the role of the President, discussed below. When appointed to sit on a specific court martial, the JA provides binding advice to the court martial panel on matters of law. The functions of the JA are set out in the CM & DFM Rules. [172]

The panel of JAs comprises persons who have been nominated to that panel by the JAG and upon nomination, appointed to the panel by the CDF or a service chief.[173] JAs serve on the panel for no more than three years, but can be

168 DFDA, s 135.
169 Chapter 2.6.6.2.
170 Select Legislative Instrument No 269, 2009, r 31.
171 See the history of the position of JA, chapter 2.2.2.
172 CM & DFM Rules, r 27.
173 DFDA, s 196.

re-appointed to the panel for a further period or periods. All members on the panel must be legal practitioners.

2.7.5 Court Martial Panel

A court martial panel is similar to a civilian jury. In courts martial, matters of fact are decided by the court martial panel, as they are by the jury in Australian civilian criminal trials. However, the military court martial panel is comprised of three to five career service officers, whereas the civilian jury usually consists of a panel of 12. Clearly, the pool from which a court martial panel can be drawn is much smaller than civilian jury pools, and majority verdicts are permitted. On any question to be determined by a court martial, the members of the court martial panel are to vote orally, in order of seniority, commencing with the most junior in rank.[174]

2.7.6 Courts Martial

A court martial[175] has jurisdiction to try any charge against any person, subject to certain exceptions.[176] Courts martial procedure has not really changed since the commencement of the *Army Act* 1881 (Imp). A court martial consists of panel members, who are all ADF members, the superior officer of whom will be the presiding President.

The functions[177] of the President of a court martial are to ensure that the proceedings are conducted in accordance with the DFDA and the CM & DFM Rules in a manner befitting a court of justice. The President is to speak on behalf of the court martial in announcing a finding or sentence or any other decision taken by the court martial. The President is also to speak on behalf of the members of the court martial in conferring with, or requesting advice from, the JA on any question of law or procedure. These panel members decide whether the accused is guilty or not guilty. Where they find the accused guilty, they determine the sentence applicable under the DFDA and do so by a simple majority.

An important difference between civilian criminal trials and courts martial is that in the latter, the panel is assisted by a JA. The JA makes rulings on matters of law and procedure which bind the panel members. So only in this way may the JA be seen to be in a position similar to that of a civilian judge conducting a criminal trial.

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174 CM & DFM Rules, r 28.

175 See the history of the courts martial, chapters 2.2.1 and 3.1.

176 DFDA, s 115. Certain custodial offences may not be heard before a court martial.

177 CM & DFM Rules, r 26.

The trial of more serious service offences is generally heard before courts martial or DFMs. There are two exceptions to this: offences referred to a court martial or DFM by a summary authority itself; or, when an accused before a summary authority exercises a right to elect, and does elect, to be tried by court martial or DFM.

There are two forms of court martial.

2.7.6.1 General Courts Martial

These are constituted by a panel of not less than five officers, including a President of the panel who is of or above the rank of Colonel (or equivalent). The punishments potentially available to a General Court Martial include a reprimand, a fine not exceeding the convicted person's pay for 28 days, loss of seniority in rank, demotion by one or more ranks, detention in a military correctional establishment for up to two years, dismissal from the ADF, and civil imprisonment for up to life.

2.7.6.2 Restricted Courts Martial

These are constituted by a panel of not less than three officers (who must have been officers for no less than three years), including a President of the panel who is of or above the rank of Lieutenant Colonel (or equivalent). They can impose similar sentences to those of a General Court Martial including imprisonment or detention for a period not exceeding six months.

Detention is different from imprisonment. Imprisonment is served in a civilian prison. If an ADF member is sentenced to imprisonment, the member must also be dismissed from the ADF.[178] Detention is a form of rehabilitation which is appropriate in matters where a service tribunal considers that an ADF member can and should be given the opportunity of rendering further service in the ADF.[179]

Courts martial and DFM trials are conducted in accordance with the laws of evidence in force in the Jervis Bay Territory of the Australian Capital Territory and apply the practice and procedure of the Supreme Court of the Australian Capital Territory, where their procedure is not otherwise provided for by or under the DFDA. Importantly, as members of the ADF, the JAG, JAs, DFMs and court martial panel members are themselves all subject to the provisions of the DFDA.

There are also several important military offices which affect the disposition of service offences under the DFDA and how and whether they are tried. These

178 DFDA, s 71.

179 Creyke, Stephens and Sutherland, (n. 132), [8.8].

offices are the JAG, the DMP and the DDCS (discussed below). Importantly, all of these offices are outside the chain of command.

2.7.7 Judge Advocate General

The Judge Advocate General (**JAG**) is appointed by the Governor-General and must be, or have been, a Justice or Judge of a federal court or of a Supreme Court of a State or Territory.[180] All appointees, to date, have been drawn from the Reserve Forces and have held the rank of Rear Admiral, Major General or Air Vice Marshal. The JAG may be a civilian or a member of the ADF and his or her duties include: the appointment of DFMs,[181] JAs,[182] and officers who provide legal reports on the trials of service offences; the making of Rules for the conduct of trials of more serious service offences; and the provision of the highest level of legal reporting for reviewing authorities in instances where a reviewing authority seeks legal advice further to that initially provided by an ADF legal officer. DFMs are appointed[183] by the JAG from the panel of JAs.[184] The JAG also provides legal review of courts martial and DFM trials. The JAG is required to submit an annual report to Parliament on the operation of the DFDA.

On 15 March 2019, effective from 31 March 2019, the JAG Rear Admiral, the Hon Justice M J Slattery, RANR, issued a Practice Note from the office of the JAG, dealing with the publication of court martial and DFM lists of hearings and outcomes of trials before each body.[185] This has allowed better transparency to be available to the public in regard to the dealing and disposition of trials of service offences by these bodies.

2.7.8 Director of Military Prosecutions

The office of the DMP was created by statute[186] and is the ADF's independent prosecutorial authority. The office holder is given statutory tenure, certain statutory functions, and independence in the performance of these functions to ensure that his or her functions are performed, and are seen to be performed,

180 DFDA, s 179.
181 DFDA, s 127.
182 DFDA, s 129B.
183 DFDA, s 129C.
184 DFDA, s 196.
185 JAG, *Practice Note 1 — Publication of Court Martial and DFM Lists and Outcomes*, AF33198257-<http://www.defence.gov.au/JAG/_Documents/Practice-Note-1-Publication.pdf>
186 DFDA, Part XIA, s 188G, commenced 12 June 2006. Questions of jurisdictional resolution which arise between the DMP and the CDPP are dealt with in accordance with the arrangements outlined in that document.

with impartiality. Since its creation, the DMP has held the rank of Brigadier or equivalent (one-star general). The DMP's military legal staff receive a posting to the DMP's office in order to undertake prosecutions under the DMP's direction. The DMP may institute charges against a defence member, independently of command. While independent from the chain of command, the DMP performs a function on behalf of command, namely, the prosecution of service offences, in order to maintain discipline in the ADF.

As there is a possibility of an overlap of offences under the DFDA and state and territory laws, the possibility of an ADF member being prosecuted twice for the same or similar offence arises. This possible occurrence led to an agreement between the DMP and the Federal and State and Territory DPPs being a '*Memorandum of Understanding between the Australian Directors of Public Prosecutions and the Director of Military Prosecutions*'[187] which is a co-operative arrangement which underpins the statutory requirement for the Commonwealth Director of Public Prosecutions' consent to allow the DMP to charge members with the ADF with service offences which have civilian criminal law counterparts, and endorses cooperation and consultation between the Australian Directors of Public Prosecutions and the DMP, particularly where jurisdiction overlaps. Ultimately, the civilian DPPs have the option of prosecuting should they wish to do so.

2.7.9 Director of Defence Counsel Services

On 15 May 2006, a military staff position of Director Defence Counsel Services (**DDCS**) was created in response to the 2005 Senate Report.[188] The DDCS has primary responsibility for coordinating and managing defence counsel services for members of the ADF who face charges before service tribunals. The position of DDCS has statutory recognition in the *Defence Act* 1903[189] with the CDF being responsible for the selection and appointment of a senior military legal officer to the position. The rank of the DDCS must not be lower than colonel or equivalent.[190] The DDCS is not subject to military command or to the DFDA in the performance of his or her functions, or the exercise of his or her powers. The DDCS is responsible for:[191]

187 Entered by the Commonwealth and all States and Territory DPPs May 2007. Access to a copy of this document was sought for the purposes of this thesis but was refused as it was "an internal DPP document".

188 Appendix 6, Recommendation 17.

189 *Defence Act* 1903 (Cth), Part VIIID, ss 110ZA — 110ZD.

190 Captain in the RAN or Group Captain in the RAAF.

191 *Ibid*., s 110ZB(1).

- The provision of counsel and other assistance to the accused, at Commonwealth expense in disciplinary proceedings before service tribunals, in particular:
- advice prior to trial and representation at trial;
- representation at appeals before service tribunals (including cases stated and referral of questions of law after trial);
- the trial and appeal/petitions from residual service tribunals when used; and,
- Legal representation and advice by legal officers, to persons entitled to such representation or advice, for the purposes of a court of inquiry, a board of inquiry or a CDF commission of inquiry at Commonwealth expense.

2.7.10 Number of Hearings: Courts martial, DFM and Summary Authorities

The following Diagram 2–3 sets out the number of courts martial and DFM trials in the period 2011 to 2017. These numbers indicate the limited number of hearings that have actually taken place across each of the Navy, Army and Air Force combined:

- 2011 (59)
- 2012 (52)
- 2013 (44)
- 2015 (52)
- 2016 (42)
- 2017 (36).

This amounts to an average of just under 50 courts martial and/or DFM trials per year.

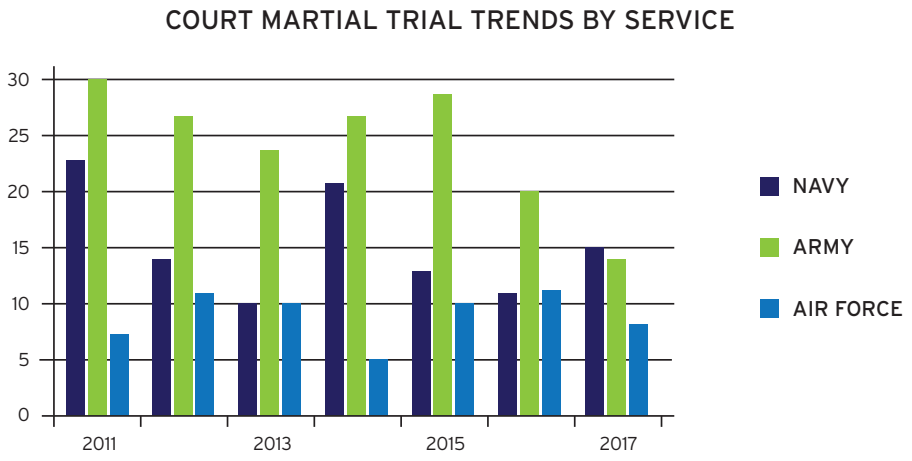

Diagram 2-3: Court martial and DFM hearings 2011-2017 [192]

192 DMP, *Annual Report,* 31 December 2017, 18.

By contrast, the number of trials before summary authorities as opposed to courts martial, DFM (and the AMC) in the period from 2000 to 2012 is as follows in Diagram 2–4:

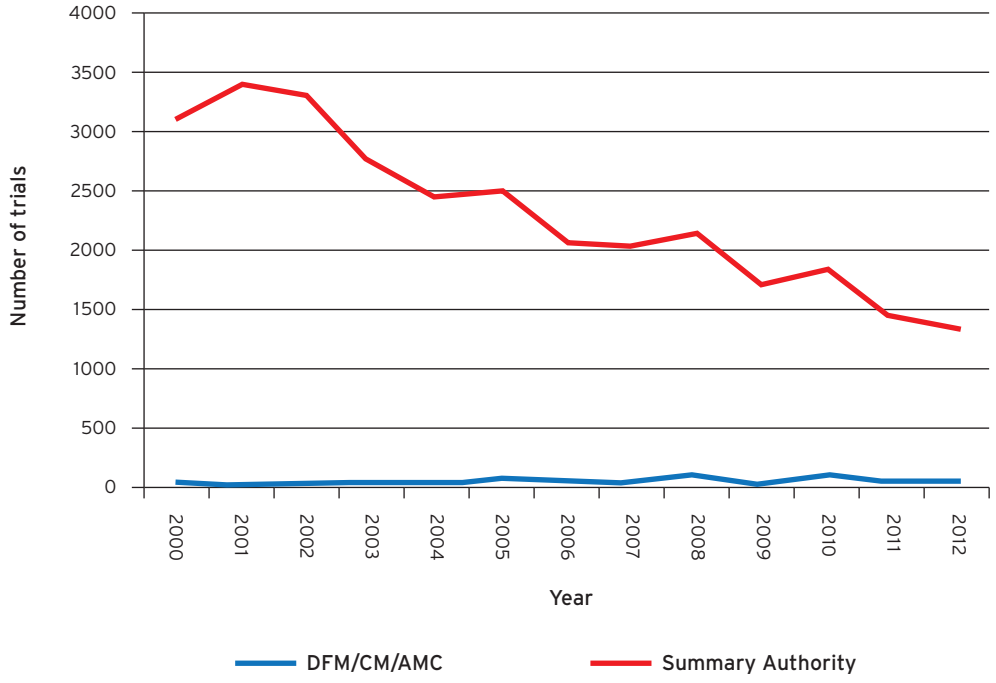

Diagram 2-4: Trials before Summary Authorities v Courts Martial, DFM and AMC 2000-2012[193]

The number of trials before summary authorities from 2013 until 2017 as shown in Diagram 2–4 remains relatively similar to the declining trend evident in Table 2–2 below.

2013	1423
2014	1392
2015	1241
2016	1129
2017	1189

Table 2-2: Discipline Trials before Summary Authorities 2013-2017[194]

193 B Cavanagh and J Devereaux, 'Reconsidering Summary Discipline Law', (2013) 32(2) *University of Queensland Law Journal* 295, 297.

194 *JAG Annual Reports* for each of the years 2013 to 2017, Appendix E to each thereof.

These statistics reveal that most ADF members will have charges of service offences heard before summary authorities, within the chain of command. Hence, ADF commanders, not DFMs, JAs or courts martial make the majority of decisions about the law and the facts in military trials.

2.8 DFDA Sentencing Options

All service tribunals may impose only those punishments authorised by the DFDA. Section 68(1) of the DFDA sets out the following sentencing options in decreasing order of severity:

(a) imprisonment for life;
(b) imprisonment for a specific period;
(c) dismissal from the Defence Force;
(d) detention for a period not exceeding 2 years;
(e) reduction in rank;
(f) forfeiture of service for the purposes of promotion;
(g) forfeiture of seniority;
(h) fine, being a fine not exceeding:
- where the convicted person is a member of the Defence Force — the amount of his or her pay for 28 days; or
- in any other case — $500;

(i) severe reprimand;
(j) restriction of privileges for a period not exceeding 14 days;
(k) stoppage of leave for a period not exceeding 21 days;
(l) extra duties for a period not exceeding 7 days;
(m) extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days; and
(n) reprimand.

Schedule 2 to the DFDA[195] further defines sentencing options by providing which punishments may be imposed upon which ranks by a court martial, DFM or AMC Accordingly. Thus, an officer may be imprisoned, dismissed, have his or her rank reduced, forfeit service for promotion purposes, forfeit seniority, be fined or reprimanded. A member of the ADF, who is not an officer, may be sentenced to any of these punishments, but not to forfeiture of service for the purposes of promotion. Unlike an officer, this class of prisoner may also be punished by detention for a period not exceeding two years. Persons who are

195 Appendix 8.3.

not ADF members may only be imprisoned and/or fined. Table 2–3 sets out the punishments available to a court martial and a DFM according to the rank of the convicted person.

CONVICTED PERSON	PUNISHMENT
Officer	• Imprisonment • Dismissal from the Defence Force • Reduction in rank • Forfeiture of service for the purposes of promotion • Forfeiture of seniority • Fine of an amount not exceeding the amount of the convicted person's pay for 28 days • Severe reprimand
Member of the ADF (not an officer)	• Imprisonment • Dismissal from the Defence Force • Detention for a period of not exceeding 2 years • Reduction in rank • Forfeiture of seniority • Fine not exceeding the amount of the convicted person's pay for 28 days • Severe reprimand • Reprimand
Person who is not a member of the ADF	• Imprisonment • Fine of an amount not exceeding $500

Table 2-3: Punishments that may be imposed by a court martial or a DFM by rank[196]

The kind of service tribunal hearing the matter also has an effect on which punishment may be imposed on the guilty person. Therefore, a superior summary authority may only impose a fine or reprimand. A commanding officer (**CO**) may fine or reprimand, but the CO may also impose a reduction in rank, forfeiture of seniority, and/or prevent the convicted person from taking leave. Further, the commanding officer has quite wide sentencing options for members below non-commissioned rank, that is, a CO may sentence the prisoner to detention, reduction in rank, forfeiture of seniority, fines, reprimands, restriction of privileges, extra duties, extra drill and stoppage of leave. A subordinate summary authority may fine, reprimand, stop leave, restrict privileges, impose extra drill, or impose extra duties. Appendix 8 sets out the sentencing options available to each of the summary authorities.

196 Schedule 2, DFDA (as at December 2018), see also Appendix 8.3.

2.9 The Chain of Command

2.9.1 Meaning

The operation of the ADF and its disciplinary system is governed by the chain of command. The constitutional basis of the chain of command stems from the Governor-General of the Commonwealth of Australia[197] and the Minister for Defence[198] having 'general control and administration' of the ADF. However, the CDF and the VCDF[199] sit at the apex of the ADF chain of command, that is, command of the ADF.

The term 'chain of command' is indicative of the way the military is managed and how lawful orders are given and followed. It is a vertical system of superiors and subordinates, where orders are given by one superior to the person immediately below him or her, with that process continuing until the order reaches those subordinates who are required to carry out or implement the order. Orders may only be handed down from one person at a time, and only to a specific class of subordinates.

The terms 'commander' and 'commanding officer' are of great importance in the ADF and its chain of command. A commander is the head of a military

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197 Section 68 of the Constitution provides, 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'.

198 *Defence Act* 1903 (Cth), s 8(1). Pursuant to the *Administrative Arrangements Order* signed by the Governor-General on 19 April 2018, the Minister for Defence also administers the following defence related Commonwealth legislation: *Australian Defence Force Cover Act* 2015, *Australian Defence Force Superannuation Act* 2015, *Cockatoo and Schnapper Islands Act* 1949, *Control of Naval Waters Act* 1918, *Defence Act* 1903, except to the extent administered by the Prime Minister and the Attorney-General and paragraph 124(1)(qba), *Defence Force Discipline Act* 1982, *Defence Force (Home Loans Assistance) Act* 1990, *Defence Force Retirement and Death Benefits Act* 1973, *Defence Force Retirement and Death Benefits (Pension Increases) Acts*, *Defence Forces Retirement Benefits Act* 1948, *Defence Forces Retirement Benefits (Pension Increases) Acts, Defence Forces Special Retirement Benefits Act* 1960, *Defence Home Ownership Assistance Scheme Act* 2008, *Defence Housing Australia Act* 1987, *Defence (Parliamentary Candidates) Act* 1969, *Defence Reserve Service (Protection) Act* 2001, *Defence (Road Transport Legislation Exemption) Act* 2006, *Defence (Special Undertakings) Act* 1952, *Defence Trade Controls Act* 2012, *Explosives Act* 1961, *Geneva Conventions Act* 1957, Part IV, *Intelligence Services Act* 2001 (insofar as it relates to that part of the Department of Defence known as the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Australian Signals Directorate), *Military Rehabilitation and Compensation Act* 2004, Chapter 3 (in relation to rehabilitation of serving members of the ADF); and Chapter 6, (in relation to treatment for injuries and diseases of serving members of the ADF), *Military Superannuation and Benefits Act* 1991, *Royal Australian Air Force Veterans' Residences Act* 1953, *Services Trust Funds Act* 1947, *War Gratuity Act* 1945, *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1995.

199 *Defence Act* 1903 (Cth), CDF s 9(1) and VCDF s 9(3).

organisation and is primarily responsible for ensuring mission readiness and maintaining good order and discipline within the unit. Several commanders serve as part of the chain of command, the succession of commanders from superior to subordinate that exercise command authority. A commander in one unit may not give actionable orders to subordinates in another unit, even though the commander is of higher rank than the subordinates in the other unit.

COs are primarily responsible for the administration and discipline of ADF members through the military unit structure. The *Military Personnel Policy Manual* places a commanding officer at the centre of processes such as reporting, management of unacceptable behaviour, approval of leave and the like. [200]

While often used as an all-encompassing term for military superiors, the term 'chain of command' refers only to the distinct organisational chain of commanders. Supervisory or technical chains are not part of a defence member's chain of command, and do not have the responsibility and authority unique to military commanders and chains of command.

Administratively, this ensures that subordinates receive only one set of orders, thereby avoiding the possibility of conflicting orders being given. This operation of the chain of command reduces the likelihood of breaches of military discipline.

200 Creyke, Stephens and Sutherland, (n. 132), [3.3.7].

EQUIVALENT MILITARY RANKS		
Navy	**Army**	**Air Force**
Admiral of the Fleet	Field Marshal	Marshal of the Royal Australian Air Force
Admiral	General	Air Chief Marshal
Vice Admiral	Lieutenant General	Air Marshal
Rear Admiral	Major General	Air Vice-Marshal
Commodore	Brigadier	Air Commodore
Captain	Colonel	Group Captain
Commander	Lieutenant Colonel	Wing Commander
Lieutenant Commander	Major	Squadron Leader
Lieutenant	Captain	Flight Lieutenant
Sub-Lieutenant	Lieutenant	Flying Officer
Acting Sub-Lieutenant	Second Lieutenant	Pilot Officer
Midshipman	Officer Cadet	Officer Cadet
Warrant Officer of the Navy	Regimental Sergeant Major of the Army	Warrant Officer of the Air Force
Warrant Officer	Warrant Officer Class 1	Warrant Officer
Chief Petty Officer	Warrant Officer Class 2	Flight Sergeant
–	Staff Sergeant	–
Petty Officer	Sergeant	Sergeant
Leading Seaman	Corporal	Corporal
–	Lance Corporal	–
Able Seaman	Private Proficient	Leading Aircraftman
Seaman	Private	Aircraftman

Table 2-4: ADF Chain of Command[201]

201 Department of Defence, *Pay and Conditions, ADF Manual*, Chapter 1, Part 4: Equivalent ranks and classifications, 1.4.1 Overview, <http://www.defence.gov.au/payandconditions/adf/chapter-1/part-4/default.asp>.

General Peter Cosgrove, in his role as CDF prior to his appointment as Governor-General of Australia, described discipline within the ADF in the following terms:[202]

> *Essential to command — a non-negotiable requirement for operational effectiveness. For this reason, the control of the exercise of discipline, through the military justice system, is an essential element of the chain of command, from the most junior leader upwards … 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.*

All personnel fit within the chain of command, and consequently, '*all members of the ADF are under command of some nature*' (emphasis added).[203] This is an important concept, as protecting and ensuring the integrity of the ADF is often cited[204] by those who argue for a separate military justice system. Accordingly, in the military, rank is most important to its hierarchy and the discharge of responsibilities for the accomplishment of a mission, whatever that mission may be. General Cosgrave, as a principal proponent of a military justice system that is separate from the civilian system, has maintained that the ability to issue orders to a subordinate and the ability to prosecute those who fail to follow the order, must go hand-in-hand.[205]

Therefore, the chain of command may be seen as a hierarchical system designed to ensure that orders are followed and followed without question. As a corollary to the importance that is placed on obeying lawful orders, failing to do so is an offence.[206] Consequently, the military justice system also operates as a management tool.[207] Notably, the placement of the DMP and the DDCS outside the chain of command has been done to provide defence members with some confidence in the impartiality and independence of decisions made by these officers which in turn provides a degree of reassurance about the fairness of trials of service offences under the DFDA.

There is no provision in the DFDA for review by the Administrative Appeals Tribunal (Cth), (**AAT**) and decisions under the DFDA are excluded from

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202 Cosgrove, (n. 18).

203 *Ibid*., [2.5].

204 Sam Nunn, 'The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases' in Eugene Fidell and Dwight Sullivan, (eds) *Evolving Military Justice*, (Naval Institute Press, 2002) 3.

205 Cosgrove, *ibid*., [2.2]–[2.4].

206 DFDA, s 27.

207 The author argues using the military disciplinary system in this way impacts upon the integrity and independence of the military justice system. The propriety of so doing, is outside the scope of this thesis.

judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[208]

2.9.2 The Reviewing Authority

As an essential element of the exercise of command within the ADF disciplinary system, the DFDA[209] provides for an internal ADF review of decisions of all service tribunal proceedings whether they be summary authorities, DFM trials or courts martial. Just as a commanding officer reviews[210] all convictions by subordinate summary authorities and transmits them to a legal officer, who considers them and may in turn transmit them to a reviewing authority, a reviewing authority[211] automatically considers convictions made by all other service tribunals and a legal report[212] is to be obtained by the reviewing authority before the actual commencement of the review.

A reviewing authority must consider the following grounds,[213] whether:

(a) the conviction is unreasonable, or cannot be supported, having regard to the evidence;
(b) as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred;
(c) there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or
(d) in all the circumstances of the case, the conviction is unsafe or unsatisfactory.

A defence member convicted by a service tribunal may also lodge a petition for review[214] by a reviewing authority. The CDF or a Service Chief may also decide[215] to conduct a further review. All of these processes are dealt with within the chain of command. This element of command, within the chain of command, was to be crucial in the determination by the High Court of Australia when it considered a challenge to the establishment of the Australian Military Court.[216]

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208 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Sch 1. See also discussion Groves, M, "The Use of Criminal Law Principles in Military Discipline: *Chief of General Staff v Stuart* (1995) 133 ALR 513" (1997) 23 *Monash University Law Review* 456, 460.
209 DFDA, ss 150–153.
210 DFDA, s 151.
211 DFDA, s 152.
212 DFDA, s 154.
213 DFDA, s 158(1).
214 DFDA, s 153.
215 DFDA, s 155.
216 *Lane v Morrison* (2009) 239 CLR 230 and discussed in chapter 6.

2.10 Summary

For over 2000 years, systems of military justice have been employed by armed forces to assert discipline in support of and within a chain of command. The Australian military justice system emanated from England upon the establishment of each colony. The offices within the current ADF military justice system all have their historical connections to medieval England. The roles of these offices have changed very little since the English Civil War. Indeed, the function and procedures of courts martial today remain much the same as codified in the *Army Act* 1881 (Imp).

There have been reforms, such as the creation of the role of the DFM, in the modernisation of the ADF military justice system in attempts to civilianise its procedures. Other reforms that were introduced, namely the DMP and the DDCS, were strongly resisted by the ADF. This issue will be examined later in chapter 5. However, to better understand the actual legal bases of the court martial system an analysis is required of the historical and traditional classification of the source of its lawful authority which is examined in the next chapter.

3 LEGAL FOUNDATION OF THE ADF MILITARY JUSTICE AND APPELLATE SYSTEMS

True it is that, by the time of federation, the scope of naval and military law and of the special jurisdictions to enforce that law were governed by statute but the provisions of those Acts, especially the Army Act [the successor to the Mutiny Act] reflected the resolution of major constitutional controversies.[217]

Overview

Throughout the course of English history from the Middle Ages onwards, courts martial were considered courts at law as they exercised the judicial power of the sovereign in military matters. This historical or traditional classification has relevance in the Australian context as the High Court of Australia has held[218] that recourse may be had to historical or traditional classifications of a body to fully understand what that body truly is. Notwithstanding that, it is argued that the High Court of Australia has chosen to give little weight to this important classification when it has considered the constitutional basis of courts martial in Australia.

The validity of the current courts martial system in Australia, established under the DFDA, has been directly challenged before the High Court on seven occasions.[219] In each instance, the High Court held that the exercise of judicial-like powers by a non-Chapter III court, in respect of defence disciplinary matters, did not offend Chapter III of the Constitution due to the constitutional doctrine of 'exceptionalism'. That is, although military service tribunals exercise judicial power, the High Court has held that they do not exercise the judicial power of the Commonwealth under Chapter III; rather, they exercise an 'exceptional' power, and the source of such power is s 51(vi) of the Constitution — that is, the defence power.

A properly constituted system of military justice requires an appellate system which is fair and operates independently of the chain of command. Since 1955, the ADF has had an appellate tribunal system in the form of the Defence Force Discipline Appeals Tribunal (**DFDAT**). The DFDAT is not a Chapter III

217 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 562, per Brennan and Toohey JJ.
218 *R v Davison* (1954) 90 CLR 353.
219 **'The Peacetime cases'**, (n. 31).

court; however, it operates outside the chain of command and has been well accepted by the ADF for over 60 years.

A properly functioning system of military justice should be independent and impartial. This chapter will analyse the issues of independence and impartiality so as to better understand whether the ADF has or can achieve these objectives.

3.1 Historical and Traditional Bases of Courts Martial in England

3.1.1 Background

The previous chapter[220] established that from 1788 with the first landing of British forces at Botany Bay, the naval and military court martial regimes which operated for the crews of the naval ships stationed in the new colony, and the accompanying marines, were those then prevailing in England. These court martial regimes had had a long history, commencing in the Middle Ages, and were based upon an evolution of power originally from the Crown and ultimately, through the Civil War, to the Parliament in Westminster.

The High Court of Australia has stated[221] that it will take into account the historical or traditional classification of a body to determine whether, in the exercise of its function, it is truly exercising judicial power. An early example is *R v Davison*[222] where the High Court of Australia had to consider whether there was an exercise of the judicial power of the Commonwealth under section 72 of the Constitution when the Federal Court of Bankruptcy made orders relating to the bankruptcy of individuals. Dixon CJ and McTiernan J, approved of the examination of the historical or traditional classification of a body by reference to Holdsworth, *A History of English Law*,[223] when they said:[224]

> *In the now long history of the English law of bankruptcy the process by which a compulsory sequestration has been brought about has always been of a description which may properly be called judicial (see Holdsworth, History of English Law, vol. 8, pp.238 et seq.).It is unnecessary to trace the history of voluntary sequestration but for a very long time it has been the subject of judicial order. There is nothing, however, inherent in the nature of voluntary sequestration to make it impossible for the legislature to provide some other means than a judicial order for the purpose.*

220 In chapter 2.2.1.
221 *R v Davison* (1954) 90 CLR 353, *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617.
222 (1954) 90 CLR 353.
223 WS Holdsworth, *A History of English Law*, 17 volumes, (Methuen & Co, London,1903).
224 (1954) 90 CLR 353, 365.

A similar approving statement was more candidly made by Kitto J:[225]

> *For this reason it seems to me that where the Parliament makes a general law which needs specified action to be taken to bring about its application in particular cases, and the question arises whether the Constitution requires that the power to take that action shall be committed to the judiciary to the exclusion of the executive, or to the executive to the exclusion of the judiciary, the answer may often be found by considering how similar or comparable powers were in fact treated in this country at the time when the Constitution was prepared.*
>
> *Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it.*

In *R v Hegarty; Ex parte City of Salisbury*[226] the High Court of Australia stated to similar effect that:

> *It is acknowledged that the historical or traditional classification of a function is a significant factor to be taken into account in deciding whether there is an exercise of judicial power involved …*

Accordingly, it is permissible, and indeed it is correct to consider the historical or traditional classification of courts martial as established in Australia from 1788.

3.1.2 Courts martial exercise 'judicial power'

Recourse to historical legal texts[227] discloses that courts martial derived from a 'court of law', namely the Court of Chivalry, which was part of the *Curia Regis*[228], forming part of the *Aula Regis* established by William the Conqueror shortly after he conquered England in 1066. The Court of Chivalry was constituted by the Constable, the Lord High Constable (who was originally the King's General), the Marshal or Earl Marshal, whose duty was to marshal the army

225 (1954) 90 CLR 353, 381.

226 (1981) 147 CLR 617, 627

227 War Office, *Manual of Military Law*, 5th Ed, London, 1907, Chapter II, [9]; W Holdsworth, (n. 218).

228 War Office, *ibid.*, [9] "The Curia Regis was a Court in a double sense: first, in the sense of being composed of the great officers of State; and secondly, in the sense of being a judicial body, as each of the great officers had judicial authority over the officers and persons belonging to or having dealings with his department. In this division of jurisdiction, the Constable or Comes Stabuli …was Commander-in-Chief of the army, and all persons and matters connected therewith: while he and the Marshal together constituted the Court of Chivalry which exercised both civil and criminal jurisdiction". See also: W Stubbs, *The Constitutional History of England in Its Origin and Development*, (Clarendon Press, 1875, Vol 1) 388–391 which contains a fuller account of the jurisdiction of the Curia Regis.

and ascertain whether those liable to serve the King in war had fulfilled their service. The criminal jurisdiction of the Court of Chivalry, except in time of war, was confined to punishment for murder and other civil crimes committed by Englishmen in foreign lands. [229] However, in time of war, the jurisdiction of the Court was extended and, from the Middle Ages,[230] the Court of Constable and Marshal acquired the character of a permanent court martial.[231]

Holdsworth[232] observed that from the Middle Ages there were four courts which administered a body of law outside the jurisdiction of the Courts of Common Law and the Courts of Equity. He classified these courts according to four groups:[233] (1) the Courts which administer the Law Merchant, (2) the Court of Constable and Marshal, (3) the Courts of the Forest, and (4) the Ecclesiastical Courts.

The Court of the Constable and Marshal was the source of a separate discipline of the army commencing in the 14th century. Holdsworth wrote:[234]

> *The discipline of the army.*
>
> *At all periods armies need to be governed by laws other than those which govern the rest of the community. These laws were administered in the Middle Ages by the Constable and Marshal's court.*

Holdsworth further observed[235] that from around the end of the 14th century, it was the aim of the Parliament at Westminster to prevent the Court of Constable and Marshal from encroaching upon the province of the civil common law. A statute of 1384[236] enacted that pleas concerning the common law should not, in the future, be "drawn before" the Court of Constable and Marshal.[237]

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229 War Office, *ibid.*, Chapter II, [11].

230 The Middle Ages (or Medieval period), lasted from the 5th century to the 15th century, being that period after classical antiquity and before the modern period or Renaissance.

231 Holdsworth, (n. 218). The Court followed the march of the army and in accordance with the Articles of War, punished summarily all offences committed by the troops.

232 *Ibid.*

233 *Ibid.,* 300.

234 *Ibid.,* 573.

235 Citing, 13 Richard II c. 2; *Black Book of the Admiralty* i 281, "the office of Conestable and Mareschalle in the time of werre is to punish all manner of men that breken the stautes … By the king made to be keped in the oost." … They also have "knowledge upon all maner crymes, contracts, pleets, querelle, trespass, injuries, and offenses don beyond the see in tyme of were bytwene souldeour and souldeour, bytwene merchaunts … artificers necessary to the oost".

236 Citing, 8 Richard II c. 5.

237 However, this enactment left uncertainty about the suits that properly concerned the common law, and what concerned Constable and Marshal. To address this question, it was declared in 1389–1390 (13 Richard II c. 2) that "to the Constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining".

In 1399,[238] it was declared that criminal appeals for crimes committed outside of the Realm should be determined in the Court of Constable and Marshal, and appeals in regard to criminal offences committed within the Realm, should be tried under common law.

It is to be understood that standing armies did not exist in England at that time. In the event of war, *Articles of War* were initiated and issued by the Crown, on the advice of the Constable, which regulated and governed the conduct of the King's naval and military forces in war. *Articles of War* remained in force during service in the naval and military forces and provided governance of the army but ceased to operate upon the conclusion of peace.

In 1689, with the conclusion of the Civil War, jurisdiction over members of the army for criminal offences committed whilst serving passed to courts martial which had been legalized by the *Mutiny Act* 1689 (Imp). Court martial jurisdiction was extended by successive enactments of the *Mutiny Acts* in the eighteenth and nineteenth centuries. Holdsworth observed that: [239]

> *The military jurisdiction of the court of the Constable and Marshal ceased to exist because it was not needed; and, together with its military jurisdiction, all memory of its jurisdiction over such connected matters as prisoners of war and prize disappeared so completely that even Lord Mansfield was ignorant of it.*

Adye, writing in 1672,[240] almost 138 years after the establishment of English courts martial, determined that a court martial was an exercise of judicial power by a court. It was a court of judicature created by Parliament, with power descending from the King, consistent with other courts of judicature. He referred[241] to the historical basis of courts martial and to the proper distinction between martial law and military law exercised by courts martial[242], and stated:[243]

> *Courts martial are at present held by the same authority as the other courts of judicature of the kingdom, and the king, (or his generals when empowered to appoint*

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238 Citing, I Henry IV c. 14; cf. RP IV 349–350 (8 Hy. VI no. vii) — a petition praying for the enforcement of this statute.

239 Holdsworth, (n. 223), 577.

240 War Office, (n. 227), Chapter II, [16].

241 SP Adye, *A Treatise on Courts Martial; An Essay on Military Punishments and Rewards*, (8th Ed, Vernor, Hood and Sharpe, London, 1810).

242 *Ibid.*, 35 — noted the distinctive characteristic being "Martial law is not exercised within its proper limits, by the advice and concurrence of parliament, whose jurisdiction, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined either to causes or persons, within any bounds. It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where has absolute despotic power, which must in all governments reside somewhere, is intrusted by the Constitution of these kingdoms."

243 *Ibid.*, 35–38.

them) has the same prerogative of moderating the rigour of law; and pardoning and remitting punishment; but he can no more add to, nor alter the sentence of a court martial, than he can a judgment given in the courts of law.

By 1803, the Crown, by means of the *Mutiny Act* 1803 (Imp)[244] and the *Articles of War*, had acquired complete statutory power over the governance of the army in time of peace, whether at home in what had then become the United Kingdom of Great Britain and Ireland[245] or in the colonies.[246] Furthermore, the Crown had the prerogative power of governing troops serving in foreign countries in time of war which was achieved by means of *Articles of War*. As further overseas dominions were acquired, the *Articles of War* were relied upon to provide for the enforcement of discipline among the naval and military forces maintained in such dominions.

The traditional and historical position that courts martial lawfully have held in the English judicial system has been considered[247] on several occasions in the United Kingdom. All decisions are consistent and have held that courts martial are courts of law.

In *Grant v Sir Charles Gould,*[248] Lord Loughborough had to decide whether a court martial was a court to which the prerogative writ of prohibition could be directed. In order to decide this question, his Lordship analysed the authority of the High Court of Justice sitting at Westminster Hall to issue such writs to existing courts. His analysis is authoritative and compelling. He held that:

The object of the Mutiny Act, therefore, is to create a court invested with authority to try those who are part of the army, in all their different descriptions of officers, and soldiers; and the object of the trial is limited to breaches of military duty …

This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of Westminster Hall, must depend upon the same rules, with all other courts, which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of applications to the courts of Westminster Hall, for a prohibition.

Naval courts-martial, military courts-martial, courts of admiralty, courts of prize, are all liable to the controlling authority, which the courts of Westminster Hall have, from time to time, exercised, for the purpose of preventing them from exceeding

244 *Mutiny Act 1803* (Imp), 43 Geo III c 20.

245 In 1801, the Parliaments at Westminster and in Dublin each passed an Act of Union 1800 to unite the Kingdom of Great Britain and the Kingdom of Ireland.

246 War Office, (n. 227).

247 *Grant v Sir Charles Gould* (1792) 2 H. Bl. 69, *R v Governor of Lewes Prisons; Ex parte Doyle* [1917] 2 KB 254, *R v Army Council; Ex parte Sandford* [1940] 1 KB 719, *R v Linzee and O'Driscol*l (1956) 40 Cr App R 177, *Attorney-General v British Broadcasting Corporation* [1981] AC 303.

248 (1792) 2 H. Bl. 69, 100.

the jurisdiction given to them: the general ground of prohibition, being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance.

In 1916, in the midst of World War I, the Easter Rising prompted a question for consideration of the King's Bench Division in *R v Governor of Lewes Prisons; Ex parte Doyle,*[249] whether a court martial hearing should be conducted in public rather than *in camera.* In order to answer this question, the Court first had to determine the legal nature of a court martial. The Court found:

On behalf of the respondent it was further contended that, … there is inherent jurisdiction in every Court, and therefore in a field general court-martial, to exclude the public if it becomes necessary for the administration of justice; … It is my judgment plain that inherent jurisdiction exists in any Court which enables it to exclude the public …

In 1940, in the depths of World War II, Goddard LCJ in *R v Army Council, Ex parte Sandford,*[250] determined not only that courts martial were themselves courts, but he went even further to state that the Army Council, which had the power to remit, confirm or alter the sentence handed down by a court martial,[251] was also a court. Importantly, his Lordship said:

Here we have a charge of a felony preferred against the appellant, and that charge was preferred before a court martial, which was a judicial tribunal having jurisdiction to impose punishment. The court martial having convicted and sentenced the appellant, the case came, under s 57 of the Army Act, before the confirming authority, who confirmed it … I cannot see, in those circumstances, why the Army Council were not acting just as much as a court as the original court martial. They were both performing duties imposed by the Army Act. I think that they were acting as a court …

In 1956, in *R v Linzee and O'Driscoll,*[252] a further statement to similar effect was made by Goddard LCJ with Hilbery and Ormerod LJJ, who described a court martial as being a court *sui generis*.

In 1981, in *Attorney-General v British Broadcasting Corporation*[253] Lord Denning, MR, had to determine whether immunity from suit applied to a particular member of a tribunal. He decided the answer was found in a determination of whether the body in question was a judicial body. In the course of his judgment, he made the following observation about courts martial:

But the principles — which confer immunity and protection — have hitherto been confined to the well-recognised courts, in which I include, of course, not only the

249 [1917] 2 KB 254, 271.

250 [1940] 1 KB 719, 725.

251 This is directly comparable to the role of a Reviewing Authority under the DFDA s 150 discussed in chapter 2.9.2.

252 (1956) 40 Cr App R 177, 185.

253 [1981] AC 303, 313.

> *High Court, but also the Crown Court, the county courts, the magistrates' courts, the consistory courts and courts-martial.*

In the same case, Lord Salmon observed:[254]

> *Indeed, in my opinion, public policy requires that most of the principles relating to contempt of court which have for ages necessarily applied to the long-established inferior courts such as county courts, magistrates' courts, courts-martial, coroners' courts and consistory courts shall not apply to valuation courts and the host of other modern tribunals.*

However, Lord Scarman[255] made the strongest statement concerning courts martial when he said:

> *I would add that the judicial system is not limited to the courts of the civil power. Courts-martial and consistory courts (the latter since 1540) are as truly entrusted with the exercise of the judicial power of the state as are civil courts: R v Daily Mail; Ex p Farnsworth [1921] 2 KB 733 and R v Daily Herald, Ex p Bishop of Norwich [1932] 2 KB 402.*

Accordingly, as is evident from this long line of English historical, traditional and legal classifications, a court martial in the United Kingdom has always been considered a court of law exercising judicial powers rather than 'judicial-like powers'.

As the High Court of Australia has already determined,[256] the historical or traditional classification of a function is a significant factor to be taken into account in deciding whether there is an exercise of judicial power. The *ratio* of the *BBC case*[257] is compelling as it held that a court martial operating under the *Army Act* 1881 (Imp) was a court of law. The pre-DFDA Australian military court martial system also operated under the same *Army Act* 1881 (Imp).[258] The question of whether this means that Australian courts martial have been exercising the judicial power of the Commonwealth is examined next.

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254 [1981] AC 303, 342.
255 [1981] AC 303, 360.
256 *R v Davison* (1954) 90 CLR 353, *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617.
257 [1981] AC 303.
258 cf chapter 2.4.1.

3.2 Australian Military Justice – The Constitutional Impediment

3.2.1 The Judicial Power of the Commonwealth

For Australia, the consequence of the English line of historical, traditional and legal classifications involves a consideration of whether courts martial established under the *Army Act* 1881 (Imp), as applied by the *Defence Act* 1903 (Cth), were operating in breach of Chapter III of the Constitution in their exercise of the judicial power of the Commonwealth. However, if courts martial established under the *Army Act* 1881 (Imp), as applied by the *Defence Act* 1903 (Cth), did not offend s 71 of the Constitution, what was the actual constitutional basis for courts martial?

Section 71 of the Constitution is central to the determination of this issue. The section provides that:

> *[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.*

The leading definition of "judicial power" is found in *Huddart Parker Pty Ltd v Moorehead* [259] where Griffith CJ stated: [260]

> *I am of opinion that the words "judicial power" as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.*

3.2.2 The Boilermakers' Principle

In 1956, the meaning of 'the judicial power of the Commonwealth' was decided by the High Court of Australia in the seminal case of *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*').[261] The majority of the Court held that Chapter III of the Constitution *'is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested*' and hence *'no part of the judicial power can be conferred in virtue of any other*

259 (1909) 8 CLR 330.

260 (1909) 8 CLR 330, 357.

261 (1956) 94 CLR 254. This case dealt with the power of conciliation and arbitration in s 51, pl. (xxxv), where the Court has consistently held that judicial power may not be conferred on the Australian Conciliation and Arbitration Commission so that, still, that power in industrial matters is conferred on the FCA.

authority or otherwise than in accordance with the provisions of Chap. III'.[262] Through consolidated appeals, and special leave from the High Court, the Privy Council in dismissing the appeals, agreed with the majority of the High Court that the affirmative language of s 71 negated the possibility of vesting judicial power in other courts or bodies. It held that Chapter III of the Constitution *'is in its terms detailed and exhaustive'*. Therefore, it is not open to the Parliament *'to turn from Chap. III to some other source of power … The conferment of such a limited power of legislation in s 51 makes it very clear that it is Chap. III alone that a larger power is contained*'.[263]

The foregoing analysis of the historical and traditional basis of courts martial in England (and then the United Kingdom) establishes that the power of courts martial to prosecute crimes and sentence offenders is an exercise of judicial power and is indistinguishable from the exercise of judicial power by a court.

The issue which arises in the Australian context established by the Constitution, is to determine whether the possible treatment by a court martial of the exercise of judicial power is to be treated as non-judicial, as it is exercised by military tribunals. It can be argued that this position may be justified by the so-called 'chameleon principle' (adopted by the High Court in 1977) in *R v Quinn; Ex parte Consolidated Food Corporation*.[264] The 'chameleon principle' operates on the basis that there is a category of powers which may be regarded as judicial when exercised by courts and yet non-judicial when exercised by other tribunals.

In 2007, the 'chameleon principle' was condemned by Kirby J in *Visnic v Australian Securities and Investments Commission*, [265] in the following terms:

> *There has been a clear tendency on the part of the Commonwealth of late to meet virtually every appeal to the separation of powers doctrine in the Constitution by an invocation of the "chameleon" principle. The Commonwealth then says that it can solve virtually all supposed infractions of the doctrine by the decision that it makes to assign the functions in question to courts or to executive bodies at its own pleasure. We need to be careful lest this "doctrine", taken too far, destroys the important objectives which the constitutional separation of powers serves. It is of the nature of executive government (and sometimes parliaments) to be impatient with the requirements of such separation.*

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262 (1956) 94 CLR 254, 270.

263 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 538.

264 (1977) 138 CLR 1.

265 *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381, 393; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 371.

However, the separation can sometimes protect the interests of the people and serve important constitutional ends that this Court should be vigilant to safeguard.

The observations of Kirby J are compelling. The parameters of what constitutes the judicial power of the Commonwealth has been authoritatively stated in the *Boilermakers' Case*. Attempts to use a principle with the nomenclature of 'chameleon' (that is, one that may change according to circumstances) seems in itself to make it clear that the principle is impermissibly straying from Chapter III and its terms which are '*detailed and exhaustive*'.[266] If the chameleon principle is not to be applied, in what sense then is the judicial power exercised by courts martial, if it is not by way of the judicial power of the Commonwealth?[267] The constitutional basis of the power exercised by courts martial was not examined by the High Court until World War II; the relevant decisions will now be analysed.

3.3 The Wartime Cases

Somewhat surprisingly, the historical and traditional context[268] of the classification of courts martial, and how it affected defence members,[269] was neither raised nor considered in the landmark cases of *R v Bevan; Ex parte Elias and Gordon*[270] and *R v Cox; Ex parte Smith*.[271] In neither case was argument directed to the issue of whether a court martial exercises judicial power other than as a Chapter III court and, therefore, was acting in excess of the powers of the Commonwealth Parliament. Consequently, there was no analysis of the historical or traditional classification of courts martial as being an exercise of judicial power by a court.

In *Bevan's Case*[272] the accused were both members of the Royal Australian Navy. However, by an order of the Governor-General in Council, all vessels of the Australian Navy and the officers and seamen on the books of those vessels

266 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 538.

267 A number of High Court judges have purported to answer this question by saying that the judicial power in question is *sui generis*, that is, that it belongs to neither the Commonwealth nor the States: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 574 (Brennan and Toohey JJ); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 586 (Gleeson CJ).

268 cf chapter 2.4.1.

269 In *Pirrie v McFarlane* (1925) 36 CLR 170,183, the High Court held a defence member does not cease to be a citizen subject to civilian law. As established in *R v White; Ex parte Byrnes* (1963) 109 CLR 665 true disciplinary matters are not part of the judicial power of the Commonwealth.

270 (1942) 66 CLR 452 (*Bevan's Case*).

271 (1945) 71 CLR 1 *(Cox's Case*).

272 (1942) 66 CLR 452.

were transferred unconditionally and for an unlimited period to the King's Royal Navy forces. That is, by this order, the appellants had become subject to the operation of British law, the *Naval Discipline Act* 1866 (Imp), due to the provisions of the *Defence Act* 1903 (Cth).[273]

On 12 March 1942, a murder was committed on board the HMAS *Australia* whilst it was on the high seas. This led to the convening of a court martial. The central issues in *Bevan's Case* were questions of statutory interpretation and inconsistencies between Australian and British law dealing with courts martial sentences. Of particular importance to the outcome of the appeal was that the *Defence Act* 1903 (Cth) did not allow for the sentence of death to be pronounced by a court martial for murder (death sentences were confined by s 98 to acts of mutiny, desertion or traitorous acts);[274] however, s 45[275] of the *Naval Discipline Act 1866* (Imp) imposed the sentence of death upon conviction for murder. Consequently, the question being considered was whether the accused should be sentenced pursuant to the English law relating to courts martial or whether they could be sentenced pursuant to the *Defence Act* 1903 (Cth) relating to courts martial. The difference was truly a matter of life or death.

At the time the case was decided by the High Court of Australia on 8 July 1942, the Commonwealth Parliament had yet to adopt the *Statute of Westminster* 1931 (Imp). It was not formally adopted until the passage of the *Statute of Westminster Adoption Act* 1942 (Cth) which was assented to on 9 October 1942 (although made retrospective to the start of World War II). This meant that until the passage of the *Adoption Act*, Imperial law applied to the extent of any inconsistency with Australian law.

Accordingly, in *Bevan's Case,* as the *Statute of Westminster* 1931 (Imp) had not then been adopted by the Commonwealth Parliament, the High Court determined that Imperial law overrode Australian law to the extent of any inconsistency, and the penalty imposed upon conviction was to be governed by Imperial law. This meant the appellants could be sentenced to death by the court martial under the *Naval Discipline Act* 1866 (Imp) notwithstanding the conflict

273 Similarly, if the offence had been committed by an Australian soldier transferred to the King's British military forces, then rather than the *Naval Discipline Act* 1866 (Imp) being the applicable statute, it would be the *Army Act* 1881 (Imp).

274 Sentence of death in certain cases only—subject to approval of Governor-General.
98. No member of the Defence Force shall be sentenced to death by any court-martial except for mutiny, desertion to the enemy, or traitorously delivering up to the enemy any garrison, fortress, post, guard, or ship, vessel, or boat, or traitorous correspondence with the enemy; and no sentence of death passed by any court-martial shall be carried into effect until confirmed by the Governor-General.

275 45. Every Person subject to this Act who shall be guilty of Murder shall suffer Death: …

with the *Defence Act* 1903 (Cth) which did not permit the imposition of capital punishment for that offence.

The issue of whether courts martial exercised the judicial power of the Commonwealth was not directly raised during the appeal.[276] Rather, Starke J observed that the High Court had jurisdiction to hear the matter as it was an application for a writ of *habeas corpus* (or alternatively, prohibition) and the application before the Court required an interpretation of the Constitution; therefore, the Court had jurisdiction to hear the case generally. Starke J stated:[277]

> *Now this case involves the interpretation of the Constitution, because the position of courts-martial in relation to the judicial power of the Commonwealth comes in question. This Court has held that the judicial power of the Commonwealth can only be vested in courts and that if any such court be created by Parliament the tenure of office of the justices of such court, by whatever name they may be called, must be for life, subject to the power of removal contained in sec. 72.*

Starke J described judicial power by reference to the guiding principles contained in *Huddart Parker Pty Ltd v Moorehead*[278] and *Shell Co. of Australia Ltd v Federal Commissioner of Taxation*[279] as the power which every sovereign authority must of necessity have in order to be able to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to pronounce a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. He then observed: [280]

> *Naval courts-martial are set up (Naval Defence Act 1910–1934 of the Commonwealth, which incorporates the Defence Act 1903-1941 of the Commonwealth (See secs 5, 36), and Imperial Naval Discipline Act 1866, secs 87, 45, and Part IV) and they exercise judicial power in the sense already mentioned. But do they exercise the judicial power of the Commonwealth? If so the proceedings of such courts are unwarranted in point of law. The question depends upon the interpretation of the Constitution and whether such courts stand outside the judicial system established under the Constitution.*

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276 (1942) 66 CLR 452 at 479, McTiernan J noted: "The question whether the sections of the Act providing for the trial and sentence of members of the Forces by court-martial are intra vires the Commonwealth Parliament was not argued. I see no reason to doubt that those provisions are a valid exercise of the powers vested in the Parliament by section 51 (vi) and (xxxix)."

277 (1942) 66 CLR 452, 466.

278 (1909) 8 CLR 330, 357.

279 [1931] AC 275, 284, 298, 299.

280 (1942) 66 CLR 452, 466.

In addressing his own question, Starke J analysed the status of courts martial adopted by the Supreme Court of the United States and determined that the American approach to courts-martial was:[281]

> *The Supreme Court of the United States has resolved that courts-martial established under the laws of the United States form no part of the judicial system of the United States and that their proceedings within the limits of their jurisdiction cannot be controlled or revised by civil courts.*

After evaluating the position adopted by the Supreme Court of the United States on the issue, Starke J then added with respect to courts martial in Australia, that they were an 'exception' to Chapter III courts:[282]

> *In my opinion the same construction should be given to the constitutional power contained in s 51(vi) of the Australian Constitution. The scope of the defence power is extensive, as is suggested by the decisions of this Court*[283]*, and though the power contained in s 51(vi) is subject to the Constitution, still the words naval and military defence of the Commonwealth and the control of the forces to execute and maintain the laws of the Commonwealth, coupled with s 69 and the incidental power (s 51(xxxix)), indicate legislative provisions special and peculiar to those forces in the way of discipline and otherwise, and indeed the Court should incline towards a construction that is necessary, not only from a practical, but also from an administrative, point of view.*

Williams J was influenced by the position adopted by the Supreme Court of the United States. However, he foresaw that there could be an issue regarding how far the jurisdiction of a court martial might extend[284] when he stated:[285]

> *As the establishment of courts-martial is necessary to assist the Governor-General, as Commander-in-Chief …, to control the forces and thereby maintain discipline, I think it must follow that the Commonwealth Parliament, like Congress, can legislate for such courts, although constitutional questions could arise as to the extent of the jurisdiction in the case of ordinary criminal as opposed to offences against discipline and duty which could be conferred upon them, but, as it would usually be impossible to separate such offences, a generous view would have to be taken on such questions.*[286]

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281 (1942) 66 CLR 452 at 467, citing *Dynes v Hoover* 61 US 65 (1858) and *Kurtz v Moffitt* 115 US 487 (1885).

282 (1942) 66 CLR 452, 467. However, see R A Brown, The Constitutionality of Service Tribunals under the *Defence Force Discipline Act* 1982 (1985) 59 *Australian Law Journal* 319. The author therein opines that the judgment of Starke J contains an internal contradiction in that, while holding that courts martial created under the defence power were not part of the judicial system of Australia, Starke J stated that that power was subject to the Constitution. Brown argues, with logic, that if the defence power is subject to the Constitution, it should surely be subject to Ch III thereof.

283 *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32; *Farey v Burvett* (1916) 21 CLR 433.

284 An issue that subsequently arose for determination in *Re Tracey, Ex parte Ryan* (1989) 166 CLR 518.

285 (1942) 66 CLR 452 at 481. Rich and McTiernan JJ did not discuss this issue.

286 This very issue was to arise for consideration in the *Peacetime Cases,* (n. 31).

Interestingly, Rich J did not deal with the matter of judicial power of the Commonwealth at all and, tellingly, no member of the High Court examined the available historical texts and English cases which had established that courts martial were courts of law.[287]

It was not until 1945 that the High Court of Australia was next able to consider the status of courts martial in *R v Cox; Ex parte Smith*.[288] In this case, a soldier had been convicted by a court martial for breaches of the *Army Act* 1881 (Imp) as applied by the *Defence Act* 1903 (Cth). The soldier was sentenced to a period of detention and ordered to be discharged from the Army. Whilst in detention, the soldier was formally discharged from the Army. Following his discharge, but during his period of detention, he was further charged, whilst actually still in detention, with participating in a mutiny in defiance of authority. It was argued that he could not have committed this offence since he was no longer a member of the Army, having been discharged. Notwithstanding, the High Court held[289] that under the *Army Act* 1881 (Imp), as applied by the *Defence Act* 1903 (Cth), the soldier remained subject to all the provisions of the *Army Act* 1881 (Imp) whilst in detention,[290] although the charge of mutiny could not be maintained against him as he had been discharged from the Army.

The case involved argument in relation to the judicial power of the Commonwealth. It was argued that if and in so far as the *Defence Act* 1903 (Cth) and the *Australian Military Regulations*[291] made thereunder purported to confer jurisdiction upon courts martial over the accused in respect of the offence, the *Defence Act* 1903 (Cth) and *Australian Military Regulations* were contrary to s71 of the *Constitution* and therefore invalid. The argument advanced was that the *ratio* in *Bevan's Case,*[292] that courts martial were not a breach of Chapter III of the Constitution, could not apply as the accused former soldier was no longer a member of the Army when the mutiny was alleged to have been instigated.

The questions for the Court's determination were set out by Latham CJ[293] and, in particular, Contention (3) which submitted that the conferring of jurisdiction upon courts martial to deal in any way with persons not members of the military forces involved an exercise of judicial power in relation to those persons. Such power could be exercised only by courts created, or invested with jurisdiction, under the Commonwealth Constitution, section 71. It was argued,

287 Refer to chapter 3.1.
288 (1945) 71 CLR 1.
289 By the Court: Latham CJ, Rich, Starke, Dixon and Williams JJ.
290 By Majority: Latham CJ, Rich, Dixon and Williams JJ.
291 SR 192, No 149–1945 No 68.
292 (1942) 66 CLR 452.
293 (1945) 71 CLR 1, 8–9.

the court martial was said to not be such a court, and the decision in *R v Bevan; Ex parte Elias and Gordon*[294] (which upheld the constitutionality of courts martial) did not apply so as to authorise the prosecution before a court martial of a person not a member of the military forces.

Unfortunately, Rich J had nothing to say about the matter; Starke J, despite delivering the lead decision in *Bevan's Case*, said nothing about the source of power being exercised by the court martial. Williams J, although agreeing that the charge could not be maintained, repeated his opinion expressed in *Bevan's Case,* when he said:[295]

> *In R v Bevan it was held that legislation providing for the trial by court-martial of members of the defence force is a valid exercise of the defence power … But the decision in R v Bevan was not intended to limit the power of the Commonwealth Parliament to legislate under the defence power for the trial of persons by court martial to persons who are members of the defence force. There are many occasions in which civilians are placed in such a position that it is necessary in the interests of defence, including the maintenance of discipline, to subject them to military law and to trial by court-martial for offences under that law.*

Dixon J made the following statement (which was to be relied upon in many of the *Peacetime* cases[296]):[297]

> *It is desirable to notice a further objection that was urged on the part of the prisoner to the jurisdiction of the courtmartial over him. The objection is that, because he is now a civilian, to allow a court-martial to exercise jurisdiction over him would be contrary to the principles of Chapter III of the Commonwealth Constitution which confides the judicial power of the Commonwealth exclusively to courts of justice.*
>
> *In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered Constitutional (R v Bevan). The exception is not real. To ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.*

This chapter argues that this statement is and remains inaccurate as there are many examples of power given to the Commonwealth under s 51 which then itself is controlled by an exercise of judicial power under Chapter III of the Constitution, for example, in cases of bankruptcy and family law. Dixon J provided no reasoning as to why courts martial were not to be regarded as part of the judicial system administering the law of the land. As has been demonstrated, Dixon J in his statement ignored the historical and traditional

294 (1942) 66 CLR 452.
295 *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 27.
296 Peacetime Cases, (n. 31).
297 *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23.

classification of courts martial[298] which were not examined in his reasons for judgment. Therefore, Dixon J's words should be considered *obiter dicta* as the *ratio* of the majority of the High Court determined that the prosecutor (Bevan) could not be subjected to a court martial because the circumstances of the case disclosed no offence. Dixon J's observation was not necessary to the determination of the appeal.

3.4 The Peacetime Cases

Notwithstanding the principles established[299] in the *Wartime cases*[300] and the *Boilermakers*' case[301], after the end of World War II, the High Court continued to wrestle with the constitutional status of military tribunals established to hear disciplinary charges against service personnel. This issue was to continue in the *Peacetime* cases.[302]

It has been argued[303] that an analysis of the *Wartime cases* and *Peacetime cases* establishes three distinct theories regarding the power exercised by a court martial and its interrelationship with s 71 of the Constitution. The first theory[304] is that military tribunals exercise judicial power but 'not the judicial power of the Commonwealth' within the meaning of s 71 of the Constitution. The second theory[305] is that the power in question is 'not judicial power at all' for constitutional purposes. The third theory[306] argues[307] that the power exercised

298 Chapter 3.1.

299 Notwithstanding in the 1940s, when both the Wartime cases were decided, and in the 1950s when Boilermakers was decided, the High Court occasionally suggested that there were some inherent powers that the Commonwealth could exercise without being subject to the limitations of the Constitution. For example, that forfeiture of property was somehow inherent in the nature of customs and excise, so that the Commonwealth could forfeit property without violating the compensation provisions of s 51, pl (xxxi) discussed by R. A. Brown "*Forfeiture of Property Under the Customs Act 1901*" (1982) 56 *Australian Law Journal* 447.

300 **'The Wartime cases'**: *Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, per Starke J at 468; *R v Cox; Ex parte Smith* (1945) 71 CLR 1.

301 (1956) 94 CLR 254.

302 Peacetime cases, (n. 31).

303 J Crowe and S Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial', (2012) 40 *Federal Law Review* 161, 163.

304 *Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, per Starke J at 468; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

305 *Lane v Morrison* (2009) 239 CLR 230.

306 *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570.

307 S Ratnapala, *Australian Constitutional Law: Foundations and Theory*, (Oxford University Press, 2002) 179–180. See also Z Cowen, 'The Separation of Judicial Power and the Exercise of Defence Powers in Australia' (1948) 26 *Canadian Bar Rev* 829; R A Brown, 'The

is 'the judicial power of the Commonwealth' which can be exercised by courts martial under a limited exception to Chapter III of the Constitution.

For reasons which will be developed in this chapter, the first theory is preferred, provided that military tribunals are part of a structure within the chain of command. Should military tribunals be taken outside the chain of command, they are no longer truly an exercise of command and discipline.

Notwithstanding the introduction in 1985 of a new military justice system under the DFDA,[308] the High Court has maintained a line of authorities supporting a doctrine of constitutional 'exceptionalism', to the effect that courts martial do not exercise the judicial power of the Commonwealth under Chapter III of the Constitution, but constitute an exception based upon a construction of the Constitution which is 'necessary not only from a practical, but also from an administrative view'.[309] The High Court has consistently applied the longstanding authority of *R v Cox; Ex parte Smith*[310] and the observation of Dixon J that the administration of military justice by military tribunals constitutes an 'exception' to Chapter III of the Constitution.[311]

In 1989, the first major constitutional challenge in the High Court of Australia to the new military justice system established under the DFDA was raised in *Re Tracey; Ex parte Ryan.*[312] The challenge[313] was twofold: first, it was argued that insofar as the DFDA purported to oust the States' civilian criminal justice system in peacetime, this constituted a breach of Chapter III of the Constitution, and, secondly, that service tribunals established under the *DFDA* (that is, trials by courts martial and Defence Force magistrate) exercise the judicial power of the Commonwealth which constitutes a breach of Chapter III of the Constitution.

The prosecutor for the writ of mandamus (Ryan), a Staff Sergeant in the Australian Regular Army, was charged with three offences under the DFDA. The first charge was that Ryan had made an entry in a service document, with

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Constitutionality of Service Tribunals under the *Defence Force Discipline Act* 1982' (1985) 59 *Australian Law Journal* 319; A Mitchell and T Voon, 'Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia' (1999) 27 *Federal Law Review* 499.

308 Chapter 2.6.

309 Established in the Wartime cases, (n. 295).

310 (1945) 71 CLR 1.

311 *Haskins v Commonwealth* (2011) 244 CLR 22, 35.

312 (1989) 166 CLR 518.

313 The author, as a Captain in the Australian Army Legal Corps (Reserve), was appointed Defending Officer for SSGT Ryan at the trial before the Defence Force magistrate, MAJ RRS Tracey, QC. The author was subsequently junior counsel for SSGT Ryan led by B Zichy-Woinarski, QC in the High Court challenge, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

intent to deceive, which was false in a material particular.[314] That charge related to a movement requisition signed by Ryan. The other two charges alleged that Ryan was absent without leave on two separate occasions.[315]

By a decision without a discernible *ratio*,[316] the High Court determined, first, that the ouster of the reach of the States' criminal justice systems was unconstitutional, and, secondly, but only by a majority, the military justice system established under the DFDA was constitutional — as being an 'exception' to Chapter III of the Constitution — as stated by Dixon J in *Cox's case*. [317]

However, Mason CJ, Wilson and Dawson JJ found that courts martial and trials before Defence Force magistrates amounted to the exercise of judicial power. In their joint judgment[318], '*[t]here has never been any real dispute about that*'. They went on to observe:

> *Of course, the powers bestowed by s. 51 are subject to the Constitution and thus subject to Ch III. The presence of Ch III means that, unless, as with the defence power, a contrary intention may be discerned, jurisdiction of a judicial nature must be created under Ch III and that it must be given to one or other … courts as the Parliament creates or such other courts as it invests with federal jurisdiction.*

Mason CJ, Wilson and Dawson JJ[319] concluded:

> *… the defence power is different because the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as part of the organization of the force itself. Thus the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Ch III and to impose upon those administering that code the duty to act judicially.*

The historical and traditional classification of courts martial was argued[320] but largely ignored by the High Court. The disparate judgments upheld the new

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314 DFDA, s 55(1)(b).

315 DFDA, s 24(1).

316 The narrowness of the base upon which the High Court decided that constitutional exceptionalism survived was highlighted upon the delivery of judgment when the following exchange took place:
Mason CJ: The Order of the Court is: Order nisi for prohibition discharged. No order as to costs.
Mr Mueke (counsel for the Commonwealth): I note that the Court has made no order as to costs. On my instructions, the matter of costs has not been argued. If the Court is not prepared to award the Commonwealth costs now, perhaps the Court would allow 21 days?
Mason CJ: What I suggest you do is read the judgment. Whilst on the face of the Court's order you appear to have won the battle, I think you will find on reading the judgement you have limped away.
High Court of Australia, Transcript of proceedings, 10 February 1989.

317 *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23.

318 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 540.

319 *Ibid*., 540–541. To like effect are the conclusions of Brennan and Toohey JJ, 574.

320 As discussed in chapter 3.1.

system under the doctrine of exceptionalism espoused in *obiter dictum* by Dixon J,[321] whilst striking out the provisions ousting the States' civilian criminal justice system.

Since *Re Tracey; Ex parte Ryan,*[322] the High Court has considered several further challenges[323] in regard to the extent to which the *DFDA* may lawfully charge ADF members with the commission of certain offences established under the *DFDA*. These challenges have relied upon the similarity between the charges and their direct civilian criminal counterparts under States' criminal law. The High Court has, by a majority, continued to consider the exercise of power in respect of discipline within the ADF as a valid exercise of the defence power.[324] In 2007, the proposition that the traditional power of military tribunals to hear charges against service personnel is not a 'judicial power of the Commonwealth' within the meaning of s 71, was reiterated by a majority of the High Court in *White v Director of Military Prosecutions*.[325] The case involved charges of indecency and assault brought against a Chief Petty Officer in the Royal Australian Navy pertaining to acts committed when the accused was off duty and out of uniform. In that case, six judges[326] confirmed that the exercise of this power was not subject to the requirements of Chapter III, even if the offences being tried were not purely disciplinary in nature. The joint judgment of Gummow, Hayne and Crennan JJ endorsed Starke J's judgment in the *Bevan* case[327] that the power exercised by service tribunals is judicial power, but not 'the judicial power of the Commonwealth'.[328] This is also the opinion of Gleeson CJ.[329] Therefore, it may be observed that a clear majority of the Court endorsed this interpretation. Callinan J, however, described the power exercised by service tribunals as a special sort of 'executive power' which should nonetheless be exercised 'in a proper and judicial way'.[330]

In *Re Colonel Aird; Ex parte Alpert*[331] and in *White v Director of Military Prosecutions*[332] Kirby J rejected the majority position that military tribunals

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321 *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23.

322 (1989) 166 CLR 518.

323 The DFDA has now been considered by the High Court in seven cases, the Peacetime Cases, (n. 31).

324 *Re Nolan; Ex parte Young* (1991) 172 CLR 460, Re *Tyler*; Ex *parte Foley* (1994) 181 CLR 18 and White v *Director of Military Prosecutions* (2007) 231 CLR 570.

325 (2007) 231 CLR 570.

326 Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J dissenting.

327 *Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452.

328 (2007) 231 CLR 570, 595–598.

329 *Ibid.*, 595–596.

330 *Ibid.*, 650.

331 (2004) 220 CLR 308.

332 (2007) 231 CLR 570.

exercise judicial power, but not the judicial power of the Commonwealth. His Honour stated his view as follows: [333]

> *The supposed point of distinction, propounded to permit service tribunals to escape from this characterisation in s 71 of the Constitution, is that, whilst they exercise "judicial power", it is not "the judicial power of the Commonwealth under Ch III of the Constitution". As a matter of language, logic, constitutional object and policy, this supposed distinction should be rejected. It has never hitherto commanded the endorsement of a majority of this Court. It should not do so now.*

According to Kirby J, the power historically exercised by military tribunals is both judicial power and the 'judicial power of the Commonwealth'. The principle in the *Boilermakers' Case* holds that such power may be exercised only by Chapter III courts. However, Kirby J concedes that a limited exception to this rule is necessary in order to support the Australian historical jurisdiction of courts martial in disciplinary matters. This opinion is difficult to justify in view of the historical or traditional classification of courts martial from the Middle Ages until the present in the United Kingdom from which the Australian court martial system developed. If anything, Kirby J's opinion is pragmatic in outcome in at least trying to reconcile the *Wartime Cases* and the *Peacetime Cases* to allow the Australian military justice system to continue to operate upon the basis of 'exceptionalism'. Perhaps he thought that it was too late for the military to be informed that its military justice system had at all times involved the exercise of the judicial power of the Commonwealth. However, if the exercise of this power remained within the chain of command, exceptionalism could be justified.[334]

In *Haskins v Commonwealth,*[335] the majority of the High Court summarised the principle of exceptionalism when it stated: [336]

> *It is to be borne at the forefront of consideration of the plaintiff's arguments about the application of Ch III of the Constitution that this Court has repeatedly upheld the validity of legislation permitting the imposition by a service tribunal that is not a Ch III court of punishment on a service member for a service offence. Legislation permitting service tribunals to punish service members has been held to be valid on the footing that there is, in such a case, no exercise of the judicial power of the Commonwealth. Punishment of a member of the defence force for a service offence, even by deprivation of liberty, can be imposed without exercising the judicial power of the Commonwealth. Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command,*

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333 *Ibid.*, 616.

334 This issue will be further developed and examined in chapter 6.

335 (2011) 244 CLR 22.

336 *Ibid.*, 35, [21]-[22] per French CJ, Gummow J, Hayne, Crennan, Kiefel and Bell JJ. This decision determined that *Military Justice (Interim Measures) Act (No 2*) 2009 (Cth) was a valid law of the Commonwealth Parliament. The High Court also held that the Act provided lawful authority justifying the detention of the sailor.

> *the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force; they are not steps taken in exercise of the judicial power of the Commonwealth.*

Arguably, in some cases the needs of military discipline may be better served by the trial of offenders in the ordinary civilian courts.[337] The greater independence and competence of courts and the wider scope for appellate review within the civil system enhances the confidence within service ranks in regard to fair treatment in criminal matters — a factor which is more likely than not to improve service morale. As Kirby J sagely observed in *Re Colonel Aird; Ex parte Alpert:*[338]

> *The culture of the military is not one in which independent and impartial resolution of charges comes naturally. These considerations reinforce the need for great caution in expanding the reach of the system of service tribunals, particularly in time of peace.*

In *White v Director of Military Prosecutions*[339] the High Court investigated the authorities on exceptionalism (*Cox,*[340] and *Bevan*[341] and *Tracey*[342]), with Gleeson CJ concluding that exceptionalism existed because: [343]

> *To adopt the language of Brennan and Toohey JJ in Tracey, history and necessity combine to compel the conclusion, as a matter of construction of the Constitution, that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, the power which is exercised is not the judicial power of the Commonwealth; it is a power sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline.*

Callinan J added: [344]

> *… command and that which goes with it, namely discipline and sanctions of a special kind, for the reasons that I earlier gave, are matters of executive power, albeit that*

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337 The 2005 Senate Report on *The Effectiveness of Australia's Military Justice System*, Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, (2005), 88–89, accepted Kirby J's view in recommending the establishment of the more independent AMC, whose constitutional status was later considered by the High Court in *Lane v Morrison* (2004) 220 CLR 301, 341. Such concerns, the Committee noted, led to reforms of military justice in Canada and the United Kingdom and caused debate in the United States Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (2005), 90–96.

338 (2004) 220 CLR 301, 341.

339 *White v Director Military Prosecutions* (2007) 231 CLR 570.

340 (1945) 71 CLR 1, 23.

341 (1942) 66 CLR 452.

342 (1989) 166 CLR 518, 573–574.

343 *White v Director Military Prosecutions* (2007) 231 CLR 570, [14].

344 *White v Director Military Prosecutions* (2007) 231 CLR 570, [240].

the power should still be exercised, so far as is reasonably possible, in a proper and judicial way, adapted as necessary to the special circumstances of military service, as I take the second defendant to accept. The presence of s 68 in the Constitution alone provides an answer to the plaintiff's submission that by necessary implication military judicial power may only be exercised by a Ch III court.

Consequently, the High Court's decisions in both the *Wartime Cases* and *Peacetime Cases* have concluded that the exercise of judicial-like power by courts martial is separate and distinct from the exercise of the judicial power of the Commonwealth. Effectively, this is because the decisions of courts martial were not "definitive" of guilt as the punishments ordered by courts martial were subject to administrative confirmation or review within the chain of command. Ultimate decisions about guilt and punishment are made on confirmation or review within the chain of command. Accordingly, having been accepted in both the *Wartime Cases* and *Peacetime Cases,* courts martial may be seen to be directed to the maintenance of service discipline within the ADF. They are military tribunals established to ensure that discipline administered within the ADF is just. However, as Dixon J observed, *obiter dicta,* in *R v Cox; Ex parte Smith*[345], courts martial do "*not form part of the judicial system administering the law of the land*". The most important aspect of this observation is that this will remain so but only as long as courts martial operate within the chain of command. This distinction was to become crucial when Parliament sought to establish the Australian Military Court, outside the chain of command.[346]

3.5 The Disciplinary Appeal System: Defence Force Discipline Appeals Tribunal

The foregoing analysis of the current Australian military justice system is not complete without reference to its appeal system. Prior to the end of World War II, there was no formal appeal structure for courts martial decisions. Provision for an appeal against a conviction by court martial was introduced by the *Courts Martial Appeals Act 1955* (Cth). Prior to this Act, reviews of courts martial decisions were conducted by formation commanders, that is, within the chain of command, on the basis of specialist military legal advice. Constitutionally, the only legal avenue open to an aggrieved member of the ADF was to challenge the

345 *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23; see also analysis of 'legislative courts' in chapter 6.1.2.

346 Discussed in chapter 6.

court martial decision by constitutional writ under s 75(v) of the *Constitution,* and then only on the limited grounds of jurisdictional error.[347]

After World War II, both Australia and the United Kingdom recognised the need for a right of appeal, in respect of a decision of a court martial, to a legally qualified tribunal, sitting in public and outside the chain of command.[348] In 1955, Parliament enacted the *Courts-Martial Appeals Act 1955* (Cth),[349] which was renamed in 1982[350] as the *Defence Force Discipline Appeals Act 1955* (Cth) (**DFDAA**). As originally enacted,[351] the Act conferred a right of appeal (from what is now the Defence Force Discipline Appeals Tribunal (**DFDAT**)) against a decision of a court martial which was unreasonable, or could not be supported, having regard to the evidence. It was also available when the decision involved an error on a question of law, or there was a miscarriage of justice. The current right of appeal[352] is now broader than it was originally.

The appellate jurisdiction of the DFDAT was conferred, not on a court established under Chapter III of the *Constitution,* but on a statutory tribunal outside the chain of command, established for that purpose. The DFDAT may sit at any place within or outside Australia as determined by its President.[353]

The period from 1962 until 1975 (the Vietnam War) saw the largest overseas deployment of the ADF since World War II.[354] During this time, the DFDAT

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347 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452.

348 *Courts Martial (Appeals) Act* 1951 (UK).

349 Commenced 1 June 1957; *Commonwealth of Australia Gazette* (1957) p 1501.

350 *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth).

351 *Courts-Martial Appeals Act* 1955 (Cth) s 23(1).

352 *DFDAA*, s 23 provides, inter alia, for an appeal in the following circumstances:

- that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;
- that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;
- that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred; or
- that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory;
- it shall allow the appeal and quash the conviction or the prescribed acquittal.

Where in an appeal it appears to the Tribunal that there is evidence that:

- was not reasonably available during the proceedings before the court martial or the Defence Force magistrate;
- is likely to be credible; and
- would have been admissible in the proceedings before the court martial or the Defence Force magistrate.

353 *DFDAA*, s 14(1). The DFDAT, in fact, has never sat overseas.

354 Australian War Memorial: https://www.awm.gov.au/articles/event/vietnam. The deployment commenced with the arrival of the Australian Army Training Team Vietnam in South Vietnam in July 1962. The war was formally declared at an end when the Governor-

dealt with a steady stream of appeal cases, all of which were heard in Australia. These cases included appeals in respect of convictions for disciplinary offences which included convictions for murder.[355] Membership of the DFDAT[356] is comprised of presidential members, drawn from superior court judges of the Commonwealth; the States and Territories and District or County Court judges are eligible to be appointed as members of DFDAT.[357]

The DFDAT is not a court for the purposes of Chapter III of the Constitution.[358] However, an "appeal" rests on a question of law from a decision of the DFDAT to the Full Court of the Federal Court of Australia (**FCA**).[359] A proceeding of this nature, although referred to as an "appeal", is a proceeding in the Federal Court's original jurisdiction. An appeal to the High Court from the Full Court of the Federal Court is possible only by special leave of the High Court.[360]

A principal reason for the establishment of the DFDAT was the need for greater independence and transparency when dealing with challenges to convictions imposed by service tribunals.

3.5.1 Independence

In a useful summary, the High Court of Australia held that the following non-exhaustive list of matters assists in deciding whether a court or tribunal may be considered independent:[361]

- the manner of the appointment of its members;
- their terms of office;
- the existence of effective guarantees against outside pressure;
- whether the body presents an appearance of independence and impartiality;[362]

General, Sir Paul Hasluck, issued a proclamation on 11 January 1973 on the advice of the Prime Minister, Gough Whitlam. Almost 60,000 Australians (Army, Navy and Air Force) served in Vietnam and of these, 521 died as a result of the war and over 3,000 were wounded.

355 *Re Allen's Appeal* (1970) 16 FLR 59 and *Re Ferriday's Appeal* (1971) 21 FLR 86.

356 *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth) s 17, which made amendments to the *Defence Force Discipline Appeal Tribunal Act* 1955 (Cth) s 8.

357 *DFDAA*, s 8. No provision has been made for members of the Federal Circuit Court of Australia to be appointed in any capacity.

358 *Lane v Morrison* (2009) 239 CLR 230 at 259–260, [93].

359 *DFDAA*, s 52. There is no such appeal in respect of single member tribunal decisions; in effect, procedural decisions.

360 *FCA Act 1976* (Cth), s 33(3).

361 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 127 per Kirby J.

362 *Langborger v Sweden* (1989) 12 EHRR 416; *Bryan v United Kingdom* (1995) 21 EHRR 342; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

- security of tenure; financial security; and institutional independence.[363]

The kinds of safeguards identified above provide for independent decision making which is free from the actual or perceived influence of the Executive and/or the Legislature, and free from the influence of the private interests of the judge or third parties. Conversely, a judicial officer beholden to the Executive for the length of his or her appointment, reappointment or remuneration, could be perceived as indebted to that Executive and unlikely to make decisions contrary to the interests of those who could: terminate his or her appointment, not reappoint, or reduce his or her remuneration. Judicial officers need to be able to make their decisions without fear and without favour.

Thus, in so far as remuneration is concerned, s 72(iii) of the Constitution provides that a judicial officer's pay shall not be reduced during his or her continuance in office. The reference to 'remuneration' includes the non-contributory pension plan entitlements which accrue under the federal, judicial pension statute.[364] The judicial pension should be better understood as an important safeguard for securing the independence of judicial officers:[365]

> *One not insignificant reason is to reduce, if not eliminate, the financial incentive for a judge to seek to establish some new career after retirement from office. As was pointed out in argument, it may otherwise be possible to construe what a judge does while in office as being affected by later employment prospects.*

As for tenure, s 72 of the *Constitution* once provided Commonwealth judicial officers with tenure for life. However, in the Referendum of 1977, one of the few successful referenda issues supported by a majority of people in most states, was that federal judicial officers now have tenure until the age of 70, or his or her earlier retirement.[366] Federal judges are also appointed pursuant to the Constitution and cannot be removed from office 'except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the grounds of proved misbehaviour or incapacity'. A further factor which safeguards the independence of the judiciary is that the Legislature cannot unilaterally amend these Constitutional provisions. Instead, its provisions are entrenched, meaning the Constitution cannot be changed other than by passage of a bill through both Houses by an

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363 *Valente v The Queen* [1985] 2 SCR 673, 687; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 127 per Kirby J.

364 The same principles apply to State judicial officers though not by operation of Commonwealth law but by the relevant State or Territory law.

365 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

366 *Constitution Alteration (Retirement of Judges) Act* 1977 (Cth).

absolute majority and then by a referendum of the people, thereby requiring a double majority for success.[367]

The removal of judges deserves some attention as it is a significant threat that the Executive holds over the judiciary. In Australia, the Constitution allows for the removal of a judge on the grounds of misbehaviour or incapacity. The idea of 'misbehaviour' has been defined to include judicial or criminal misbehaviour, such as the allegations made in the cases of Lionel Murphy (former Attorney General of Australia and High Court Justice)[368] and Judge Foord.[369] Justice Murphy died before the matter was finalised. It has also been said to include conduct rendering a judge unfit for office,[370]such as the allegations made against the Hon Justice Vasta, formerly of the Supreme Court of Queensland, who was removed in 1989 on an address of that State's unicameral Parliament. In both cases, special legislation[371] appointed commissions of judges or retired judges to determine whether the allegations were substantiated.

Independence from the Executive is, however, only one feature of this principle. The judiciary must also be independent (and also *perceived* to be so) from other sources of influence including, for example, threat of suit for judicial acts or omissions. Accordingly, federal judges' immunity from suit for judicial acts is a further aspect of securing or safeguarding a court's independence from sources of influence including, but not limited to, the Executive.[372]

A judge's immunity from suit serves a number of purposes, not the least of which is the need for finality of judicial decisions. It is also a principle which circumvents the assertion that the prospect of suit may have had some conscious or unconscious effect on the decision-making process or its outcome. [373]

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367 The *Constitution*, s 128.

368 *R v Murphy* (1985) 63 ALR 53.

369 *Foord v Whiddett* (1985) 60 ALR 269.

370 'Interpretation and determination of judicial "misbehaviour" under section 72 of the Commonwealth Constitution' — part of 'Current Topics' (1984) 58 *Australian Law Journal* 307, 311; Norman O'Bryan, 'Judicial "misbehaviour" and the Constitution' (1987) 61 *Law Institute Journal* 574; George Lush, 'Parliamentary Commission of Inquiry Re The Honourable Justice Murphy: Ruling on the Meaning of "Misbehaviour"' (1986) 2 *Australian Bar Review* 203.

371 *Parliamentary Commission of Inquiry Act* 1986 (Cth); *Parliamentary (Judges) Commission of Inquiry Act* 1988 (Qld). Two reports were made under the latter Act, the first concerned the Hon Justice Vasta and the second related to Judge Eric Pratt of the Queensland District Court. Judge Pratt was exonerated.

372 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755, 762–763 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

373 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 80 per Gummow, Hayne and Crennan JJ.

3.5.2 Impartiality

In criminal trials, judges are the arbiters of law and juries are the arbiters of fact. For a trial to be fair, both sets of decision makers must make their respective decisions free from actual bias or the apprehension of bias. Thus, impartiality concerns two kinds of bias: actual and apprehended (or sometimes referred to as 'imputed', 'apparent', 'apprehended', 'suspected', 'notional' or 'deemed').[374] Actual bias concerns the actual subjective motives, attitudes, predilections or purposes of the decision-maker. However, a complaint of apprehended bias requires the complainant to establish that '*in all the circumstances the parties or the public might entertain a reasonable apprehension that [the decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question involved in it*'.[375] Accordingly, apprehended bias is determined by reference to a standard which is more easily discerned than actual bias, although apprehended bias must still be 'firmly established'.[376] It is not a safe haven for or cause for further action by a litigant disgruntled by the outcome.

Importantly, the requirement of impartiality applies not only to a judge, but to jurors as well.[377] This is not surprising in criminal matters, as the judge makes decisions as to law and the jury makes decisions as to fact. *Webb v The Queen*[378] concerned the impartiality of a juror. Deane J identified four instances where a juror would be disqualified for the appearance of bias: interest; conduct; association; and extraneous information. These four categories apply with equal force to the position of the judge.

3.5.3 Independence and Impartiality: United States Courts Martial

In the United States, military courts are not Article III constitutional courts; instead, they are established pursuant to Article I, section 8 of the Constitution of the United States which empowers Congress to raise and support armies, to provide and maintain a navy, and to provide for their organisation and discipline. This is a constitutional arrangement similar to but not the same as that of Australian courts martial and their judges.

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374 *Minister for Immigration v Jia Legeng* [2001] 205 CLR 507, 541 per Kirby J.

375 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293–294; see also *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272, 275; S & *M Motor Repairs Pty Ltd v Caltex Oil* (Australia) Pty Ltd (1988) 12 NSWLR 358, 368; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

376 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553.

377 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 per Gleeson CJ.

378 (1994) 181 CLR 41, 74.

Similar to the Australian military justice system, the US military justice system is also driven by the chain of command and command control[379] — the military judge in the United States' military justice system is appointed by the JAG on an *ad hoc* basis, without tenure and at the pleasure of the JAG.[380] The military judge's performance is assessed annually by more senior officers, with promotion and pay being determined by that annual assessment. [381]

In *Weiss v United States*,[382] (which was heard with a second case, the matter of *Hernandez* v *United States)* the United States Supreme Court was required to address the lack of independence and impartiality in the court's martial regime. Before a special court martial, Eric Weiss, a US Marine, entered a plea of guilty to one count of larceny. He was sentenced to three months confinement, forfeited some pay and was discharged for bad conduct. Ernesto Hernandez, also a Marine, pleaded guilty to several serious drug trafficking charges and one count of conspiracy. He was sentenced to imprisonment for 25 years, lost all pay, was reduced in rank and was dishonourably discharged. On review of his sentence, the convening authority reduced his jail term to 20 years.

Both men appealed against their sentences, with the matters eventually resulting in the filing of petitions before the United States Supreme Court. The petitioners' complaints were two-fold. First, the mode of appointing the military trial and appeal judges by the JAG violated the Appointments Clause in the US Constitution, Article II, cl.2. The second challenge was that, because they lacked tenure, the judges' position violated the Due Process Clause contained in the Constitution's Fifth Amendment.

Both petitioners failed. Rehnquist CJ delivered the opinion of the Court:[383]

> *It is elementary that "a fair trial in a fair tribunal is a basic requirement of due process." … A necessary component of a fair trial is an impartial judge.*
>
> *… Petitioners, however, do not allege that the judges in their cases were or appeared to be biased. Instead, they ask us to assume that a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality. Neither history nor current practice, however, supports such an assumption.*

379 Lederer and Zeliff in Fidell and Sullivan (eds), *Evolving Military Justice* (Naval Institute Press, 2002), 29.

380 *Ibid.,* 28.

381 *Ibid.*

382 *Weiss v United States*, 510 US 163, 180 (1994).

383 The Syllabus (that is, case summary) identifies: In which Blackmun, Stevens, O'Connor, Kennedy, Souter, and Ginsburg JJ, joined, and in which Scalia and Thomas JJ, joined as to Parts I and II-A. Souter, J, filed a concurring opinion. Ginsburg, J, filed a concurring opinion. Scalia, J, filed an opinion concurring in part and concurring in the judgment, in which Thomas, J, joined.

… Although a fixed term of office is a traditional component of the Anglo American civilian judicial system, it has never been a part of the military justice tradition. …

… In the United States, although Congress has on numerous occasions during our history revised the procedures governing courts martial, it has never required tenured judges to preside over courts martial or to hear immediate appeals therefrom. … Indeed, as already mentioned, Congress did not even create the position of military judge until 1968. Courts martial thus have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all.

… Petitioners in effect urge us to disregard this history, but we are unwilling to do so. We do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today. But as Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice, it has nonetheless chosen not to give tenure to military judges. The question under the Due Process Clause is whether the existence of such tenure is such an extraordinarily weighty factor as to overcome the balance struck by Congress. And the historical fact that military judges have never had tenure is a factor that must be weighed in this calculation.

… Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. … Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court martial, we believe Congress has achieved an acceptable balance between independence and accountability.

The difficulty with this reasoning is that it highlights the position of the military judge within the chain of command.[384] Further, it is difficult to justify a system tainted by a lack of perceived independence simply on the grounds that 'it has always been this way'.[385] In addition, whether the JAG has a direct pecuniary interest[386] in a specific matter relates only to the concept of actual bias; it does not assist in dispelling concerns about apprehended bias. Or, as Judge Weiss of the Court of Military Appeals noted:[387]

the reports of decisions of this Court for the past four decades are peppered with instances of honourable persons — line officers, lawyers, judges and even high ranking

384 See the discussion of this case in Lederer and Zeliff in Fidell and Sullivan (eds), (n. 379) 40–45.

385 This resonates with the statement of Dixon J in *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23.

386 *United States v Mitchell,* 39 MJ 131, 141–142 (1994).

387 *Ibid*., 148–49. See also the discussion of this case and others in *Lederer* and Zeliff in Fidell and Sullivan (eds), (n. 379), 40–45.

officers of the JAG Corps — who affected the trial or appeal of cases in ways whin which they undoubtedly at the time believed were permissible but which this court ultimately condemned.

3.6 Independence and Impartiality: Australian Courts Martial

In Australia, where a court or tribunal is 'capable of exercising the judicial power of the Commonwealth [it must] be and appear to be an independent and impartial tribunal'.[388]

However, this statement, with its emphasis on the exercise of *judicial* power, raises an important point for courts martial and trials that had been heard before the Australian Military Court. In a trilogy of judgments, the High Court has held,[389] albeit without a binding *ratio decidendi,*[390] that courts martial are not Chapter III constitutional courts, and the adjudication and decision-making undertaken by such entities finds its power not in Chapter III of the Constitution, but is conferred pursuant to the defence power contained in s 51(vi) of the Constitution. Thus, in *Re Tracey*, Brennan and Toohey JJ held that:[391]

> *… the imposition of punishments by service authorities as for the commission of criminal offences in order to maintain or enforce service discipline has never been regarded as an exercise of the judicial power of the Commonwealth.*

If courts martial (and the former Australian Military Court) do *not* exercise judicial power of the Commonwealth and are not Chapter III courts, then it needs to be established whether there is any requirement for those proceedings to be independent and impartial. It could be said that support for the proposition that military trials do not need to demonstrate independence and impartiality (or indeed other indicia of a fair trial) is found in the Human Rights Committee's *General Comment No 32* on Article 14 where it defines courts and tribunal to include 'judicial bodies with a judicial task'.[392] Such a definition would, *prima*

388 *North Australian Legal Aid v Bradley* (2004) 218 CLR 146, 163 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

389 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

390 *Re Colonel Aird* (2004) 220 CLR 308, 321 per McHugh J.

391 (1989) 166 CLR 518, 572.

392 General Comment No 32, to Article 14 (at n. 425), paragraph 7 which provides in general terms the right to equality before courts and tribunals and extends to whenever domestic law entrusts a judicial body with a judicial task. See also *Perterer v Austria*, UN Doc CCPR/C/81/D/1015/2001 (2004), paragraph 9.2 (disciplinary proceedings against a civil servant); *Everett v Spain*, UN Doc CCPR/C/81/D/961/2000(2004), paragraph 6.4 (extradition).

facie, exclude the Australian military justice system service tribunals as they are not created as judicial bodies exercising judicial power pursuant to Chapter III of the Constitution; rather, they are service tribunals created under the defence power. However, in making this *prima facie* observation with respect to *General Comment* No 32, it is acknowledged that HRC comments are neither binding on the Commonwealth nor followed or adopted by the Commonwealth with any regularity. The point here, however, is to determine whether there is *any* justification or support for the proposition that military trials are exempt from the fair trial requirements of independence and impartiality.

If such propositions are correct, both the Australian Military Court and courts martial could be thought to be exempt from the requirement that their processes be fair, independent and impartial as they are not judicial entities within the meaning of Chapter III. However, the principles of natural justice would still apply as those principles do not depend upon Chapter III of the Constitution.[393]

A propos of Australian military tribunals, it is clear that even though these 'courts' are part of the Executive, and despite their exercise of defence power (not judicial power), the right to a fair trial still applies. In *Cox,*[394] and *Bevan*[395] and *Tracey*,[396] the various Justices all agreed that courts martial were not Chapter III judicial bodies. Nevertheless, they were still required to act judicially. In *Cox*, Dixon J cited *Bevan*, saying:[397]

> *In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional. … To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.*

In the more recent case of *White v Director of Military Prosecutions*,[398] the High Court reviewed the trilogy of authorities (*Cox,* and *Bevan* and *Tracey*), with Gleeson CJ observing:[399]

> *To adopt the language of Brennan and Toohey JJ in Tracey, history and necessity combine to compel the conclusion, as a matter of construction of the Constitution, that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, the power which is exercised is not the judicial power of the Commonwealth; it is a power*

393 *Ibid.*, [18].
394 (1945) 71 CLR 1, 23.
395 (1942) 66 CLR 452.
396 (1989) 166 CLR 518, 573–574.
397 (1945) 71 CLR 1, 23.
398 *White v Director Military Prosecutions* (2007) 231 CLR 570.
399 *Ibid.*, [14].

sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline.

Thus, while courts martial do not exercise *judicial* power as contemplated in Chapter III of the Constitution, the decision-making process must still be judicially exercised. If the powers must be exercised judicially, then the rights to and requirements of an independent and impartial trial must follow. Pursuant to international law, if decision makers are determining rights and obligations or criminal charges, then they are 'courts' and therefore must be independent and impartial.

It would appear that Article 14[400] of the *International Covenant on Civil and Political Rights* has been invoked only once to support an appeal to the DFDAT. In *Stuart v Chief of Army,*[401] the appellant argued that the military justice system, as constituted by the *DFDA*, Regulations and associated subordinate legislation, was 'inherently flawed in that it fails to accord procedural fairness to accused persons because of "inherent systemic bias and command influence"'.[402] These arguments, however, were to prove unsuccessful.

3.7 Summary

The ADF military justice system has persisted in its defiance of challenges to its constitutionality, its lack of independence, and the perception of bias. The *Wartime Cases*[403] are to be seen as necessary outcomes amidst the largest war in which this nation has ever engaged. The disposition of those cases, whilst criticised for excepting courts martial from the provisions of Chapter III, are now to be understood through the decisions constituting the *Peacetime Cases*[404] in the way Gleeson CJ has having been the result of history and necessity rather than a strict reading of the Constitution itself.[405] The *Peacetime Cases* have resulted in disquiet amongst members of the High Court of Australia over the years concerning the proper basis upon which courts martial exercise their powers.

Indeed, the ADF itself has had cause to launch many enquiries into the operation and effectiveness of the *DFDA*. These enquiries and their recommendations will be analysed in the next chapter.

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400 Text at (n. 425).
401 [2003] ADFDAT 3.
402 *Ibid.*, [33].
403 (n. 300).
404 (n. 31).
405 *White v Director Military Prosecutions* (2007) 231 CLR 570, [14].

PART B

Reformation of the Military Justice System in Australia

4 SPORADIC REVIEWS OF THE OPERATION OF THE DFDA

A soldier or a member of the Air Force does not cease to be a citizen: if he commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian. The command of an officer cannot justify a breach of the law.[406]

Overview

This chapter critically analyses the ADF disciplinary system. Between 1997 and 2001, the ADF military disciplinary system was the subject of five separate inquiries. Each of these inquiries made recommendations of a civilianising nature. The inquiries were:

- **1997 DFDA Report** — Brigadier, the Hon Justice A. Abadee, A Study into the Judicial System under the Defence Force Discipline Act, 11 August 1997
- **1998 Ombudsman's Report** — Commonwealth Ombudsman, The ADF, Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976, January 1998
- **1999 Military Justice Report** — Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Military Justice Procedures in the Australian Defence Force, 21 June 1999
- **2001 Parachute Battalion Report** — Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion, 11 April 2001
- **2001 Military Justice Report** — The Hon. J.C.S. Burchett QC, Report of an Inquiry into Military Justice in the Australian Defence Force, July 2001

These enquiries all made recommendations for reform of the military disciplinary system so that it would resemble more closely, and be aligned with, the Australian civilian criminal justice system, thereby increasing impartiality and independence from the military chain of command. Specifically, this chapter

406 *Pirrie v McFarlane* (1925) 36 CLR 170, 228 per Starke J.

identifies the recommendations made by these inquiries and the military's generally negative responses to them which evidences resistance to reform.

4.1 Introduction

Notwithstanding the significant parliamentary, coronial[407] and quasi-judicial inquiries into the ADF disciplinary system, the Australian Senate Foreign Affairs, Defence and Trade Committee noted in its scathing 2005 Senate Report,[408] that:[409]

> *Despite several attempts to reform the military justice system, Australian Defence Force (ADF) personnel continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.*
>
> *A decade of rolling inquiries has not met with the broad-based change required to protect the rights of Service personnel. The committee considers that a major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.*

The 2005 Senate recommendations must be viewed in the context of the various inquiries that had preceded it and which the Committee had reviewed, commencing with the 1997 *DFDA* Report.

4.2 1997 DFDA Report

4.2.1 Background

In 1995, Brigadier, the Hon Justice Abadee, (**Abadee**) a judge of the New South Wales Supreme Court and a Deputy JAG, was commissioned by the Chief of Defence Force (**CDF**) to examine existing arrangements for the conduct of trials under the DFDA, in order to determine whether those arrangements satisfied current tests of judicial impartiality and independence. The inquiry was commissioned in the aftermath of a number of High Court of Australia challenges to the system of military justice established under the *DFDA*.[410]

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407 2002–2003 West Australian Coroner's investigation of a fire on the HMAS *Westralia*.

408 Senate, Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System*, June 2005 (**2005 Senate Report**).

409 2005 Senate Report, Preface xxi.

410 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

Furthermore, around that time, judicial decisions[411] in the United Kingdom and Canada had determined that aspects of the military justice systems in those countries had not satisfied accepted standards of judicial independence and impartiality.

Abadee's report, *A Study into Judicial Systems under the Defence Force Discipline Act*[412] (**1997 DFDA Report**) was provided to the CDF in August 1997. The report contained 48 recommendations, with an emphasis on reducing the multiple roles of Convening Authorities.[413] Of the 48 recommendations, 39 were approved by the CDF.[414] Among the most important of Abadee's recommendations were those relating to the Convening Authority, in which he stressed that there was a most powerful case for eliminating its multiple roles.[415]

4.2.2 Role of the Convening Authority

The position of the Convening Authority presented a vexed issue to Abadee. The Joint Standing Committee[416] described the multiple roles of the Convening Authority and also set out Abadee's concerns which were:

> *'Under current arrangements the Convening Authority in ADF disciplinary proceedings has the power to:*
> - *determine whether there should be a trial;*
> - *determine the nature of the tribunal and the charges;*
> - *select the trial judge and jury;*
> - *select the prosecutor; and*
> - *review the proceedings.'*

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411 *R v Généreux* [1992] 1 SCR 259; *R v Forster* [1992] 1 SCR 339; *Findlay v United Kingdom* (1997) 24 EHRR 221.

412 Brigadier, the Hon Justice A. Abadee, *A Study into the Judicial System under the Defence Force Discipline Act,* 11 August 1997. The report has not been publicly released; however, subsequent inquiries refer to and quote from it. See Jacoba Brasch, 'More martial than court: from exceptionalism to fair trial convergence in Australian courts', (PhD Thesis, University of New South Wales, 2011), 233, footnote 674, confirms the 1997 DFDA Report is unable to be locate publicily. These later enquiries are the sources of attribution hereafter.

413 Refer to chapter 4.2.2.

414 The recommendations of the 1997 DFDA Report, and the ADF's response thereto.

415 Joint Standing Committee, on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force 1999*, cited on p. 203 and see also the Government Response to this: "The Australian Defence Force was of the view that the recommendations that were agreed would significantly improve institutional independence with respect to prosecution in Courts Martial and Defence Force Magistrate trials without creating the position of an independent Director of Military Prosecutions. The [ADF] held serious reservations about the practicality and need for such an appointment under present circumstances". Multiple roles are set out below.

416 Joint Standing Committee, *ibid.,* 121.

However, it has been more forcefully observed that the 'Convening Authority' has been 'a cornerstone of the Australian military justice system. This is an officer appointed by the Chief of the Defence Force or a Service Chief'.[417]

The Convening Authority's[418] jurisdiction is activated once a matter is referred to it, in a procedure analogous to the civilian police referring matters to the civilian Director of Public Prosecutions (**DPP**). However, unlike a civilian DPP, the Convening Authority has traditionally had the sole discretion for the application of each of the following steps in the trial process to determine:

- whether there should be a trial;
- whether the charges referred from the accused person's commanding officer were adequate;
- if not, drafting and presenting new charges;
- the kind of tribunal that would be convened;
- who would be the prosecutor and defending officer;
- who would be the DFM or JA;
- securing attendance of the prosecution and defence witnesses;
- the appointment of members of the court martial panel; and
- at the end of the process, to review the outcome of the proceedings, with the ability to replace the determination of guilt or innocence, and sentence.

Abadee expressed concern that these arrangements were likely to engender a perception of unfairness regardless of the actual fairness of the particular proceedings. Having initiated the prosecution, the Convening Authority could be seen as having an interest in the outcome of the case so as to potentially justify the decision to prosecute. Further, where the officer presiding at the trial is under the command of the Convening Authority, allegations may be levelled regarding undue influence of the Convening Authority, to the possible detriment of the accused. As one of a number of measures to address this

417 The Hon. Justice P Heerey, President, DFDAT, 'The role of the Commander in Military Criminal Procedure' (Speech delivered to the 6th Budapest International Military Law Conference, 14–17 June 2003). <http://www.defenceappeals.gov.au/papersheerey.html> website 14 February 2015.

418 The role of the Convening Authority was replaced by the introduction of the office of the Director of Military Prosecutions in 2006, an independent statutory appointment at the legal officer rank of brigadier, outside the chain of command, with its own office, staff and budget. Units still possess authority to initiate and lay charges, but those matters which commanding officers wish to have dealt with by higher service tribunals are now referred to the DMP for decision on whether to proceed, and if so, the form of the charges and the appropriate tribunal. The DMP also selects the prosecuting officer from the staff of his or her own office.

shortcoming in the current disciplinary system, Abadee recommended the removal of the multiple roles of the Convening Authority.[419]

On this matter, Abadee was separately supported by the JAG in his 1997 Annual Report,[420] who commented:

> *The recommendations in the Abadee report are based on a recognition of the importance of maintaining service discipline whilst, at the same time, paying proper regard to both the existence and appearance of a fair trial and independent system of trial.*
>
> *The most important recommendations relate to the multiple roles presently vested in the Convening Authority. The first of those roles is concerned with the decision to lay charges and the selection of appropriate charges. However, the Convening Authority also appoints the Judge Advocate and the members of the court or the Defence [F]orce Magistrate. It is my firm view that Command influence should cease at the point at which charges are laid. In the light of present day concerns for an independent trial in disciplinary procedures and the experience in other military jurisdictions, I regard it as essential that both the Judge Advocate and members of the court or the Defence Force Magistrate be appointed by an authority other than the Convening Authority. If the reforms presently under consideration are implemented these functions will be vested in the Judge Advocate General.*

Abadee enquired into the perceived lack of independence and impartiality of courts martial. He examined how those perceptions were made worse by the multiple roles the Convening Authority could adopt and the actual perception that the Convening Authority could exert command influence over the trial process.

In arriving at his recommendations, which may be distilled from extracts quoted in subsequent reports,[421] Abadee examined the 1997 decision of the European Court of Human Rights in *Findlay v United Kingdom*.[422] In that case, the Court found that SGT Findlay had not received a fair hearing before an independent and impartial military tribunal constituted pursuant to the *Army Act* 1955 (UK). Principally, the Court unanimously found that there had been a violation of Article 6 of the *European Convention on Human Rights* (**ECHR)**[423] in the trial by court martial. In July 1990, after a heavy drinking session, Findlay had held members of his unit at gunpoint and threatened to kill himself and some of them. After firing two shots into a television set, he surrendered and

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419 Joint Standing Committee, (n. 410), 121.

420 JAG, DFDA Report for the period 1 January to 31 December 1997, 5.

421 1999 Military Justice Report and the 2001 Military Justice Report.

422 *Findlay v United Kingdom* (1997) 24 EHRR 221.

423 Article 6 of the ECHR provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Full text is at (n. 457).

was arrested. Psychiatric reports indicated that the incident resulted from Post-Traumatic Stress Disorder.

The convening officer was a Major General who had decided to charge Findlay with six civilian and two military offences. The convening officer was responsible for appointing the prosecuting officer and also the members of the court martial. This consisted of a president, who was a member of the convening officer's staff, and four officers of ranks subordinate to that of the convening officer and serving in units commanded by him. A Judge Advocate, a barrister whose role was to provide legal advice to the court martial, was appointed by the JAG's office.

Findlay appeared before the court martial and pleaded guilty to seven of the charges. He was sentenced to two years' imprisonment, demoted in rank from sergeant to guardsman, and then dismissed from the Army. No reasons were given for this decision. Findlay's petitions to the "confirming officer", who was the same person as the convening officer, and to the first and second "reviewing authorities" against his reduction in sentence, were rejected. Neither of the reviewing authorities was a legally-qualified army officer, and both had been advised by the JAG's office. Findlay was also refused leave to apply for judicial review.

At the time of Findlay's trial, the court martial procedure in the United Kingdom was governed by the *Army Act* 1955 (UK). Notwithstanding that the Act has been amended by the *Armed Forces Act* 1996 (UK),[424] particularly in regard to the role of the convening officer, the decision is of importance. The European Court of Human Rights found that the convening officer played a central role in the applicant's prosecution and was closely linked to the prosecuting authorities, in that, *inter alia*, he decided which charges should be brought, he appointed the members of the court martial and the prosecuting and defending officers, and he secured the attendance of witnesses at the hearing. All members of the court martial were military personnel subordinate in rank to the convening officer.

Furthermore, the same person also acted as confirming officer. As a result, the decision of the court martial was not effective until ratified by him, and he had power to vary the sentence imposed. The European Court of Human Rights found this was contrary to the well-established principle that a tribunal should have the power to make a binding decision which could not be altered by a non-judicial authority. In these circumstances, Findlay's doubts about the tribunal's

424 *Armed Forces Act* 1996 (UK) came into force on 1 April 1997.

independence and impartiality were objectively justified and the European Court of Human Rights found that there had been a violation of Article 6.

Although the ECHR does not apply as a matter of domestic law in Australia, Abadee was satisfied that there was a close similarity between Article 6(1) of the ECHR and Article 14(1) of the *International Covenant on Civil and Political Rights (***ICCPR***)*.[425] Abadee concluded that while Australia had ratified the

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425 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 — entry into force 23 March 1976, in accordance with Article 49

Article 14:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the grounds that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

ICCPR and was, in fact, a party to the First Optional Protocol to the ICCPR, it had not yet been adopted as part of Australian domestic law.[426] However, Abadee was influenced by the *Findlay* decision and considered the Australian method by which a court martial was constituted by a Convening Authority, and the pivotal role of the Convening Authority, gave rise to the perception of a lack of impartiality and independence irrespective of how the trial itself was actually conducted.[427]

Abadee criticised the multiple and potentially conflicting roles of a Convening Authority: [428]

> *"There is a particular view, indeed almost a consensus view, that provisions of the DFDA in allocating multiple roles to the CA [Convening Authority], including the initiation of prosecution, and review of CM [Courts Martial] (and DFM) proceedings, do raise legitimate concerns as to the appearance of fairness and impartiality of such trials, despite the specific precautions to protect against the improper or unlawful use of command influence and the wide range of procedural rights to guard against command influence. … There is an acceptance that the system may be perceived to place the CA … in the position of determining whether there be a trial, the nature of the tribunal and charges, and selecting the trial judge, 'jury' and prosecutor, as well as reviewing the proceedings."*

Abadee concluded:

> *"2. There is a most powerful case for eliminating the multiple roles of the convening authority."*

The ADF appeared to respond positively [429] to this recommendation in stating:

> *"ADF Response — The role of the Convening Authority to select membership of courts martial and DFM will be transferred to the JAG who will do so after consultation with the services."*

However, the problem with the ADF response was three-fold. First, the JAG was an appointee of the Executive and his ability to select the court martial panel and DFM could not be viewed as being independent of the Executive. Secondly, the JAG's power to appoint was not unconstrained, as the JAG was required to consult others within the chain of command. Finally, the ADF response

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7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

426 1997 DFDA Report, 45, cited in 1999 Military Justice Report, [4.12].

427 Article 14 of the ICCPR (n. 420) has been invoked only once in aid of an appeal to the DFDAT: *Stuart v Chief of Army* [2003] ADFDAT 3.

428 1997 DFDA Report,151–2 cited in 2005 Senate Report, [4.12].

429 House of Representatives Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Report on Military Justice Procedures in the ADF*, (21 June 1999) Appendix E, Summary of Abadee Recommendations, 2.

emphasized only one aspect of the problem of multiple roles by proposing transferring the power to nominate a court martial or DFM to the JAG. What was not addressed by the ADF response was there were numerous other roles retained within the Convening Authority.[430]

Accordingly, the ADF's statement may really be seen as entrenching the Convening Authority as it served and supported a commander's ability to maintain discipline through the ability to control a prosecution and trial. This attitude ignores the right of members of the military to an independent and impartial hearing on matters affecting their personal and financial affairs in a free and democratic society with a freely enlisted ADF in the late 20th Century. The ADF response continued its century-long primary perceived practice of pursuing its official aim — harnessing a disciplined force to fight and win wars.

It is clear that the military resisted the over-arching reform recommended by Abadee with respect to the multiple roles of the convening authority, and instead opted for a piece-meal, minimalist approach.

4.2.3 Director of Military Prosecutions

Another recommendation which failed to find favour with the CDF included a proposal that consideration be given to establishing an independent office of the DMP on a tri-service, whole-of-ADF, basis.

Abadee was not alone in his support for the creation of a DMP for the Australian military justice system. In the 2001 Military Justice Report, Justice Burchett alluded to the matter of a DMP as having first been raised in 1995 by then JAG, Rear Admiral Rowlands: [431]

> *"As a discrete issue, the idea of a DMP appears to be relatively recent. So far as I am aware, it was first specifically raised, in an Australian Defence Force context, in 1994 by the then, in a paper entitled The Civilian Influence on Military Legal Structures. The following year, in his annual report for 1995, he stated: 'I believe there would be an advantage in establishing a legal officer at the Colonel (or equivalent) level as a Director of Military Prosecutions. The office would encourage consistency in approach and more professional supervision of the prosecution process before Defence Force Magistrates and Courts Martial (and, perhaps, more serious charges at the summary level).'"*

Notwithstanding the earlier recommendation by JAG, Rear Admiral Rowlands, that had not been acted upon, Abadee considered such an office would still be:[432]

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430 See confirmation of the multiple roles in the 1999 Military Justice Report.

431 2001 Military Justice Report, [207].

432 1997 DFDA Report, [160] cited in the 1999 Military Justice Report, [4.50].

important to ensure a high degree of manifest independence in the vital task of making decisions to prosecute and in the exercise of prosecution discretions. The decision to prosecute should be made on entirely neutral grounds to avoid the suspicion that it might otherwise be biased.

In addition, Abadee recommended that:

Careful consideration should be given to examining the question of the appointment of an 'independent' Director of Military Prosecutions upon a tri-service basis.

This recommendation was intended to achieve institutional independence, particularly with respect to the prosecuting role and prosecutorial decision-making.

However, this recommendation was rejected by the ADF on the following grounds: [433]

A DMP will not be established. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders must retain the power to prosecute. This is vital especially during operations and when forces are deployed overseas. Moreover, the establishment of a DMP would place limitations on commanders and would result in unacceptable delays in the administration of discipline.

Moreover, Abadee's recommendations which were potentially influenced by an appointment of a DMP, were also soundly rejected by the ADF:[434]

4. *Careful consideration should be given to examining the question of the appointment of an 'independent' Director of Military Prosecutions upon a tri-service basis.*
   ADF Response — A DMP will not be established. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders must retain the power to prosecute. This is vital especially during operations and when forces are deployed overseas. Moreover, the establishment of a DMP would place limitations on commanders and would result in unacceptable delays in the administration of discipline.
5. *The matter of any such appointment, if at all, whether it should be tri- service, the role and duties of any Director and the matter of the responsibility of the prosecuting authority to any other authority and to whom should be dealt with any legislative change. At the same time the matter of whether the prosecutor should be organised as an independent unit under the Act should also be addressed.*

ADF Response — THIS RECOMMENDATION HAS NOT BEEN AGREED. A DMP will not be established. (note — emphasis added by the ADF)

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433 Response cited in the 1999 Military Justice Report.

434 House of Representatives Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Report on Military Justice Procedures in the ADF*, (21 June 1999) Appendix E, Summary of Abadee Recommendations, 4 and 5.

4.2.4 Performance for Pay and Promotion

The 1997 DFDA Report recommended that "*an Officer's performance as a member of a court martial being used to determine qualifications for promotion or rate of pay or appointment*" be disallowed.[435] The 1997 DFDA Report failed to determine what is meant by the expression 'performance'. Logically, performance may be evaluated according to the efficiency of the officer in the discharge of his or her duty. However, it remains unclear how, exactly, this efficiency is determined. The 1997 Report concluded: [436]

> *"Further, that the officer reporting on efficiency of the president or members should not take into account the performance of duties of the president or members of any court martial. Section 193 protects such a member during performance of his/her duties as a member. There is a case for implementing the spirit of such a section generally."*

However, in practice, officers who had been appointed by the Convening Authority to decide matters of fact and sentence, have the 'efficiency' of their decision-making reported upon and this is taken into account when determining the officers' performance, and also affects their pay level.

Abadee was clear in his recommendations:

> *"There should be no reporting on JAs, DFMs and s.154(1)(a) reporting officers in respect of their judicial duties."*

Brasch has observed:

> *"When pressed by Abadee regarding these unquestionably dubious practices, the ADF approved Abadee's recommendations. It would have been untenable for the ADF to attempt to justify or reject such a position."*[437]

4.3 The 1998 Ombudsman's Report

4.3.1 Background

In July 1995, the CDF invited the Commonwealth Ombudsman to investigate matters pertaining to an allegation of sexual assault which had occurred on an ADF base and to consider the ADF's response and, further, to provide any recommendations as to how the ADF could better handle investigations of similar instances in the future.

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435 Appendix 1: 1997 DFDA Report, Recommendation 19, extracted at 1999 Military Justice Report.

436 *Ibid.*

437 Brasch, (n. 412), 234.

4.3.2 Recommendations

In January 1998, three years after the referral, the Ombudsman handed down her report (***1998 Ombudsman's Report***). [438] The Ombudsman identified a range of systemic flaws and shortcomings in both the administrative and disciplinary investigation procedures of the ADF. Although the Ombudsman did not investigate the existing ADF trial process for sexual assault offences, she emphasized the importance of a thorough, rigorous, balanced and properly-documented investigation. This is necessary because the outcome of the investigation has a direct result on whether a charge will be laid and, if so, whether the evidence would be admissible at trial.

In relation to existing disciplinary investigations, the Ombudsman reported a lack of experience and inappropriate training by those undertaking investigations.[439] She had also observed the inadequacy of questioning techniques, the recording of interviews and the taking of statements,[440] in addition to a lack of guidance about evidence gathering and analysis,[441] and the absence of a structured process for supervising or monitoring the progress of investigations.[442]

The Ombudsman summarized her findings with respect to ADF disciplinary investigations in the following terms: [443]

> *"I consider that there is evidence of a range of problems experienced in the conduct of investigations in cases examined by my office. These have included:*
> - *inadequate planning of investigations*
> - *failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed*
> - *pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response*
> - *failure to record evidence properly and, possibly, preparation of witnesses and unauthorised questioning of witnesses*
> - *failure to analyze evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and*
> - *inadequate record keeping."*

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438 Appendix 2, The 1998 Commonwealth Ombudsman's Report, 'Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences'.

439 *Ibid*., see [5.3]–[5.10] for military police and [5.11]–[5.17] for administrative investigating officers.

440 *Ibid*., [5.27]–[5.32].

441 *Ibid*., [5.41]–[5.47].

442 *Ibid*., [6.13] and [6.33]. The Ombudsman noted at [6.34], that there was 'some monitoring of investigations undertaken by Army and the investigation of complaints of unacceptable sexual behaviour'.

443 Appendix 2, 1998 Ombudsman's Report, [5.44]–[5.56].

The Ombudsman had provided a draft of her report to the ADF to allow it to consider a response. As a consequence of this process, the Ombudsman was able to report that the ADF would "*form a working party to develop an ADF-wide training strategy and guidance on DIR [Defence Inquiry Regulations 1985] investigations*."[444] Furthermore, in respect of administrative inquiries, subsequently the Ombudsman was able to report that the ADF had prepared *"a comprehensive draft manual titled Administrative Inquiries and Investigations in the ADF, a task for which it is to be highly commended."*[445]

4.4 1999 Military Justice Report

4.4.1 Background

In 1999, the Senate Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry tabled its report in *'Military Justice Procedures in the Australian Defence Force*' (***1999 Military Justice Report***). The Senate Committee commenced its inquiry following significant media and public interest in a spate of internal ADF inquiries, and several High Court of Australia challenges to the validity of aspects of the DFDA.[446] The inquiry's attention was drawn to the circumstances surrounding the deaths of service personnel, as well as the treatment of some members of the ADF who had complained they had been treated unfairly by the military justice system.[447]

The inquiry was established by the Senate to "examine the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military inquiries and ADF disciplinary processes."[448] Unlike the 1997 DFDA Report, or the 1998 Ombudsman's Report, this inquiry invited submissions and comments from individuals who considered themselves (or their next of kin in the case of deceased ADF members) to be victims of the military justice system.[449]

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444 *Ibid*., [5.57].

445 *Ibid*., [Privacy 61].

446 Appendix 3, 1999 Military Justice Report, [1.7].

447 Brasch, (n. 412), 236.

448 Appendix 3, *ibid*., [1.8].

449 The Committee advertised for submissions on 13 December 1997 and conducted public hearings from 11 May 1998 until 24 July 1998. The inquiry attracted more than 80 submissions and 30 supplementary submissions with the overwhelming majority of evidence provided by persons, or the relatives of persons, with recent military experience: *ibid*., [1.9].

The Senate's Terms of Reference required the Committee to examine the avenues for investigative and punitive action within the ADF in order to determine whether extant procedures were unfair, inappropriate or subject to misuse. The Report noted that *"The Committee restricted its investigations to the legislative framework and procedures for military inquiries and disciplinary processes and did not attempt to re-hear specific cases."*[450]

When it considered military discipline, [451] the Committee provided a summary of the issues already canvassed by Abadee,[452] including the list of Australia's obligations under the ICCPR. This part of the report summarised previous arguments recorded in the 1997 DFDA Report. It was not a critical analysis of the ADF submissions which had previously been made to Abadee and to the Committee. For example, the Committee recognised and seemed to accept[453] the submissions made by the ADF in a private briefing that "*without such a [separate] system of military discipline it [the military] cannot effectively perform its role: to fight and win wars*."[454]

The Committee also appears to have accepted an ADF submission that a by-product of the pursuit of discipline was that soldiers are not granted the same rights as other members of society.[455] The 1999 Military Justice Report recites:

> *The existence of a code of military discipline that coexists with the civilian justice system suggests that military personnel do not enjoy the same rights as other members of our society. This is certainly the case. … While the ADF is experiencing changes that reflect those occurring in society, there is still a perception that members of the military do not enjoy the same rights as other members of society.*

These statements that soldiers do not have the same rights as other citizens were at odds with the Committee's view on the status of the ICCPR within Australian municipal law system. The Committee had correctly identified the importance of the *Findlay*[456] decision due to the similarity between Article 6(1)[457] of the

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450 *Ibid.*, [1.14].

451 Chapter 4, Military Discipline, The Requirement for Military Discipline, 115–225. (NB: A considerable part of the report concentrated on the administrative inquiry processes, such as Boards of Inquiry and Redress of Grievance procedures. These administrative procedures are beyond the parameters of this thesis).

452 Appendix 1, The 1997 DFDA Report.

453 *Ibid.*, [4.1]–[4.4] culminating in its finding at [4.5].

454 Department of Defence, Private Briefing, Transcript 5, cited in the 1999 Military Justice Report, [4.2], footnote 3.

455 Appendix 3, 1999 Military Justice Report, [4.3]–[4.5].

456 *Findlay v United Kingdom* (1997) 24 EHRR 221.

457 Article 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the

European Convention on Human Rights and Fundamental Freedoms and Article 14 of the ICCPR.[458] The Committee was also aware that the United Nations Human Rights Committee held, in its General Comment No. 13,[459] that Article 14 of the ICCPR was equally applicable to both military courts and civilian courts.[460] In addition, the Committee observed: [461]

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interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

458 *Ibid*., [4.10].

459 Office of the High Commissioner for Human Rights, Covenant on Civil and Political Rights, General Comment No. 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, Adopted at the Twenty-first Session of the Human Rights Committee, on 13 April 1984, [4]:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often, the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

460 *Ibid*., [4.10], text at (n. 422). Brasch, (n. 412), 238.

461 *Ibid*., [4.13].

> *"with regard to the first protocol, there is an obligation within public international law which is placed upon Australia to comply as an original signatory to the covenant. … Although the ICCPR is not legally binding on its signatories, the Australian government is clearly of the opinion that existing laws provide for all the rights that are provided for in the ICCPR. In essence, Australia has complied with the ICCPR and it is now part of Australian law. Justice Abadee agrees, suggesting that the 'requirement that the trial of a person should be fair and impartial is deeply rooted in the Australian system of law."*

The requirement for a fair trial is 'deeply rooted' in the Australian justice system. The Senate Committee received submissions in support of amendments to the DFDA to reflect this right.[462] However, the Committee accepted Defence submissions that the "remote theoretical possibility"[463] of an international tribunal adjudicating on the independence and impartiality of Australian courts martial did not warrant overturning the *status quo*. The ADF rejected submissions that its system warranted criticism, self-servingly describing it as "practical, efficient and effective."[464]

In addition, the Senate Committee investigated whether the responsibility for military trials ought to be transferred to a judicial entity separate from the ADF,[465] but ultimately failed to make any recommendations for or against the creation of a separate military judiciary.[466]

4.4.2 Post Implementation of 1997 DFDA Report Recommendations

One of the terms of reference for the 1999 Joint Committee was for it to investigate the implementation of the recommendations from the 1997 DFDA Report. In that regard, the ADF submitted to this Joint Committee that: [467]

> *the creation of a separate military judiciary would be both impractical and unnecessary. Unnecessary in that the existing system, enhanced by the acceptance of most of the Abadee recommendations, will provide an 'independent and impartial*

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462 See for example, Professor Barker who submitted to the Committee that the findings of *Findlay v. United Kingdom* are relevant to Australia, and that the DFDA should be amended to ensure that an accused person before a court martial is guaranteed a fair trial by an independent tribunal in accordance with Article 14 (1) ICCPR, cited in the 1999 Military Justice Report, [4.11].

463 Department of Defence, Submission, 1043, cited in the 1999 Military Justice Report, [4.14].

464 Appendix 3: 1999 Military Justice Report, [4.14]. These observations by the military were later to be criticised in the 2005 Senate Report.

465 *Ibid.*, [4.23]–[4.32].

466 *Ibid.*, the Committee accepted the findings of Ombudsman dated January 1998, with respect to flawed investigations, secret investigations denying natural justice, and inadequate training in the operation of the DFDA: [3.122]–[3.134], [4.100]–[4.104].

467 Department of Defence, Submission, 1041 and 1045 cited in the 1999 Military Justice Report, [4.25]. Brasch, (n. 412), 244.

disciplinary system, consistent with the needs of the ADF and the interests of justice'. Impractical in terms of the 'command structure and operational requirements of the ADF.'

The ADF's submission about accepting "most" of the Abadee recommendations can only be a reference to quantity, not quality. In addition, while the ADF agreed to implement a considerable number of recommendations, the significant reforms pertaining to the establishment of a DMP and the elimination of all of the multiple roles of the Convening Authority, were not accepted. The 1999 Senate Committee was not satisfied that the changes proposed by the ADF would address the perception that trials were not being conducted in an independent and impartial manner.[468] However, the ADF maintained the myth that 'all was well'.

Although the ADF accepted (in terms of number) most of Abadee's recommendations, these did not include those which would have had the effect of civilianising trials conducted by the ADF. However, supposing that the ADF accepted most recommendations, this would have two effects: firstly, it would safeguard the ADF from further inquiry; and, secondly, it might convince the inquirers and the wider public that the ADF operates as a fair and just entity that is responsive to change and entitled to support. Similarly, in submitting to the inquiry that all was well, and failing to inform it about the 3RAR allegations, the ADF thereby managed to avoid scrutiny of its poor record, post-Abadee, of implementing reforms to the military justice system.

4.4.3 Establishing a Director of Military Prosecutions

The 1999 Senate Committee noted that the changes to the multiple roles of the convening authority proposed by the ADF failed to solve the problem that the power to prosecute remained among the prerogatives of the chain of command and that that power was exercised without the need for binding legal advice.[469] The 1999 Committee received a number of submissions in support of the 1997 DFDA Report recommendation for the creation of the office of the DMP. The 1999 Committee itself concluded that the creation of a DMP would remove courts martial and DFM proceedings from the chain of command and would "*facilitate an independent and impartial trial*",[470] as a result. The Committee considered a range of options which it included in a table:[471]

468 Foreword to 1999 Military Justice Report.
469 *Ibid.,* [4.38].
470 *Ibid*., [4.39].
471 *Ibid.,* 130.

Table 4.2 Alternate Models

84. *A member convicted of a service offence has access to two levels of review on petition. In the first instance there is access to a reviewing authority appointed by the Service Chief and then there may be a further review by the Service Chief (See Department of Defence, Submission, p. 563). When conducting a review by petition, a reviewing officer is required to obtain a legal report which is binding on them on questions of law.*

85. *A person convicted by a court martial or by a DFM may be able to pursue an appeal against the conviction, but not the punishment, to the Defence Force Discipline Appeals Tribunal convened under the Defence Force Discipline Appeals Act 1955. Appeals are heard by a tribunal comprising, usually, of not less than three judges (Justice or Judge of a federal court or of the Supreme Court of a State or Territory) who are appointed by the Governor General (Defence Force Discipline Appeals Act, 1955, Section 7).*

Again, the ADF failed to accept the need for the creation of an independent prosecutorial office. Moreover, the ADF relied on the need for a commander to make such decisions. It stated that there was "*no Australian legal imperative requiring such an appointment*", arguing that it intended to reform the convening authority structure in accordance with the recommendations of the 1997 DFDA Report.[472] However, the proposed reforms, which the ADF offered to make regarding the convening authority, failed to remove from the chain of command the power to prosecute.

Also, it remains unclear why, if the ADF had embraced Abadee's 1997 recommendations as it alleged, the proposed changes to the multiple roles of the convening authority were still only proposals and had not been actioned. It was also disingenuous of the ADF to appear to embrace Abadee's recommendations, when Abadee had found a 'substantial case for establishing a DMP to enhance impartiality and independence', a recommendation which the ADF would not countenance.

The ADF again argued that a commander must retain the power to prosecute, which 'is a paramount tenet of ADF discipline'.[473] The military also expressed concern that a DMP would create considerable delays, while a commander could produce a timely verdict.[474] Ironically, delay became an issue canvassed in two subsequent reports: the 2001 Parachute Battalion Report[475] and 2001

472 *Ibid*., [4.12]–[4.20], [4.62].

473 Department of Defence, Submission, 1042, cited in the 1999 Military Justice Report, [4.57].

474 Vice Admiral Don Chalmers, Transcript, 45, cited in the 1999 Military Justice Report, [4.59].

475 Analysed in chapter 4.5.

Military Justice Report.[476] These two reports were critical of the time it took the military's own justice system to present an accused for trial. Notably, the FCA in *Hoffman v Chief of Army*,[477] criticised the delay in ADF proceedings under the court martial system, which the ADF had inaccurately described as 'swift'.[478] In that case, Major Hoffman was accused of common assault, seven years after the incident was alleged to have occurred. The charges were laid to avoid the expiration of the statute of limitations. At first instance, the DFM observed: [479]

> *I will not attach blame to the delay which has occurred, but it is my very strong view that the delay is inexcusable. That any person, pardon me, be they Major, a Private, or General, could have an investigation hanging over their heads since, at the very earliest 1999 through today, brings no credit to the Defence Force.*
>
> *Had this man been properly dealt with and properly punished in 1996, or seven, or indeed in 1998, or nine, then the effects of any punishment which may have been awarded would have been today effectively overcome. Even if dealt with in 1999, then the accused would currently still have at least three or four clear reporting periods at that time and would be now in a position where he would be eligible for consideration for promotion. All of his reporting periods since this offence have been clear. All of them have been, as I have mentioned before, of the very highest standing.*

The Full Court of the FCA found the decision to prosecute was improper and that the DFM should have considered that the gross delay amounted to an abuse of process, and permanently stayed the proceedings.[480]

Returning now to the 1999 Military Justice Report, the ADF's response to the recommendation that a DMP be established, stated: [481]

> *the marginal advantage to be gained from the enhanced perception of independence and impartiality of an independent DMP, would not compensate for the disadvantage that would result from commanders losing the prerogative to decide whether to prosecute.*

The ADF's response emphasizes the recurring theme of the importance of a commander maintaining discipline and retaining power to coerce compliance with his or her orders. However, the workings of the military justice system extend beyond merely providing a commander with the punitive means to compel obedience to orders. If a defence member is accused of an offence, be it a sexual offence or theft, it is harder to justify why a non-legally trained commander must decide whether to charge the subordinate defence member.

476 2001 Military Justice Report, The Hon. J.C.S. Burchett QC, *Report of an Inquiry into Military Justice in the Australian Defence Force,* (July 2001). Analysed in chapter 4.6.

477 *Hoffman v Chief of Army* [2004] FCAFC 148.

478 *Ibid.*, [165], for the criticism. See Department of Defence, Submission, 1043, cited in the 1999 Military Justice Report, [4.14] for the military, referring to its justice as 'efficient'.

479 *Hoffman v Chief of Army* [2004] FCAFC 148, [90].

480 *Ibid.*, [175].

481 Department of Defence, Submission, 1042.

This decision would be more impartial if made by a legally qualified and experienced DPP equivalent.

It is also challenging to understand how a non-legally qualified commander could be expected to form an educated opinion regarding important legal matters, as the prosecution policies of the ADF require, so as to balance: [482]

> *… whether the admissible evidence available is capable of establishing the offence;*
>
> *whether there is a reasonable prospect of achieving a conviction; and*
>
> *other discretionary factors, such as consistency and fairness, operational requirements, deterrence, seriousness of the offence, interests of the victim, nature of the offender, prior conduct, degree of culpability, effect upon morale and delay in dealing with matters.*

The 1999 Military Justice Report, the 1997 DFDA Report and the 1998 Ombudsman's Report found significant flaws in ADF investigation processes and evidence-gathering procedures. However, the decision to prosecute is the single most important decision in the prosecution process and this is recognised by the *Australian Defence Force Prosecution Policy:*[483]

> *The initial decision whether or not to prosecute is the most important step in the prosecution process. A wrong decision to prosecute, and conversely a wrong decision not to prosecute, tends to undermine confidence in the military discipline system.*

Nevertheless, it is evident that instead of placing such important decisions in the hands of a legally trained person who is not subject to the chain of command, the ADF still contended that the decision to prosecute must remain as the commander's prerogative. This attitude of the ADF is unreasonable. The 1999 Senate Committee concluded[484] that the creation of the office of DMP would provide three main advantages: firstly, prosecutorial decisions would be made independently of the chain of command; secondly, it would ensure consistency across the three services; and, thirdly, it would provide for impartiality in the conduct of trials.

With guarantees from the ADF that "all was well", and with the promise that the ADF intended to implement some of the Abadee reform recommendations concerning the convening authority, the 1999 Military Justice Report ultimately declined to formally recommend the creation of a DMP. Instead, it delayed any further discussion on the independence and impartiality of courts martial and DFMs until the proposed post-Abadee arrangements had been functioning for

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482 *Defence Instructions (General) Personnel* (Cth) 45–4.

483 *Ibid*., [2]; see also ADF, *Discipline Law Manual,* Vol 1, [4.2].

484 *Ibid.*, [4.63].

three years.[485] Still, the 1999 Senate Committee clearly expressed its position to the ADF and the direction that it would likely follow in the near future: [486]

> *Independence and impartiality in the military justice system was a strong theme throughout the conduct of the inquiry. In cases involving the death of an ADF member, the Committee was aware of a strong feeling, particularly from family members of the deceased, that the military justice system lacks independence. While the Committee received no evidence to support an allegation of a lack of independence in the military justice system there is no question that this perception exists in some quarters.*
>
> *However, the Committee was of the view that ADF initiated changes to the military justice system [post Abadee] will not fully address both the perceived and actual independence and impartiality of the system.*

On 17 May 2001, the JAG of the ADF, Major General Justice Kevin Duggan, presented his annual report for the year 2000 to the Minister for Defence. [487] The JAG summarized the arguments for and against the creation of a DMP and concluded[488] that there were a number of benefits favouring the creation of a DMP, which included the decision to prosecute would be executed by a legally trained officer of appropriate rank and there would be uniformity in the exercise of the prosecutorial discretion. He also considered that it was an appropriate measure to remove from a commander the decision-making power to prosecute, given that a conflict of interest could occur if a commander's decision of whether to prosecute might suggest that his subordinates were undisciplined. He also considered that the decision to prosecute should be made by a person with no connection to the alleged offender, thereby removing the commander from the difficult position of deciding whether to charge a fellow officer under his or her command.

In addition, the JAG also acknowledged that a DMP would "be following the civilian trend of appointing a Director of Public Prosecutions" which had occurred in the armies of the United Kingdom and Canada. The JAG also expressed a concern that if the commanding officer were responsible for the decision to prosecute, he or she might decide to deal with the matter personally so as to avoid a prosecution drawing attention to problems within his or her command. In evaluating the benefits of setting up a DMP, the JAG referred to a

485 *Ibid.*, [4.66]–[4.67].

486 Foreword to 1999 Military Justice Report.

487 JAG, *Annual Report DFDA* (2000). Major General the Hon Justice Kevin Duggan, in addition to being JAG between 1996 and 2001, was a Justice of the Supreme Court of South Australia.

488 *Ibid.*, [46].

Canadian study prepared for the *Commission of Inquiry into the Deployment of Canadian Forces to Somalia,*[489] which concluded: [490]

> *In terms of the characteristics of the offices of those executing the prosecution authority in the military, it is clear that the commanding officer is in no position to exercise independence of judgment in the exercise of the discretion whether to proceed on particular charges. This conclusion is inescapable when one considers the variety of roles the commanding officer must discharge in the events leading up to a trial within the military justice system. Again, given that the overriding consideration in the process is the good order and discipline of the military, the commanding officer is responsible to his or her superiors in relation to that consideration and, as such, subject to "command influence" in relation to how disciplinary matters are handled within his or her sphere of responsibility.*
>
> *If the sole function of the military justice system were to address matters relating to the efficiency, discipline and morale of the military, then this state of affairs would be uncontroversial. The commanding officer is obviously in a position to judge what effect certain forms of misconduct are likely to have on the smooth functioning and operational readiness of military units. Insofar as the military justice system addresses these concerns, the existing system is reasonably fit for its purpose. However, the fact that there are public interests far broader than this gives rise to a concern about the manner in which prosecutorial authority is exercised within the military.*

Furthermore, the JAG evaluated two arguments against the creation of a DMP. First, that discipline and command issues are best addressed by the commander; second, that the office of DMP could cause delays in the prosecution process. After considering the arguments, the JAG concluded in favour of a DMP: "*I have reached the conclusion that it would be in the interests of the ADF to establish an office of an independent DMP to assume control over courts martial and DFM cases*."[491]

The above analysis confirms that by 2000 the ADF ought to have been in no doubt about the stance taken by independent reviews with respect to the establishment of an independent office of DMP. The arguments in support of a DMP were unassailable, whereas the arguments advanced by the ADF were not sustainable.

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489 Commission of Inquiry, Somalia, 1995–1997, (Privy Council Office, Ottawa, 1997).

490 James W O'Reilly and Patrick Healy, 'Independence in the Prosecution of Offences in the Canadian Forces — Military Policing and Prosecutorial Discretion' cited in the JAG *Annual Report 2000*.

491 JAG *Annual Report* (2000); see also Military Justice Report 1999, [44].

4.5 2001 Parachute Battalion Report

4.5.1 Background

In 2000, the Australian media disclosed allegations of brutality and extra-judicial 'justice' in the 3rd Battalion, Royal Australian Regiment (3RAR),[492] including allegations that the ADF investigative and disciplinary proceedings were being inappropriately delayed and that there was a significant lack of transparency and independence in the investigations. These investigations were being conducted at the time of the 1999 Senate Committee inquiry.

What was unknown to the Senate Committee when it prepared the 1999 Military Justice Report was that the ADF had suppressed evidence of an extant military investigation into allegations of brutality which had taken place in the 3rd Battalion of the Royal Australian Regiment (**3RAR**) and which were to be investigated by a further Joint Standing Committee on Foreign Affairs Defence and Trade in 2001. [493] When this latter report was handed down, it was apparent that the 1999 Senate Committee had not been informed by the ADF about allegations of brutality within the 3RAR, nor about the ADF investigation of these allegations, which was being conducted during the 1999 Senate Committee investigation. The subsequent 2001 Parachute Battalion Report expressed concern that the allegations it had reported may have potentially been withheld from the 1999 Senate Committee, concluding that the 3RAR evidence "could have materially affected the recommendations made in the 1999 report."[494] This observation was significant, as the 1999 Joint Committee had accepted the military's assurance that "*the ADF discipline system appear to establish a balance between 'the needs of the ADF, the interests of justice per se and its practical administration in the ADF*".[495] Accordingly, the Committee then stated:

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492 See for example news reports; Michael Ware, 'Behind Closed Doors: Australia's Army covers up brutality in an elite unit — and undermines the military justice system,' *Canberra Times*, 21 August 2000, 52–54; Lincoln Wright ,'I was told to bash others: ex-Army private', *Canberra Times*, 26 November 2000, 3; 'Cosgrove defends slow-paced army justice', *Townsville Bulletin*, 29 August 2000, 9. Brasch, (n. 412), 253.

493 Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*, (11 April 2001), dealt with in detail in chapter 4.5 below.

494 Appendix 4, 2001 Parachute Battalion Report, [1.4].

495 Appendix 3, 1999 Military Justice Report, [4.66].

Recommendation 46

The Committee recommends that, after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed.

Taking into consideration that the 1999 Inquiry was conducted in order to inquire into allegations of 'punitive action in the ADF' and to discover whether current procedures were being abused, and despite the ADF providing the Committee with a private briefing, it seems disingenuous on the part of the ADF that it failed to alert or otherwise advise the Joint Committee of the 3RAR investigations being conducted by the ADF.[496]

As a consequence of adverse media reports, two investigations were initiated. The first was conducted by the Hon James Burchett QC to investigate the wider systemic concerns with the military justice system arising out of the 3RAR matter. This culminated in the 2001 Military Justice Report.[497] The second, the Joint Standing Committee on Foreign Affairs, Defence and Trade, examined the specific allegations of brutality within 3RAR and produced the **2001 Parachute Battalion Report**. For this latter inquiry, the Joint Committee did not have terms of reference in the traditional sense, but investigated the following 13 specific allegations:[498]

3RAR

1. *Soldiers would be assumed to be guilty of a crime or misdemeanour, based on accusations*
2. *Illegal punishments were devised to 'correct' the behaviour of offenders*
3. *Some punishments were administered as bashings*
4. *Other punishments involved putting 'offenders' through activities which, by their nature, were designed to punish*
5. *Key appointments condoned the activity*
6. *The system was widely employed*
7. *There was a system of intimidation within the battalion which prevented soldiers speaking out*

The ADF Inquiry Process

8. *Obfuscation by the Department of Defence, including the misleading of a committee*

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496 The majority in the 2001 Military Justice Report found the failure to advise the 1999 Committee 'disappointing' but added at [6.19]: 'While the existence of the 3RAR issue may have materially affected the committee report, there is no evidence to show that there was any intent to mislead the committee.' The 2001 Committee also found that there was a system of extra-judicial punishment taking place at 3RAR between 1996 and 1998: 2001 Parachute Battalion Report, [6.5].

497 Analysed in chapter 4.6.

498 Appendix 4, 2001 Parachute Battalion Report, [1.3].

9. *The army had kept its knowledge of these incidents confidential for almost two years*
10. *The ADF failed to act when first made aware of the alleged behaviour.*

The ADF Justice System

11. *The system had arisen because of frustration with the bureaucracy within the existing discipline system*
12. *Senior officers interfered in the military discipline process.*
13. *There are excessive delays in the military justice system.*[499]

These were serious allegations which, if found to be true, called into question the sincerity of the ADF's earlier submissions that its justice system was efficient, fair and effective.[500]

For each of the 13 matters, the Senate Committee approached the allegations by adopting a three-part framework: first, it considered the evidence that existed to support or refute the allegations; second, it inquired whether the evidence identified weaknesses within the ADF justice and inquiry system; finally, it considered the conclusions and recommendations that could be made about the ADF discipline and inquiry systems.

In regard to the allegations under the heading '3RAR' above, the 2001 Joint Standing Committee concluded that it was in 'no doubt':[501]

> *6.5 … that there was a system of extra judicial punishment taking place at 3RAR over the period of 1996–1998. The punishment was perpetrated on private soldiers who were presumed guilty of offences, most notably theft and involvement with drugs, without a hearing, or who were considered not to be performing to an adequate standard. Individuals who were loud, brash or over confident were more likely to be targeted in this way.*

Addressing the allegations concerning illegal punishments also under the heading '3RAR' above, the 2001 Joint Committee found 'strong evidence' that fellow privates or junior NCOs were responsible for 'illegal bashings' of victims: 'In most cases the victim required medical attention after the attack. These bashings were criminal acts.'[502]

Concerning the broader ADF military justice system, the 2001 Joint Committee also concluded:[503]

> *We believe the entire legal process surrounding the incidents at 3RAR took far too long. Much of the blame lies with the defence legal system, which needs some reform.*

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499 *Ibid*., Table 1.1.

500 Department of Defence, Submission, 1043, cited in the 1999 Military Justice Report, [4.14].

501 2001 Parachute Battalion Report, [6.5].

502 *Ibid.,* [6.6].

503 *Ibid.,* [6.28].

The establishment of a DMP was the subject of discussion before the Committee; however, the Joint Committee's members who comprised the majority ultimately found:[504]

> *The committee feels that Defence has gone a significant way to addressing the issues raised by the events at 3RAR. There was considerable discussion in the committee regarding a Director of Military Prosecutions, but the committee felt that Defence needed to be given sufficient time for the results of their actions to be assessed before discussing the possible establishment of such a position.*

This observation was unusual as there was undisputable evidence before the 2001 Joint Committee of two clear instances of command interference in the prosecutorial process. In the first instance, General Cosgrove sought to remove charges to a higher authority. The outcome of this intervention was to produce two aborted trials before a DFM, with the 2001 Joint Committee noting that *"[c]learly this was done with the very best of intentions (but) interference is interference, irrespective of the mala fides or bona fides of those interfering."*[505] The second example was alluded to only as it was the subject of charges and, presumably, of a court martial.

Many of the recommendations in the 2001 Parachute Battalion Report determined that the investigation processes of the military justice system were defective, which had implications for the probative value of any evidence upon which the convening authority purportedly acted. The 2001 Joint Committee raised concerns similar to those which had been identified in the earlier 1998 Ombudsman Report.

In a dissenting report,[506] 13 of the 32 members of the 2001 Joint Committee took the opportunity to agitate for the introduction of an independent DMP. The dissenters claimed that if the 1999 Joint Standing Committee had been informed about the 3RAR case, it would likely have recommended the establishment of a DMP.[507] They also concluded:[508]

> *The general public is very comfortable with the independent operation of a Director of Public Prosecutions. The case for a Director of Military Prosecutions rests not*

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504 *Ibid.,* [6.31].

505 *Ibid.*, [7.18].

506 The dissenting chapter begins with the following important contextual observation: [7.1] It is unusual for either of the major parties to dissent from a report of the Defence Sub Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The subcommittee has had a significant history of bipartisanship. The submission of such a report is not done lightly. The dissent is limited tothe areas of a Director of Military Prosecutions and the lack of Ministerial accountability. Brasch, (n. 412), 256.

507 2001 Parachute Battalion Report, [7.14].

508 *Ibid.,* [7.15].

only with the need to create the perception of independence, but the reality of actual independence.

The dissenters further stated that:[509]

In light of the recurrence of issues relating to brutality and military justice and noting the recommendations of the committee's previous report into military justice procedures in the ADF, those dissenting members now strongly recommend that the ADF establish a statutory office of the Director of Military Prosecutions, for Defence Force Magistrate trials and Courts-Martial (for criminal and quasi criminal matters).

4.5.2 Establishing a DMP

The Committee was officially notified that the ADF had established a 'prosecution team' as a means of improving its competencies[510] and, presumably, of providing greater transparency in the trial process. However, the Committee also heard evidence that:[511]

As Commodore Smith said in evidence, "they (the team) are directed towards building competence and they still do not take away from the convening authority, the key decision to refer matters". So command or the convening authority still determines whether or not charges will be laid.

While the creation of a prosecution team would provide benefits, even if only in improving competencies, the decision to prosecute was still not free from the actual or perceived influence of the chain of command.

When referring to the possible establishment of a DMP, the majority of members concluded that the ADF required more time to consider the matter, whereas the 13 dissenters called for the immediate implementation of the DMP. The Government was well aware of the lack of unity within the Committee, and responded on 22 March 2002: [512]

Director of Military Prosecutions

The Government notes that the Committee was substantially divided on the matter of the appointment of a Director of Military Prosecutions (DMP), with a dissenting report appended to the main report recommending the establishment of a statutory office of the DMP. In announcing publicly the outcome of the Burchett Audit of Military Justice, on 16 August 2001 the Chief of Defence Force indicated that a DMP would be appointed. Legislation to amend the Defence Force Discipline Act will be proposed once the Chiefs of Staff Committee has considered how the DMP is to be appointed and function.

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509 *Ibid.*, [7.23].
510 *Ibid.,* [7.16].
511 *Ibid.,* [7.17].
512 See Appendix 9: Government Response to the 2001 Parachute Battalion Report, 4.

In March 2002, despite this response, General Cosgrove stated that the establishment of a statutory DMP was 'in limbo'.[513]

4.6 2001 Military Justice report

4.6.1 Background

In contrast to the 2001 Parachute Battalion Report, the 2001 Military Justice Report was to create a "high level audit team to determine whether or not there exists within the ADF a culture of systematic avoidance of due disciplinary process'.[514] In 2000, Burchett acknowledged that the main concern for his review and the 2001 Joint Standing Committee's review, was the expression of public disquiet after allegations had been made public that members of the 3RAR had been mistreated (and in some cases, assaulted) as a means of punishment.[515] His evaluation also examined a broad range of topics including: the lack of training in the use of the DFDA, unequal punishments varying from rank and terms of service, equity and diversity issues, inconsistency of sentences, a lack of transparency, a lack of access to legal advice, delayed prosecutions, underlying presumptions of guilt, procedural unfairness and the need for a DMP. In the course of his investigations, Burchett had access to the 2001 Military Justice Report which highlighted the same problems as those identified in previous inquiries: flawed and delayed investigations, unreasonable exertion of command influence during investigative processes, a lack of procedural fairness to victims and defendants, and qualification issues in the conduct of investigations.[516]

In addition to evaluating the independence and impartiality of the military justice system, Burchett considered other elements of a fair trial including instances of cases evidencing or violating equality before the law, the presumption of innocence, and access to representation. He observed that equal treatment before the law was a basic civil right which has been reflected in almost every civilized country, and that ICCPR Article 14(1) is no exception. However, Burchett identified what he regarded as two areas of inequality in the military justice system: the leniency accorded to more senior ranks, aircrew,

513 2005 Senate Report, Executive Summary, [5], xxvi. See also PJ Cosgrove, Submission 16, (n. 18), [2.83].

514 See for example, Department of Defence media release, '*Army's Plan for a Fair Go*', 6 October 2000.

515 Appendix 5, 2001 Military Justice Report, see for example, [73].

516 *Ibid.*, [39]–[44].

critical trades' categories and Reserves;[517] and, the discrepancies in sentences across the services. For example, sailors face significantly longer sentences than their air force and army counterparts accused of the same violations.[518] Thus, he recommended that sentencing terms, especially for summary offences, be published as a way of promoting consistency without constraining sentencing discretion at the same time.[519]

After hearing a considerable amount of evidence, Burchett acknowledged that defence members could not access legal advice, and recommended that the ADF review the number and location of legal officers. This recommendation was made subsequent to information being obtained from focus groups and interviews which revealed that either a defence lawyer was simply not available, or the sole lawyer on base had already advised the Commanding Officer and was therefore conflicted if advising the defence member. Townsville and Darwin have the greatest number of ADF personnel in Australia, but Townsville had not had a resident JA or DFM for many years, and there was only one Reserve Army JA in Darwin.[520]

Burchett also investigated whether the presumption of innocence was being observed. He discovered that even though the ADF now renounced the attitude implied by the expression "march the guilty bastard in",[521] a presumption of guilt still existed. He found the presumption of guilt now had a subtler presentation, as there was a practice and perception that charges were not brought unless it was quite clear that the person charged had committed the offence. Burchett found numerous examples of cases where the accused was deprived of a genuine examination of the case against him or her because of a prevalent belief in the guilt of the person charged. Furthermore, the accused suffered from a reversal of the onus of proof, which should be on the prosecution to rebut the presumption of innocence and prove guilt. The accused was also pressured to plead guilty, and the victim was perceived to suffer a 'loss of face' if acquitted. Burchett expressed concern that charging only those pre-determined to be guilty "is bad for discipline, both in itself and because it may introduce a temptation to distort the evidence in order to ensure a conviction."[522]

Having turned his attention to the fair trial requirement for the proceedings to be open, Burchett recommended that the military adopt the United States'

517 *Ibid.*, [171], [176].
518 *Ibid.*, [147].
519 *Ibid.*, [172], Brasch, (n. 412), 260.
520 2005 Senate Report, xxxiii, [37].
521 2001 Military Justice Report, [48], Brasch, (n. 412), 261.
522 *Ibid.*, [204].

military practice of publicising disciplinary outcomes. He maintained that this would help to make the system transparent and promote consistency.

The Report contained a raft of recommendations which included the establishment of a statutory office of the DMP. Burchett considered whether the decision to prosecute should remain a responsibility of convening authorities or of a DMP. For Burchett, two subsidiary questions arose: first, whether the DMP would be granted the discretion to prosecute; and second, whether the DMP would act merely in an advisory role or actually conduct the prosecution.[523] In regard to the civilian courts, the DPP is an independent office created by Statute and has the unfettered discretion to decide whether or not to prosecute an individual.

Burchett considered all sides of the argument about the creation of a tri-service office of a DMP, separate from existing Convening Authorities to deal with the prosecution of members facing trial by court martial or DFM. Burchett researched the provisions of international law. In particular, he analysed the decision of the European Court of Human Rights in *Findlay v United Kingdom* [524] and the Canadian decision of *R v Généreux*,[525] where both entities had found that the multiple roles of the convening authority were illegal, and lacking both impartiality and independence. In addition, he concluded that the convening authorities impugned by the European Court and the Supreme Court of Canada were "substantially similar to arrangements presently in use in the Australian Defence Force."[526] Burchett noted that although Australia did not have the same constitutional and convention obligations as Canada and the United Kingdom, "the essential principles are no less important in Australia than they are overseas."[527]

Burchett traced the recommendations made by the earlier 1997 DFDA Report and the 1999 Military Justice Report and observed the ADF's reluctance to accept recommendations for a DMP. He summarised its opposition to a DMP as follows:[528]

> *From the material available to me it is clear that, at the time, Australian Defence Force reluctance to agree to the DMP concept was not based only on doctrinal views of the commander's prerogative to decide whether to prosecute as a paramount tenet of military discipline, but also upon concerns about the practicality of the proposal, particularly in situations of conflict.*

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523 *Ibid.,* [206].
524 (1997) EHRR 221.
525 [1992] 1 SCR 259.
526 2001 Military Justice Report, [208].
527 *Ibid.*, [209].
528 *Ibid.*, [219], Brasch, (n. 412), 263.

After a comprehensive consideration of the arguments, submissions and evidence for and against the appointment of a DMP, Burchett concluded that there was more to be gained from the early introduction of an independent DMP than from "postponing the decision any further":[529]

> *I believe the following conclusions can be drawn:*
>
> - *a principal tenet of Australia's military justice system is an entitlement to an independent and impartial trial;*
> - *there is no legal imperative (in the sense the legislation is threatened with a High Court ruling of invalidity of the kind that was encountered in UK and Canada) for the establishment of an independent DMP;*
> - *although there is little by way of hard evidence to support a contention that the Court Martial or Defence Force Magistrate trial process suffers from a lack of independence or impartiality in practice, the present system, post Abadee, still encourages a perception that command influence in the prosecution process is a real possibility, and involves some risk of that possibility materialising;*
> - *the role of the Convening Authority in the prosecution process as presently followed in Australia is substantially similar to that which was found to lack independence and impartiality by an international tribunal;*
> - *the establishment of an independent DMP with the discretion to prosecute is likely to reduce significantly perceptions that the prosecution process (in its present form) lacks independence and impartiality;*
> - *there is a strong conviction that the traditional linkage between command and discipline must be reflected in the prosecution process for Courts Martial and Defence Force Magistrate trials;*
> - *the concept of an independent DMP appears to be more acceptable within the Australian Defence Force now than it was previously, provided a practicable model can be devised.*[530]

4.6.2 Establishing a DMP

In his conclusions, Burchett explained why the civilianising reform of creating a DMP had not been implemented. Burchett concludes that "there is no legal imperative … for the establishment of an independent DMP" because, unlike the Canadian or British military, the ADF had not been coerced to change by adverse civilian court decisions.

529 *Ibid.*, [224].
530 *Ibid.*, [224].

4.7 Summary

When the 2001 Military Justice Report was published, there was a ground swell of opinion which exerted pressure on the ADF to reform its system of justice. Reform was first called for in 1994 when the then JAG, Rear Admiral Rowlands, recommended first in a paper and then again in his 1995 JAG Annual Report, that a DMP be established. The 1997 DFDA Report made the same recommendation. Then, the 1999 Military Justice Report left the ADF in no doubt that a DMP was desirable. In 2000, the JAG had reported on the advantages of a DMP in his 2000 JAG Annual Report. The 2001 Parachute Battalion Report had made clear its recommendation for a DMP, with the 13 dissenting members indicating that had the 1999 Joint Committee been apprised of the 3RAR allegations, the creation of a DMP would also have certainly been recommended. Notwithstanding all of this, it was not enough to cause the ADF to establish an independent DMP.

In 2005, the Australian military justice system was comprehensively reviewed by the Senate. This is analysed in the next chapter.

5 THE 2005 SENATE REPORT INTO THE ADF MILITARY JUSTICE SYSTEM

The command in chief of the naval and military forces of the Commonwealth is, in accordance with constitutional usage, vested in the Governor-General as the Queen's representative. This is one of the oldest and most honoured prerogatives of the Crown … All matters … relating to the disposition and management of the federal forces will be regulated by the Governor-General with the advice of his ministry. [531]

Overview

This chapter analyses the pivotal report of the Senate Foreign Affairs, Defence and Trade Committee, titled "*The effectiveness of Australia's military justice system*" June 2005 (***2005 Senate Report***) which delivered a scathing review of the hesitancy and refusal of the ADF to embrace a civilianisation of the ADF disciplinary system. This chapter examines the investigation by the Senate Committee which found significant failures in the military justice system which were endemic to the system and included flawed investigations and prosecution decisions, together with unreasonable denials of access to legal advice to defence members. Moreover, it found that the failure to establish a Director of Military Prosecutions had contributed to an unsatisfactory military disciplinary system. After a review of the military justice system, the Senate Committee concluded that it was inherently unfair to defence members and recommended the establishment of a permanent Chapter III military court to ensure impartiality and independence from the chain of command.

531 Quick and Garran, (n. 103), 701–2.

5.1 The 2005 Senate Report

5.1.1 Background

On 30 October 2003, following adverse news coverage concerning the death of a serviceman and the treatment of members of the ADF,[532] the Senate Foreign Affairs, Defence and Trade Committee commenced an inquiry, not only into those incidents but also into the Australian military justice system. In doing so, the Senate adopted the following motion:

> 1. *That the following matters be referred to the Committee for inquiry and report:*
>   *(a) the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and*
>   *(b) the handling by the Australian Defence Force (ADF) of:*
>   *(i)–(iv) [4 specific allegations of mistreatment, flawed investigations, drug abuse were listed]*
> 2. *Without limiting the scope of its inquiry, the Committee shall consider the process and handling of the following investigations by the ADF into:*
>   *(a)–(e) [5 specific investigations were listed]*
> 3. *The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector General of the ADF and the proposed office of Director of Military Prosecutions.*[533]

In its 2005 Senate Report, the Committee observed that the military justice system had been the subject of various inquiries, all of which had identified failings and flaws within the system. However, the Committee recorded '*despite assurances from the ADF that measures have been taken to correct these failings, reports have continued to surface suggesting that problems persist*'.[534]

The 2005 Senate Report concluded that, after almost a decade of promises, the ADF failed to carry out the reforms envisaged by many previous inquiries (analysed in chapter 4 above). Moreover, the language of the 2005 Senate Report, properly and justifiably, could be described as direct. Instead, of carrying out the recommended reforms, the ADF had launched a 'reform process' which failed to significantly alter the structures of the ADF, and defaulted to the position that the pivotal role was that of the military commander and a system which enshrined the chain of command.

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532 2005 Senate Report, xxv, [4].

533 The death of Private Jeremy Williams; the reasons for the fatal fire on the HMAS *Westralia;* the suspension of Cadet Sergeant Eleanore Tibble; allegations of misconduct by members of the Special Air Service in East Timor; and the disappearance at sea of Acting Leading Seaman Gurr in 2002.

534 2005 Senate Report, [1.4].

This chapter argues that the Senate Committee tired of the false promises offered by the ADF with its unsatisfactory statements of presumed intent, and consequentially made sweeping recommendations proposing, *inter alia*: the creation of a Chapter III military court, so as to 'to ensure its independence and impartiality'; the Australian Federal Police (not the military police) investigate all criminal activity said to have been committed overseas by defence members; civilian prosecuting authorities, not military ones, were to determine whether prosecutions should be initiated for civilian equivalent crimes and Jervis Bay Territory offences; and, a DMP was to be established but with limited jurisdiction to initiate prosecutions where there is no equivalent or relevant offence in the civilian criminal law. [535]

These recommendations, if implemented, would probably have covered all aspects of the military justice system and transferred to civilian authorities most of the decisions pertaining to investigation and prosecution. This contrasted with the ADF's perception that if such recommendations were accepted, this would signal the end of the commander's central, pivotal and 'non-negotiable' role (according to the ADF) [536] as initiator of prosecutions and convener of hearings.

The desire to create a permanent Chapter III military court was not novel. As discussed in chapter 3 above, it was first suggested in the 1999 Military Justice Report. However, the 2005 Senate Committee gave more serious consideration to the matter and took evidence and submissions regarding both the structure and operations of service tribunals. Both factors were identified as impeding the capacity of the military disciplinary system to deliver impartial, rigorous and fair outcomes.[537] The 2005 Senate Committee placed great emphasis on experiences in comparable jurisdictions dealing with independent standing military courts.[538] The Committee observed: [539]

> *[The] growing international trend towards appointing tenured independent military judicial officials and creating standing military courts allows those Service personnel access to independent and impartial tribunals, and should not go unnoticed in Australia.*

535 However, given the comparisons between offences under the *DFDA* and equivalent civilian offences set out in Appendix 10, few charges would have remained within the jurisdiction of the DMP.

536 2005 Senate Report, 23.

537 *Ibid.*, [5.3].

538 *Ibid.*, [5.70].

539 *Ibid.*, [5.70].

Thereafter, the Committee also observed that:

> *5.79 It is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirements of a functional Defence Force and the rights of Service personnel, to the detriment of both. Twenty years since the introduction of the DFDA, the time has come to address seriously the overall viability of the system. Australian judicial decisions and the evidence before this committee suggest the discipline system is becoming unworkable and potentially open to challenge on constitutional grounds. Overseas jurisprudence and developments suggest that alternative approaches may be more effective.*
>
> *5.81 Based on the evidence to this inquiry, leaving the disciplinary structures within the military justice system unchanged is clearly not viable. The status quo leaves too many members of the ADF exposed to harm. Overseas jurisdictions have increasingly moved towards structures that impart greater independence and impartiality.*

Based on the trend in comparable jurisdictions, the Committee concluded that reform was achievable only through a reaction to a successful court challenge. The Committee then recommended that the Government be pre-emptive in its approach to the reform of the military justice system:[540]

> *The Government should not wait for disciplinary tribunals to come under constitutional challenge before acting to address the weaknesses inherent within the current system. Rather, it should adopt a proactive stance and protect Service personnel now. Nor should the Government adopt 'constitutionality' as its minimum standard. The goal should not be to establish a system that will merely gain the approval of the High Court. The goal should be to structure a tribunal system that can protect the rights of Service personnel to the fullest extent possible, whilst simultaneously accommodating the functional requirements of the ADF.*

Consequently, the Committee recommended that *ad hoc* courts martial and trial by DFM should cease. Instead, it supported the creation of a Permanent Military Court, being a Chapter III court, possibly as a division of the Federal Magistrates Court of Australia.[541] This would have seen an end to the 'exceptional' separate status of the military justice system.

The multiple benefits of such an approach were cited by the Committee,[542] including but not limited to, the conferring on service personnel of the same fair trial rights as those enjoyed by ordinary Australian citizens who appeared in civilian courts. The Committee confirmed that in doing so, Australia would be complying with its obligations under Article 14(1) of the ICCPR and the system of trial procedures regarding service personnel would be consistent with world's best practice. The Committee also recommended the appointment of judges

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540 *Ibid.*, [5.86].
541 *Ibid.*, [5.93] — now called the Federal Circuit Court of Australia; Brasch, (n. 412), 269.
542 *Ibid.*, [5.93].

by the Governor-General in Council (as opposed to the convening authority or JAG) and the conferring of tenure upon those judges until the retirement age of 70. This would remove the perceptions of a lack of independence, which the Committee recognised was a problem within the existing military justice system. Moreover, the Committee recommended that, in order to be appointed, judicial officers would need to have extensive experience within the civilian justice system as well as military experience. According to the Committee, this would make it possible for judicial officers to appreciate the institutional context within which military discipline is applied, although it should be executed in a manner completely independent of the ADF.

The Committee anticipated that its recommendations would provide a range of advantages, including the development of a body of precedent which allowed for consistent decision-making, and the removal of considerable costs and inconveniences associated with the *ad hoc* convening of service tribunals.

Consistent with previous reports,[543] the Committee was critical not only of the ADF's failure to implement a statutory DMP, but also of other fair-trial flaws. In that regard, the Committee expressed its concern and frustration that recurrent problems[544] had not been addressed.

The Committee concluded that despite its review being the sixth conducted in eight years, there still existed '*an inherent conflict of duties through the CDF's control over the appointment of convening authorities, who in turn control the forum and rules of a trial*' and the *'CDF's role in appointing judge advocates, court martial presidents and members, and DFMs*'.[545]

5.2 Senate Identifies Significant Issues

5.2.1 Flawed Military Investigations

The Committee referred to investigations 'plagued' by delay and incompetence. Indeed, the members' serious concerns were expressed in the following recommendation:[546]

> *The continual failure of the ADF to rectify recurrent problems leads the committee to the conclusion that the investigative function should be removed from the defence forces altogether and referred to the civilian experts.*

543 Set out in the Overview, chapter 4.
544 Analysed in chapter 5.2.
545 2005 Senate Report, [5.93].
546 *Ibid.*, [3.118].

5.2.2 Flawed Prosecution Decisions

The Committee proceeded on the basis that the prosecutorial decision-making process was 'highly problematic'. In particular, it received and accepted evidence that decisions to prosecute were at times made on unsworn, untested, unreliable, non-corroborating accusatory 'evidence', compiled long after the event and relying on witnesses who would not, and/or could not, testify at the trial. In addition, it was also complemented by a concomitant failure to consider, or properly consider, exculpatory evidence when deciding to prosecute.[547]

The Committee also discovered that prosecution decisions were not always executed according to the ADF prosecution policy.[548] Furthermore, when it became apparent that a prosecution could not succeed, '*the policy was again contravened by its continuation, regardless of the high likelihood of failure*'.[549] In reaching this conclusion about failings in prosecution policy, the Committee relied not only upon submissions previously made to earlier inquiries, but also on the *Hoffman*[550] decision of the Full Court of the FCA,[551] in which the Court found the decision to initiate a prosecution against Hoffman, where charges had been laid seven years after the alleged incident (so as to avoid the time bar limitation imposed under the DFDA), was flawed.[552]

5.2.3 Insufficient Access to Legal Advice

In the July 2001 Military Justice Report, Burchett raised for the first time the issue regarding defence members' lack of access to legal representation and advice. The 2005 Senate Committee recognised that this matter had persisted during its review, and concluded that access to legal assistance was a right found in Article 14(3)(d) the ICCPR.[553] Although service offences are not dealt with on indictment, the High Court of Australia decision in *Dietrich v R*,[554] by way of analogy, stressed the importance of these rights, in the civilian criminal context, as a means of ensuring a fair trial.

The 2005 Senate Committee referred to the practical problem of securing legal assistance in disciplinary proceedings. The problem arose due to there

547 *Ibid.*, Preface xxviii, [3.25], [3.40], [4.6].

548 *Ibid.*, [4.7] being *Defence Instructions (General) Personnel* (Cth) 45–4, see also ADF, *Discipline Law Manual*, Vol 1, [4.2].

549 *Ibid.*, [4.7].

550 *Hoffman v Chief of Army* [2004] FCAFC 148. This was analysed in chapter 4.4.3.

551 2005 Senate Report, [4.8].

552 *Ibid.*, [4.8].

553 See (n. 425).

554 *Dietrich v R* (1992) 177 CLR 292. The decision established the principle that a person charged with a serious criminal offence should have a trial stayed until they can obtain legal representation.

often being only one military lawyer on base who had already provided advice to the convening authority and therefore would experience conflict when assisting the accused. Unlike the 2001 Military Justice Report, this Committee did not focus its attention on the availability of legal assistance (as had been the issue before Burchett), but rather it considered the quality of available legal assistance. In particular, the Committee heard evidence and accepted concerns expressed by witnesses that the military's Permanent Legal Officers did not have to hold practising certificates and, consequently, they were not subject to the ethical obligations required of civilian legal practitioners. The implication arising from this evidence was that these Permanent Legal Officers did not have the requisite degree of actual or perceived impartiality and independence, in that military personnel could be ordered to do or not do something, which would otherwise be precluded by the ethical rules of conduct which govern the behaviour of a lawyer in a civilian situation.

The Committee considered the various decisions of the Supreme Court of the Australian Capital Territory in *Vance v Chief of Air Force*.[555] Vance and the Department of Defence were involved in a suite of cases, described at one time as an '*outbreak of interlocutory skirmishing in what appears to have become a war of attrition between the plaintiff and the defendants*'.[556] In 1995, Vance had been the subject of a board of inquiry which culminated in the termination of his service: not once, but twice and, each time, the termination of his employment was revoked.[557] Vance alleged that his termination on purported medical grounds was but a facade for the desire of the ADF to '*get rid of him*'.[558] Crispin J decided that Defence Legal Officers lacked independence from the chain of command and Crispin J held '*they are clearly employed within an authoritarian structure in which obedience may be enforced by penal sanctions. … the degree of independence they may exercise will generally be limited to that permitted by senior officers entitled to command*.'[559]

The Committee expressed concern that, unlike civilian lawyers, military legal officers were not required to hold certificates of practice. This meant that they were not required to continue their professional education or retain

555 *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2004] ACTSC 78; *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2004] ACTSC 85; *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2007] ACTSC 80. Brasch, (n. 412), 273.

556 *Vance v Air Marshall McCormack in his capacity as Chief of Air Force and Anor* [2007] ACTSC 80.

557 *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2004] ACTSC 78, [4] and [5].

558 *Ibid.*, [6]

559 *Ibid.*, [57]–[58].

membership of either a state's bar or solicitors' association. The Committee concluded that military legal officers were not required to uphold and conform to the codes of ethical and professional conduct that apply to civilian legal practitioners. Consequently, the Committee recommended[560] Permanent ADF Legal Officers be required to hold current practising certificates as lawyers, and the ADF establish a Director of Defence Counsel Services.[561]

Ultimately, the Government adopted 30 of the 40 Senate Committee recommendations in whole, in part, or in principle.[562] However, due to the high number of recommendations, the Government failed to agree that the approved recommendations would necessarily improve the civilianising of the military justice system. For example, the Committee recommended that all ADF members suspected of criminal activity in Australia be referred to the appropriate State or Territory civilian police for investigation and prosecution before the civilian courts;[563] and that the investigation of all suspected criminal activity committed outside Australia by ADF members be conducted by the Australian Federal Police.[564] Consistent with these two recommendations, the Committee also recommended that military service police should only investigate the commission of a suspected offence if, in the first instance, there was no equivalent offence in the civilian criminal law.[565]

It is necessary to note that none of these three recommendations, which it is argued were well considered, was approved by the Government. Therefore, investigations and prosecutions of service offences remain 'in-house' and are conducted by service police who are not trained to the same standard as civilian police. The Committee also recommended[566] that all verdicts regarding prosecutions for civilian equivalent criminal offences be referred to civilian prosecuting authorities. This was not agreed to; nor was the recommendation[567] that the DMP should initiate a prosecution in the first instance only where there was no equivalent or relevant offence in the civilian criminal law. Following that recommendation, the Committee recommended, but the ADF disagreed, that the DMP should initiate prosecutions for other offences only where the civilian prosecuting authorities declined to do so, but then only where proceedings

560 2005 Senate Report, paragraph 4.75.

561 Note: this office was not introduced until 2015 with passage of the *Defence Legislation (Enhancement of Military Justice) Act 2015* (Cth) No 106, 2015, Part VIIID. That is, 10 years later.

562 See Appendix 6.

563 Appendix 6 — Recommendation 1.

564 *Ibid.*, Recommendation 2.

565 *Ibid.*, Recommendation 3.

566 *Ibid.*, Recommendation 7.

567 *Ibid.*, Recommendation 8.

under the DFDA could reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.[568]

The Committee also recommended the formation of a permanent military court which is to be a Chapter III Court, thereby ensuring independence and impartiality.[569] In this regard, the ADF agreed to the creation of a permanent military court; however, it refused to agree to it being a Chapter III Court and argued that the court should be established based on the defence power of the Constitution.[570]

5.3 The ADF asserts the military justice system works well

In its submissions to the 2005 Senate inquiry, the ADF claimed that its military justice system was functioning adequately, as it had always done. On 1 March 2004, General Cosgrove, as CDF at that time, made an '*Opening Statement to the Senate Inquiry into the Military Justice System*' in which he stressed that an in-house justice system was an imperative for the smooth operation of military matters.

In language redolent of that which had been presented by proponents of the separate military justice system, General Cosgrove reiterated and elaborated on the theme that in-house justice is imperative for discipline (*quaere*, rather than justice). For example: [571]

> *"An enduring and essential feature of any effective armed force is the need for discipline. Establishing and maintaining a high standard of discipline in both peace and war is applicable to all members of the ADF. It is vital if we are to win when the Government calls upon us to fight. So, within the disciplined environment essential for the effective conduct of operations, the Military Justice System complements the system of command. This is an important difference between the military and civilian justice systems."*

And then the General added: [572]

> *"… The more we shift the responsibility for military justice away from the chain of command, the more we risk undermining both systems. That said, I am especially*

568 *Ibid.*, Recommendation 9.

569 *Ibid.*, Recommendations 18 & 19.

570 This was to have dire consequences for the military, the AMC and the 171 people convicted by the AMC before it was declared to be invalid by the High Court in *Lane v Morrison* discussed later in chapter 6.3.

571 Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, '*Effectiveness of Australia's Military Justice System*', 1 March 2004, Canberra, 4.

572 2005 Senate Report, [7].

supportive of the establishment of the Offices of the Inspector-General of the ADF and the Director of Military Prosecutions, both of which I have established in my tenure.

General Cosgrove acknowledged that civilian and military justice systems might be thought to be considerably similar; however, he submitted such a comparison was '*perhaps even unhelpful*'.[573] Concerning military justice overall, General Cosgrove described the military justice system literally as *'by and large open, fair and effective'*[574] providing '*impartial, rigorous and fair outcomes*' only.[575] Rather astonishingly, he went so far as to conclude that '*none of the five inquiries conducted since 1998 has concluded that the Military Justice System or aspects of it are broken*'.[576] That assertion is surprising when considering the content and findings of the earlier reports which were highly critical of the existing military justice system.

Upon a review of the evidence and previous reports,[577] the Committee was unable to agree with the CDF that '*the military justice system is sound*'.[578] The Committee expressed a contrary opinion:[579]

In view of the extensive evidence received, the committee cannot, with confidence, agree with this assessment. It received a significant volume of submissions describing a litany of systemic flaws in both law and policy and believes that the shortcomings in the current system are placing the servicemen and women of Australia at a great disadvantage. They deserve a system that is fairer, with rules and protections that are consistently applied. The committee has recommended a series of reforms that would constitute a major overhaul of the military justice system in Australia.

14. … it is apparent to the committee that in the military justice system there is at least some degree of substance in the submissions the committee has received which suggests the system is not operating properly and justly. This perception in itself is an indictment on any justice system. Modern legal systems are underpinned by the maxim that justice must not only be done but be seen to be done. Assessed against this principle, in too many instances current ADF rules and practice founder.

Ultimately, the 2005 Senate Report was both 'scathing' and 'damning' of the existing military justice system.[580]

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573 *Ibid.*, 4.

574 *Ibid.*, [3].

575 *Ibid.*, [11].

576 *Ibid.*, [12].

577 1997 DFDA Report, 1998 Ombudsman's Report, 1999 Military Justice Report, 2001 Parachute Battalion Report, 2001 Military Justice Report.

578 2005 Senate Report, 13; and, xxvi [7], with contrary views expressed by the Committee, [8].

579 The recommendations arising from the Inquiry and, the then government's response to the 2005 Senate Report are in Appendix 6.

580 See for example: 'Military justice reforms 'window dressing'', *The Age*, 6 October 2005; Minister defends military justice system against civilian incursion', *Sydney Morning Herald*, 20 June 2005; Tracy Bowden, 'Military justice system changes recommended' *7.30 Report*, Australian Broadcasting Corporation, 16 June 2005.

5.4 A Chapter III Court

Recommendation 18 of the 2005 Senate Report considered the disposition of justice in the ADF. This recommendation was accepted (**Government Response**).[581] It concluded the DFDA was to be amended to provide for the creation of a permanent military court able to conduct trials of service offences under the DFDA that were currently otherwise being tried before courts martial or DFMs.

Moreover, Recommendation 19 provided for the creation of a permanent military court pursuant to Chapter III of the Constitution which enshrined protections guaranteeing independence and impartiality. The Committee specifically addressed this as a matter of ensuring 'independence and impartiality'[582] and to that end, further recommended the Governor-General in Council was to appoint the Judges and they were to have tenure until retirement age. Tenure of judges would reflect the conditions of appointment and tenure provided for civilian federal judges. Recommendation 20 provided that the Judges' appointed to the permanent military court be required to have a minimum of five years' recent experience in civilian courts at the time of appointment.

The Committee's Recommendations, 19 and 20, were not agreed to by the Government.[583] The Government Response to those recommendations concerning Chapter III of the Constitution argued that military courts did not apply ordinary 'criminal jurisdiction' because the object of a military court was the maintenance of military discipline. From a human rights perspective, it would appear that the right to a fair trial is secondary to matters of discipline. The ADF submitted that "*it is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial.*" [584]

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581 Department of Defence, Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, 'Report on the Effectiveness of Australia's Military Justice System', October 2005, 4.

582 2005 Senate Report, xxi.

583 Government Response,14–15.

584 2005 Senate Report, [5.95]. Such a line of logic would have only doctors able to determine medical negligence claims in civil courts, and only engineers able to decide construction matters. Such 'logic' does a great disservice to the broad and varied range of subject matters which judges in civil courts must hear and determine every day.

The Government Response continued to rely on the same 'exceptionalist' argument that a 'court' system internal to the military was required because such a 'court' would be deployable '*it must be deployable and have credibility with, and acceptance of, the Defence Force*.'[585]

5.5 Establish a DMP

5.5.1 DMP

In March 2002, after receipt of: the JAG paper of 1994,[586] the JAG Annual Report of 1995, the 1997 DFDA Report, the 1999 Military Justice Report, the 2001 Military Justice Report and the 2001 Parachute Battalion Report, combined with the amendments in comparative and international law jurisprudence, the Government announced the establishment of an independent office of the DMP.[587] At the same time, the Government stated that the amendments to the DFDA would be introduced after the ADF had conducted a precise and comprehensive examination of the DMP's functions. In February 2003, the ADF and the Government reached an agreement to establish the office of DMP.[588]

However, the actual implementation beyond that agreement was one of 'torpid languor'.[589] The next statement about the formation of the DMP appeared in a media release dated 30 June 2003, and was made by the Hon Danna Vale, Minister Assisting the Minister for Defence, that: [590]

> *I have directed Defence to expedite the development of the necessary legislation required to establish this position as a statutory appointment providing independent prosecutorial decision-making similar to that of Commonwealth, State and Territory Directors of Public Prosecution.*

The words "*to expedite*" would suggest the legislation was to be advanced or accelerated, although this was not to be the case. In his submission to the 2005 Senate Committee Inquiry, General Cosgrove said the legislation establishing

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585 *Ibid.*, [5.95].

586 JAG, Rear Admiral Rowlands, 'The Civilian Influence on Military Legal Structures' (1995) cited in 2001 Military Justice Report 2001, [107].

587 'Response to Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion', *The Australian*, 3 March 2002.

588 Cosgrove, (n. 512).

589 A phrase borrowed from Heydon J in a completely unrelated matter: 'The torpid languor of one hand washes the drowsy procrastination of the other.' *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27, [156].

590 The Hon Danna Vale MP, 'Media Release', 30 June 2003; also noted in 2005 Senate Report, [4.21].

the DMP would be announced in 2004.[591] Similarly, in March 2004, in evidence given before the Committee provided by the Director-General of the Defence Legal Service, Air Commodore Harvey, said that the legislation was 'imminent'.[592]

On 16 June 2005, when the Senate Report was tabled, the establishment of a statutorily independent DMP was 'in limbo';[593] that is, it was neither expeditious nor imminent.

Additionally, at the time of the Senate inquiry, a DMP of a kind had been created but not with unconstrained discretion and statutory independence. Instead, this DMP office remained within the chain of command and the office only acted in an advisory capacity, with the power to prosecute still held by the Convening Authority. The unfairness of this arrangement was emphasized by the officer holding this advisory position, Colonel Gary Hevey, when he provided evidence to the Committee in August 2004. Hevey not only complained about the unsatisfactory nature of his office, but also expressed his frustration with the Government's inaction: [594]

> *I am caught between a rock and a hard place, where people demand statutory independence of me and do not give it to me. I have just sat in the other room and watched the discussion concerning independence and how people can be said to be independent. The claim can be made of me: don't you have to report to the Chief of the Defence Force? The answer is, 'Yes, I do.' Why? Because he is my boss. Then the next question comes: 'When you chose to prosecute or not to prosecute Private Bloggs, General Smith, Admiral Jones or whoever it may be, were you influenced in that decision?' Until I am removed from the chain of command by the office being established properly, I cannot be independent. I must be a person who is within a chain of command somewhere. So, no, the position is not statutorily independent. Would I like it to be? Yes, please. How quickly? As quickly as you can possibly do it.*

The lack of priority, which the ADF ascribed to creating a statutorily independent DMP is described in two ways which complement the aforementioned statements. First, the advisory position was created at the rank of Colonel, which meant the advising DMP would find himself or herself advising upon prosecutorial decisions perhaps involving offenders higher in the chain of command, including one- and two-star-general equivalents.[595] Secondly, the

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591 Cosgrove, Submission 16, (n. 18), 18; also noted in 2005 Senate Report, [4.22].

592 Air Commodore Simon Harvey, Director-General Defence Legal Service, Official Committee, noted in 2005 Senate Report, [4.22].

593 Cosgrove, (n. 507).

594 2005 Senate Report, [4.23].

595 *Ibid.*, [4.40].

daily payment of $275[596] indicated that the ADF was not serious about attracting high-quality personnel, and nor did it ascribe any significant value to the role.[597]

The Committee questioned Colonel Hevey about the delay in producing draft amendments to the DFDA to establish a DMP. Thereafter, it investigated whether such delay was a result of the complexity of the task: [598]

> *A committee member asked Colonel Hevey if the delay might be due to the complexity of the legislation. Colonel Hevey told the committee that a bill could be easily modelled on current statutes creating the various Commonwealth, State and Territory Directors of Public Prosecutions, adding 'this is not a massive task'.*

Eventually, the Senate Committee was severe in its criticism of the delay by the Government in failing to enact legislation providing for the establishment of an independent DMP: [599]

> *The committee holds the opinion that a statutorily independent DMP is a vital element of an impartial, rigorous and fair military justice system. It finds the Government's inaction unsatisfactory. Until such time as the promised legislation is passed, decisions to initiate prosecutions are not seen to be impartial, the DMP is not independent, and fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes.*

On 12 December 2005, Parliament finally introduced legislation to create the office of DMP[600]. The amendments relevant to the creation of the DMP consisted of 18 clauses, many of which were modelled on existing Commonwealth DPP legislation. Hence, it is difficult to comprehend how the drafting of these provisions could have taken three years.[601] The most likely explanation is that the Government was complicit in the delay. This chapter argues that it must have been pressured by the ADF to ignore the recommendations of the various reports, analysed above, and that the Government supported the ADF in its desire to maintain secrecy and the control of prosecutions.

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596 *Ibid.*, [4.40]

597 This is not to say the Committee was in any way critical of the DMP, Colonel Hevey; at 2005 Senate Report, [4.41], the Committee observed: "The current DMP indicated to the committee that he considers the work to be a 'labour of love' and does it 'because I am silly enough to think it is worthwhile'. If the DMP's remuneration rate is not pegged at a level more commensurate with private rates, it cannot always be assumed that the position will attract personnel as experienced, committed and altruistic as Colonel Hevey."

598 2005 Senate Report, [4.25].

599 *Ibid.*, [4.27].

600 DFDA, Part XIA, ss 188G–188GQ.

601 Comparing the two aforementioned offices, it should also be noted that while the Commonwealth DPP is appointed by the Governor-General (s. 18 *Director of Public Prosecutions Act* 1983 (Cth)), the military's DMP is appointed by the Minister under s188GF of the DFDA. Accordingly, the perception of command influence remains, with the DMP remaining as part of and responsible to the Executive.

Notwithstanding the delay, with the passage of the amendments to the *DFDA*, the prosecutorial discretions of the convening authority are now exercised by the DMP, an independent statutory appointment, requiring the officer rank of Brigadier or equivalent, outside the chain of command, and with her own office, staff and budget. Military commanders still possess authority to initiate and lay charges, but any matters which commanding officers wish to have dealt with by higher service tribunals are now referred to the DMP for its decision on whether to proceed and, if so, the form of the charges and the appropriate tribunal. The DMP also selects the prosecuting officer from the staff in the DMP's office. However, the DMP also possesses the power to initiate disciplinary proceedings, having also been authorised to lay charges directly against service personnel.

5.5.2 Registrar of Military Justice

The administrative discretions of the convening authority are now exercised by a new office of the Registrar of Military Justice (**RMJ**),[602] an independent statutory appointment requiring the officer rank of Colonel or equivalent, outside the chain of command, and with his or her own staff and budget contained within the office of the JAG.

If the DMP decides that a matter should be tried by court martial or DFM, the charges are referred from the DMP to the RMJ with a binding request that the matter be set down for hearing. The RMJ appoints the Judge Advocate or DFM, nominated by the JAG. That person will hear the matter, and the RMJ decides on the date, time and location of the trial. If the matter warrants a court martial, it is also the responsibility of the RMJ to appoint the court martial panel. The RMJ currently does this by approaching the relevant service officer career management agency and requesting that a number of officers with specific ranks be nominated for court martial duty. Without knowing the identity of the accused or the nature of the charges, the relevant agency produces a list of officers who are releasable from duty, without prejudice to operational interests. The RMJ then uses this list to randomly appoint the number of panel members required by the court martial.

5.5.3 Director of Defence Counsel Services

The responsibilities of the convening authority's defending officer counsel are now exercised by the Director of Defence Counsel Services (**DDCS**).[603] While

602 DFDA, Part XI, Division 3, ss 188F–188FM.

603 *Defence Act* 1903 (Cth), Part VIIID, ss 110ZA–110ZD.

being a legal officer with the rank of Colonel or equivalent, the DDCS, unlike the DMP and the RMJ, is not a statutory appointment. It is the responsibility of the DDCS to ensure that any accused who wishes to be represented by a defending officer is provided with a service lawyer. An accused may be represented by a civilian lawyer but at his or her own expense.

5.6 Summary

All this has now been achieved despite a consistent theme that permeates all of the reviews analysed in this chapter: that the ADF had been keen to impress upon those conducting the various inquiries that its military justice system was working well, making statements such as 'the military justice system is sound'[604] and that '*none of the five inquiries conducted since 1998 has concluded that the military justice system or aspects of it are broken*'.[605] Nothing could have been further from the truth.

The ADF resisted, and still resists, any attempt to develop any form of external intervention. Thus, the recommendation from one inquiry to create, for example, a DMP was not sufficient to bring about change. Indeed, the recommendations of two JAGs and two civilian judges associated with a Senate Inquiry were not sufficient to bring about change. In the meantime, the ADF made repeated submissions to each successive inquiry, claiming that the military justice system was efficient, effective and reliable. Those submissions were, however, contrary to the weight of the evidence. They were highly misleading and disingenuous, and should not have been made.

Despite this deliberate obfuscation by the military, a civilianising reform did occur with the establishment of a DMP which was finally established after significant delay and successive recommendations by consecutive inquiries. It was not until 2015 that a DDCS was established.[606]

The substantive and relevant changes, which occurred in response to the 'decade of rolling inquires', have had to be imposed from outside the ADF. This is not surprising due to the constant theme argued by the ADF that its military justice system was sound. Furthermore, in 2004, the CDF had claimed that the

604 Evidence of General Cosgrove, 1 March 2004, 2005 Senate Report, see also at xxvi, [7], with contrary views expressed by Committee at [8].

605 *Ibid.,* 12.

606 An attempt was made to establish a permanent military court; however, the service tribunal model adopted by the Department of Defence, which remained contradicting the 2005 Senate recommendations, and was held to be unconstitutional by the High Court of Australia. This is analysed in chapter 6.

comparisons with the civilian system were 'unhelpful'.[607] It is almost indisputable that both Abadee and Burchett brought their decades of common law values and norms with them, while inquiring into the military justice system, but the ADF eschewed substantive change in each case.

The ADF's only reaction to the various inquiries was to incrementally amend the military justice system, thereby seeking to protect its biased system which the ADF falsely claimed was fair. In 2001, Burchett had referred to the approach of the military's 'doctrinal' opposition to a DMP before previous inquiries, and to a perception within the ADF of 'a sense of inevitability' that a DMP would at some point in the future be implemented.[608] However, the ADF took no affirmative steps; instead, it allowed an additional four years to elapse before the legislation was finally passed in the Parliament.

The 2005 Senate Report aptly described the resistance by the ADF to civilianising reforms as a 'hangover from a time when the battlefield was so far removed from the normal world that the Defence Force needed to be self-contained …'[609] A similar observation equally applicable to the calls for civilianising reform, was made by Lamer J of the Supreme Court of Canada when dealing with the Canadian military:[610]

> *Constitutionality is a minimum standard … those responsible for organizing and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied.*

The overall recommendations arising from the 2005 Senate Report were for the total restructuring of the military disciplinary system so as to accord to defence members the same rights as civilians when investigated and tried, similar to the domestic Australian criminal law system with all the safeguards attached thereto.

The next chapter examines the Government responses over time to the 2005 Senate Report calling for the establishment of a military Chapter III court. Time was to move slowly indeed.

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607 Evidence of General Cosgrove, Official Committee Hansard, (n. 598), 4.
608 2001 Military Justice Report, paragraph 221.
609 2005 Senate Report, paragraph 5.31.
610 [1992] 1 SCR 259.

6 GOVERNMENT ATTEMPTS TO CREATE A MILITARY COURT FOR THE ADF

The Court is not in a position to know or to inquire what measures are necessary for the proper conduct of a warlike operation and must depend upon those upon whom finally rests the responsibility of action.[611]

Overview

The 2005 Senate Report recommended the establishment of a permanent Chapter III court with jurisdiction to deal with serious military service offences. The Government's response to the recommendations was to refuse to establish a permanent Chapter III court. Instead, it established the 'Australian Military Court,' relying on the defence power in s 51(vi) of the Constitution. The legality of the establishment of this 'court' was later successfully challenged in the High Court of Australia in *Lane v Morrison*[612] on the grounds that it was a breach of Chapter III of the Constitution. In *Lane*, the High Court unanimously upheld the challenge and the Australian Military Court was abolished. As a matter of urgency, the Government then introduced interim remedial legislation to preserve the judgments of the Australian Military Court, and reintroduced the military disciplinary structure which had previously existed under the DFDA. In 2010, and again after its re-election in 2012, the Government introduced bills into the Parliament to establish a permanent Chapter III 'Military Court of Australia'. However, due to the proroguing of Parliament in 2013, and the election of a new Government, thereafter no steps were taken to consider such bills. Currently, ADF disciplinary matters are dealt with under the old DFDA procedures, reintroduced as interim remedial legislation only, but which appears to have now become a permanent regime by default for failing to consider any alternative regime.

611 *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 363 per Dixon J.
612 *Lane v Morrison* (2009) 239 CLR 230.

6.1 The Government decides to create a military 'court'

As examined in chapter 5[613], Recommendations 18 and 19[614] of the 2005 Senate Report led to an amendment of the DFDA to create a permanent Chapter III military court able to conduct trials for service offences (that were otherwise then being heard before courts martial or by DFMs). Those recommendations were rejected by the Coalition Government,[615] although it proposed the creation of a military 'court' not constituted pursuant to Chapter III of the Constitution, but one based on s 51(vi), that is, the defence power.

In 2006, the *Defence Legislation Amendment Bill* 2006 (Cth) (**DLAB**), was introduced into the Parliament purportedly to give effect to the Government Response[616] (**Government Response**) to the 2005 Senate Report. Both the Government Response and the Explanatory Memorandum[617] emphasised that the creation of the new court which was to be called the Australian Military Court (AMC), was intended to satisfy the principles of impartiality and judicial independence and, most importantly, it was to be independent of the chain of command. The Government added: [618]

> *Current advice is that there are significant policy and legal issues raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.*

The Explanatory Memorandum stated: [619]

> *The AMC is not an exercise of the ordinary criminal jurisdiction. More is required than the ability to understand specialist evidence at a trial. A knowledge and background into the military environment and culture is required.*
>
> *The AMC is a 'service tribunal' under the DFDA and therefore is part of the military justice system, the object of which is to maintain military discipline within the ADF.*

Largely, the Government Response to the recommendations of the 2005 Senate Report was to the effect that military courts were different from civilian courts as they did not apply what it referred to as 'ordinary criminal jurisdiction'. Rather, it stated that the object of a military court was to maintain military discipline. It failed to mention 'administer justice'. In other words, from a human rights perspective, it could be implied by extrapolation that fair trial rights

613 Chapter 5.4.
614 See Appendix 6.
615 Government Response, (n. 580), 14–15.
616 Appendix 6, Government Response, 2.
617 Commonwealth of Australia, House of Representatives, Defence Legislation Amendment Bill 2006, (Cth) Explanatory Memorandum, 'Outline'.
618 Appendix 6, Government Response, 15.
619 Defence Legislation Amendment Bill 2006 (Cth), Explanatory Memorandum, [4].

were secondary to matters of military discipline. The Government Response supported the notion that military courts have an exceptional status on the basis that "*it is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial.*"[620]

The rationale behind the Government Response continued thus:[621]

> *The limitations resulting from those constraints means that having a separate military court outside Chapter III is preferable to bringing the military justice system into line with Chapter III requirements.*
>
> *The Government will instead establish a permanent military court, to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court would be established under appropriate Defence legislation and would satisfy the principles of impartiality and judicial independence through the statutory appointment of military judge advocates by the Minister for Defence, with security of tenure (fixed five-year terms with possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). To enhance the independence of military judge advocates outside the chain of command, they would not be eligible for promotion during the period of their appointment.*

As is evident, the Government accepted the argument of the ADF that the chain of command required a military court which maintained its exceptional status and would somehow rely upon the defence power as justification for its creation whilst placing control of its review and decisions outside the chain of command.

6.2 Use of the term 'court'

Rather than continue to use the sole description 'court martial' for the newly-created tribunal, the Government proposed to use the descriptor 'court' in the DLAB, when naming the new AMC. This use of language was to be important as the distinction between the court's nomenclature and whether it was a properly constituted Chapter III court in law, as opposed to an administrative tribunal, would eventually require examination in the High Court.

The legal meaning of the term 'court' was examined by the New South Wales Court of Appeal in *Australian Postal Commission v Dao (No 2)*[622]. In that case, the court had to determine, as a matter of statutory construction, whether the

620 2005 Senate Report, [5.95].

621 Appendix 6, Government Response, (n. 580), 19.

622 (1986) 6 NSWLR 497. Cf. in *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] 1 VR 716 the Supreme Court of Victoria held that the Workers Compensation Board was "a court of law" within the meaning of the *Administrative Law Act* 1978 (Vic), with the consequence that its decisions were not amenable to administrative review under that statute.

Equal Opportunity Tribunal, established by the *Anti-Discrimination Act* 1977 (NSW), was a 'court' according to the meaning in the *Suitors' Fund Act* 1951 (NSW). McHugh JA made the following observations about the importance of the description of the court in question:

> *In ordinary usage the word 'court' has many meanings: they range from the group who form the retinue of a sovereign to an area used to play certain ball games. Legal usage also gives the word several meanings. Thus a 'court' may refer to a body exercising judicial power as in the Constitution, Ch III, or to a body exercising non-judicial power such as the Coroners Court or to a court of petty sessions hearing committal proceedings. It may even refer to a body exercising judicial and arbitral powers such as the former Commonwealth Court of Conciliation and Arbitration or the Queensland Industrial Court.*

In *Lane v Morrison,*[623] the High Court of Australia considered the use of the term 'court' and, in particular, French CJ and Gummow J[624] observed that there is a distinction between the creation of a federal court by Parliament and on the other hand the conferral on it of jurisdiction under s 77 of the Constitution. Section 71 of the Constitution provides "*such other federal courts as the Parliament creates*", indicating that it is the judicial power of the Commonwealth which identifies the function of a court, rather than the body of law to be applied in exercise of that function. The judges of federal courts are appointed in accordance with, and have the tenure and remuneration provided in, Chapter III of the Constitution. Whilst in office, they cannot be removed otherwise than as provided by s 72(ii). Therefore, it follows that, once created by the Parliament, and at least while its judges are in office, a federal court cannot be abolished by the Parliament.

Hence, the use of the term 'court' by itself was not definitive of the body exercising judicial power. However, it would appear that the DLAB was drafted in such a way as to borrow essentially all of the trappings and operations of a judicial court from the civil judicial system but without being validly constituted as a court of law. Interestingly, as observed above, there was no attempt in the DLAB to persist with the structure or nomenclature of a court martial. However, the issue for later determination was whether it would be possible to use the defence power to create what appeared to be a court, without actually being a legally constituted court, and to do so in a simple manner by legislative means. However, what the Government presented, by its use of the term 'court', was its intention that the AMC be accepted as a 'legislative court' rather than a

623 *Lane v Morrison* (2009) 239 CLR 230.
624 *Ibid.*, 240 [24]–[25].

'judicial court'. This raised the fundamental constitutional question of whether it was permissible under the Constitution.

6.3 Legislative Courts

The Australian Constitution was modelled on the Constitution of the United States of America. The Constitution of the United States recognises 'legislative courts', and their jurisdiction has been considered by the Supreme Court of the United States. Article I[625] of the Constitution of the United States empowers Congress to establish 'courts' by legislation, which are courts other than those created by Article III[626] of its Constitution. Importantly, these 'legislative courts' include courts martial. They also include other specialist jurisdictions[627] and are not limited to military tribunals and territorial courts. In the United States, these specialist 'legislative courts' have the power to decide controversies between the United States and its citizens arising under certain laws of the United States. However, they are merely legislative tribunals, albeit being referred to as 'courts', as they are created under Article I of the Constitution.

The Supreme Court of the United States has limited the jurisdictional exception of Article I 'legislative courts' (they are separate from Article III courts which exercise 'judicial power') to deciding those classes of cases in which the claim originated from a federal regulatory scheme. That is, the Supreme Court of the United States has determined that 'legislative courts' may exercise jurisdiction only where the resolution of a claim by an expert

625 Article I, Section 1 of the *Constitution of the United States* provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Section 8 provides: "The Congress shall have the Power … [t]o provide for the organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."

626 Article III, Section 1 of the *Constitution of the United States* provides that "the judicial Power of the United states, shall be vested in one supreme court, and in such inferior Courts as the congress may from time to time ordain and establish …" Article III courts of the United States of America comprise the Supreme Court of the United States and the inferior courts of the United States established by the Congress being United States Courts of Appeals, United States District Courts, and the United States Court of International Trade.

627 In addition to Courts Martial under the *Uniform Code of Military Justice* (**UCMJ**) being legislative courts, further classes include, for example, the Tax Court: which determines disputes concerning federal income tax, usually prior to the time at which formal tax assessments are issued by the Internal Revenue Service; and, the Foreign Intelligence Surveillance Court: which is comprised of a panel of serving federal judges appointed solely by the Chief Justice of the United States for a maximum period of seven years. The appointments to both of these bodies are not made with confirmation nor oversight by the Congress.

Government agency is involved, which itself is essential to a limited regulatory objective within the authority of that agency.[628]

In 1914, the High Court of Australia seemed to be attracted to the possibility that 'legislative courts' may be permissible in Australia, as an exception to Chapter III of the Constitution. In *R v Turner; Ex parte Marine Board of Hobart*[629], Higgins J, considered decisions of the Supreme Court of the United States which had upheld the validity of 'legislative courts' on the basis that they had been lawfully established under the powers of Art I of the Constitution of the United States. If this interpretation had been accepted as part of Australian Constitutional jurisprudence, the Commonwealth Parliament may have been able to rely upon legislative powers outside of Chapter III (specifically outside of ss 71 and 72 of the Constitution) to establish a body styled as a 'court' (displaying features commonly associated with judicial courts), provided only that such a body did not exercise the 'judicial power of the Commonwealth'. This would have left open the interesting question of determining what constitutes the judicial power of the Commonwealth and the boundaries of such power.

For instance, if 'legislative courts' were able to be validly established under the Australian Constitution, it would have been arguable that some of the legislative power would have extended to the creation of courts with jurisdiction appropriate to the subject matter of such power. For example, Courts of Marine Inquiry, once established under the *Navigation Act* 1912 (Cth), could have allowed the Parliament to validly create a body described as a 'court' without endowing it with the character of a court under Chapter III of the Constitution. However, the majority in *R v Turner; Ex parte Marine Board of Hobart*[630] disposed of the case without ruling on the question of whether s 51(i) of the Constitution empowered the Parliament to establish a court with exclusive power to deal with marine collisions which occurred during inter-state trade. If the High Court had decided the issue, then the legislature would then have been under no limitation as to the tribunals which could be established or the tenure of the judicial officers by whom they might be constituted. However, the existence of Chapter III of the Constitution and the nature of its provisions make it clear that no resort can be had to judicial power except under or in conformity with the sections which comprise Chapter III of the Constitution.

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628 *Northern Pipeline Constr. Co. v Marathon Pipe Line Co.,* 458 US 50 (1982), *Thomas v Union Carbide Agricultural Products Co.*, 473 US 568 (1985), *Commodity Futures Trading Commission v Schor*, 478 US 833 (1986), *Stern v Marshall*, 564 US 462 (2011); *United States v Jicarilla Apache Nation*, 564 US162 (2011).

629 (1927) 39 CLR 411.

630 (1927) 39 CLR 411, per Knox CJ, Gavan Duffy, Rich, Starke and Powers JJ.

The apparent attraction to American jurisprudence expressed by Higgins J failed to survive the later consideration by the High Court of Australia in the seminal decision on the meaning of 'the judicial power of the Commonwealth' in the *Boilermakers' Case,* which decided: [631]

> *Had there been no Chap. III in the Constitution it may be supposed that some at least of the legislative powers would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power. This could hardly have been otherwise with the powers in respect of bankruptcy and insolvency (s 51(xvii)) and with respect to divorce and matrimonial causes (s 51(xxii)). The legislature would then have been under no limitations as to the tribunals to be set up or the tenure of the judicial officers by whom they might be constituted. But the existence in the Constitution of Chap. III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71–80.*

Notwithstanding the principles established in the *Boilermakers' Case*, the Commonwealth contended[632] in *Lane v Morrison* that the replacement of the court martial system by the AMC was only a "modernisation" of terminology and was not a matter of substance. It was contended, in reliance upon legislative powers outside Chapter III of the Constitution, that Parliament might validly be able to create a body styled as a 'court' and displaying some features commonly associated with courts, provided only that the body "*does not exercise the judicial power of the Commonwealth*".

The High Court observed[633] that if this submission of the Commonwealth were to be accepted, it would have laid the foundation in Australia for the creation of a system of 'legislative courts' resembling the United States' model. French CJ and Gummow J rejected the submission on the basis that the notion of 'legislative courts' is inconsistent with the statement of general principle in the *Boilermakers' Case*'. [634]

Accordingly, the American concept of 'legislative courts' is not included in the system of judicature in Australia, that is (so it seems), with the 'apparent exception' of courts martial.

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631 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

632 In the written submissions of the Solicitor-General: *Lane v Morrison* (2009) 239 CLR 230–242 [29].

633 *Lane v Morrison* (2009) 239 CLR 230, 243 [30].

634 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269.

6.4 The 'Australian Military Court' is established

In 2006, the Senate Standing Committee on Foreign Affairs, Defence and Trade had the opportunity to review the Government Response and the DLAB. The report of the Senate Committee[635] (**the 2006 Senate Committee Report**) was tabled in October 2006 and in it, the Committee concluded that the proposed AMC would not achieve the level of independence and impartiality required to ensure a fair and effective military justice system, and observed that the Government had merely settled for the bare minimum of reform.[636]

The Senate Committee identified 28 concerns with the contents of the DLAB including that it sought to create a judicial-type independent and impartial court but without the proposed 'court' actually properly constituted as a Chapter III court. The Senate Committee, following its receipt of submissions, identified a number of serious reservations about the DLAB which comprised:[637]

- *the jurisdiction of a military court and the possibility of a successful High Court challenge to its validity;*
- *the five-year fixed terms provided for military judges and the possible adverse effect on the depth of the judicial experience of members of the court and its ability to attract high quality legal officers;*
- *the renewable five-year terms provided for military judges, which are not automatic and, according to the JAG, 'considerably reduces the actual and perceived independence of the judges of the AMC';*
- *the provisions for terminating the appointment of military judges which, under specified circumstances, provides for the Minister for Defence to terminate an appointment, rather than the Governor General on address by both Houses of Parliament;*
- *compulsory retirement for military judges from the ADF upon ceasing office as a military judge and the likelihood this provision would diminish the attraction of the position and dissuade suitable appointees from applying for the office;*
- *the lack of incentive for an accused to opt for the more administratively convenient trial by military judge alone;*
- *the composition of a military jury, especially in light of the jurisdiction of the AMC, extending to criminal offences committed by ADF members overseas;*[638]
- *the failure to stipulate that the AMC was to be a court of record;*
- *the transitional arrangements from current service tribunals to the AMC;*
- *the desirability of establishing the Director of Defence Counsel Services as an independent statutory position; and*

635 Commonwealth of Australia, Senate, Standing Committee on Foreign Affairs, Defence and Trade, Defence Legislation Amendment Bill 2006 [Provisions], October 2006.

636 *Ibid.*, [1.27] and [1.28].

637 *Ibid.*, [1.22].

638 The Senate Standing Committee for the Scrutiny of Bills expressed concerns about the constitution of the proposed military jury and sought advice from the Minister.

- *the provisions relating to the CDF Commission of Inquiry being contained in Regulations whereas they should be in the DLAB.*

The creation of the proposed AMC was criticised in the High Court of Australia, when Kirby J took the unusual step of commenting upon the DLAB. The criticism was unusual as it related to a bill in debate and not an act. Kirby J referred dismissively to the proposed 'court' as 'this so-called military court'.[639] Kirby J attacked the proposed 'court', in the following terms: [640]

> *The (pending) amendments to the (DFDA) (i.e. the amendments introducing the Australian Military Court) — provide a warning about the importance of this decision (that is, the decision in White) for whether criminal laws might be applied outside the ordinary courts of the land to citizens who might happen to be members of the Defence Force. The Court cannot later complain that it was not warned of the next intended step in military exceptionalism.*

Notwithstanding these well-founded warnings, the Government and the ADF persisted.

It is to be observed that when the DLAB was introduced to the Parliament in its original form, the AMC was not described as a '*court of record*'. At no time since Federation have trials by courts martial or by DFMs ever been designated as trials before a 'court of record'. The designation is important. A 'court of record' is a 'court' which is declared by an Act of Parliament to be so, as only a 'court' is lawfully empowered to impose a fine or imprisonment for a contempt[641] committed against it. However, following the introduction of amendments to the DLAB during its debate in the Parliament, the Government agreed to alter its position and recognise the AMC as a 'court of record' whilst at the same time refusing to establish it as a Chapter III court. Through this amendment, the Government intended the AMC to have the power to deal with contempt of the AMC and to conduct proceedings in public and record its proceedings. Notably, by means of this legal change of status, the Parliament

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639 In 2007, the High Court heard argument in the matter of *White v Director of Military Prosecutions* [2007] HCATrans 26, where Kirby J provided observations which made it clear that he thought little of the DLAB and the idea of the AMC contained within it. Kirby J said this during the course of submissions: "*So we are calling them in the future non-courts courts and non-magistrates magistrates*."

640 *White v Director of Military* Prosecutions (2007) 231 CLR 570, [89].

641 *R v Taylor; Ex parte Roach* (1951) 82 CLR 587, is in point. Dixon, Webb, Fullagar and Kitto JJ said: "By definition contempt is confined as an offence to courses of conduct prejudicial to the judicial power and does not extend to impairments of other forms of authority. Obstructions to the exercise of executive power, administrative power, legislative power or other governmental power are not within the conception of the offence of contempt of court."

purported to create a body which had all the trappings of a federal court[642] with a 'federal jurisdiction' to determine military offences; however, at the same time, this body was deliberately not established as a 'court' under the judicature provisions of Chapter III of the Constitution.

The decision to not establish a permanent Chapter III military court was not well received publicly.[643] Senator David Johnston, a member of the 2005 Senate Inquiry, (subsequently the Minister for Defence in the Abbott Government), when asked why compensation had still not been paid to the families of four young soldiers who had suicided, said of the ADF and its administration of military justice: [644]

> *When it comes to rules of engagement, when it comes to the Rome treaty of the international criminal code, when it comes to UN resolutions, our legal representatives in the ADF are in fact the world's best, may I say. But when it comes to one on one, straight out good old justice inside the ADF, they're probably the worst.*

Notwithstanding the 2005 Senate Recommendations, the 2006 Senate Committee's criticism, media condemnation, public statements and, indeed, observations of Kirby J in the High Court of Australia, none of these observations was sufficient to force the ADF to implement civilianising reforms to the service tribunal system. However, the decision to create a permanent military court, but not as a Chapter III court, was later shown to be fatally flawed.

6.5 The Australian Military Court is found to be invalid

As it transpired, in August 2005, whilst the Senate and the Government were considering the form of the legislation to create the AMC, an unfortunate incident of 'tea-bagging'[645] was to bring the AMC undone. On 8 August 2007, almost two years after the incident, Royal Australian Navy Reservist, Leading Seaman Brian Lane, was accused of indecently assaulting a superior officer. Lane

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642 While purporting not to be a Chapter III court: the AMC was established as a permanent court of record (s 114), with a seal (DFDA s 119), and a stamp (s 120), with a 'Chief Judge' and 'Judge' (ss 188AA, 188AO), and used the expression 'Your Honour' (Practice Direction No 1 of the Australian Military Court, paragraph 3, 5 November 2007, Annexure 3). It had a 'jury' system (Part VII, Division 4), applied the rules of evidence as a court (s 145) and was the final appellate court for appeals from decisions of Summary Authorities (Part IX). It determined criminal guilt (s 131B) and had a power of contempt of court (s 53(4)(d)).

643 See: 'Military justice reforms "window dressing"', *The Age*, 6 October 2005; 'Minister defends military justice system against civilian incursion', *Sydney Morning Herald*, 20 June 2005.

644 Mark Bannerman, 'Army failed suicidal soldiers', *7.30 Report*, Australian Broadcasting Corporation, 28 May 2005.

645 Lane, the accused, was alleged to have placed his genitals on an army sergeant's forehead while the sergeant was asleep, a practice known as 'tea-bagging'.

denied the charge. On 23 August 2007, Lane was administratively discharged from the Navy and charged before the AMC with '*an act of indecency without consent*' in breach of s 61 of the DFDA, which picked up s60(2) of the *Crimes Act* 1900 (ACT) that constitutes an indecent assault on a superior officer. The charge was listed to be tried before the AMC on 25 March 2008; however, by this time Mr Lane was a civilian.

Lane filed a Notice to Show Cause in the High Court of Australia seeking:

- a prerogative writ of prohibition to prevent Colonel Morrison, a military judge of the AMC, from conducting a trial and hearing the charge;
- a declaration that the provisions in Division 3 of Pt VII [646] (introduced by the *Defence Legislation Amendment Act* 2006 (Cth) (**DLAA**)), creating the AMC, were invalid as they purported to create an independent court outside the command structure of the ADF, which was inconsistent with s 68 of Chapter III of the Constitution; and
- a declaration that the conferral of jurisdiction on the AMC was beyond the scope of the defence power in s 51(vi) of the Constitution.

These arguments were successful in *Lane v Morrison*[647], and the High Court held that the AMC was invalidly exercising the judicial power of the Commonwealth without complying with the provisions of Chapter III.

Lane challenged the validity of the DLAA in purporting to establish the AMC by directly challenging the apparent doctrine of exceptionalism[648] to the judicial power of the Commonwealth being vested in courts established under Chapter III.[649]

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646 Section114 of the DLAA gave rise to the constitutional problem and provided:
"114 Creation of the Australian Military Court
A court, to be known as the Australian Military Court, is created by this Act.
Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.
Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of service tribunal in subsection 3(1).
(1A) The Australian Military Court is a court of record.
(2) The Australian Military Court consists of:
(a) the Chief Military Judge; and
(b) such other Military Judges as from time to time hold office in accordance with this Act.

647 *Lane v Morrison* (2009) 239 CLR 230.

648 *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23 per Dixon J.

649 *White v Director of Military Prosecutions* (2007) 231 CLR 570 per Callinan J at p 649, [240] and [242]. The distinction was recognised in *Hembury v Chief of the General Staff (*1998) 193 CLR 641 at 653, that the DFDAT was not exercising jurisdiction analogous to that of a Court of Criminal Appeal and it would no longer be available in respect of appeals from the AMC as a permanent Court which is external to "command" as it was a tribunal — not a Chapter III court.

Lane argued that the 'apparent exception' from Chapter III arose due to the particular characteristic of courts martial, being *ad hoc* service tribunals, which formed part of the exercise of the chain of command. The exercise of this power to convene courts martial was said to be an exercise of power by the Executive, through the chain of command, in its disciplinary capacity which imposed upon the Executive an obligation to act judicially.

In *Lane*, it was argued that a fair reading of s 68[650] of the Constitution precluded the establishment of a permanent military court outside of Chapter III. This point had been commented upon by way of obiter dicta by Callinan J in an earlier decision where he had had said:[651]

> *The presence of s. 68 in the Constitution may even, arguably, have further relevance to military justice, with the result that it may not be subject to judicial supervision under Chapter III of the Constitution, and is administrable only militarily, and not by Chapter III courts, whether specially constituted or not.*

On this same point and in the same case, a divergent and strongly differing view was expressed by Kirby J who stated a diametrically opposing view when he stated:[652]

> *The present proceedings do not call for a decision as to whether the future provisions of the Act for a "military jury" (or for the proposed Australian Military Court outside Ch III of the Constitution) are valid. However, the existence of such provisions, called to the Court's notice during the argument, alerts the Court to the implications of the present case for the future operation of Ch III in the context of military justice. The amendments provide a warning about the importance of this decision for whether criminal laws might be applied, outside the ordinary courts of the land, to citizens who happen to be members of the Defence Force. The Court cannot later complain that it was not warned of the next intended step in military exceptionalism.*

Both statements clearly conflicted with each other and were *obiter dicta*. However, Kirby J expressly left open the '*future operation of Ch III in the context*

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650 *Section 68: Command of naval and military forces*
The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

651 *White v Director of Military Prosecutions* (2009) 239 CLR 230 at [241]. Callinan's dicta was not followed up by any other member of the High Court and it was expressly rejected by Kirby J. However, Callinan's view has been favourably commented upon academically by Associate Professor Cameron Moore in, C Moore, 'Case Note – *White v Director of Military Prosecutions* [2007]' 2009 4(2) *University of New England Law Journal* 53. Moore has also favourably commented upon Callinan's *dicta* in his book, C. Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force*, (ANU Press, 2017) chapter 2. Moore's views do not take into account the reasons expressed by French CJ and Gummow J. In contrast, the contrary view of Kirby J must be seen to have been accepted by the Government in its drafting of the MCAB 2010 and the MCAB 2012 seeking to establish a Chapter III military court.

652 *White v Director of Military Prosecutions*, at [89].

of military justice'.[653] When analysed the competing views may be understood as, firstly, whether the 'exception' to the judicial power of the Commonwealth vesting with a Chapter III Court envisages a military tribunal determining issues of criminal guilt or, alternatively, was the power a *sui generis* power of making a finding of liability for purely military disciplinary purposes and, if so, does this encroach upon the judicial power of the Commonwealth if dispensed by a non-Chapter III Court?

Lane v Morrison reconciled the differing views of Callinan J and Kirby J. On the s 68 argument, French CJ and Gummow J found that the exercise of command may be the subject of legislation supported by s 51(vi) of the Constitution, though the creation of the AMC apart from the command structure and thereby purporting to exercise the judicial power of the Commonwealth, could not be sustained by the defence power.[654] The majority found it was not necessary to decide the plaintiff's submissions with respect to s 68 of the Constitution.[655]

Callinan's *dicta* was, therefore, rejected by French CJ and Gummow J and consequently his *dicta* is not determinative of the interplay between s 51(vi) and s 68 of the Constitution. Lane further argued that s 68 was a power *sui generis,* being the limited power to make a finding of liability for purely military disciplinary purposes. This limited power was separate from the judicial power of the Commonwealth as it was a power intended only for the maintenance and enforcement of military discipline on an *ad hoc* basis, as each court martial was convened separately according to the circumstances of the relevant charge. This argument relied upon a construction of s 68 of the Constitution which precluded the creation of the AMC as it was constituted by the appointment of military judges and the statutory office of the DMP. Both of these institutions were necessary for the trial of alleged disciplinary offences under the *DFDA*.[656] However, it was argued, the judges and the DMP were separate from the chain of command and this was an unlawful fettering of command upon which the 'exception' law-making power in s 51(vi) relied.

Lane argued that s 68 was either the legislative expression of the antecedent prerogative power of the Crown[657] pursuant to which it could maintain discipline of the military forces or, alternatively, s 68 itself vested the power

653 This is precisely what this thesis advocates for in chapter 7 below.

654 *Lane v Morrison*, fn618, [59] and [60].

655 *Ibid.*, [116].

656 Part VIII, Division 2.

657 Clode's *Military and Martial Law*, 2nd Edition, (John Murray, Albemarle Street, London, 1874), Chapter VII, 91, [21], Annexure 1.

in the executive to maintain discipline of the military forces.[658] Section 68 was not a 'titular power'[659] but had some work to do in its own right as an executive power of command. This was because s 68 confirms the power of command in its most absolute form which imposes an obligation on a defence member inferior in rank to comply with lawful orders of that defence member's superiors. Notwithstanding, in *Coutts v Commonwealth,*[660] Deane J suggested that the role of the Governor General under s 68 of the Constitution was essentially titular. However, this observation did not accord with accepted principles of Constitutional interpretation.[661] The vesting of power by s 68 is real and the titular office in no way derogates from command as vested by s 68 and as permissibly addressed by s 9(2)[662] of the *Defence Act* 1903 (Cth).

By extension, in those circumstances, the establishment of the AMC placed it outside the chain of command, and this offended s 68. Accordingly, rather than being a *sui generis* power, it was now a *de jure* power in a permanent capacity. This being so, it was argued that the AMC was not part of the chain of command structure enforcing military discipline. In this circumstance, if military command sought to exercise discipline outside of the AMC, it would likely be in contempt of the AMC.[663] This outcome was anathema to military discipline.

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658 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 per Starke J at 467–468, and per Williams J at 481; *Commonwealth v Quince* (1944) 68 CLR 227 at 255 per Williams J.

659 *Commonwealth v Quince* (1943–44) 68 CLR 227 at 255 Williams J referred to the King as the titular head of the armed forces and, therefore, the Governor-General filled a similar position.

660 (1984–85) 157 CLR 91, 108–109.

661 *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367–368; R v Coldham (1983) 153 CLR 297, 314; *Street v Queensland Bar Association* (1989) 168 CLR 461, 527.

662 Section 9 — Command of the Defence Force
(1) The Chief of the Defence Force has command of the Defence Force.
(2) The Chief of the Defence Force must advise the Minister on matters relating to the command of the Defence Force.
(3) The Vice Chief of the Defence Force is to assist the Chief of the Defence Force in the command of the Defence Force.
(4) In so assisting, the Vice Chief of the Defence Force must comply with any directions of the Chief of the Defence Force.

663 *Defence Act* 1903 (Cth), s 89.

It was further argued that, as the AMC was empowered to enforce breaches of the criminal law as Territorial offences, the AMC was in fact no more part of the chain of command than any other civilian criminal court of the land.[664] Accordingly, the AMC could not be subject to the control, review or confirmation of the chain of command. This being so, the DLAA could not have been a valid exercise of the 'exception' to Chapter III, but rather the AMC was a body purporting to exercise the powers of a Chapter III court without having been constitutionally established as such and consequently, it was invalid.

Earlier decisions of the High Court of Australia had deemed that the object of military discipline was limited to the trial of breaches of military duty.[665] This meant that the operation of the DLAA, in picking up in s 10 of the DFDA, chapter 2 of the *Criminal Code Act* 1995 (Cth), which amounts to serious criminal behaviour as distinct from strict issues of breaches of military duty, was, therefore, in blatant contrast with the earlier versions of s 10[666] and s 12[667] of the DFDA. These earlier versions of the sections had not involved conviction for disciplinary offences which would have a criminal consequence for the accused. However, the later version now appearing in the DLAA now meant that convictions for what were to be 'disciplinary offences' before the AMC now had a consequence at law. Hence, it followed that a determination of criminal guilt by the AMC must be the exercise of judicial power which could only be, and was, the judicial power of the Commonwealth.[668]

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664 What was not specifically argued nor contended was that the AMC had been improperly vested (by *DFDA*, ss 10, 15–61, 114 and 115 and Part VIII, Division 2), with a general criminal jurisdiction that was not subordinate and supplementary to the general criminal law although the *DFDA* had created a criminal jurisdiction in a 'court' that violated the separation of powers under Chapter III.

665 *Groves v Commonwealth* (1982) 150 CLR 113, 125 and 126, Stephens, Mason, Aickin and Wilson JJ; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, Mason CJ, Wilson and Dawson JJ, 538, and Brennan and Toohey JJ, 557.

666 Repealed DFDA s 10 provided:
"Subject to this Part, the principles of the common law with respect to criminal liability apply in relation to service offences other than old system offences".
Section 10 was repealed and substituted by s 40 *Defence Legislation (Application of the Criminal Code) Act* 2001, Act No 141 of 2001.
Section 10 now provides:
"Chapter 2 of the Criminal Code applies to all service offences, other than old system offences".
Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility. Service offences under DFDA ss 15–60 were amended to reflect the physical and fault elements of each offence and to identify the legal and evidential burdens of proof.

667 Repealed s 12 stated that the onus was on the prosecution and the burden was beyond reasonable doubt but did not impose or provide for "criminal guilt". Section 12 was repealed by s 43 *Defence Legislation (Amendment of the Criminal Code) Act* 2001.

668 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189; *Waterside Workers Federation of Australia v J W Alexander Lt*d (1918) 25 CLR 434, 444.

All seven judges of the High Court of Australia agreed with Lane's submissions. In both joint judgments, the High Court collectively held that the establishment of the AMC and the conferral of jurisdiction on it were invalid exercises of power. Consequently, the amendments introduced by the DLAA were invalid.

The High Court, by its respective majorities, placed particular importance upon the process of the establishment and review of decisions of courts martial. The Court analysed the rights of review and confirmation within the chain of command. In fact, it was a consequence of the DLAA abrogating the rights involving confirmation and review by the chain of command, which led the High Court to decide the AMC could not come within the Dixon J 'exception' to Chapter III.[669] The High Court relied upon the stated intention in the DLAA Explanatory Memorandum that the establishment of the AMC was to create a body independent of the chain of command in order to establish independence and impartiality, which are the very attributes of judicial power.

The fact that the AMC was established as a court of record was significant, yet this, taken together with the contempt powers,[670] and the fact a decision of the AMC on a trial of a charge was conclusive at law, led to the conclusion that the AMC was purporting to exercise 'the judicial power of the Commonwealth' and, therefore, its creation was beyond the scope of s 51(vi) of the Constitution to make laws for the naval and military defence of the Commonwealth and States.

French CJ and Gummow J held: [671]

> *There was an attempt by the Parliament to borrow for the AMC the reputation of the judicial branch of government for impartiality and non-partisanship, upon which its legitimacy has been said, in this Court, ultimately to depend,*[672] *and to thereby apply 'the neutral colours of judicial action'*[673] *to the work of the AMC …*
>
> *In Australia, the 2006 Act established the AMC outside the previous command structure and evinced a legislative design to meet the concerns which had underpinned the decision in Findlay. But in doing so, the Parliament exceeded the exercise of power conferred by s 51(vi).*

669 *Lane v Morrison* (2009) 239 CLR 230, [75].

670 French CJ and Gummow J referred to *R v Taylor; Ex parte Roach* (1951) 82 CLR 587 at 598: "By definition, contempt is confined as an offence to courses of conduct prejudicial to the judicial power and does not extend to impairments of other forms of authority. Obstructions to the exercise of legislative power, executive power or other governmental power are not within the conception of the offence of contempt of court."

671 *Lane v Morrison* (2009) 239 CLR 230 at [4]–[5].

672 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9, 21–22.

673 *Mistretta v United States*, 488 US 361, 407 (1989).

Furthermore, Hayne, Heydon, Crennan, Kiefel and Bell JJ held:[674]

> *The determinative issue in this matter is whether the DFDA provides for the AMC, a court not created in accordance with Ch III of the Constitution, to exercise the judicial power of the Commonwealth.*

The second basis relied upon by the majority to support their conclusion of invalidity was s 114(1A) of the Act which specifically provided the AMC was to be 'a court of record'. The combination of a power to make decisions about guilt for offences against the general criminal law, and its designation as a 'court of record', had the consequence that the decision of the AMC would preclude subsequent prosecution in the civil courts for an offence substantially the same as the offence tried by the AMC. [675]

Accordingly, the High Court held that the provision creating the AMC was invalid not just because the AMC was purporting to be a court of record, but because it was established to make binding and authoritative decisions of guilt or innocence independently from the chain of command. It was an impermissible exercise of the judicial power of the Commonwealth. None of the provisions of the DFDA[676] (as amended by the DLAA) could be severed or read down in a way which would give the provisions operational validity. Consequently, the whole of Division 3 of Pt VII was declared to be invalid.

6.6 Urgent 'Interim Measures' introduced by Parliament

Following the High Court's decision in *Lane v Morrison*,[677] the Government announced that it would return to the previous system of DFDA courts martial and DFMs whilst taking urgent legal advice about its future options. In a press release issued on 26 August 2009, the Minister for Defence, Senator John Faulkner, announced: [678]

> *The Minister for Defence, Senator John Faulkner, said the Government respected the Court's decision and will move military justice to a judicial system that meets the requirements of Chapter III of the Constitution.*
>
> *As an interim measure, the Government will reinstate, by legislation, the pre-2007 military justice machinery to give Defence a level of certainty in military justice matters …*

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674 *Lane v Morrison* (2009) 239 CLR 230, [65].

675 *Ibid.*, [115].

676 Div 3 of Pt VII of the DFDA.

677 (2009) 239 CLR 230.

678 Senator the Hon John Faulkner, Minister for Defence 26 Aug 2009, '*Australian Military Court' Press Release,* 26 August 2009.

Senator Faulkner said: 'The Senate Committee had recommended a Chapter III court with oversight by the Attorney-General, and greater independence from the military. The legislation establishing the AMC fell short of these recommendations.'

'The Government will review the High Court's decision carefully and consider alternative models for establishing the jurisdiction in a Chapter III court. I will work closely with the Attorney-General given his responsibilities in this area', Senator Faulkner said.

The last paragraph provides some insight into the difficulties which existed, for in order to work with the Attorney General, the ADF had to move beyond its autonomous and unilateral control which for the ADF meant it had to accept the decision of the High Court and work to create a functioning independent military justice system. The ADF had to learn to work cooperatively with others, not only outside the chain of command, but also outside the ADF.

It was reported that Liberal Opposition's Shadow Attorney-General, Senator George Brandis QC, blamed his own former Liberal Government Minister for Defence, Senator Robert Hill, for having 'bungled' military justice law reform.[679] In a separate article, Senator Brandis referred to the prevailing views of the Department of Defence: [680]

Opposition legal affairs spokesman George Brandis yesterday backed the plan to make any new body part of the Federal Court system.

He said a 2005 report by the Senate's defence and foreign affairs committee had proposed such a course and had warned of the issues of not setting up the AMC as a Chapter III Court.

'But the views of Defence that there wasn't a problem prevailed and we can now see that the Senate was right, and the Defence Department was wrong,' Senator Brandis said.

On 9 September 2009, the Labor Government presented two bills to restore the pre-AMC service tribunal courts martial system, which became the *Military Justice (Interim Measures) Act (No. 1)* 2009 (**2009 No 1 Act**) and the *Military Justice (Interim Measures) Act (No. 2)* 2009 (**2009 No 2 Act**). The Explanatory Memorandum to the 2009 No 1 Act stated: [681]

The purpose of this Bill is to return to the service tribunal system that existed before the creation of the AMC. This is an interim measure until the Government can legislate for a Chapter III court.

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679 Christian Kerr, 'George Brandis blames Robert Hill for military court bungle', *The Australian*, 27 August 2009.

680 Patrick Walters, 'Vow to fix military courts', *The Australian*, 28 August 2009.

681 Military Justice (Interim Measures) Bill *(No. 1)* 2009, Explanatory Memorandum, 9 September 2009. See also Commonwealth of Australia, House of Representatives, *Parliamentary Debates*, 'Second Reading Speech', 14 September 2009, 57–58 (Kelly).

In the second reading debates, members were keen to identify the ADF as the master of its own demise; for example, the Member for Paterson stated: [682]

> *As I previously said, this decision was inevitable, and that is because the Australian Military Court was claiming to exercise a judicial power of the Commonwealth that did not meet the requirements of Chapter III of the Constitution …*
>
> *There is now some debate about why the decision was made to ignore the advice of the parliament and proceed with the establishment of the Australian Military Court without regard to Chapter III considerations. For the record, Defence was advised that the hybrid form of court they sought to establish would be problematic, as you cannot have or exercise judicial power other than pursuant to Chapter III of the Australian Constitution …*
>
> *The situation the ADF now finds itself in is regrettable.*

Equally, the Member for Forrest summarized the ADF's part in the invalidated Court accordingly: [683]

> *In 2007, the ADF dismissed the advice of the Senate Foreign Affairs, Defence and Trade References Committee when establishing the Australian Military Court. The ADF were informed at the time that they could not have judicial power other than pursuant to Chapter III of the Australian Constitution. Subsequently, the ADF were informed that the 'hybrid' form of court they sought to establish was problematic. The parliament charted a course so that Australia could have a standalone, independent military judicial arm comparable to those of the United States, Britain and Canada. Unfortunately, this was ignored by the ADF.*

Government members were eager to demonstrate that when they were in Opposition, they had rallied against the hybrid system ultimately adopted by Defence; for example, the Member for Issacs said: [684]

> *As I have said, this outcome, with the uncertainty that it has created for the Australian military justice system, is an outcome which could have been avoided had the words of caution expressed by opposition Labor members in this place at the time been heeded.*

There was little question that the ADF, rather than the Government, was responsible for the Australian Military Court. As the Member for Herbert succinctly stated: [685]

> *As the previous speaker indicated, there were certainly some concerns about the form of that court, and it is now history that the form adopted by the former government did not in fact withstand the scrutiny of the law. Part of the problem was that the former government took the advice of Defence.*
>
> *I am not being critical of Defence — I am just stating the facts. Defence wanted this particular arrangement and Defence got this particular arrangement, but it was*

682 *Ibid.*, 58–59 (Baldwin).
683 *Ibid.*, 67 (Marino).
684 *Ibid.*, 60 (Dreyfus).
685 *Ibid.*, 61–62 (Lindsay).

not an appropriate arrangement at law. Perhaps in hindsight the former government should have accepted wider advice, but that was not to be the case …

The 2009 No 1 Act was an urgent legislative response to the outcome in *Lane's case*.[686] It did not result in just the restoration, on what was said to be an interim basis, of the original jurisdiction for the treatment of military discipline cases exercised by summary authorities and, as required, by DFMs and courts martial. It also resulted in the restoration of the jurisdiction exercised by the DFDAT regarding convictions by DFMs or courts martial. However, there was no continuance of the provision for appeals in respect of convictions and sentence.

6.7 Further 'Interim Measures' Introduced

Prior to the determination of *Lane's Case*,[687] the AMC had convicted 171 members of the ADF. In order to validate those decisions, the 2009 No 2 Act was passed which had the effect of imposing retrospective disciplinary sanctions on those convicted in lieu of sentences imposed by the AMC. In this regard, the Explanatory Memorandum stated:

The principal mechanism by which the Bill seeks to maintain the continuity of discipline within the ADF is by imposing disciplinary sanctions on persons corresponding to punishments imposed by the AMC and, to the extent necessary, summary authorities in the period between the AMC's establishment and the declaration of invalidity by the High Court.

As explained below, the Bill does not purport to validate any convictions or punishments imposed by the AMC. Nor does the Bill purport to convict any person of any offence. Rather, the Bill, by its own force, purports to impose disciplinary sanctions.

Section 6 of the 2009 No 2 Act provided individuals with protection from any further trial under the *DFDA*.[688] Indeed, the Explanatory Memorandum foreshadowed as much:

The Bill recognises that there may be circumstances in which a person affected by a disciplinary liability imposed by the Bill wishes to contest whether that liability should remain imposed. The Bill gives affected persons a right to seek review of whether they should remain liable under the Act, and the reviewing authority is given power to discharge persons from such liability. In cases where the disciplinary liability imposed by the Bill relates to detention — a serious disciplinary measure peculiar to the ADF — the Bill requires automatic review by the reviewing authority to determine whether that disciplinary liability should be discharged.

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686 (2009) 239 CLR 230.

687 *Ibid.*

688 Equating with the common law principles of *autrefois acquit* and *autrefois convict*.

In 2013, the Government needed to extend the interim measures yet again and this time it took the opportunity[689] to extend the appointment, remuneration and entitlement arrangements of the now Chief Judge Advocate (**CJA**) and JAs for a further two years to expire in September 2015.

6.8 'Military Court of Australia' Bills Introduced and Lapse

As a result of the 2009 No 1 Act and the 2009 No 2 Act, the previous *DFDA* military disciplinary structure was reintroduced. The Government had to determine whether it would maintain the interim measures on a permanent basis or whether it would take the alternative step of creating a valid Chapter III military court.

On 24 May 2010, a new Labor Government announced it intended to legislate to establish a 'Military Court of Australia' (**MCA**), which was to be a court created under Chapter III of the Constitution. In a joint press release, Attorney-General, Robert McClelland and Minister for Defence, Senator John Faulkner announced:

> *Judicial officers appointed to the new Military Court of Australia will have the same independence and constitutional protections that apply in other federal courts,' Mr McClelland said.*
>
> *To ensure that the new court has the necessary understanding of the requirements and critical nature of military discipline, all judicial officers appointed to the court must have either past military experience or a familiarity with the services. They may not, however, be serving ADF members, nor members of the Reserves.*

The press release confirmed that the intention of the Government was for a new court to commence functioning in 2011. However, the joint press release not only announced the creation of a new military court; it also announced the merger of the FCA, the Family Court of Australia (**FamCA**) and the Federal Magistrates Court of Australia[690], which would be divided into a trial division and an appeal division.[691] This radical restructuring of the federal judiciary was rejected by the Liberal National Opposition prior to the federal election in August 2010. However, while the Liberal Opposition was opposed to the idea of an entire federal court system restructure, it supported the creation of a Chapter

689 *Military Justice (Interim Measures) Amendment Act* 2013 (Cth). Further extension was made by the *Defence Legislation (Enhancement of Military Justice) Act* 2015 (Cth).

690 Later to be renamed the Federal Circuit Court of Australia.

691 'The new Military Court of Australia will form part of a restructured federal court system in which the Federal Magistrates Court will continue to hear general federal law matters,' Mr McClelland said.

III constitutional court for the ADF. For example, when the Lane decision[692] was handed down, Senator Brandis, then Shadow Attorney-General, announced that the court should have been created as a Chapter III court.[693]

On 24 June 2010, the Military Court of Australia Bill 2010 (**MCAB 2010**) was introduced into the 42nd Parliament[694] and shortly thereafter, was sent to the Senate Legal and Constitutional Legislation Committee for consideration but lapsed when the Parliament was dissolved on 19 July 2010 for an election. The MCAB 2010 had to be re-introduced into the Parliament by a new government and passed by both Houses.

In 2010, the Labor Government was returned to government but delayed the reintroduction of the bill until 21 June 2012[695] when the Military Court of Australia Bill 2012 (**MCAB 2012**)[696] was tabled by the Attorney-General. The MCAB 2012 was referred for consideration to the Senate Standing Committee on Legal and Constitutional Affairs which called for submissions prior to delivering its report to the Senate on 9 October 2012.[697] The Committee recommended that

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692 (2009) 239 CLR 230.

693 Kerr, above (n. 674).

694 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2010, 6522 (Robert McClelland, Attorney-General). The provisions of that bill were referred by the Senate to the Senate Legal and Constitutional Affairs Legislation Committee, for inquiry and report by 21 September 2010 but due to the proroguing of Parliament the inquiry was discontinued on 23 July 2010.

695 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2012, 7414, 7415 (Nicola Roxon, Attorney-General); Explanatory Memorandum, Military Court of Australia Bill 2012 and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012, 7 (***the Transitional Provisions Bill***). Significantly, the Director of Military Prosecutions no longer was to have the right to appeal findings of not guilty which had been contained in the MCAB 2010. The key features of the Transitional Provisions Bill were highlighted by the Attorney-General (House of Representatives Hansard, 21 June 2012, pp 7415–7416) to effect amendments to defence and other legislation, consequential to the creation of a Military Court of Australia. Significantly, it also provided arrangements for the transition to the Military Court system from the system of courts martial and DFMs. Courts martial and DFMs were to be retained as a residual or backup system. They would only be used in very rare circumstances where it is necessary, but not possible, for the Military Court to conduct a trial overseas … The bill also abolished the Defence Force Discipline Appeal Tribunal and the jurisdiction of the tribunal was to be absorbed by the Military Court. This transitional bill also included further initiatives to enhance military discipline system. It modernises the existing provisions dealing with persons found unfit for trial or persons acquitted on the basis of mental impairment.

696 MCAB 2012 was introduced together with the Transitional Bill.

697 Senate Legal and Constitutional Affairs Legislation Committee*, Inquiry into the provisions of the Military Court of Australia Bill 2012,* 9 October 2012. See [4.53] to [4.55] where the Committee expressed 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.

the MCAB 2012 provide some additional policy rationale but, otherwise, the Committee recommended that the MCAB 2012 be passed. Recommendations for an amendment to the MCAB 2012 were made by dissenting (Liberal) senators (Liberal senators) to allow for trial by jury and to permit reservists to be appointed to the court and, if accepted, they recommended passage of the MCAB 2012.[698]

The Explanatory Memorandum[699] to the MCAB 2012 included a diagram outlining the structure of the proposed MCA.

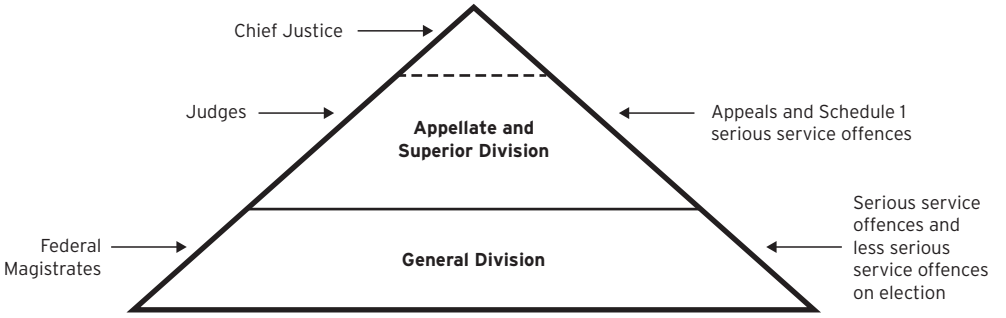

Diagram 6-1: MCAB 2012 Proposed Structure of the MCA

The MCAB 2012 required the MCA to have two Divisions: Appellate and Superior Division (**Superior Division**) and a General Division. All proceedings in the MCA must be instituted, heard and determined in either the Superior Division or the General Division. Judges[700] of the MCA will be assigned to the Superior Division while Federal Magistrates[701] will be assigned to the General Division.[702] Judges and Federal Magistrates may exercise the powers of the MCA only in their respective Divisions.[703] The appellate jurisdiction of the MCA will be exercised by judges in the Superior Division.[704] Federal Magistrates of the MCA are assigned to the General Division.[705] This reflects the intention for

698 Liberal Senators dissenting report, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Military Court of Australia Bill 2012*, 9 October 2012 at 57 see [1.19] to [1.21].

699 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Provisions of the Military Court of Australia Bill 2012,* 9 October 2012, [15].

700 Judges were to be federal judges with the status of either the FCA or the FamCA: MCAB 2012, cl 3(b).

701 On 12 April 2013, Federal Magistrates were renamed as judges with the change of name of the Federal Magistrates Court of Australia to the Federal Circuit Court of Australia.

702 MCAB 2012, cl 13.

703 MCAB 2012, cl 54 specifies certain matters are to be dealt with in the General Division and the Superior Division respectively, in the exercise of the MCA's original jurisdiction.

704 MCAB 2012, cl 10. Judges of the MCA including the Chief Justice, are assigned to the Superior Division.

705 MCAB 2012, cl 10.

certain matters to be heard in each Division, as set out in Part 5 (Original jurisdiction) and Part 6 (Appellate jurisdiction) of the MCAB 2012.

The Superior Division of the MCA[706] was to hear trials of "*Service offences listed in Schedule 1*"[707] (**Schedule 1 Offences**) which are those that go to the

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706 MCAB 2012, Cl 65.

707 "Meaning of Schedule 1 offence and ancillary offence"
Clause 65: A Schedule 1 offence is:
(5) (a) an offence against a provision of the Defence Force Discipline Act 1982 that is specified in the table in Schedule 1 to this Act; or
(b) an offence that:
is an ancillary offence in relation to an offence referred to in paragraph (a); and
was committed by a person at a time when the person was a defence member or a defence civilian.
(6) An ancillary offence, in relation to an offence referred to in paragraph (5)(a), is an offence against:
(a) section 11.1, 11.4 or 11.5 of the Criminal Code; or
(b) section 6 of the Crimes Act 1914;
that relates to that other offence.
"Schedule 1 — Service offences to be dealt with by the Appellate and Superior Division"
Provision of the DFDA:
S 15(1) Abandoning or surrendering a post etc.
S 15A(1) Causing the capture or destruction of a service ship etc.
S 15B(1) Aiding the enemy while captured
S 15C(1) Providing the enemy with material assistance
S 15D(1) Harbouring enemies
S 15E(1) Offences relating to signals and messages
S 15F(1) Failing to carry out orders
S 15G(1) Imperilling the success of operations
S 16(1) Communicating with the enemy
S 16A(1) Failing to report information received from the enemy
S 16B(1) Offence committed with intent to assist the enemy
S 20(1) Mutiny
S 20(2) Mutiny in connection with service against enemy
S 21(2) Failing to suppress mutiny in connection with service against enemy
S 22(1) Desertion
S 22(2) Desertion
S 36(1) Dangerous conduct
S 59(1) Selling etc. prohibited drugs outside Australia
S 61(1) if:
(a) the Territory offence concerned is an offence referred to in s63(1)(a)(i), (ia), (ii) or (iii) or s 63(1)(b) of the DFDA; or
(b) the fixed or maximum punishment for the Territory offence concerned is imprisonment for 10 years or more Engaging in conduct in the Jervis Bay Territory that is a Territory offence
S 61(2) if:
(a) the Territory offence concerned is an offence referred to in subparagraph 63(1)(a)(i), (ia), (ii) or (iii) or paragraph 63(1)(b) of the DFDA; or
(b) the fixed or maximum punishment for the Territory offence concerned is imprisonment for 10 years or more Engaging in conduct in a public place outside the Jervis Bay Territory that is a Territory offence
S 61(3) if:

very core of the maintenance of discipline in the ADF. They include, for example, offences relating to operations against the enemy, mutiny, desertion and ordering the commission of a service offence. Schedule 1 Offences also include offences for which the most serious penalties can be imposed under the DFDA. This ensures that charges of the most serious service offences prescribed as Schedule 1 Offences are heard by Judges, as well as charges which the Chief Justice considers appropriate for Judges to hear and determine, while less serious service offences are heard by Federal Magistrates. A single Judge[708] is to exercise the original jurisdiction of the MCA in the Superior Division, in respect of Schedule 1 Offences or a proceeding which the Chief Justice has directed to be heard in that Division.[709] However, as the MCAB 2012 proposed the previous court martial and DFM system was to survive only in respect of hearings overseas where the MCA had determined it would not hear, called the *Residual Court Martial System*,[710] appeals from a court martial or DFM will be heard by the Full Court in the Superior Division.[711]

6.9 Issues arising from the MCAB 2012

6.9.1 The Jury Issue

When the MCAB 2012 was considered by the Senate Legal and Constitutional Affairs Committee, it received submissions[712] concerning the lack of an option for trials of defence members for serious service offences to be heard before a judge and jury. In fact, proposed clause 64 of the MCAB 2012 provides that all service offences charges are to be dealt with 'otherwise than on indictment'. That

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(a) the Territory offence concerned is an offence referred to in s63(1)(a)(i), (ia), (ii) or (iii) or s 63(1)(b) of the DFDA; or

(b) the fixed or maximum punishment for the Territory offence concerned is imprisonment for 10 years or more Engaging in conduct outside the Jervis Bay Territory that is a Territory offence

S 62(1) if:

(a) the relevant service offence referred to in s62(1) is based on a Territory offence Commanding or ordering service offence to be committed in subparagraph 63(1)(a)(i), (ia), (ii) or (iii) or paragraph 63(1)(b) of the DFDA; or

(b) the fixed or maximum punishment for the relevant service offence referred to in S62(1) is imprisonment for 10 years or more.

708 MCAB 2012, Cl 65.

709 MCAB 2012, Cl 65(3).

710 Dealt with in chapter 6.9.3.

711 MCAB 2012, Cl 65(4).

712 The Committee received 15 submissions including those from the Returned & Services League of Australia (RSL) Submission (undated), Submission No 53.

is, they will not be heard before a jury. This raises a dilemma for members of the ADF. They do not lose their rights as citizens by becoming members of the ADF, but they do voluntarily, in peacetime, agree to serve in the ADF and abide by its lawful orders and the consequences for breaches of those orders which may amount to service offences under the *DFDA*.

As may be observed from the Schedule 1 Offences, a Territory Offence can include a charge of murder. Ordinarily, in the civilian criminal law, this would be a charge preferred on indictment. 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.*

In *R v. Snow,*[713] Griffith CJ described the constitutional guarantee provided in s 80 of the Constitution as "*a fundamental law of the Commonwealth*". The rationale behind that guarantee is the protection of the citizen against those who customarily exercise the authority of government who might seek by their laws to abolish or undermine "*the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England*".

However, in *R v Archdall and Roskruge; Ex parte Carrigan and Brown,*[714] the High Court held that Parliament was not actually required to use an 'indictment' for an offence which carried a penalty of one year's imprisonment. Higgins J stated that *'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment'*.[715]

This does not necessarily produce a just outcome. An examination of the *Crimes Act* 1914 (Cth) reveals that ordinarily such serious offences as may be laid against members of the ADF in the civil criminal law would be 'indictable'. Indeed, Appendix 9 (hereto) sets out the scale of punishments able to be handed down by a court martial or a DFM which includes life imprisonment.[716] The following sections of the *Crimes Act* 1914 (Cth) are plain in their meaning:

> *4G Indictable offences*
>
> *Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.*

713 (1915) 20 CLR 315, 323.
714 (1928) 41 CLR 128.
715 (1928) 41 CLR 128, 139.
716 Appendix 9, DFDA Schedule 2, s 68(1)(a) punishment — life imprisonment.

4H Summary offences

Offences against a law of the Commonwealth, being offences which:
(a) are punishable by imprisonment for a period not exceeding 12 months; or
(b) are not punishable by imprisonment;
are summary offences, unless the contrary intention appears.

In the Second Reading Speech,[717] the Attorney-General gave two reasons for not including the option of trial by jury in the MCAB 2012. 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 does not need to 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 a service offence needs to be tried overseas, a requirement to empanel a civilian jury would create significant practical barriers for the prosecution of offences.

Notwithstanding these comments, the s 80 issue has not yet been tested by a case in which an ADF member facing a charge which carries a long term of imprisonment (for instance, more than 12 months) has been denied the right to trial by jury by virtue of the treatment of service offences as being 'otherwise on indictment'.

Or is s 80 of the constitution merely procedural and can be avoided simply by charging an ADF member 'otherwise than on indictment'?

In *R v Federal Court of Bankruptcy; Ex p. Lowenstein*[718] Dixon and Evatt JJ highlighted the foolishness of the notion that the framers of the Constitution solemnly inserted in the Constitution a provision of merely procedural significance. After referring to Higgins J's statement in the *Archdall Case*, [719]Dixon and Evatt JJ observed:

> *"It is a queer intention to ascribe to a constitution; for it supposes that the concern of the framers of the provision was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but to prevent a procedural solecism, namely, the use of indictment in cases where the legislature might think fit to authorise the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that 'the Constitution is not to be mocked.' A cynic might, perhaps, suggest the possibility that section 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and*

717 House of Representatives, *Hansard*, 21 June 2012, 7414.
718 (1938) 59 CLR 556, 581–582.
719 (1928) 41 CLR 128.

> *an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorising the substitution of some other form of charge for an indictment seems but to mock at the provision …*

In *Li Chia Hsing v Rankin*[720], Murphy J endorsed the views of Dixon and Evatt JJ and added that, in his opinion s 80 *'contains a guarantee of a fundamental right to trial by jury in criminal cases (at least in serious ones).*' It is argued that it cannot be said that a term of imprisonment in excess of 12 months is not serious.

The extent of the 'guarantee' of trial by jury contained in s 80 of the Constitution was tested in *Kingswell v the Queen.*[721] The majority of Gibbs CJ, Wilson and Dawson JJ had little difficulty in observing:[722]

> *The fact that s80 has been given an interpretation which deprives it of much substantial effect provides a reason for refusing to import into the section restrictions on the legislative power which it does not express. It has been held that s80 does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily. This result has been criticized, but the Court has consistently refused to reopen the question and the construction of the section should be regarded as settled.*[723]

However, it is the powerful dissent of Deane J in *Kingswell* [724] which raised the awaiting issue for determination of whether a serious service offence, which would otherwise be dealt with on indictment in the civilian criminal justice system, but is not, will offend s 80 of the Constitution.

For example, will s 80 of the Constitution be breached if the charge of a serious service offence under s 61 of the DFDA, picking up s 60(2) of the *Crimes Act* 1900 (ACT), for murder and carrying a sentence of life imprisonment, is dealt with by a DFDA charge 'otherwise than on indictment'?

Interestingly, the determination of this issue will not readily arise in peacetime as serious criminal offences which would also be service offences are dealt with in the civilian criminal law systems.

In *Kingswell*, Deane J observed that treating the notion of a 'trial on indictment' in s 80 as involving the absence of any applicable statutory procedure providing for immediate determination by justices or magistrates or a judge,

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720 (1978) 141 CLR 182, 198; cf *Beckwith v R* (1976) 135 CLR 569 at 585; *Yager v R* (1977) 139 CLR 28 at 52; *Hammond v Commonwealth* (1982) 152 CLR 188 at 201.

721 (1985) 159 CLR 264.

722 (1985) 159 CLR 264, [10].

723 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86, at p 88; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182.

724 (1985) 159 CLR 264, 296–322.

would mean that the Parliament could effectively avoid the primary purpose of s 80 by providing that the trial of any designated offence should be by way of such statutory procedure. In the military context, this has led to the use of the word 'charge' instead of 'indictment'. Deane J went on to observe that it is a "*deep seated conviction for free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment*." [725]

Deane J stated that the consequence of this device is that s 80 would not contain an effective guarantee of trial by jury. What is worse, the designated method of avoiding the ostensible guarantee of trial by jury in the case of serious offences provided in s 80 would be by way of a legislative provision that such offences be dealt with by a statutory summary procedure devised to deal only with less serious offences. On this point, Deane J observed "*As Dixon and Evatt JJ commented in Lowenstein … there is high authority for the proposition that the Constitution is not to be so mocked*." [726]

As it is clear that the Constitution is not to be mocked in this way, Deane J stated:[727]

> *In these circumstances, one would need to identify convincing legal reasoning or direct authority to justify construing the words "on indictment" as introducing to the phrase "trial on indictment" in s.80 an essential negative element that the trial be not by way of "summary proceedings". There is no convincing legal reasoning to justify such a reading of s.80. To the contrary, as Dixon and Evatt JJ. demonstrated …, the ordinary principles of constitutional construction support the conclusion that the words "trial on indictment" in s.80 should be construed by reference to substance rather than mere procedure or form and as referring to the elements which will, of themselves, suffice, as a matter of substance, to characterize a proceeding as a trial on indictment for the purposes of s.80. The most obvious of those elements is that implicit in the notion of a "trial … of (an) offence", namely, that the proceedings should be concerned to determine, for the purposes of the law, whether or not a person is guilty of some offence of which he stands accused.*

Deane J went on to analyse[728] the legislation in force in England and the Australian colonies which dealt with indictable offences and summary offences, and concluded[729] "*In my respectful view, Dixon and Evatt JJ were correct in their conclusion that there lies at the heart of the concept of 'trial on indictment' in s 80 the notion of the trial of a 'serious offence*'." As noted above, it is argued the trial

725 (1985) 159 CLR 264, 298.
726 *Ibid.*, 307.
727 *Ibid.*, 308.
728 *Ibid.*, 309.
729 *Ibid.*, 310.

of a serious service offence carrying with it a term of imprisonment in excess of 12 months must be considered as serious.

Within four months of the decision in *Kingswell's case*, the High Court decided *Brown v R.*[730] In that case, Brown had been charged with an offence against section 233B(1)(ca) of the *Customs Act* 1901 (Cth), which prohibited possession of a drug reasonably suspected of having been imported into Australia. The charging document was called an '*information*', that is, it was not called an 'indictment', but it was skilfully argued, it was common ground that the trial was on 'indictment'. Importantly, from any subsequent DFDA point of view which uses 'charge' and not 'indictment', this meant that the High Court avoided actually having to determine what difference, if any, the naming of the charging document may have made to the decision. Brown sought to elect[731] to be tried by judge alone. The trial judge ruled that s 80 of the Constitution precluded such an election and the matter must proceed before a judge and jury. When Brown was convicted, he appealed. This raised the converse question of whether the right to trial by jury under s 80 could be waived even though it was initiated by a document called an 'information'.

The majority of the High Court held that s 80 could not be waived. In doing so, they revealed a quite different approach from the previous narrow construction of the section. According to Brennan J:[732]

> *Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice … Section 80 of the Constitution entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence. That section is not concerned with a mere matter of procedure but with the constitution or organisation of any court exercising that jurisdiction.*

Deane J reiterated the views he had expressed in *Kingswell*[733] and concluded that s 80 commanded trial by jury, rather than conferring a privilege that could be waived.

The High Court adopted a broader construction of s 80 in *Cheatle & anor v R*[734] where the defendants had been charged with conspiracy to defraud the Commonwealth. Section 57(1) of the *Juries Act* 1927 (SA) provided for a majority verdict by ten or eleven jurors. The defendants were convicted on a majority verdict. They appealed and argued that unanimity was an indispensable feature

730 (1986) 160 CLR 171.
731 *Juries Act* 1927 (SA), s 7(1).
732 (1986) 160 CLR 171, 215.
733 (1985) 159 CLR 264.
734 (1993) 177 CLR 541.

of trial by jury, according to long-established notions which continued to apply up to the time the Constitution was enacted. The High Court unanimously accepted the appellants' argument and, it is argued, revealed a broader approach to s 80.

Whilst the scope of compliance by the DFDA with s 80 of the Constitution is outside the scope of this thesis, the warning signals contained in *Kingswell* (and other cases discussed above) cannot be ignored when considering Australia's present and possible future military justice system in its determination to charge defence members otherwise than on indictment.

Gray,[735] in his analysis of the High Court cases pertaining to s 80,[736] observed that even McHugh J in *Cheng v The Queen*[737] eventually accepted the narrow orthodox view regarding s 80, stating that "*the section serves little purpose*". Gray went on to question the wisdom of continuing to interpret a provision in such a fundamental document as the Constitution in a way that even some of its adherents admit render the section impotent.[738] Gray further observed that this is even more so when one realizes that, potentially, the section could be used to strongly protect rights which many great judges and legal scholars agree are fundamental in a democratic society.[739] Perhaps most poignantly, Gray questioned how it can be seriously argued that the right to a unanimous verdict was 'essential', but the requirement to use a jury at all for some kinds of cases was not.[740]

Against this background concerning the breadth or narrowness of s 80 of the Constitution, the Senate Legal and Constitutional Affairs Committee's inquiry into the MCAB 2012 was challenged by the RSL[741] in its submission

735 Anthony Gray, *Mockery and the Right to Trial by Jury*, (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 66, 80.

736 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 (Dixon and Evatt JJ dissenting), *Zarb v Kennedy* (1968) 121 CLR 283, *Li Chia Hsing v Rankin* (1978) 141 CLR 182 (Murphy J dissenting), *Kingswell v R* (1985) 159 CLR 264 (Brennan and Deane JJ dissenting), *Brown v The Queen* (1986) 160 CLR 171 (Brennan and Deane JJ dissenting on this point), *Cheng v The Queen* (20001) 203 CLR 248 (Gaudron and Kirby JJ dissenting on this point), *Brownlee v The Queen* (2001) 207 CLR 278 (Kirby J dissenting on this point).

737 (2000) 203 CLR 248, 289.

738 Barwick CJ lamented, but declined to address, 'what might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision', *Spratt v Hermes (*1965) 114 CLR 226, 244.

739 Gray, *ibid.*, 80.

740 *Ibid*., 84.

741 The RSL argued that the MCAB 2012 did not comply with the norms of contemporary Australian society as it denied the right of trial by jury to members of the ADF charged with serious service offences. The Bill established a "two-tier" system of military justice (a Military Court, and, Courts Martial and DFM hearings overseas when the Military Court chose not to sit overseas) without establishing compelling reasons for so doing. Furthermore, the Bill did not address another separate circumstance, where members of

challenging the MCAB 2012 requiring that all charges in the proposed military court be tried 'otherwise than on indictment' and, therefore, without a jury. The RSL[742] argued that the sole reason advanced for this position was contained in the Explanatory Memorandum to the MCAB 2012, namely: "*where there is a need to try service offences overseas, the requirement to empanel a civilian jury would establish almost unsurmountable barriers to the prosecution of offences*", and that this reason was inadequate, insufficient and failed to stand up to close analysis for the reasons contained in the submission.

In his submission to the Senate Committee, Street[743] argued that Articles 84 and 87 of the *Third Geneva Convention Relative to the Treatment of Prisoners of War* of 12 August 1949 in Schedule 3 to the *Geneva Conventions Act 1957 (Cth)* operated to provide a prisoner of war tried in Australia with greater protective rights to a trial by jury as prisoners of war have the benefit of s 80 of the Constitution.[744]

Street logically argues that since military offences include a power to prosecute civilian offences, as if they were military offences, then civilian-based offences are properly dealt with by civilian prosecutors. The Commonwealth DPP has the system, procedures, experience, balance and expertise to properly deal with prosecution of indictable federal civilian offences. The State and Territory DPPs have similar expertise. By contrast, he argues that the DMP simply does not have that same level of expertise and it is both unfair and unreasonable to leave prosecutorial decisions concerning ordinary civilian offences of ADF personnel to the DMP. He concludes that this prosecutorial power vested in the DMP operates so as to permit the pursuit of civilian offences in the name of a military offence. This is not appropriate and is even less appropriate when a decision to prosecute a civilian-type offence by the DMP results in ADF personnel being deprived of the benefits and protection of s 80 to which every other Australian is entitled.

Consequently, it is argued that 'real disciplinary offences' should be dealt with by the chain of command and 'criminal offences' by a civilian criminal justice system. The DMP is not 'command' as it is outside of the chain of command. Accordingly, on the one hand because of the statutory independence

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the ADF are charged on indictment in the ordinary civil criminal courts they are deprived of the opportunity of having defence personnel serve on the jury to their cases due to s4(1) of *Jury Exemption Act* 1965 (Cth).

742 The Australian Defence Association made similar comments at [47], Submission No 13, dated 16 September 2012.

743 Alexander W Street, SC, Submission No 2, dated 11 July 2012.

744 Street SC argues the charge would be an indictable federal offence triable in the civilian criminal courts notwithstanding s 7 of the DFDA.

of the DMP, command cannot prohibit the DMP from pursuing an inappropriate prosecution as it may see it. On the other hand, disciplinary action by command which fosters real military discipline, rather than prosecution by a statutorily independent DMP, must be a truly desirable outcome for command.

What is also of concern is the generic offence under s 60 of the *DFDA* which is a catch-all provision which creates a criminal offence[745] for what is a military issue being *'prejudicial conduct'*. A charge of this nature is properly to be regarded as a unique service nexus offence and a very useful command discipline provision, but only when used by command — not by a DMP. It is argued that no ADF member should be exposed to the prospect of a criminal record for contravention of a 'prejudicial conduct' service offence under s 60 of the DFDA. The better solution is to recognise that what most promotes discipline within the ADF is discipline through command, not prosecution by the DMP. The DMP should not have power to prosecute a prejudicial conduct offence under the *DFDA*, as this offence should be dealt with only by command, and a conviction for that offence should have no civilian consequences.

6.9.2 Deployability of a Military Court

A serious issue likely to arise should a military court be established, is the determination of what is to occur when members of the ADF are deployed overseas and offences are allegedly committed in breach of the *DFDA*. Deployment refers to activities required to move ADF personnel and materials from its base in Australia to a specified overseas operational destination such as Afghanistan, for example. Whereas members of the ADF may be ordered to be deployed as a condition of their terms of service with the ADF, the military court is deliberately not part of the ADF. The proposed MCA is intended to be a Chapter III court. This presents difficulties for the ADF in respect of any determination by the military court that it is not prepared to sit and preside on trials overseas.

A Chapter III judge may not be ordered by the Executive, through the ADF or otherwise, to deploy with the ADF. The judiciary is an independent tier of government equal to the Executive and not subservient to it by way of compliance with an order to deploy. A judicial member of the military court will not be considered a *'defence civilian'* under s 3 of the DFDA, as it is incompatible with judicial office to consent "*to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force*."[746]

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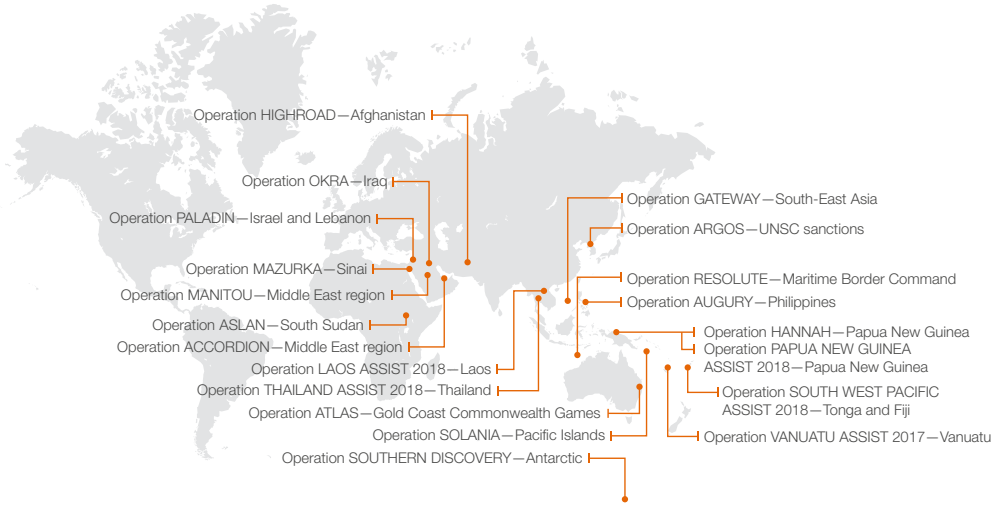
745 As was proposed by MCAB 2012, cl 64 and s 3A of the *DFDA* in the Transitional Provisions Bill.

746 DFDA, s 3 definition: "defence civilian" (n. 157).

There can be no provision in any statute establishing a military court which requires the judicial members mandatorily attend overseas to exercise jurisdiction. Whilst a judicial member may be assigned to a particular location, this must be in their commission of appointment and that relates only to a geographical position in Australia.[747]



Map 6-1: ADF operations overseas 2019 [748]

There are other practical issues which were not addressed in the MCAB 2012 which affect judicial members when agreeing to conduct hearings overseas. Neither the MCAB 2012 nor the Transitional Bill provided for conditions of service of judges when the military court is sitting overseas. Judges sitting overseas will be performing their services in high risk areas of hostility and combat. Not only will the judges be exposed to such hazards, but also, so will their staff.

None of these 'judicial civilians' will necessarily be protected under the *Law of Armed Conflict* [749] in any special category other than as 'civilian non-combatants' under the *Fourth Geneva Convention*.[750] The *Law of Armed Conflict*, also known as international humanitarian law or the *Law of War*,

747 MCAB, cls 14(1) and (2).

748 Department of Defence, *Annual Report,* 2017–2018, Figure 1.1, 5.

749 *Third Geneva Convention relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, adopted 1929, revised 1949. Article 4 defines prisoners of war — civilian judicial officers of military courts are not included. Currently ratified by 196 parties to the Convention.

750 *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, adopted 1949. Currently ratified by 196 parties to the Convention.

regulates the conduct of hostilities, including the use of weaponry and the protection of victims in situations of both international and non-international armed conflict. It covers: the personal status of combatants and civilians; the conduct of hostilities (methods and means of warfare, including choice of weapons and targeting operations); the protection of victims (sick, wounded, shipwrecked, prisoners of war, and civilians); and various ways of securing the law's implementation and enforcement.

Nonetheless, in the event of capture, it may be possible for members of the military court to have recourse to Article 4A(4) of the *Third Geneva Convention* to claim prisoner of war status which provides:

> *(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.*

However, as may be appreciated, it is entirely unsatisfactory for members of a military court to be left to the goodwill of the enemy in order to accord to members of a foreign military their rights as prisoners of war under the *Third Geneva Convention*. Furthermore, members of the military court are not covered by the *Military Rehabilitation and Compensation Act* 2004 (Cth).[751] It might be possible for members of the military court to have recourse to the *Safety Rehabilitation and Compensation Act* 1988 (Cth).[752] It would be advisable to include a provision in the legislation to enable members of the military court and accompanying staff to be entitled to rehabilitation and compensation under the *Military Rehabilitation and Compensation Act* 2004 (Cth). There may also be a need to review the *Judges Pensions Act* 1968 (Cth) to ensure that there is no lessening of coverage.

These real issues relating to deployment highlight the difficulties confronting an overseas sitting of the military court. As at 31 December 2018, over 2400 members of the ADF are deployed in overseas operations as follows:

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751 In the event that a member of the MCA whilst serving overseas is injured or requires medical assistance, this may be one of the matters to be arranged between the CJM and the CDF under cl 32 of MCAB 2012. This probably further highlights the lack of precision in the MCAB 2012 or the transitional bill to actually address the possibility of the MCA sitting overseas.

752 The terms of rehabilitation and compensation under the latter Act are inferior to those provided under the *Military Rehabilitation and Compensation Act* 2004 (Cth). It is outside the scope of this thesis to detail the changes. The point to note that there is a discrepancy.

OPERATION	LOCATION	PERSONNEL	GOVERNMENT MANDATE
Accordion	Middle East Region	500	Ongoing
Aslan	Sudan	25	Reviewed Annually
Manitou	Middle East Region	240	Ongoing
Mazurka	Egypt	27	Ongoing
Okra	Middle East Region and Iraq	600	Ongoing
Paladin	Israel/Lebanon	12	Reviewed Annually
Resolute	Australian Maritime Interests	600	Ongoing
Highroad	Afghanistan	300	Ongoing
Augury – Philippines	Philippines	100	Reviewed Annually

Table 6-1: Number of ADF members Deployed overseas 2018 [753]

As may be appreciated, there is a real possibility of breaches of the DFDA by members of the ADF at many overseas locations. Should hostilities at any point increase, there is also the likelihood of increased deployment of ADF members at short notice. With the current numbers alone being deployed, the issue for consideration is whether the MCA can or should sit overseas. This important issue will now be considered.

753 <http://defence.gov.au/Operations/>

According to the Explanatory Memorandum to the MCAB 2012,[754] the military court is to have the power to determine where it will sit.[755] Generally, it would sit in Australia. However, it may sit at any location outside Australia to hear and determine a proceeding or part of a proceeding in respect of a charge

754 MCAB 2012, Explanatory Memorandum, [89]-[91].

755 MCAB 2012, cl 51, Place of sitting

(1) The Military Court is to sit at a place in Australia to hear and determine a proceeding, or a part of a proceeding, unless the Military Court determines, in accordance with this section, that it is both necessary and possible for it to sit at a place outside Australia to hear and determine the proceeding or the part of the proceeding.

(2) The Military Court may sit at a place outside Australia to hear and determine a proceeding, or a part of a proceeding, if:
  (a) the accused person or the Director of Military Prosecutions requests the Military Court to sit at that place; and
  (b) the Military Court determines, in the interests of justice, that it is necessary for it to sit at that place; and
  (c) the Military Court determines, under subsection (4), that it is possible for it to sit at that place.

(3) For the purposes of making a determination under paragraph (2)(b), the Military Court must have regard to:
  (a) the location where the service offence is alleged to have been committed; and
  (b) the location of the accused person; and
  (c) the location of witnesses (if any); and
  (d) the ability of those witnesses to give evidence in Australia; and
  (e) any submissions made by the accused person or the Director of Military Prosecutions.

(4) If the Military Court determines that it is necessary for it to sit at a place outside Australia, the Military Court must also determine whether it is possible for it to sit at that place, having regard to:
  (a) the security of the place; and
  (b) any relevant Australian or foreign laws; and
  (c) if the place is in another country:
    (i) any relevant agreements or arrangements that are in force between Australia and that country; and
    (ii) the international legal basis for the presence of the Australian Defence Force in that country; and
    (iii) the international legal basis for the presence of the Military Court in that country; and
  (d) any submissions made by the accused person or the Director of Military Prosecutions.

(5) If the Military Court determines:
  (a) that it is necessary for it to sit at a place outside Australia to hear and determine a proceeding or a part of a proceeding; but
  (b) that it is not possible for it to sit at that place to hear and determine the proceeding or the part of the proceeding;

  then:
  (c) the proceeding is taken to have been discontinued; and
  (d) all charges to which the proceeding relates are taken to have been withdrawn from the Military Court.

Note: The charges may be dealt with under the Defence Force Discipline Act 1982.

of a service offence where it is necessary to do so, in the interests of justice, and the accused person or the DMP has applied for it to do so.

The agreements or arrangements in place between Australia and the host nation could include Status of Forces Agreements[756] (**SOFAs**) or other international arrangements which provide for the exercise of jurisdiction over deployed forces for the purposes of military discipline. If the country in question does not have a recognised or functioning government in place, and the presence of the ADF is based upon a United Nations Security Council resolution[757], this is likely to be a relevant consideration.

However, before embarking upon a review of SOFAs, the MCA would have to commence its consideration of a charge with a degree of hesitancy given that any attempt to exercise jurisdiction in a foreign country (being a war zone) would involve a transgression upon the sovereignty of that other jurisdiction. It is a tenet of public international law, that when dealing with issues of sovereignty, there is a duty to maintain non-interference with a sovereign power involving itself in the jurisdiction of another sovereign power, without the consent of the other.[758] It has long been settled that no foreign power can *"of right institute or erect any court of judicature of any kind within a jurisdiction … but such only as may be warranted by, and be in pursuance, of treaties"*.[759]

The Explanatory Memorandum[760] to the MCAB 2012 recognises that if the military court determines it is necessary to sit at a place outside Australia in the interests of justice, the military court is then required to determine whether it is

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756 A Status of Forces Agreement is an agreement between a host country and a foreign nation to allow the stationing of military forces in that country. SOFAs are often included, along with other types of military arrangements, as part of a comprehensive security arrangement. For example, "The North Atlantic Treaty Organization, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, last updated 14 October 2009"<https://www.nato.int/cps/en/natohq/official_texts_17265.htm>.

757 For example, "Comprehensive Review Of The Whole Question Of Peace-Keeping Operations In All Their Aspects, Model status-of-forces agreement for peace-keeping operations, Report of the Secretary-General, 9 October 1990" <https://undocs.org/a/45/594>.

758 M Akehurst, 'Jurisdiction in International Law' (1972) 46 *British Yearbook of International Law* 145; Charter of the United Nations art 2(7) 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with The Charter of The United Nations, GA Res 2625, UN GAOR, 25th sess, 1883rd mtg, Supp No 28, 24 October 1970, art 3. See also 'Draft Declaration on Rights and Duties of States' [1949] *Yearbook of the International Law Commission* 286, art 3.

759 *Glass v The Betsey*, 3 US 6, 16 (1794).

760 MCAB 2012, Explanatory Memorandum, cl 51(4), [102].

possible to do so. In this regard, the military court must consider: the security of that other place, any relevant Australian or foreign laws, any arrangements in place between Australia and the host nation, the international legal basis for the presence of both the ADF and the military court in that country, and submissions from the accused person and the DMP.

However, where it is necessary but not possible for the military court to sit in a place outside Australia to hear and determine the proceeding or a part of the proceeding, the proceeding is discontinued and the charge is withdrawn from the military court.[761] In this instance, it is argued that charges may be dealt with under the DFDA by a new ACMT (discussed in chapter 7) as those persons may be ordered to be deployed to a place outside Australia to hear and determine the charge.

6.9.3 Residual Courts Martial 'Backup' System

Although it was intended that the MCAB 2012 replace the system of courts martial and DFMs in the military justice system, courts martial and DFMs were to be retained as a 'residual or backup system'[762] where the military court determined that it is necessary, but not possible, for the military court to conduct a trial overseas. However, as has already been established, courts martial and DFMs operate within the military chain of command and are not independent of the ADF. JAs would continue to be appointed by the CDF or a Service Chief, on the nomination of the JAG and DFMs are appointed from JAs by the JAG.

In fact, as a consequence, this limits the right of persons to have charges of service offences heard by an independent and impartial tribunal. However, given the confined circumstance in which a court martial or DFM would operate, the Explanatory Memorandum[763] argues that these limits are reasonable, necessary and proportionate as an alternative means of handling such cases.

It is argued that the ACMT[764] provides a better outcome than would otherwise be obtained by resurrecting the old courts martial and DFM hearings. The ACMT will conduct proceedings approximating as closely as possible the civilian criminal trials as, it is argued, the DFM will be the judge and the panel members will only be jurors bound by determinations of law from the DFM. The DFM will be in charge of sentencing, no longer the remit of the court martial panel.

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761 MCAB 2012, clause 51(5).

762 The Backup System was contained in the Transitional Bill.

763 MCAB 2012, Explanatory Memorandum, [133].

764 Discussed in chapter 7.12.3.

It is recognised that this is an inferior outcome to that of having a Chapter III military court determine charges in overseas areas of conflict but the reality in regard to the lack of protections for members of the military court and their staff cannot be ignored.

6.10 Summary

Currently, the Australian military justice system remains within the chain of command, convened in an *ad hoc* fashion, with participants appointed on an a*d hoc* basis, and being reliant upon the defence power of the Constitution, which has received less than overwhelming approval in previous decisions of the High Court of Australia.

The next chapter proposes a structure for the establishment of a Chapter III military court.

7 A PROPOSED NEW MILITARY JUSTICE REGIME FOR THE ADF TO OPERATE IN PEACE AND IN WAR

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.[765]

Overview

The foregoing chapters have argued that the ADF needs to proceed further in the reorganisation of its military justice system. To do so, it is argued that, consistent with the recommendations of the 2005 Senate Report, it must establish a military justice system which provides for both impartiality and independence from the chain of command. Given the constitutional restraints, explained in chapter 3.2 above, in order for the ADF to achieve this outcome, it will be necessary for the Parliament to establish a Chapter III court, which must be a specialist military court (**military court**). The matters which must be considered and provided for in the enabling legislation for the creation and establishment of the military court will be examined in this chapter. Much of the preparatory work was undertaken in the MCAB 2010 and further improved in the MCAB 2012, both of which were examined in chapter 6.8. However, since 2012, no Government has been prepared to give further support to the necessary reform of the ADF military justice system and to the establishment of the military court.

In the event that the arguments presented in this chapter are accepted, there should then be little standing in the path of the establishment of the military court. This thesis recognises that there will be serious issues confronting the military court when it is called upon to decide whether to sit overseas in war-like situations. If such a situation were to arise, this chapter argues for the establishment of an alternative service tribunal which would operate alongside the military court when the ADF is engaged in an overseas war or similar operations, in circumstances where international law will not permit the military court to sit. This chapter argues for the establishment of an alternate

765 *The Zamora* [1916] 2 AC 77, 107, per Lord Parker.

new form of court martial system in a new service tribunal herein called the Australian Court Martial Tribunal (**ACMT**)[766] in the event that the military court declines to exercise its jurisdiction overseas (in areas of operation by the ADF). The ACMT would provide a new system for the dispensation of military justice, somewhat similar in structure to the failed AMC. However, the ACMT would be a service tribunal which would require review and confirmation of its orders, within the chain of command, in order to avail itself of its 'apparent exceptionalism' from Chapter III of the Constitution.

Accordingly, this chapter presents and analyses the solutions proposed by this thesis. The analysis is in two parts: first, it considers the essential elements of a properly-constituted military court created under Chapter III; secondly, it considers the establishment of a new 'court martial system', the ACMT, which is to operate only in circumstances where a military court determines that it will not exercise its jurisdiction overseas for whatever reason.

7.1 Essential elements of a properly constituted Chapter III military court

Independence and impartiality must be the cornerstones of the new military justice system.[767] Chapter 5 examined the reviews conducted of the current system of military justice operating in Australia, which were critical of the lack of independence that courts martial and DFMs have from the Executive. These reviews culminated in recommendations by the 2005 Senate Report for changes to be made to the entire military justice system to ensure fair trials. *Cox,*[768] *Bevan*[769] and *Tracey*[770] constitute the accepted legal 'trilogy' of military law authorities which require all service tribunals to act judicially. In *Cox*, in Dixon J's often cited passage on *Bevan*, stating:[771]

> *In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional. … To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.*

766 Discussed further in chapter 7.12. The residual role of the ACMT will need to be provided for in Transitional Provisions and Consequential Amendments legislation. See also MCAB 2012, cl 51.

767 Discussed in chapters 3.5.1 and 3.5.2.

768 (1945) 71 CLR 1, 23.

769 (1942) 66 CLR 452.

770 (1989) 166 CLR 518, 573–574.

771 (1945) 71 CLR 1, 23.

In the High Court decision of *White v Director of Military Prosecutions*,[772] Gleeson CJ reviewed the trilogy and pertinently made the following observation regarding the apparent 'exceptionalism' of service tribunals:[773]

> *To adopt the language of Brennan and Toohey JJ in Tracey, history and necessity combine to compel the conclusion, as a matter of construction of the Constitution, that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, the power which is exercised is not the judicial power of the Commonwealth; it is a power sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline*

Consequently, while courts martial '*apparently*'[774] do not and cannot exercise the judicial power of the Commonwealth according to Chapter III of the Constitution, the decision-making by those who preside must be exercised judicially which, logically, carries with it the rights to, and requirements of, an independent and impartial trial. Furthermore, pursuant to the principles of international law,[775] if decision makers are determining rights and obligations or criminal charges, then they are considered to be 'courts' and therefore must act independently and impartially in what they do.

Before any bill to establish the military court is recommended to the Parliament[776] to be passed, its compatibility with human rights and freedoms must be considered[777] and this includes a reference to Article 14[778] of the ICCPR. Although, of itself, this instrument does not confer a right to trial by jury, it does require a trial before an impartial and independent tribunal. In order to meet the criteria of independence and impartiality, it is argued that the military court to be established under Chapter III of the Constitution must be a specialist court staffed with specialist judges.[779] Consistent with the requirements of a specialist court, the military court must be a superior court of record comprising judicial officers who, by reason of their experience or training, understand the

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772 *White v Director Military Prosecutions* (2007) 231 CLR 570.

773 *Ibid.*, [14].

774 (1945) 71 CLR 1, 23.

775 See chapter 4.2.2.

776 MCAB 2012, Explanatory Memorandum, 59.

777 Being those recognised or declared in the international instruments listed in s3 of the *Human Rights (Parliamentary Scrutiny) Act* 2011 (Cth).

778 See (n. 420).

779 As in the requirements for appointments to the FamCA — See *Family Law Act* 1975 (Cth), s22(2), a person shall not be appointed as a Judge unless:
(a) the person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than five years; and
(b) by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

nature of service in the ADF.[780] This requirement would not require judicial officers of such a specialist court to adapt their approach to the exercise of their judicial functions to operate in a militaristic fashion, nor does it intimate any subservience to the military and the chain of command. On the contrary, judicial officers of such a specialist court would be expected to exercise their functions as independent and impartial judicial persons. However, to maintain and protect the independence of judicial officers appointed to such a specialist court from within the ranks of the ADF, it would be a requirement that no judicial officer may concurrently hold any position in the ADF. That is, they may no longer be members of the ADF in any capacity and would have to resign their commissions. Given the likely small size of the military court,[781] especially in peacetime, judicial officers appointed to the military court would be able to hold dual commissions in other federal courts on the same terms and conditions, and be given judicial tenure to the age of 70 as required by Chapter III of the Constitution.

The requisite enabling legislation to establish the military court must replace the interim measures[782] which re-established and maintained the pre-2007 system of courts martial and DFMs. Those interim measure were legislated following the High Court decision in *Lane v Morrison*[783], which unanimously found that the provisions of the *DFDA*, which created the AMC, were invalid.

Prior to commencing this dissertation, consideration was given to developing an argument supporting the establishment of the military court as a division of the Federal Circuit Court of Australia (**FCCA**). However, as a result of proposed changes to the FCCA announced by the Government and introduced in 2018,[784] it is possible, and perhaps probable, that the FCCA will

780 In this respect, in its consideration of the MCAB 2012, the Senate Committee noted a submission from the Australian Defence Association which expressed its concern that 'there is no standard or criterion as to what this experience or training is to consist of, or how the training or experience is to be attained, measured or indeed how long its duration needs to be'. Submission, 9.

781 Discussed in chapter 2.6.9.

782 See chapter 6.4. The 2009 (No 1) Act was further amended to extend the interim arrangements by the *Military Justice (Interim Measures) Amendment Act 2011* (Cth) and again extended by the *Military Justice (Interim Measures) Amendment Act* 2013 (Cth). These Act would also need to be replaced if still extant at the time of commencement of a military court.

783 (2009) 239 CLR 230.

784 Federal Circuit and Family Court of Australia Bill 2018 (Cth) and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth). The Liberal National Party Coalition Government was returned on 18 May 2019. On 7 August 2019 the Attorney General, Christian Porter MP, at the Family Court and Federal Circuit Court Plenary announced the legislation, whilst being amended, was to be reintroduced into the 46th Parliament: <https://www.attorneygeneral.gov.au/Media/

be formally merged with the Family Court of Australia (**FamCA**). As a result, and given the uncertainty surrounding the separate existence of the FCCA, this thesis argues that a stand-alone military court should be established until such time as the proposed merger is either completed or abandoned at which time it might be reviewed. However, until that time, it is argued that a military court, in its own right, should be established.

7.2 Jurisdiction of the military court

7.2.1 Original jurisdiction

As a general rule, the 'original jurisdiction' of a court refers to the jurisdiction with which it has been invested to hear and determine proceedings brought before it at first instance, rather than on appeal from a lower court or tribunal.[785]

The proposed military court will be vested with the power to imprison. Accordingly, its jurisdiction is best understood to be criminal in effect and its original jurisdiction[786] may be modelled on Part III, Division 1A of the *Federal Court of Australia Act* 1976 (Cth),[787] which established that court's specialist federal criminal cartel jurisdiction. Using this part of the Act as a

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Pages/family-court-and-federal-circuit-court-plenary-opening-address-7th-august-2019.aspx>.

785 Butterworths, *Concise Australian Legal Dictionary*, 3rd ed., (LexisNexis Butterworths, Australia, 2004), 312.

786 The enabling legislation establishing the military court may also provide it with such other jurisdiction as is vested in it by the Parliament: cf MCAB 2012, cl 63(1).

787 Section 23AA, *FCA Act* 1976 (Cth) sets out the "Background and simplified outline" of the Division:

- The following is background to, and a simplified outline of, this Division:
- This Division sets out procedures to be followed during criminal proceedings in the Court relating to certain indictable offences.
- This Division does not confer jurisdiction on the Court in relation to indictable offences. Other provisions need to have done this.
- This Division does not set out all of the procedures to be followed during these criminal proceedings. It is supplemented by procedures set out in the Rules of Court, and also by procedures set out in:
  (a) State and Territory laws; and
  (b) Rules of Court of State and Territory courts;

as applied by sections 68, 68B and 68C of the *Judiciary Act* 1903.

The procedures set out in this Division include procedures about the following:

(a) preparing, amending and filing indictments;
(b) pre-trial hearings and disclosure;
(c) empanelling and discharging juries;
(d) pleas and verdicts;
(e) persons committed to the Court for sentencing.

guide, the original jurisdiction[788] of the proposed military court to try specific serious 'service offences' under the *DFDA* can be established. What will remain unchanged is the definition of 'service offence' in s 3 of the *DFDA*,[789] that encompasses an offence against the *DFDA* or the regulations; or an offence which is an ancillary offence[790] in relation to an offence against the *DFDA* or the regulations; and was committed by a person at a time when the person was a defence member or a defence civilian.[791]

It is recognised that the FCA's cartel jurisdiction proceeds on the basis that charges laid in the FCA must be for indictable offences and, therefore, they must be heard before a judge and jury. Whether charges of 'service offences' in the proposed military court should be 'on indictment' is addressed in detail below.[792]

Upon the establishment of the military court, summary authorities[793] will continue to be retained under the *DFDA*. This will permit commanding officers, within the military chain of command, to deal summarily with service offences which are more of a disciplinary nature. The vast majority of service offences, which are less serious in nature, will continue to be heard and determined by those summary authorities, as has been the case since the enactment of the *DFDA*.

7.2.2 Conferral of other jurisdiction on the military court

As the proposed military court is to be a specialist military court, it would be expedient to confer upon it a concurrent jurisdiction to hear and determine matters which would then contribute to what could become military law related jurisprudence. Such a step may also add to the attraction of appointment to the military court if the original jurisdiction, whilst specialist, extended beyond purely military disciplinary law. Examples of some areas of law, currently falling under the responsibility of the Minister for Defence,[794] and therefore having a

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788 The original jurisdiction may also include any jurisdiction vested in it to hear and determine certain appeals from decisions of persons, authorities or tribunals other than courts. This may be done by express provision, or, by the operation of s 15C of the *Acts Interpretation Act* 1901 (Cth) to a provision that authorises a proceeding to be instituted in the military court in relation to a matter.

789 cf chapter 2.5.1.

790 This means an offence against section 11.1, 11.4 or 11.5 of the *Criminal Code*; or section 6 of the *Crimes Act* 1914 (Cth), that relates to that other offence.

791 DFDA, s 3 definition: "defence civilian" (n. 152).

792 Chapter 7.11.

793 See chapters 2.6.1 and 2.6.9.

794 See chapter 2.8 and (n. 193).

military connexion, which it may be convenient to place within an expanded jurisprudence could include, *inter alia*, the following.

7.2.2.1 Piracy offences

Once thought of as acts redolent of an earlier period of history, piracy in modern times has become a scourge of both shipping companies and airlines. Maritime piracy made world headlines in 2009 when Somali pirates boarded the US-flagged *'Maersk Alabama'* in what was the first hijacking of a US ship in 200 years.[795] The latest statistics from the International Maritime Bureau, an arm of the International Chamber of Commerce, record that as at 6 November 2018, 174 incidents of maritime piracy had been reported globally, compared with 87 acts of piracy reported in 2017.[796]

The Royal Australian Navy is currently deployed on Operation RESOLUTE[797] which is the ADF's contribution to the Whole-of-Government effort to protect Australia's borders and offshore maritime interests.[798] It is the only ADF operation which currently defends the Australian homeland. This particular Area of Operations covers approximately 10 per cent of the world's surface and includes Australia's Exclusive Economic Zone which extends up to 200 nautical miles around the mainland. The Christmas, Cocos, Keeling, Norfolk, Heard, Macquarie and Lord Howe Islands also fall within the boundaries of Operation RESOLUTE. The ADF has undertaken this Operation in order to protect Australia's maritime domain from security threats including piracy, robbery and violence at sea.

'Piracy' is defined in Part IV of the *Crimes Act* 1914 (Cth), as an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft, and directed: [799]

(a) if the act is done on the high seas or in the coastal sea of Australia against another ship or aircraft or against persons or property on board another ship or aircraft; or

(b) if the act is done in a place beyond the jurisdiction of any country — against a ship, aircraft, persons or property.

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795 Amy Tikkanen, Maersk Alabama hijacking, *Encyclopedia Britannica*, online at 1 April 2019 <https://www.britannica.com/event/Maersk-Alabama-hijacking>.

796 International Chamber of Commerce, International Maritime Bureau, Piracy and Armed Robbery News and Reporting, website 2 November 2018 <https://www.icc-ccs.org/index.php/piracy-reporting-centre/piracynewsafigures>.

797 Map 6–1, ADF operations overseas 2019, (n. 740).

798 Royal Australian Navy, Daily News, Operation RESOLUTE, <http://news.navy.gov.au/?tpid=94&tpl=13>, 3 January 2019.

799 *Crimes Act* 1914 (Cth), s 51.

The *Crimes Act* 1914 (Cth)[800] also establishes the offence of operating a pirate-controlled ship or aircraft. Jurisdiction for both of these offences applies irrespective of the nationality of the perpetrators or the victims, the flag state of the vessels involved, or of any connection with Australia. However, the Attorney-General's consent is required for Australian authorities to prosecute for an offence against Part IV.[801]

Additionally, the *Crimes (Ships and Fixed Platforms) Act* 1992 (Cth) implements Australia's international legal obligations to prosecute and punish acts of maritime violence as provided for in the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (1988) and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (1988). The Attorney-General's consent is required for prosecutions of most offences under the Act.[802] *Prima facie*, offences under the Act extend to relevant acts, matters and things outside Australia and to all persons whatever their nationality or citizenship.[803] However, for most offences, proceedings cannot be commenced unless one or more of the enumerated elements are present, linking the offence to Australia or to a State Party to the relevant international instrument.[804] Such an element would be present where, for example, the ship concerned was an Australian ship or where the alleged offender was a national of Australia or of a State Party to the relevant instrument.

In relation to all of the abovementioned criminal offences, there may be observed a strong association with the activities of the ADF and, as charges for these offences may be laid only with the consent of the Commonwealth Attorney General, and all charges are to be heard in a court of competent jurisdiction, they may quite conveniently be heard and determined in the military court.

7.2.2.2 Genocide and Crimes against Humanity

The ADF is involved in military operations overseas in theatres of conflict where many appalling and disgraceful acts such as genocide and other crimes against humanity have been committed by others. Genocide, crimes against humanity and war crimes[805] are prohibited under Division 268 of the *Criminal Code Act* 1995 (Cth) (***Commonwealth Criminal Code***). Torture itself is prohibited under Division 274 of the *Commonwealth Criminal Code*. All of these offences

800 *Ibid.,* s 53.
801 *Ibid.,* s 55.
802 *Crimes (Ships and Fixed Platforms) Act* 1992 (Cth), s 30.
803 *Ibid.,* s 5.
804 *Ibid.,* ss 18 and 29.
805 Other than those covered by the *War Crimes Act* 1945 (Cth).

are subject to category D jurisdiction, which is defined[806] as applying whether or not the conduct constituting the alleged offence, or a result of the conduct constituting the alleged offence, occurs in Australia. There is no requirement that the alleged victim or perpetrator be an Australian citizen, resident or body corporate.

As these offences are topical and influenced by *realpolitik*, the Attorney General's consent is required before a prosecution may be commenced for an offence under Division 268.[807] For an offence under Division 274, the Attorney General's consent is required where the conduct constituting the alleged offence occurred wholly outside Australia.[808] In exercising discretion as to whether to consent to a prosecution, the Attorney General may have regard to matters including considerations of international law, practice and comity, prosecution action that is being or might be brought in a foreign country, and other matters of public interest.

In relation to all of the abovementioned criminal offences, there may be observed a strong association with the activities of the ADF and, as charges for these offences may be laid only with the consent of the Commonwealth Attorney General, and all charges are to be heard in a court of competent jurisdiction, they may quite conveniently be heard and determined in the military court.

7.2.2.3 Weapons of Mass Destruction

The *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1995 (Cth), together with concurrent associated jurisdiction arising from the *Charter of the United Nations Act* 1945 (Cth), *Crimes (Biological Weapons) Act* 1978, *Chemical Weapons (Prohibitions) Act* 1976 (Cth) and the *Autonomous Sanctions Act* 2011 (Cth), makes it an offence for a person or organisation to help other States develop weapons of mass destruction. These weapons are defined as nuclear, biological and chemical weapons. The Act does not implement specific treaty obligations but is intended to provide a "safety net" closing any loopholes in relation to international trade in weapons of mass destruction not covered by the *Crimes (Biological Weapons) Act* 1978 and the *Chemical Weapons (Prohibitions) Act* 1976 (Cth).

The Act[809] provides that where a person supplies goods to another, believing or suspecting on reasonable grounds that the goods may be used in a programme for the development, production, acquisition or stockpiling of weapons of mass

806 *Commonwealth Criminal Code*, s 154.
807 *Ibid.*, s 268.128.
808 *Ibid.*, s 274.3.
809 *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1995 (Cth), s 9.

destruction, that person is guilty of an offence punishable by imprisonment for a maximum of eight years. The person is not guilty of an offence if the supply of goods is authorised by a permit[810] or if the Minister has issued the person with a written notice.[811]

The Act[812] sets out the prohibition and exemptions concerning the export of goods which are not regulated under the *Customs Acts* 1901 (Cth). The Act[813] also attributes the belief and suspicion of a director, employee or agent, acting within his or her authority, to the relevant corporation, unless the corporation can prove that it took reasonable precautions and exercised due diligence to avoid the conduct.

To understand how this specialist criminal jurisdiction may be vested in the military court, a recent example may suffice. On 17 December 2017,[814] the Australian Federal Police, under the *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1995 (Cth), brought two charges against a man for allegedly providing brokering services, which would or may assist a weapons of mass destruction program, and the provision of the services was not authorised by a permit or written notice, contrary to s 11 of the Act. Under the *Charter of the United Nations Act* 1945 (Cth), the man was also charged with two offences of allegedly being engaged in conduct which contravened a United Nations sanction enforcement law, namely the provision of brokering services for the sale of missiles and related expertise from the Democratic People's Republic of Korea (DPRK), contrary to s 27(1) of the *Charter of the United Nations Act* 1945 (Cth) and reg 11(2) of the *Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations* 2008 (Cth). Two further charges were laid under the *Autonomous Sanctions Act* 2011 (Cth): it was alleged that he engaged in conduct which contravened a sanction law, namely the provision to a person or entity of a brokerage service for the sale of coal from the DPRK, which assisted with or was provided in relation to an extractive or related industry in the DPRK, contrary to s 16(1) of the *Autonomous Sanctions Act* 2011 (Cth) and regulation 13(1) of the *Autonomous Sanctions Regulations* 2011 (Cth).

In relation to all of the above criminal offences, there is a strong association with the activities of the ADF as they involve a threat to the defence of the

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810 *Ibid.,* s 13.

811 *Ibid.,* s 12.

812 *Ibid.,* s 10. Section 11, which is almost identical to s 10, concerns the provision of services rather than goods to another person.

813 *Ibid.,* s 15.

814 Australian Federal Police, Media Release, *AFP investigation uncovers alleged breaches of UN Sanctions and Weapons of Mass Destruction Act in Australia,* 17 December 2017.

nation and as all charges are to be heard in a court of competent jurisdiction, they may quite conveniently be heard and determined in the military court.

7.2.2.4 War Crimes

The *War Crimes Act* 1945 (Cth) is now an historical anomaly given the effluxion of time since the end of World War II. Very few survivors remain. However, its existence highlights a consequence of the conclusion of international conflict between nations and when, in this instance, Australia was a victor, certain international obligations with respect to charging the enemy with the commission of offences for alleged atrocities requires a court of competent jurisdiction.

The Act authorised the establishment of Australian Military Tribunals for the purpose of hearing trials against Japanese for alleged crimes in World War II. As it transpired, no Japanese was ever charged under the Act. In 1988, the Australian Government amended the original legislation to provide for the prosecution of war crimes committed in Europe during World War II.[815] Consequently, only three cases have been initiated under the Act and of the charges laid, two defendants were acquitted for lack of evidence at the committal stage of proceedings. The only defendant to be tried unsuccessfully challenged the constitutional validity of the legislation;[816] however, he was acquitted by the jury at the trial stage of proceedings as the prosecution was not able to prove the charges beyond reasonable doubt.

Whilst the number of detected offences under the *War Crimes Act* 1945 (Cth) will dissipate by natural attrition given the lengthening years since the conclusion of World War II, other categories of war crimes are likely to accrue given the involvement of Australian citizens in recent theatres of conflict involving conflicts in Syria and Iraq which have for the first time in many years brought to the public consciousness in Australia the issue of war criminals, and will present complex issues for the Parliament to consider.[817]

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815 Although an old Act of Parliament covering the outcome of activities in World War II, the Act has been relatively recently amended by the *War Crimes Amendment Act* 1988 (Cth); the *War Crimes Amendment Act* 1999, and the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001.

816 *Commonwealth v. Polyukovich* (1991) 172 CLR 501.

817 Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy', (2016) 40(1) *Melbourne University Law Review* 46.

7.2.2.5 Veterans' Entitlements and ADF members' Compensation

Veterans are former ADF members. The nation owes these individuals and current serving members of the ADF respect and a fair hearing regarding claims for compensation for injuries suffered during service.

Military compensation in Australia is provided through three overlapping schemes: the *Military Rehabilitation and Compensation Act* 2004 (Cth), the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act* 1988 (Cth) and the *Veterans' Entitlements Act* 1986 (Cth). [818]

Serving defence members and veterans can initially pursue claims for compensation before the specialist boards established under the respective Acts. However, if aggrieved by the outcome of a determination, the claimant may seek a review before the Australian Administrative Tribunal (**AAT**).

Appeals from the AAT in this area of military entitlement[819] and compensation should be heard and determined by the military court rather than by way of an appeal from the AAT to the FCA.

The facilitation of this avenue of appeal would require consequential amendments to the *Administrative Appeals Tribunal Act* 1975 (Cth), Part IVA, to direct appeals on questions of law in those types of appeals to the military court rather than to the FCA. It is argued that such a specifically directed set of appeals should style an amendment based on *Administrative Appeals Tribunal Act* 1975 (Cth), s 44AAA, which authorises appeals to the FCCA (here the military court) in respect of child support matters (here military and veterans' appeals) rather than to the FCA.

7.3 Structure of the military court

The *Court Martial and Defence Force Magistrate Rules* 2009[820] contain a current list of 144 service offences[821] against the DFDA,[822] the *Defence Force Discipline Regulations* 1995 (Cth)[823] and the *Criminal Code,*[824] all of which are currently

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818 Creyke, Stephens and Sutherland, (n. 127), Chapter 25, 'Military Compensation, Superannuation and Insurance', 282–326.

819 For example, *Veterans' Entitlements Act* 1986, ss 115R, 155A(1), 175(1), 175(1A), 175(2), 175(2A), 175(2B) 175(2C), 175(2D), 175(4) and 175(5).

820 *Court Martial and Defence Force Magistrate Rules* 2009 (Cth), Legislative Instrument No 296 (**CM & DFM Rules**).

821 Set out in Appendix 7.

822 CM & DFM Rules, Schedule 1, Part 1.

823 CM & DFM Rules, Schedule 1, Part 2.

824 CM & DFM Rules, Schedule 1, Part 3 dealing with attempts at procuring, aiding and abetting and the like.

triable before a court martial or DFM. It is proposed that all these offences be triable in the proposed military court.

Of these 144 service offences, 22 are more serious service offences[825] according to the MCAB 2012 listing (referred to as ***Schedule 1 Offences***, see Table 7–1 below). Schedule 1 Offences relate to operations against the enemy, mutiny, desertion and ordering the commission of a service offence for which the most serious penalties can be imposed under the DFDA.

PROPOSED SCHEDULE 1 SERVICE OFFENCE
Abandoning or surrendering a post[826]
Causing the capture or destruction of a service ship, aircraft or vehicle[827]
Aiding the enemy while captured[828]
Providing the enemy with material assistance[829]
Harbouring enemies[830]
Offences relating to signals and messages[831]
Failing to carry out orders[832]
Imperilling the success of operations[833]
Communicating with the enemy[834]
Failing to report information received from the enemy[835]
Offence committed with intent to assist the enemy[836]

825 MCAB 2012, cl 20.
826 DFDA, s 15(1).
827 DFDA, s 15A(1).
828 DFDA, s 15B(1).
829 DFDA, s 15C(1).
830 DFDA, s 15D(1).
831 DFDA, s 15E(1).
832 DFDA, s 15F(1).
833 DFDA, s 15G(1).
834 DFDA, s 16(1).
835 DFDA, s 16A(1).
836 DFDA, s 16B(1).

PROPOSED SCHEDULE 1 SERVICE OFFENCE
Mutiny[837]
Mutiny in connection with service against enemy[838]
Failing to suppress mutiny in connection with service against enemy[839]
Desertion[840]
Dangerous conduct[841]
Dealing in or possession of prohibited drugs[842]
Engaging in conduct in the Jervis Bay Territory that is a Territory offence[843]
Commanding or ordering service offence to be committed[844]

Table 7-1: MCAB 2012 Proposed Schedule 1 Offences

The MCAB 2012 proposed the establishment of two divisions of its military court:

- An Appellate and Superior Division (**Superior Division**) constituted by judges of FCA status (herein **Justices**); and
- A General Division constituted by Federal Magistrates of the Federal Magistrates Court of Australia (**FMC**).[845]

837 DFDA, s 20(1).

838 DFDA, s 20(2).

839 DFDA, s 21(2).

840 DFDA, s 22(1) and s 22(2).

841 DFDA, s 36(1).

842 DFDA, s 59(1).

843 DFDA, **s 61(1)** if: (a) the Territory offence concerned is an offence referred to in s 63(1)(a)(i), (ia), (ii) or (iii) or s 63(1)(b) of the DFDA; or (b) the fixed or maximum punishment for the Territory offence concerned is imprisonment for 10 years or more; or, DFDA, **s 61(2)** if: (a) the Territory offence concerned is an offence referred to in s 63(1)(a)(i), (ia), (ii) or (iii) or s 63(1)(b) of the DFDA; or (b) the fixed or maximum punishment for the Territory offence concerned is imprisonment for 10 years or more; or, DFDA, **s 61(3)** if: (a) the Territory offence concerned is an offence referred to in s 63(1)(a)(i), (ia), (ii) or (iii) or s 63(1)(b) of the DFDA; or (b) the fixed or maximum punishment for the Territory offence concerned is imprisonment for 10 years or more.

844 DFDA **s 62(1)** if: (a) the relevant service offence referred to in s 62(1) is based on a Territory offence referred to in s 63(1)(a)(i), (ia), (ii) or (iii) or paragraph 63(1)(b) of the DFDA; or (b) the fixed or maximum punishment for the relevant service offence referred to in s 62(1) is imprisonment for 10 years or more.

845 MCAB 2012, cl 9(3)(b).

The MCAB 2012 provided that more serious service offences, listed as Schedule 1 Offences,[846] were to be heard by the Superior Division. All other service offences were to be triable in the General Division.

A Schedule 1 Offence falls within the higher range of maximum punishments, providing for a maximum penalty of between five years and life imprisonment, [847] and for which consent for prosecution in the military justice system was first required by the DMP from the Commonwealth DPP. It is also notable that the Superior Division was also to conduct trials of 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 ten years and life imprisonment and which, if tried in the civilian criminal courts, would have been treated as indictable offences which must be tried before a judge and jury. [848]

However, where a person was charged with a number of service offences, including offences proposed as Schedule 1 Offences, the Chief Justice of the military court (**CJM**) was able to direct that all charges could be dealt with together in the Superior Division.[849]

In 2013, the FMC was restructured and renamed as the Federal Circuit Court of Australia (**FCCA**).[850] A consequence of this change was that those judicial officers of the FMC who were styled as 'Federal Magistrates' were redesignated as Federal Circuit Court judges (herein **Judges**).

It is useful to recall that the FCCA was created to deal with less complex cases, that is, when compared to those dealt with in the FCA and the FamCA. However, and throughout its existence, the FCCA's work remains primarily in areas of family law, bankruptcy and migration law. Its jurisdiction also extends to areas of workplace relations, privacy, admiralty, copyright and trade practices law. It will be observed that no part of its jurisdiction may be considered criminal or quasi-criminal, and judges appointed to the FCCA are most unlikely to have had any meaningful criminal law experience.[851]

The Explanatory Memorandum to the MCAB 2012 contains no reasoning in support of the proposed two-divisional structure of the military court; nor does it explain why there should be two different levels of judicial officers dealing with the trial of service offences. It merely refers to clause 65 whereby certain matters are to be dealt with in their respective Divisions:

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846 Table 7–1.

847 MCAB 2012, Explanatory Memorandum, [11].

848 The 'indictment' issue is discussed in chapter 6.9.1 and chapter 7.11.

849 MCAB 2012, Explanatory Memorandum, [138].

850 *Federal Circuit Court of Australia (Legislation Amendment) Act* 2012 (Cth).

851 A similar observation may be made from a review of FCA judges, which is predominately comprised of commercial and taxation lawyers.

65 Exercise of original jurisdiction

General Division

(1) The original jurisdiction of the Military Court (other than jurisdiction in respect of a proceeding referred to in subsection (2)) is to be exercised in the General Division by a single Federal Magistrate.

Appellate and Superior Division

(2) The original jurisdiction of the Military Court is to be exercised in the Appellate and Superior Division if:
- *(a) the proceeding is for the trial of a charge of a Schedule 1 offence; or*
- *(b) the proceeding is in respect of:*
  - *(i) an appeal from a determination of a court martial or a Defence Force magistrate under Schedule 3B to the Defence Force Discipline Act 1982; or*
  - *(ii) a question of law referred to the Full Court under that Schedule; or*
- *(c) the Chief Justice directs (whether before or after a proceeding is instituted) that the proceeding is to be heard and determined in the Appellate and Superior Division.*

(3) Jurisdiction in respect of a proceeding referred to in paragraph (2)(a) or (c) is to be exercised by a single Judge.

(4) Except as otherwise provided by this Act or the Defence Force Discipline Act 1982, jurisdiction in respect of a proceeding referred to in paragraph (2)(b) is to be exercised by a Full Court.

If the Government has no good reason for formally dividing the military court into two legislated divisions, this should not occur by legislation. The military court should be constituted as a single court, without divisions, staffed by a mixture of Justices and Judges[852] with the order for the despatch of the business of the military court being the preserve of the CJM and the Rules of Court.[853]

This chapter will now explain the method of appointment to the military court. Consistent with other Chapter III courts, appointment to the military court would be by appointment first as a judge of the FCA or the FCCA, and, secondly being coincident, as a justice or a judge to the military court, by the Governor-General by commission on the recommendation of the Attorney-General, after consultation with the Minister for Defence.

852 It is argued that the military court will be constituted by a Chief Justice and additional appointments of dual commissions to several Federal Court status justices and by FCCA judges on a part-time basis, collectively herein called 'judges' without necessary distinction.

853 This is consistent with MCAB 2012, cl 53 which proposed the CJM be responsible for ensuring the effective, orderly and expeditious discharge of the business of the court as a whole and of each Division.

The criteria[854] for judicial appointment to the military court must be consistent with appointments to other federal courts, and consistent with another specialist court, the prime example being appointments to the FamCA.[855] The legislation must provide specific criteria for judicial appointment to the military court. A person should not be appointed to the military court unless, by reason of training, experience and personal qualities the person is a suitable person to deal with matters of military disciplinary law and understands the nature and culture of military service in the ADF. While the criteria concerning experience and training may be met by demonstrating prior service in the ADF, there may be other ways by which candidates may gain the relevant experience or training which would make them suitable for appointment to the court.[856]

Otherwise, to be eligible for appointment as a judge of the military court, a person must be or have been a judge of another federal court or a judge or magistrate of a State or Territory court or have been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than five years.

The MCAB 2012[857] provided for Federal Magistrates to be appointed to the military court on a part-time basis. This is consistent with clause 1 of Schedule 1 to the (now) *Federal Circuit Court of Australia Act* 1999 (Cth) (**FCCA Act**). This procedure should be adopted for the military court as it permits the appointment of FCCA Judges on a part-time basis and provides flexibility to the CJM in managing the workload of the military court.

In order to protect the independence and impartiality of the military court, legal officers currently serving in the ADF will not be eligible for appointment.[858] They must first resign from the ADF, thereby freeing themselves from the chain of command before being able to accept any judicial appointment to the military court. This process is necessary because as long as they remain part of the ADF, they are considered to be part of the chain of command and, therefore, not perceived as being impartial and independent. Additionally, once appointed, judicial officers will no longer be eligible for recruitment into the ADF in any role.[859]

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854 MCAB 2012, cl 3(a).

855 See *Family Law Act* 1975 (Cth), s 22(2), (n. 776).

856 For example, this may be an academic with experience in the area of military justice or the operations of the ADF.

857 MCAB 2012, cl 22.

858 MCAB 2012, cl 11(4).

859 For example, this would render any member of the military court ineligible to serve as Judge Advocate General. See also MCAB 2012, cl 11.

In accordance with s 72 of the Constitution, a person is not eligible for appointment to a military court if he or she has attained the age of 70. Judges appointed to the military court will have tenure to the age of 70. This provides the necessary independence and constitutional protections for an impartial judiciary in the military court system.

Diagram 7–1 below depicts the structure of the military court under the MCAB 2012, and the charges which could be tried in each of its Divisions.[860]

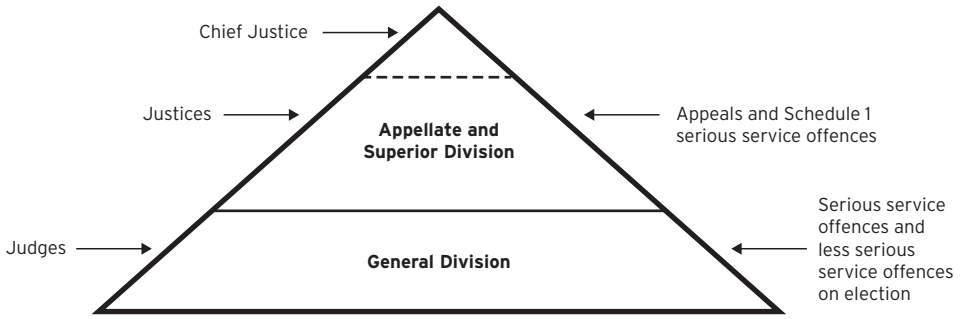

Diagram 7-1: MCAB 2012 Proposed Structure of the military court (post-FCCA restructure)

It is notable the MCAB 2012 recommended an appellate jurisdiction within the Superior Division for all appeals within the military court. However, it is argued [861] that the military court should not exercise an appellate jurisdiction especially given the likely small number of cases it will hear.[862] It should exercise only a limited appellate jurisdiction for minor procedural appeals from a Judge to a Justice or a review from the Registrar to a Justice, for instance, for an extension of time to take steps. Additionally, there is one further proposed area which requires an appellate supervisory jurisdiction and this is for the purposes of the military court hearing interlocutory applications in connection with an appeal to the Full Court of the FCA[863] from what is termed in this dissertation, the Australian Court Martial Tribunal, (**ACMT**).[864] This will be analysed further in section 7.12 below.

860 MCAB 2012, Explanatory Memorandum, [15] Diagram 1.
861 See chapter 7.9.
862 See chapter 2.7.10. This is approximately 50 cases per annum, and not all of those are trials as the number includes pleas of guilty.
863 See chapter 7.9.
864 Discussed in chapter 7.12.

As a consequence of the recommendations advanced in this chapter, the proposed structure of the military court, and the types of charges to be tried by its single division, are represented in Diagram 7–2 below.

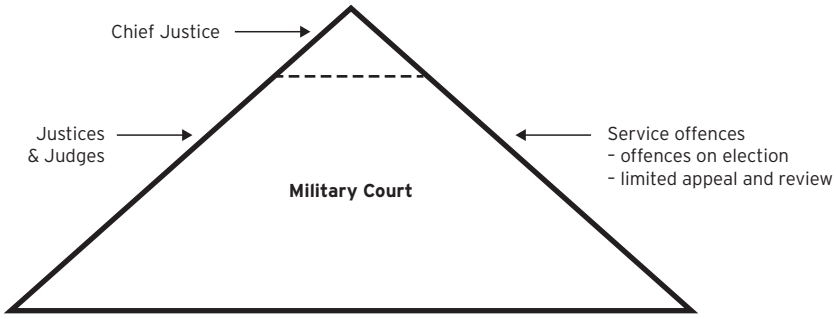

Diagram 7-2: Military court structure proposed by this thesis

7.4 Right of service member to elect for trial in the military court

Consistent with the drafting of the Transitional Bill 2012,[865] prior to a charge being heard before a summary authority, an ADF member is to have the right to elect to be tried in the military court rather than before the summary authority.[866] This right is available from the moment the ADF member is charged with an offence until the entry of a plea at a trial before a summary authority. Currently, ADF members charged with less serious service offences to be tried by a summary authority[867] do not have the right to elect to be tried by a court martial or a DFM on every charge.

Consequently, the election procedure will enable an accused to have charges of service offences heard and determined by an independent and impartial tribunal — outside the chain of command. Conversely, the legislation should also give to the summary authority itself the power to refer service offences for trial in the military court where it seems just and fair to do so.

865 Military Court (Transitional Provisions and Consequential Amendments) Bill 2012, Schedule 1, proposed amending DFDA, to insert a new Division 1, Part VII "Election by accused person for trial by Military Court".

866 There will be no right to appeal to the military court from a decision of a summary authority. This will continue to be dealt with within the chain of command under DFDA, Part VIIIA, Division 2 by the Reviewing Authority.

867 See examples in Appendix 8.3.

7.5 Management of the military court

7.5.1 CJM: functions and powers

Responsibility for management of the business of the military court, including its financial affairs, is to be vested in the CJM.[868] The CJM must also hold a commission as a judge of the FCA because the CJM of the military court will preside over appeals to the Full Court of the FCA from the military court (and from the ACMT).[869] Indeed, it would be preferable to permit the CJM to arrange the sitting of the Full Court of the FCA as, quite possibly, there may be other FCA judges who have significant ADF experience.

The MCAB 2012,[870] recommended the appointment of a Registrar to assist the CJM in the management of the administrative affairs of the military court. The Registrar is to be the same officer who is the Registrar of the FCA appointed under section 18C of the *FCA Act* 1976 (Cth). Physically, the military court will be expected to make use of the existing infrastructure of the FCA. These 'sharing of resources' provisions will generally be consistent with Part IIA of the *FCA Act* 1976 (Cth) and Part 7 of the *FCCA Act* 1999 (Cth). This will allow for functions performed by the Registrar of the Federal Court, who will also hold the same position in the military court, to have effect as if it had been performed by the military court. This outcome is also consistent with section 90 of the *FCCA Act* 1999 (Cth) where the same role of Registrar is performed in both courts by the same person. Consistent with s 18W of the *FCA Act* 1976 (Cth) and s 117A of the *FFCCA Act* 1999 (Cth), the CJM may delegate all administrative powers to any one or more of the Justices or Judges of the court.

7.5.2 Arrangements with CDF

As there is to be a close link between the military court and the ADF, provision will need be made to authorise the CJM to make arrangements with the CDF for certain matters.[871] By way of illustration, formal arrangements may need to be made to permit members of the ADF to provide administrative assistance in relation to proceedings in the military court. This will also facilitate a means of liaison between the Department of Defence and the court in relation to administrative arrangements of the court. Administrative support by service personnel may, for example, take the form of escort or orderly duties to assist

868 MCAB 2012, Part 3, Division 2.
869 Chapter 7.12.
870 MCAB 2012, Explanatory Memorandum, [65]; MCAB 2012, Part 3, Division 4.
871 MCAB 2012, Explanatory Memorandum, [66]; MCAB 2012, cl 32.

with the conduct of trials. It is expected that a senior military officer position would be created within the ADF, possibly within the staff of the CDF, to act as a liaison between the ADF and the CJM to address administrative arrangements. Selection of suitable personnel would be left to the ADF and not the military court.

Whilst not essential, the wearing of military uniform by administrative assistants should be left to the discretion of the CJM and the Rules of the military court. It is possible that the utilisation of uniformed ADF personnel in administrative assistance roles may provide a visible means of promoting the service nature and identity of the military court to service personnel and the public.[872] To ensure the independence of the court, ADF members will not carry out any form of judicial function. Members of the ADF providing administrative or liaison assistance to the court (in accordance with an arrangement with the CDF) are to be subject to the direction and control of the CJM and the Registrar and are not to be subject to the direction or control of any other person or body and, in particular, the ADF. This is important to ensure the independence and impartiality of the military court, consistent with Chapter III of the Constitution.

An ADF member will not be subject to control by military command or the *DFDA* in relation to the provision of administrative or liaison assistance to the military court. This is because the military court is created as an independent and impartial court under Chapter III of the Constitution. However, in relation to any other matter, the ADF member remains subject to control by military command and the DFDA.

7.5.3 Registrar: functions and powers

The Registrar is to have the power to do all things necessary or convenient for the purpose of assisting the CJM.[873] In particular, this will ensure that the Registrar can assist the CJM in conducting the administrative affairs of the court.[874] This will confirm the independence and impartiality of the Registrar, in the performance of his or her functions and powers. Therefore, the Registrar will be subject to the direction and control of the CJM and not any other person or body in relation to the performance of a function or the exercise of a power under the enabling Act or the Rules of Court.[875]

The functions and powers conferred on the Registrar will be in addition to the functions and powers conferred on the Registrar by any other law of

872 MCAB 2012, Explanatory Memorandum, [34].
873 MCAB 2012, Explanatory Memorandum, [77]; MCAB 2012, Part 3, Division 4.
874 MCAB 2012, cl 36(2).
875 These provisions are consistent with s 18D of the *FCA Act* 1976 (Cth).

the Commonwealth. As summarised above, the Registrar is to mean the same person who fills the position as Registrar of the FCA appointed under section 18C of the *FCA Act* 1976 (Cth) who has powers and functions under the *FCA Act* 1976 (Cth).

Certain procedural powers of the court are to be exercised by Registrars, which include the Registrar and any Deputy Registrars, at the direction of the court.[876] This includes powers to dispense with service of any process, make orders in relation to substituted service, pre-trial disclosures, the adjournment of a hearing, exempting a party from compliance with the Rules of Court, or any other power prescribed by the Rules of Court. A Registrar has total independence in relation to the manner in which he or she exercises these powers and is not subject to the direction or control of any person or body. However, an exercise of these powers by a Registrar is subject to review by the court. If a Registrar considers it inappropriate for him or her to exercise any of these powers, or an application is made for the military court to determine the matter, he or she must refer the application for the exercise of the power to the military court. [877]

7.5.4 Contempt of the court

Consistent with the military court being a superior court of record, it is to have the same power as that of the High Court of Australia to punish for contempt of its power and authority.[878] The jurisdiction of the military court to punish for contempt may be exercised by the military court as constituted at the time of the contempt.[879]

7.6 DMP

Although not part of the military court, the DMP is to continue as a separate statutory office under the new military justice system. The DMP will be responsible for prosecuting charges in the military court. Charges may be referred to the DMP in three principal ways:

- election by the accused at a summary level;
- referral of charges to the DMP by a summary authority before the actual hearing phase of the summary hearing, or

876 MCAB 2012, Explanatory Memorandum, [79], MCAB 2012, cl 37.
877 These provisions are based on s 35A of the *FCA Act* 1976 (Cth).
878 MCAB 2012, cl 61.
879 These provisions are consistent with s 31 of the *FCA Act* 1976 (Cth).

- referral of charges to the DMP by the ADF Investigative Service or a summary authority before the hearing of the summary hearing.

Where, for instance, the military court determines that it is necessary, but not possible, for it to conduct a trial overseas, the DMP will be able to have the charges dealt with under the *DFDA* before the ACMT.[880] The *DFDA* will authorise the DMP to prosecute charges in the ACMT.

7.7 Interaction with Australian state and territory civilian criminal law

In *Re Tracey; Ex parte Ryan*[881] the High Court of Australia established that it is impermissible for the DFDA to attempt to oust the jurisdiction of a civilian state or territory court from conducting a trial of a defence member charged with breaching the civilian criminal law. As a consequence of this decision, s 63 of the *DFDA* requires the DMP to obtain the consent of the Commonwealth DPP prior to the institution of a prosecution of certain serious service offences with criminal law equivalents, for example, murder, rape, and assault committed within Australia.[882] A *Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions (22 May 2007)*[883] exists which sets out the considerations operating between the respective Commonwealth, State and Territory DPPs in providing a consent to the DMP to prosecute offences which would also constitute offences against their respective domestic criminal laws.

7.8 Abolition of the DFDAT

Upon the establishment of the military court, the DFDAT is to be abolished. The DFDAT was established under the *Defence Force Discipline Appeals Act 1955* (Cth) and is vested with jurisdiction to conduct appeals from courts martial

880 Chapter 7.12.

881 (1989) 166 CLR 518.

882 Consequential Amendments Bill, Explanatory Memorandum, 4–5.

883 The author requested access to this document from the Office of the Commonwealth DPP on 9 May 2019 but was refused on 10 May 2019 with a written email response: "We advise that as the memorandum is an internal document only, we are unable to assist with this request." However, I have not obtained access to the DMP's version of the memorandum which is archived on a site in the USA accessed at <https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/australian-mj-sys/06_MOU_Between_Australian_Directors_of_Public_Prosecutions_and_DMP.pdf>

and DFMs (and previously, the AMC). However, as the DFDAT is a non-judicial body, it is not constitutionally able to review the decisions of a Chapter III court. As argued below, the jurisdiction of the DFDAT will be absorbed by the Full Court of the FCA, which will be vested with jurisdiction to hear and determine appeals from judgments of the military court at first instance as well as appeals from the ACMT on the same or similar grounds as currently exist for appeals to the DFDAT.[884]

7.9 Appeals from the military court to go to the Full Court of the Federal Court of Australia

The Full Court of the FCA is the proper intermediate repository for the exercise of judicial power of the Commonwealth to hear and determine appeals from the military court. The Full Court of the FCA currently hears and determines appeals from the DFDAT which has been and remains a most useful body providing for appellate review. The grounds of appeal from the military court to the Full Court of the FCA may be based on those currently available in appealing decisions to the DFDAT.[885]

There is good reason to use the established appellate structure of the Full Court of the FCA to hear and determine appeals from the military court. It will assist in developing consistency as an intermediate appellate authority. Further, there is a significant public benefit in ensuring that specialist jurisdictions, such as the military court, be exposed to the benefit of determination of its appeals by a federal appellate court of general jurisdiction which also gives symmetry

884 Chapter 7.12.

885 DFDAA, s 23 provides, *inter alia*, for an appeal in the following circumstances:

- that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;
- that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;
- that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred; or
- that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory;
- it shall allow the appeal and quash the conviction or the prescribed acquittal.
- where in an appeal it appears to the Tribunal that there is evidence that:
- was not reasonably available during the proceedings before the court martial or the Defence Force magistrate;
- is likely to be credible; and
- would have been admissible in the proceedings before the court martial or the Defence Force magistrate.

to the structure of the Australian federal judicature with the High Court of Australia at its apex.

The High Court of Australia, in its constitutionally entrenched appellate jurisdiction provided for in s 73 of Chapter III of the Constitution, is empowered to hear and determine appeals (subject to the grant of special leave) from all jurisdictions, and this ensures certainty, consistency and coherence in the law. These same principles are equally applicable at the intermediate appellate level and confirm why appeals from the military court should lie with the Full Court of the FCA.

Therefore, appeals from the military court on points of law should be heard and determined by the Full Court of FCA over which, ideally, the CJM of the military court would preside. Ideally, if available, the remaining members making up the bench of the Full Court of the FCA should have had some ADF experience, whether in the active or reserve ADF.

The enabling legislation will need to permit the DMP to appeal to the military court for leave to refer a question of law to a Full Court of the FCA for its determination.[886] By way of illustration, such a question could arise if a judgment of the military court acquits a person following a trial for a service offence. If leave to appeal is granted, both the DMP and the acquitted person may make submissions to the Full Court.[887] Where the Full Court of the FCA determines an appeal from the military court on a question of law, this will not affect the acquittal of the defence member.[888]

Further, it is to be observed from the drafting of the MCAB 2012,[889] that a matter could be heard by the Full Court of the Superior Division without any further right of appeal. This would be contrary to Article 14 paragraph 5 of the International Convention on Civil and Political Rights which provides that "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*". This is another reason why an appeal on questions of law should lie with the Full Court of the FCA in regard to all decisions of the military court.

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886 MCAB 2012, Explanatory Memorandum, [297]; MCAB 2012, cl 112.

887 In some cases, the acquitted person may take no interest in the proceedings but in others the person may want to make submissions because they consider that the rulings made at the trial were correct.

888 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289.

889 MCAB 2012, Explanatory Memorandum, [140].

7.10 Appeals to the High Court of Australia

The procedure for appeals to the High Court of Australia from the military court are to be modelled[890] on s 33 of the *FCA Act* 1976 (Cth).[891] This will prevent appeals to the High Court from a judgment of a single Justice or Judge of the military court in its original jurisdiction. Those appeals must first be heard by the Full Court of the FCA presided over by the CJM of the military court.

Appeals to the High Court from a judgment of a Full Court of the FCA presided over by the CJM of the military court, will be by special leave[892] to be granted by the High Court. Similarly, appeals to the High Court from a judgment of a single Justice exercising any limited appellate jurisdiction of the military court, will be by special leave to be granted by the High Court. This will not, and cannot, prevent an interested party from seeking relief in the nature of a writ of mandamus, prohibition or an injunction against an officer of the Commonwealth from the High Court under s 75(v) of the Constitution.

Not all matters will be appealable, such as matters which are interlocutory in nature and outcome, such as, if the judgment is a decision to join or remove a party or to adjourn, expedite or vacate a hearing date or not to do any of those things. However, and to avoid doubt,[893] a party may appeal against a final judgment in a proceeding before the military court on the basis of an

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890 MCAB 2012, cl 113.

891 Principally, the subsections are:

(1) The jurisdiction of the High Court to hear and determine appeals from judgments of the Court, whether in civil or criminal matters, is subject to the exceptions and regulations prescribed by this section.

(2) Except as otherwise provided by another Act, an appeal shall not be brought to the High Court from a judgment of the Court constituted by a single Judge exercising the original jurisdiction of the Court.

(3) Except as otherwise provided by another Act, an appeal shall not be brought from a judgment of a Full Court of the Court unless the High Court gives special leave to appeal.

(4) An appeal must not be brought from a judgment of the Court constituted by a single Judge exercising the appellate jurisdiction of the Court unless the High Court gives special leave to appeal.

892 The grant of special leave is governed by the requirement set out in s 35A of the *Judiciary Act* 1903 (Cth), "*… the High Court may have regard to any matters that it considers relevant but shall have regard to: (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law: (i) that is of public importance, whether because of its general application or otherwise; or (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.*"

893 MCAB 2012, cl 113(2).

interlocutory judgment of the court made in the proceeding, even if there has been or can be no appeal to the High Court against that interlocutory judgment.

7.11 Trials of Service Offences: On indictment or otherwise than by indictment?

As a result of the High Court's[894] consideration of service offences under the DFDA, the issue arises as to whether charges to be heard and determined by the military court are to be laid 'on indictment or otherwise'. For the reasons which follow, an indictment is a necessary procedural requirement.

Since the enactment of the DFDA, all charges laid before a court martial or a DFM have been tried 'otherwise than on indictment' and, therefore, without a jury. Neither military, nor civilian, juries have traditionally been used in the military justice system except, importantly, for a brief period where what has been described as 'military juries' were used under the AMC system.[895] Instead, the existing court martial system reinstated by the 2009 No 1 Act, uses a JA and panel of military officers in a court martial or a DFM sitting alone.[896]

Section 80 of the Constitution provides that:

> *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.*

Section 80 of the Constitution mandates trial by jury in circumstances where the prosecution of a federal offence proceeds by way of indictment as jury trials are compulsory. With the exception of cartel offences, jury trials for federal offences are heard and determined in State and Territory courts. In trials for federal offences in state courts, state procedural laws (including the appropriate juries' statute) will be applied, provided they are not inconsistent with s 80 of the Constitution or other Commonwealth laws.[897]

Australian criminal law and practice provides that criminal offences are divided into either summary or indictable offences, with the latter being more serious offences.[898] An indictable offence can vary between jurisdictions within Australia. Importantly, in the federal jurisdiction, it includes all offences

894 In *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, the High Court dismissed the prosecutor's argument that offences under the DFDA should be commenced by indictment.

895 Appendix 9.2.

896 MCAB 2012, Explanatory Memorandum, [10]; CM & DFM Rules, Legislative Instrument No 296.

897 *Judiciary Act* 1903 (Cth) s 68.

898 These include the offences of treason, murder, rape, assault, manslaughter.

punishable by more than 12 months' imprisonment.[899] An indictable offence is typically tried before a judge and jury (although there are statutory exceptions permitting trial by judge alone in some instances).[900]

Clause 64 of the MCAB 2012 provided that "*Charges of service offences are to be dealt with otherwise than on indictment*". This had the effect of removing the 'right' to trial by jury which is otherwise guaranteed for all indictable offences by s 80 of the Constitution.

On the issue of service charges being indictable, the Senate Committee review of the MCAB 2012 received a submission from the Returned Services League of Australia[901] which stated:

> *… the legislation denies service members accused of serious service offences the right of trial by jury. This is at odds with the norms of contemporary Australian society which hold that service members are citizens and should enjoy all the privileges and rights of citizens including having the right of trial by jury when accused of serious service offences.*

Alexander Street SC, made a similar observation in his submission where he observed: [902]

> *The rule of law binds all Australian and the source of the rule of law as well as its supremacy is the Constitution. To devise a Military Justice system that deprives ADF members of their rights under s80 falls below the standard of best practice in Military Justice System design and the deprival of that right will inevitably be held invalid by reason of being contrary to Chapter III.*

However, a High Court authority from 1928[903] set out the seemingly accepted position that:[904]

> *… section 80 does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily.*

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899 *Crimes Act* 1914 (Cth), s 4G.

900 *Criminal Procedure Act* 1986 (NSW) s 132; *Juries Act* 1927 (SA) s 7; *Criminal Code* 2010 (WA) ss 651A–651C; *Supreme Court Act* 1933 (ACT) s 68B.

901 Returned Services League of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Military Court of Australia Bill 2012 [Provisions] and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions]*, undated.

902 A Street, *Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Military Court of Australia Bill 2012 [Provisions]* and *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions]*, 11 July 2012, 4; now a judge of the FCCA.

903 *R v Archdall and Roskruge; Ex parte Carrigan and Brown* [1928] HCA 18; (1928) 41 CLR 128.

904 *Kingswell v The Queen* [1985] HCA 72; (1985) 159 CLR 264 per Gibbs CJ, Wilson and Dawson JJ at 276–277.

> *This result has been criticised, but the Court has consistently refused to reopen the question and the construction of the section should be regarded as settled.*

These matters appear to have been relied upon by the Government when it drafted clause 64 of the MCAB 2012. While it is accepted that the Parliament is able to determine which offences are to be classified as indictable and which are not, there is an expressed concern at the apparent ease with which the right to a jury trial may be removed. By way of illustration, in *White v Director of Military Prosecutions*,[905] Kirby J stated:

> *In past cases, a majority of this Court has favoured the tautological view that s 80's guarantee of "trial by jury" is limited to cases in which the Parliament and the Executive provide for the commencement of prosecution by filing an indictment. However, a persistent minority has rejected this view as inconsistent with the function of s 80 as providing a guarantee of jury trial which could not so easily be circumvented. With respect, 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. When Australian judges and lawyers become more accustomed to reasoning by reference to fundamental rights, they will see the truth of this proposition more clearly.*

Commentary of this nature by a pre-eminent jurist confirms there is strong argument that the High Court of Australia might yet entertain a submission that clause 64 (or similar), if enacted, would be found to be invalid as it contradicted the robust interpretation of s 80 of the Constitution adopted by the High Court of Australia, to date.

In *Huddart, Parker and Co. Proprietary Ltd. v Moorehead,*[906] the High Court sought to identify 'the essential features' of the institution of trial by jury which had been adopted by s 80 of the Constitution, stating:

> *It is the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process.*

In *Cheatle v R,*[907] the High Court endorsed that observation as follows:

> *That statement correctly draws attention to the representative character of a jury and to the fact-finding function which a jury traditionally served in civil litigation and in criminal committal and trial processes. It does not, however, attempt to address the more particular question of what, if any, are the minimum requirements which must be observed to ensure that a jury in a criminal trial is adequately representative of the community.*

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905 (2007) 231 CLR 570, [167].
906 (1909) 8 CLR 330, 375.
907 [1993] HCA 44; (1993) 177 CLR 541, [4].

Stellios[908] has accurately recognised that the High Court of Australia went on to identify '*unanimity, representativeness, randomness and impartiality as essential features*' as keystones in the selection of a jury in Australia. In its 1996–97 review of jury service,[909] the Victorian Parliament Law Reform Committee when dealing with 'representativeness' defined it as "*an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc)".*

The High Court of Australia[910] has also recognised that an essential feature of a jury trial is that its selection is '*random and impartial*', as opposed to selection by the prosecution or the state. It is significant that in New South Wales, South Australia, Western Australia, Queensland and the Australian Capital Territory, the question of whether a trial for an indictable offence proceeds as a jury trial may also depend upon whether the accused has elected to be tried by judge alone, without a jury.[911]

It is manifestly demonstrable that clause 64 of the MCAB 2012 detracts from a right guaranteed by s 80 of the Constitution, as it fails to provide for a jury trial with the 'essential features' of a jury. According to the Explanatory Memorandum,[912] '*a jury in a Chapter III court could not be … restricted to Defence members and a civilian would not necessarily be familiar with the military context of service offences*' and this would create significant problems in terms of identifying a group of persons from which any jury is to be selected.

In contrast to clause 64 of the MCAB 2012 which essentially operated to exclude juries, the DLAA, which established the AMC, provided for 'military juries'; indeed, for certain offences, military juries were mandatory. Notably, s132A of the *DFDA* (as it existed immediately following the commencement of the DLAA) provided for certain offences to be tried by a Military Judge and military jury, unless the accused person elected to be tried by a Military Judge alone. [913]

Former ss 122–124 of the *DFDA*[914] specified when military juries were to be used, the constitution of military juries, and the questions to be determined

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908 J Stellios, 'The High Court's recent encounters with section 80 jury trials' (2005) 29 *Criminal Law Journal* 139–153 at 147.

909 Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report*: Volume 1(1996), 7 [1.20].

910 *Cheatle v The Queen* (1993) 177 CLR 541; *Katsuno v The Queen* (1999) 199 CLR 40; *Ng v The Queen* (2003) 217 CLR 521.

911 *Criminal Procedure Act* 1986 (NSW) s 132; *Juries Act* 1927 (SA) s 7; *Criminal Code* 2010 (WA) ss 651A–651C; *Supreme Court Act* 1933 (ACT) s 68B.

912 MCAB 2012, Explanatory Memorandum, 2.

913 *Australian Military Court Rules* 2007 (Cth), Legislative Instrument No 360, Parts 6 and 9.

914 Set out in Appendix 9.2.

by a military jury. The existence of provisions of this nature in the 2006 DLAA legislation confirms the ADF has considered military juries feasible in the recent past under the AMC.

The apparent rationale or justification for the absence of jury trials under the MCAB 2012 is provided for in the Explanatory Memorandum in the following manner: [915]

> *Neither military nor civilian juries have traditionally been used in the military justice system, except for a brief period where military juries were used under the Australian Military Court system. Instead, the existing court martial system uses a panel of military officers or a Defence Force magistrate sitting alone … Within a Chapter III Court, trial by a judicial officer, who by reason of experience or training understands the nature of service in the ADF, is the best solution to ensure that the finder of fact appreciates the military context of alleged offences. Additionally, where the Military Court sits overseas, a requirement to empanel a civilian jury would create practical barriers to the prosecution of offences.*

However, there is no universal view that a jury trial is desirable for the trial of all indictable offences, and there are provisions in the legislation in New South Wales, Queensland, South Australia, Western Australia and the Australian Capital Territory for a person to elect to be tried by judge alone.[916]

The primary argument[917] against jury trials is the lack of transparency in decision-making. No reasons are given by the jury for its decision, the decision is deliberated upon in private and no-one (including the presiding judge) can be informed of what occurred behind the closed doors of the jury room.

The MCAB 2012 noted that the alternative to a jury trial is for cases to be determined by a single judge. The advantage of this process is that reasons are provided which enable decisions to be appealed. The delivery of reasons can provide more clarity and improve the transparency of the process. The New South Wales Legislative Council Standing Committee on Law and Justice Inquiry into judge-alone trials conducted under s 132 of the *Criminal Procedure Act* 1986 (NSW) was presented with a submission[918] which argued that written judgments afford clear avenues of appeal for counsel if they felt the decision of the judge was 'perverse':

> *You might get a jury that has a particular view that this is not dishonest and another jury later on says it is dishonest, and neither gives any actual reason, whereas if the judge concludes dishonesty the judge has to explain why and it is open then*

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915 MCAB 2012, Explanatory Memorandum, 2.

916 (n. 908).

917 A Van Onselen, 'Are juries a waste of time?', *The Sunday Telegraph*, 28 August 2011, 99.

918 Standing Committee on Law and Justice, *Inquiry into judge alone trials under s.132 of the Criminal Procedure Act 1986*, Parliament of New South Wales, 8 November 2010, Malcolm McCusker QC, 27.

to scrutiny and possibly appeal. I do not think that having judges write the reason for the decision is going to create an avalanche of appeals, it is just that it gives the accused and … the prosecution a right of appeal if a verdict is clearly perverse.

Where a military court could actually sit overseas, it is recognised and accepted that a requirement to empanel a civilian jury is likely to create practical barriers for the conduct of a trial. The MCAB 2012 recognised this difficulty and it proposed a trial by a single judge of the military court without a jury. It argued that a judge, who by reason of experience or training is able to understand the nature of service in the ADF, would provide a resolution to ensure that the finder of fact appreciates the military context of alleged offences. However, it is observed that this stands in contrast to the position of the ADF in the establishment of the former AMC which conducted trials of service offences with 'military juries' comprised of either six or 12 members[919] and did not proceed on a 'judge alone' basis.

Accordingly, it may be accepted that the MCAB 2012 proposal for a single judge was the preferred option of the ADF in an attempt to maintain control of trials of defence members in a military court when sitting overseas before a single military court judge sitting without a jury. That is because, presumably, the military court sitting overseas could not assemble a jury which would meet the criteria of *'unanimity, representativeness, randomness and impartiality as essential features*.[920]

It is intended that the procedures for instituting and conducting proceedings in the original jurisdiction of the military court will replicate those of other civilian trial courts. A system of pre-trial hearings and disclosure obligations on the parties, aimed at reducing the length of trials by ensuring any issues not in dispute, are identified at an early stage. This process narrows the range of issues to be dealt with at trial which permits the court to concentrate on those issues genuinely in dispute, thereby enabling the court to deliver decisions in a timely manner.[921]

The military court must be empowered to make orders for the custody and bail of accused persons.[922] Further, the military court must be empowered to order bail subject to specific conditions, to vary or revoke bail orders, and to make orders for the forfeiture of securities when an accused person fails to comply with a bail undertaking.

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919 *Australian Military Court Rules* 2007 (Cth), Legislative Instrument No 360, Parts 6 and 9.

920 Stellios, (n. 905), 147.

921 MCAB 2012, Explanatory Memorandum, [13].

922 These are similar to the powers available to the FCA in the exercise of its criminal cartel jurisdiction.

The military court must be vested with jurisdiction to hear appeals from decisions of the ACMT on procedural matters only.[923] The appellate jurisdiction of the military court will be confined to procedural interlocutory matters and exercised by a single Justice. Appeals from the military court will otherwise be to the Full Court of the FCA presided over by the CJM of the military court.[924] The enabling legislation must provide for appeals to the High Court in certain circumstances.[925]

It is worth noting the emotive language used by the Australian Defence Association[926] in its submission to the Senate Committee concerning the recommendation in the MCAB 2012 to refuse to allow either a jury or a court martial panel:

> *39. The proposed MCA Bill is an affront to the civil rights of ADF personnel as fellow Australian citizens. That some cannot recognise this, or excuse it as merely a necessary and clever legal drafting exercise, is outrageous.*

The position of the ADA was then forcefully summarised as follows:[927]

> *43. Moreover, the clear result is that:*
>
> *a. The MCA is being imposed by legislation without the members of the ADF being consulted, especially about the apparent loss of their rights as Australian citizens that is involved.*
> *b. This is particularly so in that the MCA deliberately excludes the right to be tried by jury for serious offences — a right that generally applies to all other Australian citizens.*
> *c. This significant and undoubted disregard for the human and civil rights of ADF personnel is airily dismissed by the theoreticians pushing the flawed concept and flawed practices embodied in the proposed MCA.*

The problem of whether to have service charges tried before the military court as indictable offences presents a difficulty when the military court determines that it will sit overseas. The empanelling of a civilian jury in an overseas war zone which is able to meet the requirements, referred to by Stellios[928] as *'unanimity, representativeness, randomness and impartiality as essential features'* appears quite remote. If accepted, as it must be, that the purpose of a Chapter III court

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923 Examples of Commonwealth legislation that will apply to a military court proceeding will include (but are not limited to) the DFDA, the *Evidence Act* 1995 (Cth), the *Crimes Act* 1914 (Cth) and the *Criminal Code Act* 1995 (Cth). Certain parts of the *Evidence (Miscellaneous Provisions) Act* 1991 of the Australian Capital Territory will also apply to proceedings in the court.

924 See chapter 7.9.

925 Dealt with in chapter 6.13.

926 Senate Committee Review, MCAB 2012, Submission, 9, [39].

927 *Ibid.,* [43].

928 Stellios, (n. 905), 147.

is to provide for the independent and impartial dispensation of justice in the hearing and determination of serious service offences, then this should be considered in the context of what actually occurs in practice in the real world. The reality, as depicted in Diagrams 2–2 and 2–3, is that in peacetime all trials conducted by the military court will be within Australia. This instance presents no difficulty if trials are conducted in military courts with juries.

Therefore, it follows that in a democratic society, defence members should not be denied access to the procedure whereby all service offences which would otherwise satisfy the definition of an 'indictable offence' under the *Crimes Act* 1914 (Cth), that is, offences for which imprisonment of 12 months or more, are to be dealt with on indictment in the military court.

Indeed, it is argued that the military court should not be empowered to sit outside Australia since this will not constitutionally satisfy the requirement provided in s 80 of the Constitution[929] that the accused be given a trial by 'jury'. It is to be recalled that even the former AMC gave to an accused defence member the right to have a charge tried before a military jury, if he or she so elected. The outcome proposed in the MCAB 2012 of charges being preferred 'otherwise than on indictment' in a Chapter III military court for offences which carry a punishment of 12 months' imprisonment or more, is unsatisfactory and the submissions provided to the Senate Committee in regard to this requirement should be preferred. [930]

A solution for the hearing and determination of service offences in war-like situations overseas is required and this is provided in the next part of this chapter.

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929 Stellios, (n. 905), 147.

930 Returned Services League of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Military Court of Australia Bill 2012 [Provisions] and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions]*, undated; A Street SC, *Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Military Court of Australia Bill 2012 [Provisions] and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions]*, 11 July 2012, 4; now a judge of the FCCA; Australian Defence Association, *Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Military Court of Australia Bill 2012 [Provisions] and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions]*, 9.

7.12 The military court cannot sit overseas: a Solution for War – an 'Australian Court Martial Tribunal'

7.12.1 MCAB 2012 criteria – Whether to sit overseas

For the reasons set out in chapter 7.11, the military court should not have jurisdiction to sit in warzones outside of Australia. This position is in stark contradiction to the recommendation proposed in the MCAB 2012 which was that the military court was to have domestic and extra-territorial operation[931] and was to be authorised to sit anywhere within Australia or outside of Australia.[932]

The MCAB 2012[933] proposed to permit the military court to determine whether it was necessary for it to sit in a warzone or elsewhere outside Australia. In doing so, there were a variety of legal impediments which the military court would have had to take into account to determine whether it was possible for it to sit at that place. In deciding this issue, the military court had to consider the security of that place, together with any relevant Australian or foreign laws. Additionally, if the place was in another country, the military court was required to also consider: any relevant agreements or arrangements in force between Australia and that country, the international legal basis for the presence of the ADF in that country; and, the international legal basis for the presence of the military court in that country. Finally, the court was required to consider any submissions made by the accused person or the DMP. [934]

These were substantial issues for determination and, in all likelihood, these would have involved appeals or prerogative writs being sought from decisions for the military court to sit in another country. It would be difficult to imagine these legal challenges being expedited in such a way that they could be concluded in less than several years. It is contended that the MCAB 2012 was naïve in the implicit expectation that, having gone through the legal regime proposed in cl 51, the military court would shortly thereafter proceed overseas and commence to hear and determine the trial of a service offence.

In considering the extra-territorial aspect of the planned jurisdiction of the military court under the MCAB 2012, the Senate Committee received a persuasive submission that: [935]

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931 MCAB 2012, cl 5.

932 MCAB 2012, cl 51(1).

933 MCAB 2012, cls 51(4) and 52.

934 MCAB 2012, cl 51(4).

935 A Duxbury, R Liivoja and M Groves, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Military Court of Australia Bill 2012 [Provisions] and*

> *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.*

Accordingly, it seems futile to embark upon an overseas sitting of the military court. As this is likely the case, it is argued that the military court should not sit overseas. Its extra-territoriality may be maintained so that trials may be conducted in Australia if just and necessary.

In this instance, where the military court could have tried the accused but for the need to conduct a trial overseas, the recommendation provided in the MCAB 2012 was that where the military court determined it was necessary to sit outside Australia, but it was not possible to do so, the military court proceeding had to be discontinued and all charges withdrawn — but not dismissed. [936]

As canvassed earlier, [937] there are also real issues with attempting to send civilians into a war zone. Chapter III judges and their staff are civilians and, if sent overseas, their well-being and their lives may be at risk. Their position under the Laws of Armed Conflict is less than satisfactory and then there are unresolved issues of medical or disability entitlements for those persons and their families and dependents if they are killed, wounded, injured or become ill. It is simply too dangerous to consider sending civilians to a war or a war-like theatre of operation.

Finally, it is recognised that the establishment of the military court will replace the 'interim'[938] system of hearings by courts martial and DFMs under the current military justice system. They will no longer exist as they are incompatible with the existence of a Chapter III military court. Accordingly, if the military court is not to have jurisdiction to sit overseas (which is similar in outcome to that proposed under the MCAB 2012 that the military court cannot sit overseas), what will occur in an operational area of conflict in which the ADF is deployed but where the military court does not sit? A system of military justice for the ADF must still be available to assist the chain of command.

Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions], 13 July 2012, 4.

936 MCAB 2012, cl 51(5).

937 See chapter 6.9.2.

938 Reintroduced by the 2009 No 1 Act.

7.12.2 MCAB 2012 – The 'Backup System' Proposal

In circumstances where the military court will not or cannot sit overseas, the Transitional Bill[939] accompanying the MCAB 2012, proposed that the current courts martial and DFM system be retained as a '*residual or backup system*' to conduct trials for service offences overseas (**'Backup System'**).[940]

The difficulty with this is that the Backup System operates within the military chain of command and is neither impartial nor independent of the ADF. Notwithstanding, the Transitional Bill[941] recognised this and noted that the Backup System would operate during the highly confined circumstances of a war, and that in these constrained situations, the result would be 'reasonable, necessary and proportionate'.

The MCAB 2012[942] recommended the Backup System conduct its proceedings in public and have the power to exclude the public, or specified persons, if it is considered necessary in the interests of the security or defence of Australia, the proper administration of justice or public morals. Any such determination by a court martial or DFM to conduct proceedings in private or order the non-publication of proceedings were to be based on the individual circumstances of each case.

However, the proposed Backup System was not well received[943] as the provisions enacted in the 'interim' legislation[944] largely mirrored the '*ad hoc*' arrangements which existed for courts martial (prior to the introduction of the AMC). The current revived courts martial structure under the continued 'interim measures' covering the ADF was the subject of Burnett's[945] paper delivered at a JAG conference in 2013, where he described the structure as consisting now of the office of CJA which is a statutory office with tenure[946]

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939 The Transitional Bill.

940 The Transitional Bill proposed to move the provisions in the DFDA which relate only to courts martial and DFM trials to a new Schedule 3B to the DFDA.

941 Transitional Bill, Explanatory Memorandum, [28]–[32].

942 MCAB 2012, cl 56(5).

943 Duxbury, Liivoja and Groves, Submission, (n. 932); Returned Services League of Australia, Submission, (n. 927).

944 2009 No 1 Act.

945 AIRCDRE Judge M. Burnett, DJAG (AF), *Does the ADF require a Chapter III military court?* JAG Conference, HMAS *Creswell*, Jervis Bay NSW, 28 October 2013.

946 *Military Justice (Interim Measures) Act (No. 1*) 2009 (Cth) introduced the office of the CJA provides at s 188A for a term of 5 years with one extension giving a maximum term of 10 years. In *Re Tyler; Ex parte Foley,* Brennan and Toohey JJ at 33 critically alluded to the tenure of the JAG, noting that he only had security within his period of tenure. Arguably to address these concerns JAs should be appointed on the same basis as the CJA. That is, the term of their appointments should be for the balance of their service life with no right to return to other duties. Otherwise the measures provided for in respect of the AMC would

and remuneration[947] fixed by the *DFDA*. The CJA is appointed by instrument issued by the JAG. Since the creation of the CJA, the position has been filled by officers who are one-star or two-star generals.[948] The DFDA provides that the JAG appoints all JAs to courts martial upon their being convened by the RMJ.[949] The JAG has appointed a full-time JA and DFM officer for repeating periods of 12 months.[950] The CJA, by delegation, can exercise all powers of the JAG except the power to appoint JAs and DFMs to office and provide s154 opinions. The CJA is required to provide administrative assistance to the JAG. The CJA must hold at least a one-star rank[951] and be a member of the JAs' panel. To be eligible for appointment to the JAs' panel, the appointee must be an officer[952] who has been admitted as a legal practitioner and has been so admitted for not less than five years.[953]

However, under the proposed Backup System, courts martial and DFM hearings were to be continued and to be convened on an *ad hoc* basis, rather than as a standing body, and the eligibility for membership of a court martial panel required the person to be an officer of not less than seven years;[954] hence, the former bias provisions were revived.[955] Yet, consistent with the courts martial

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provide an appropriate model. The interim measures legislation expired on 21 September 2017 with the retirement of Major General Westwood.

947 If the CJA and JAs are judicial officers and not remunerated in respect of duties they perform in the capacity of JAs, this will not be in issue. As a judicial officer their remuneration will directly be subject to protection. In the case of reservists undertaking duty, they would enjoy the protection of the *Defence Reserve Service (Protection) Act* 2001 (Cth) in respect of the performance of duty. Additionally, the rendering of judicial service in the performance of duty could be subject to co-operation between the state and federal Attorneys-General (as well as the Minister for Defence) via COAG, as is presently contemplated in respect of service for the JAG by s 182(1) DFDA.

948 From 2009 until 21 September 2017, (Brigadier, and later) Major General Ian Westwood AO, and then as from 22 September 2017 (for a 5-year term) Brigadier Michael Cowen QC. JAG, DFDA Annual Report 2017, 25 May 2018, 4.

949 DFDA, ss 129B and 129C.

950 On 8 February 2016, Group Captain Ian Scott Henderson AM, was appointed as a full-time JA and DFM. His appointment was extended and in June 2017 his appointment was further extended to 31 December 2018. JAG, DFDA Annual Report 2017, 25 May 2018, 5.

951 Brigadier in the Army, Commodore in the RAN, or, Air Commodore in the RAAF.

952 Upon reaching retirement age or medical incapacity for service, the CJA or JA would automatically cease to be an officer and thus be ineligible to hold appointment.

953 DFDA, s 196(3).

954 DFDA, s 183.

955 DFDA, ss 121, 122:

121 Objection on grounds of ineligibility etc.

At any time before a court martial is sworn or affirmed, the accused person may lodge an objection with the Registrar to any member or reserve member of the court martial or to the judge advocate on the grounds that the member or judge advocate:

(a) is ineligible;

(b) is, or is likely to be, biased; or

system which existed to 2007, the only persons who could be appointed as JAs were officers nominated by the JAG.[956] The links to the Executive were therefore restored and the Backup System once more proposed the same outcome.

Arguably, it is the *ad hoc* nature of the Backup System which was to operate overseas (in times of war or war-like operations), which is the central complaint about the proposal to introduce the Backup System itself. Therefore, it is argued that in the event of war or war-like operations overseas, a more appropriate solution would be the establishment of a 'standing and permanent military service tribunal' to hear trials overseas of service offences committed overseas, which this dissertation names the '*Australian Court Martial Tribunal*'.

7.12.3 An alternative 'Backup System': The Australian Court Martial Tribunal (ACMT)

It has been a central tenet of this thesis that a Chapter III court should be established as a military court with jurisdiction, only within Australia, to hear and determine by trial on indictment, service offences which carry a potential sentence of 12 months' imprisonment or more. This thesis argues for the requirement that serious service offences be dealt with on indictment; hence, this requirement would not permit the military court to sit and hear jury trial overseas.[957]

However, there will be a requirement to deal with the trial of service offences overseas, in war or war-like situations, where a constitutional solution for the hearing and determination of service offences must be found. That is, as a Chapter III court is not available, what is the 'least-worst' outcome which may be suggested for the ADF? Of necessity, this requirement requires a return to the doctrine of 'exceptionalism' to produce a solution for the trial overseas of service offences: the ACMT.

The authorities on exceptionalism (*Cox,*[958] *Bevan*[959] and *Tracey*[960]), established that a service tribunal which operates within the chain of command

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(c) is likely to be thought, on reasonable grounds, to be biased.

122 Notification of belief of bias

A member or reserve member, or the judge advocate, of a court martial who believes himself or herself:

(a) to be biased, or likely to be biased; or

(b) likely to be thought, on reasonable grounds, to be biased;

shall notify the Registrar forthwith.

956 DFDA ss 179, 180.

957 Chapter 7.11 and the requirements for a constitutional s 80 jury.

958 (1945) 71 CLR 1, 23.

959 (1942) 66 CLR 452.

960 (1989) 166 CLR 518, 573–574.

and does not purport to, or exercise, the judicial power of the Commonwealth, will be a valid exercise of the s51(v) defence power. Accordingly, a standing court martial which satisfies these requirements will be a valid exercise of Commonwealth powers.

As courts martial have traditionally and historically been convened on an *ad hoc* basis, the lack of continuity has been acknowledged as presenting problems in the retention of expertise and knowledge of processes. [961] Consequently, the *ad hoc* nature of courts martial needs to be addressed in a reform agenda.

In order to address this problem, it is proposed that the ACMT should be established under legislation[962] as a permanent 'service tribunal' under the DFDA invested with jurisdiction activated only upon a declaration by the Governor-General that Australia is either at war, or the ADF is operating in an overseas theatre of conflict (in circumstances similar to those in which the ADF is currently involved[963]) where the military court has no jurisdiction to sit and hear the matter.

Although the creation of the specialist ACMT service tribunal under the DFDA is a novel solution, it is a response to calls by JAGs since 2013 for the creation of a permanent court martial (which have never been implemented). [964]

In order to manage the ACMT, it should be comprised of the CJM of the military court, as **President** of the ACMT, and by standing appointments, in peacetime, of at least one (1) tribunal member of FCA status (herein called **'Vice-President'** or **'V-P'**) and two (2) tribunal members of FCCA status (herein called **'Deputy-President'** or **'D-P'**).[965] The President will not preside on trials before the ACMT, but it will be an appointment, *persona designate,*[966] to allow for the President to conduct non-judicial functions rather than as a member of the ACMT. The President will be responsible for the ACMT's management, staffing and the allocation of a V-P or D-P to a trial. The President will not carry

961 Burnett, (n. 942), 35.

962 By a similar mechanism in former s114A of the *DFDA* which introduced the AMC.

963 Map 6–1, ADF operations overseas 2019, (n. 745).

964 Appendix 11, JAG, *Annual Report*, 2017, Annex P, Item 17, states that the JAG recommendation was made in the JAG 2013 and 2014 Annual Reports.

965 This number of three tribunal members (1 V-Ps and 2 D-Ps) is consistent with the JAG, *Annual Report*, 2017, Annex P, Item 11 recommending the appointment of 3 full-time and permanent JAs under the current system. This JAG recommendation was made in the JAG 2013 and 2014 *Annual Reports* and remains unimplemented.

966 Generally, it is impermissible for a federal judge to exercise non-judicial power, however, it is permissible for a judge to do so if the power has been conferred on the judge personally, as opposed to powers having been conferred on the court. High Court of Australia in *R v Kirby; Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254. Similarly, the appointment may be modelled on s7A of the *Administrative Appeals Tribunal Act* 1975 (Cth) dealing with the appointment of an FCA judge as President of the AAT.

military rank but will be accorded a status equal to that developed between ADF ranks and classifications within the Australian Public Service.[967] On this basis, the President will hold a rank equivalent to a three-star general.

In order to safeguard the independence of the office of V-P and D-P in the ACMT, the appointment should be made by the Governor-General.[968] Those eligible to be appointed (at least during the comfort of peacetime when trial numbers will be very small) should be former judges who would otherwise be persons who are currently eligible for appointment to the DFDAT, comprised of V-P members[969] drawn from superior court judges of the Commonwealth, the States and Territories and D-P members from intermediate trial courts, the District or County Courts and FCCA judges.[970]

An appointment should carry a rank of no less than a two-star general for a VP and one-star for a D-P.[971] This would have a powerful effect on the perception and standing of the office of V-P and D-P within the ADF. Given the three-star general rank equivalency proposed for the President, a tribunal hierarchy is maintained. Currently, a DFM position is filled by a rank of, at least, Major or equivalent. This is a considerably lower rank than that of a two-star general. In peacetime, the CDF of the ADF carries the rank of full General (four-star general) or equivalent which is two ranks above a Major General or three ranks above a Brigadier. The chances of a perceived bias or impartiality of an ACMT member at such a high rank would be almost inconceivable as the chain of command would allow only the most senior officers in the ADF to seek to influence a matter before the ACMT. There is no evidence of any such interference in the history of service tribunals established under the DFDA.

Equally, the apparent independence of V-Ps and D-Ps will be enhanced by requiring the CJM of the military court, as President, who remains in Australia, to assume the sole responsibility for the allocation of V-Ps and D-Ps within the ACMT to conduct trials upon reference from the Registrar of the ACMT (who

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967 *Defence Enterprise Collective Agreement Delegations 2015 (No 2)* (Cth), 6 February 2015, Schedule 1, for example, Item (a), SES Band 3 (Chief of Division) is an Officer equivalent rank #9, equivalent to a Lieutenant-General (3 star).

968 Appointment by the Attorney General would ensure appropriate consultation between both the Attorney General and Minister for Defence on both appointments of the CJA and JAs.

969 *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth) s 17, which made amendments to the *DFDAA* 1955 (Cth) s 8.

970 *DFDAA,* s 8. Currently, no provision has been made for members of the FCCA to be appointed in any capacity.

971 From 2009 until 21 September 2017, (Brigadier, and later) Major General Ian Westwood AO, and then as from 22 September 2017 (for a 5-year term) Brigadier Michael Cowen QC. JAG, DFDA Annual Report 2017, 25 May 2018, 4.

would also be the same person as the Registrar of the military court).[972] Under this proposed structure, the position of RMJ would be abolished.

In respect of any proceedings before the ACMT, the President could be empowered to issue any directions or make orders as might be necessary up until the commencement of trial with such powers being delegable to a V-P or D-P, once appointed. Again, the AMC measures would provide a suitable model for this proposal.

Tenure, rank and remuneration could be addressed in a manner similar to that which was provided by the AMC scheme or by a fixed period of, say, seven years with no promotion necessary since the ACMT members, being retired judges, will be eligible for only one period of appointment.

In 2013, by way of an analogy, Burnett[973] observed that the effect of this arrangement to have a standing court martial would be to render the JAG solely responsible for the system of supervision of summary justice, and reviews and petitions from both summary and, what this thesis proposes, ACMT proceedings. The President would be solely responsible for the administration of the ACMT and remain as a Chapter III judge, not within the chain of command.

The ACMT, as proposed, would meet the test of being seen to be impartial and independent whilst still operating within a much-reduced chain of command. As Lamer CJ observed in *R v Genereux*:[974]

> *The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups.*

Burnett has criticised[975] the *ad hoc* nature of the courts martial system. His particular concern was the need to restrain the abuse of powers under Parts V and VI of the DFDA, that are the powers related to summons, arrest, custody, suspension from duty and investigation of service offences. These are all valid issues of concern and, it is argued, can all be adequately dealt with by the establishment of a standing ACMT.

There are other advantages to a standing ACMT which would also be able to dispose of interlocutory matters before the commencement of a trial. Consideration could also be given to empowering the ACMT to make ancillary

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972 Alternatively, the Registrar appointed under s 24C of the *Administrative Appeals Tribunal Act* 1975 (Cth), which Act may be used as a model for machinery in the establishment of the ACMT.

973 Burnett, (n. 937), 25.

974 [1992] 1 SCR 259, 286.

975 Burnett, *ibid*., 35.

orders relevant to matters arising under the *DFDA*. Review of such interlocutory decisions could be performed by the military court in Australia which could use telecommunications systems to hear applications dealing with these sorts of matters, remotely from Australia.

When the AMC was established, one of its powers was that it could conduct trials of service offences before a military judge sitting with a military jury. The military judge acted in the role of a civilian judge in a criminal trial and was responsible for matters of law, procedure and sentence. A military jury was selected under the rules of the AMC and was responsible only for the determination of verdicts of guilty or not guilty.[976]

The ACMT should be structured in a way similar to that which operated under the AMC. That is, with necessary modifications, the former Part 9 of the *Australian Military Court Rules* 2007 (Cth) may be redrafted. The V-P or D-P (in lieu of the then AMC CMJ or AMC MJ) will preside at the trial and sit either alone or with a military jury of six or 12 members, [977] all of whom will be bound by the rulings of the V-P or D-P and will determine only whether the accused is guilty or not guilty of the service offence. There is good reason to adopt the classification of service offences used in the AMC as Class 1, Class 2 and Class 3 offences.[978] In this regard, the procedures adopted by the AMC may be replicated such that a V-P or D-P in the ACMT will sit with a military jury[979] unless an accused person elects to be tried by a V-P or D-P alone in the ACMT.

It is noteworthy that in 2013, after the High Court of Australia declared the AMC invalid in 2009, a recommendation (which has never been implemented) with an analogous outcome as argued above, was made by the JAG[980] concerning the current court martial system. The JAG recommended that there be an adjustment to the respective roles of the JA and the President of a court martial. It was argued that an option for consideration was for a JA to preside at the court martial and the panel of officers appointed as members of the court martial would have a role analogous to that of a jury in a civilian trial. The JAG

976 *Australian Military Court Rules* 2007 (Cth), Part 9, Military Juries, rr33–41.

977 *Ibid.*

978 Appendix 9.1.

979 Appendix 9.2 sets out the criteria for military juries in the AMC which refer back to the classification of offences in Appendix 9.1.

980 JAG, *Annual Report*, 2017, Annex P, Item 14 recites the JAG recommendation was made in the JAG 2013 Annual Report. Also, it should be noted the criticism of the role played by the President in courts martial where the JAG Annual Report at Item 6 contains a further recommendation to "*Review appropriateness of a court martial President exercising judicial discretions. Ideally, consistent with the approach in DFDA s 134(1), all discretions that would ordinarily be given or exercised by a judge sitting with a jury in a civil criminal proceeding should be vested*" in the CJA and JAs.

argued that the court martial panel would be the sole arbiters of matters of fact with a clear distinction between the conduct of the trial according to law and the adjudication of guilt or innocence. The JAG further argued that if the JA were to preside, this would offer significant advantages in terms of dealing with pre-trial matters.

The JAG[981] had also made an additional recommendation (which has also never been implemented) which would have afforded JAs more direct involvement in the sentencing process under Part IV of the DFDA for courts martial. The JAG also argued that JAs should preside over the sentencing process and be part of the private deliberative processes of the court martial and should have a second or casting vote if a simple majority cannot otherwise be achieved. Importantly, the JAG recommended that courts martial should also be required to give reasons for sentence in order to increase the transparency of the process.

It may be observed, therefore, that though there have been recommendations for reform made by successive JAGs the recommendations argued for in the establishment of the ACMT and its operations actually go further and implement the recommendations made by JAGs over many years.

7.12.4 ACMT decisions: internal review by the JAG

The legal justification for the creation of the ACMT is the exercise of the doctrine of 'exceptionalism' from Chapter III of the Constitution as explained by the High Court to use the defence power in s51(v) of the Constitution to create a standing service tribunal, the ACMT. In order to comply with the doctrine of exceptionalism, ACMT actions must be within the chain of command and be subjected to the DFDA 'review mechanisms'[982] for convictions and punishments imposed by service tribunals. This will include an automatic review by a reviewing authority, a petition to a reviewing authority, and a further review by the CDF or a Service Chief.[983] However, where an appeal is lodged to the

981 JAG, *Annual Report,* 2017, Annex P, Item 15 recites the JAG recommendation was made in the JAG 2013 Annual Report and the JAG 2014 Annual report.

982 DFDA, Part VIIIA, Division 2, the Reviewing Authority. This section should be amended to require the Reviewing Authority to be the JAG (a two-star general) as the military ranks of the VP and the DP will not permit a lower ranked officer to review the actions of such senior officers within the chain of command. See chapter 2.6.6.

983 JAG, *Annual Report*, 2017, Annex P, Item 22, is critical of the DFDA review mechanism and has made the following recommendation in 2016 (which has not been implemented): *"Three levels of internal review of guilty findings (automatic review by command, petition for review by a reviewing authority and request for further review by CDF / Service Chief) and an external appeal process (Defence Force Discipline Appeals Tribunal) does not represent best practice and requires further consideration".*

Full Court of the FCA from a decision of the ACMT, the *DFDA* review process will be discontinued. This is consistent with the exercise of judicial power by an independent Chapter III court.

The following diagram sets out the structure of the military court and the ACMT proposed in this thesis.

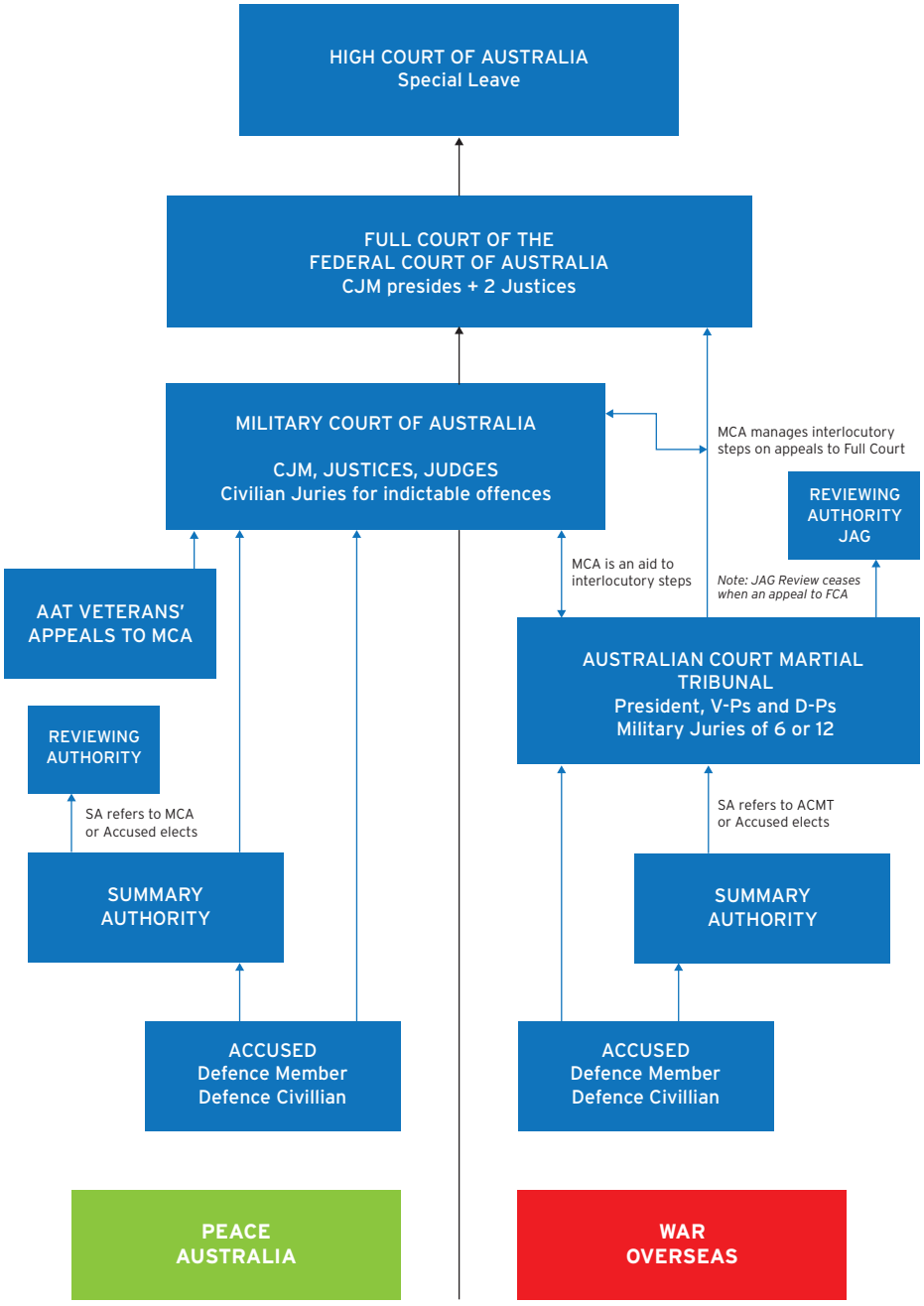

Diagram 7-3: A Proposed New Military Justice Regime for the ADF: In Peace and in War

7.13 Conclusion

In the event that the recommendations made in this thesis are accepted, Australia will have established a modern military justice system for the ADF which covers its operations during times of both peace and war.

It will lead to the establishment of a constitutional federal Chapter III specialist military court with jurisdiction extending to the trial and determination of service offences[984] committed in Australia, and for those offences committed overseas and for which trials will be held in Australia, in peacetime. It will also have established a standing ACMT which will have jurisdiction to hear and determine only those service offences committed and tried overseas where the military court will not have jurisdiction.

Consequently, in peacetime in Australia, the ADF will have a sound, impartial and independent Chapter III military court and, in war (or war-like circumstances) overseas, it will have a sound, impartial and 'practically independent from the chain of command' military tribunal, the ACMT.

In reality, in peacetime, this provides a military justice system that allows minor service offences to be tried within the chain of command, gives to the accused the right to elect, and preserves the DMP's right to charge a defence member before an independent and impartial military court free from the chain of command. This can only enhance the fairness for an accused and allow equal access to justice in the administration of military discipline.

In respect of the trial of more serious service offences, these will be dealt with by the Commonwealth, exercising its judicial power, impartially and independently, safeguarded from any interference by the chain of command. The ability to use the ACMT during times of war provides an important repository for the exercise of military justice along lines very similar to those in the military court.

The establishment of a military court will bring to an end the debate about the doctrine of exceptionalism that has been used to justify the dubious constitutional grounds upon which the military justice system has operated since Federation, that being the so-called doctrine of 'exceptionalism' from the operation of Chapter III. Oddly and conversely, in war-time, 'exceptionalism' will still need to be relied upon to empower the ACMT.

Parliament is urged to act now — in peacetime — and not during times of war.

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984 This is together with such other jurisdiction as may be conferred on it. See chapter 7.2.2.

PART C

Appendices

1 APPENDIX 1: SUMMARY OF 1997 DFDA REPORT – RECOMMENDATIONS & ADF RESPONSE

Source: Joint Standing Committee on Foreign Affairs, Defence and Trade Report on Military Justice Procedures in the Australian Defence Force, Appendix E; see also Brasch, (n. 412), app 6

- The standard of military justice should not vary according to whether it is a time of peace or war. Because the Defence Force must constantly train for war, there should be no different approach for the conduct of tribunals in peace time to those conducted in war, overseas or during a period of civil disorder in Australia.
  ADF Response — This recommendation is fully supported by the ADF.
- There is a most powerful case for eliminating the multiple roles of the convening authority.
  ADF Response — The role of the Convening Authority to select membership of courts martial and DFM will be transferred to the JAG who will do so after consultation with the services.
- Prosecution guidelines similar to those in operation in the various States or the Commonwealth (with suitable modifications) should be introduced.
  ADF Response — Prosecution policy to guide Convening Authorities is to be introduced. DGDLO has been tasked with developing the policy.
- Careful consideration should be given to examining the question of the appointment of an 'independent' Director of Military Prosecutions upon a tri-service basis.
  ADF Response — A DMP will not be established. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders must retain the power to prosecute. This is vital especially during operations and when forces are deployed overseas. Moreover the establishment of a DMP would place limitations on commanders and would result in unacceptable delays in the administration of discipline.
- The matter of any such appointment, if at all, whether it should be tri- service, the role and duties of any Director and the matter of the responsibility of the prosecuting authority to any other authority and to whom should be dealt with any legislative change. At the same time the matter of whether the

prosecutor should be organised as an independent unit under the Act should also be addressed.
ADF Response — THIS RECOMMENDATION HAS NOT BEEN AGREED.

A DMP will not be established (See Recommendation 4).

- The present system of the JAG nominating officers to the JA's panel, appointing DFMs and recommending s.154(1)(a) reporting officers should be retained.
  ADF Response — In line with this recommendation, no change to the present procedure will be made.
- There should be no command or control (except of an administrative nature) exercised over JAs, DFMs and s.154(1)(a) reporting officers in the performance of their judicial duties. This would involve amendment to such provisions as AMR Reg 583 and even AMR Reg 585 (or their service equivalents, if any).
  ADF Response — These appointments will be assigned under the technical control of the JAG. In effect they will be managed by the JAG.
- On the assumption that by convention the JAA would continue to be a military officer, the JAA should remain under the command of the JAG.
  ADF Response — The JAA will be placed under command of the JAG.
- There should be no reporting on JAs, DFMs and s.154(1)(a) reporting officers in respect of their judicial duties.
  ADF Response — There will be no reporting on these appointments in respect of their judicial duties.
- There should be a separate administrative authority in respect of non- judicial duties of the JAs, DFMs and s.154(1)(a) reporting officers and reporting on such duties by their respective 'Head of Corps'.
  ADF Response — A separate administrative authority will be established with respect to non-judicial duties of these appointments.
- Duties of a judicial nature, including the appointment of JA or DFM to a particular trial be allocated to JAs, DFMs and s.154(1)(a) reporting officers by the JAG. This could be done through a Judge Advocate Administrator.
  ADF Response — Selection of these appointments for a particular trial will be transferred to the JAG to be undertaken in consultation with the services.
- The JAA should be under command of and reported on by the JAG and the DGDLO.
  ADF Response — The JAA will reside in the office of the JAG and consequently, in these circumstances the DGDLO will not command or report upon the JAA.

- Convening orders issued by convening authorities should include a request for the JAG to appoint a JA or DFM, or alternatively a statement (if it be the case) that a particular JA or DFM has been appointed by the JAG.
  ADF Response — Convening Authorities will continue to decide whether to prosecute and will hand appointment aspects to the JAG. Convening Authorities will no longer issue convening orders but will order a member to face a court martial or DFM and the JAG's office will then make the necessary appointments after consulting service authorities.

- The subject of fixed tenure (for JAs, DFMs and s.154(1)(a) reporting officers) should be further considered. Whilst I do not consider it essential, the notion of fixed tenure (with a virtual right of extension) is not opposed. It may provide a means of ensuring that appointees perform duties and should not hold office for the sake of it, whilst remaining inactive or unavailable for one reason or another.
  ADF Response — JAs, DFMs and s.154(1)(a) reporting officers will have a specified tenure.

- Subject to the constraints, inter alia, discussed, I do not see why those who are appointed as JAs, DFMs and s.154(1)(a) reporting officers should not generally be able to perform duties of a non-judicial or duties not inconsistent with the performance of the type of judicial duties or functions that they may be called upon to perform from time to time.
  ADF Response — These appointments should not be restricted from performing other tasks of a non-judicial nature not inconsistent with their judicial duties.

- Consideration should be given to the establishment of the equivalent of a Court Administration Unit, independent of the convening authority and outside his chain of command or independent tri-service officer to perform the function of selecting members for a court martial. (This is said upon the assumption that there is not strong support for the U.K. scheme of a Court Administration officer who has taken over many of the convening authority's powers).
  ADF Response — The duty of selecting members of a court martial or DFM will be transferred to the JAG's office in consultation with the services.

- If the present system [of convening authorities] is to be retained, then:
  (1) convening authority should wherever possible appoint, subject to service exigencies, persons from outside his command and at least outside the accused's unit. The matter of some members outside the convening authority's command being included is likewise a matter that could be considered.

(2) Such selection should be from a 'large pool' and as a desirable objective, as random as possible. The matter of the tri-service pool situation could even be considered for the few courts martial in fact held.

ADF Response — The decision has been made that the JAG and not the convening authority will make appointment of members of courts martial. (See Recommendation 16)

- Reviews of court martial proceedings and DFM trials should be conducted by an authority other than the convening authority.
  ADF Response — Reviews of court martial proceedings and DFM trials will be conducted by authorities other than convening authorities.
- There should be a prohibition upon consideration of an Officer's performance as a member of a court martial being used determine qualifications for promotion or rate of pay or appointment. Further, that the officer reporting on efficiency of the president or members should not take into account the performance of duties of the president or members of any court martial. Section 193 protects such a member during performance of his/her duties as a member. There is a case for implementing the spirit of such a section generally.
  ADF Response — An officer's performance as a member of a court martial will not be reported upon for promotion or pay purposes.
- Whilst the matter of whether the JA should be involved in the imposition sentence, could be the subject of further study, it is not necessary presently to recommend a change in the current system. Indeed, at the service level, in serious cases where a CM is justified, that there would be considerable opposition to taking powers of sentencing away from the court itself.
  ADF Response — The present system whereby the court and not the JA imposes sentence will be retained.
- Despite what I have said above, I do not consider that one should ignore the argument for the trial JA imposing sentence and giving reasons for such. I believe that support for his doing so would be strengthened where appeal rights in respect of a CM sentence to be conferred. The issue should thus be further considered.
  ADF Response — This has been noted. The decision has been taken, in line with the previous recommendation, that the present system whereby the court and not the JA imposes sentence will be retained.
- A good case should be established for now considering the conferring of rights of appeal (by leave) in relation to sentences imposed by court martial or DFM. There is no pressure for change from those interviewed or who had

put in submissions. However, it is observed that were appellate rights given in relation to sentence, the justification for requiring stated reasons for particular sentence would be considerably increased. Amendments would also need to be made to s.20 of the DFD Appeals Act to deal with the rights of appeal in relation to sentence.

ADF Response — The present system of reviews, appeals and petitions are comprehensive and far exceed what is available through the civil court system. Consequently, the introduction of further appeals (on sentence) is unnecessary and would cause administrative delays to the finalisation of disciplinary matters.

- No case is made for a prosecution appeal as of right or by leave appeal against sentence. Whether there should be a limited right of appeal in respect of sentence would be a highly controversial issue. The situation with a disciplinary tribunal exercising disciplinary power is not quite analogous with the position of the prosecution in relation to prosecution appeals against sentence on the grounds of manifest inadequacy I the ordinary criminal courts. The position in the civil courts is that the Crown may address on sentence at trial, and does in some cases, have a duty to do so.

  ADF Response — This recommendation was noted and agreed. No change to the present procedure is appropriate.

- That consideration be given to the inclusion of a 'no conviction' option in respect of an offence charged under the DFDA. Such would recognise that there may be good reasons for no conviction being recorded.

  ADF Response — Amendments to the relevant legislation are to be developed to provide for the recording of 'no conviction' under the DFDA.

- There is a good case for amending s.116 to make warrant officers eligible for membership of courts martial. Whether or not, after a period of time, lower ranks could/ should be involved may depend upon experience involving the significant change proposed and how, if made, it works out in practice.

  ADF Response — THIS RECOMMENDATION HAS NOT BEEN AGREED.

  It is considered important that the boundaries between commissioned and non-commissioned officers be preserved. Warrant officers firmly believe that their role is to administer and decide discipline. Consequently, warrant officers will not be eligible for membership of courts martial.

- Specifically, that non-commissioned members of the rank of Warrant Officer be eligible to serve upon a General or Restricted Court Martial provided that the non-commissioned member is equal or senior in rank to the accused.

ADF Response — THIS RECOMMENDATION HAS NOT BEEN AGREED.

This recommendation provides conditions under which warrant officers might serve on courts martial but the proposal that they do so was rejected in the outcome of the previous recommendation.

- That although arguments exist for a limited right of appeal in some cases from decisions of a commanding officer or other summary authorities, no action should be taken, at this stage, to introduce any such appeal rights.
  ADF Response — This recommendation was noted and agreed. No change to the present procedure is appropriate.

- In view of the arguments advanced during this study, the issue of conferring rights of appeal, if any, should be the subject of further consideration, particularly in the classes of cases which have been identified (eg elective punishments involving reduction in rank).
  ADF Response — The decision was made, in accordance with the previous recommendation, that no appeal system be introduced.

- The present review system has generally proved to be efficacious and provided appropriate protections for defence members and benefits to the Service in streamlining the administration of justice.
  ADF Response — This recommendation was noted and agreed.

- The advantages of any system of appeal from decisions at the summary authority level are outweighed by the disadvantages. The study lends support to the views of the senior officers who opposed the introduction of an appeal system.
  ADF Response — This recommendation was noted and agreed.

- Concern is felt regarding submissions that suggest that some s.154(1)(a) reporting officers may not have sufficient experience or training properly to report for the benefit of the reviewing authority. The difficulty could be addressed by training, exposure to criminal law eg by way of secondment to offices of the DPP, and/or by the employment of reserve officers. The Army particularly does well in this area, frequently using reserve legal officers to do reports under s.154(1)(b). Perhaps a certificate of qualification and suitability to be s.154(1)(b) reporting officer could be given by the newly established Military Law Centre.
  ADF Response — This will be included for study in a training needs analysis which is to be conducted.

- Subject to the exigencies of service s. 154(1)(b) reporting officers should be legal officers totally independent of the prosecution process and of the reviewing authority.
  ADF Response — Officers appointed as s.154(1)(b) reporting officers will be legal officers independent of the prosecution process and the reviewing authority.

- To assist particularly Commanding Officers, that increased formalised training and education be furnished to them before they take up their position as Commanding Officer and exercise service tribunal jurisdiction as a summary authority. Steps be taken to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. The new Military Law Centre could play a significant 'supportive' role in this area of education, even awarding a 'certificate' on completion of a course.
  ADF Response — It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.

- In respect of elective punishments, provision be made for the election to be in writing and for the summary authority to furnish the accused certain explanations about the election when giving him the opportunity to elect trial by DFM or court martial.
  ADF Response — This has been agreed and amendments to the relevant legislation will be developed.

- The punishment of reduction in rank should be removed as an elective punishment.
  ADF Response — THIS RECOMMENDATION HAS NOT BEEN AGREED.

  Reduction in rank is a punishment essential to the maintenance of discipline especially at the lower rank levels and is of particular importance during operations. Consequently, it is to be retained as an elective punishment.

- In the absence of appeal rights, the range of elective punishments presently available should be reviewed.
  ADF Response — THIS RECOMMENDATION HAS NOT BEEN AGREED.

  Like reduction in rank, the full range of elective punishments is important in maintaining discipline especially at the lower rank levels and during operations. Consequently, in deciding to retain reduction in rank as an elective punishment, the need to review elective punishments as a whole has not been agreed.

- That provisions (probably by way of regulations) be introduced requiring that an election be in writing and further dealing with the obligations upon an officer to provide explanations to the accused when giving him the opportunity to elect.
  ADF Response — Amendments to legislation will be developed to require summary authorities to provide explanations in writing to an accused regarding the election.
- That a structured and in-depth course of teaching and training in relation to the DFDA be implemented for all officers about to be appointed as commanding officers. That course should be the same irrespective of service.
  ADF Response — It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.
- That ongoing education and instruction be given to those who act in the capacity of a summary authority.
  ADF Response — It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.
- That sentencing statistics and guidelines in relation to summary punishments be prepared, published and made available from time to time.
  ADF Response — This will be included for study in a training needs analysis which is to be conducted.
- The legal principles discussed in reports of the JAG/DJAGs (and in s.154(1)(a) reports) should be the subject of reporting and dissemination to commanding officers.
  ADF Response — This will be included for study in a training needs analysis which is to be conducted.
- [This recommendation is identical to Recommendation 33].
- That the Military Law Centre provide uniform training and education to commanding officers before such officers commence to sit as summary authorities, to ensure they are knowledgeable about their roles in the military justice system as a summary authority. The matter of certification by the Military Law Centre or some other body could be addressed.
  ADF Response — It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the

military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.

- There is a case for providing some basic legal training and work materials to those [who] may be called upon to participate as a prosecuting or defending officer at a summary trial.
  ADF Response — It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.

- That instructions be given, if necessary, by statutory amendment, that any summary authority (including CO, SUPSA and SUBSA) who has been involved in the investigation or the preferring of a charge against an accused shall not hear or deal with any such charge against that accused.
  ADF Response — This will be included for study in a training needs analysis which is to be conducted.

- Absent a compelling need or legal requirement, there is no need to change the present system of reporting on commanding officers in relation to the performance of duties in maintaining and enforcing service discipline.
  ADF Response — It is agreed that no change to the present arrangements is necessary.

- There should be no reporting upon a commanding officer in respect of the performance of duties as a service tribunal in a particular case.
  ADF Response — A commanding officer's performance of duties as a service tribunal in a particular case will not be reported.

- Consideration should be given to extending the discipline officer jurisdiction (with appropriate modifications) to deal with officers holding the rank of major and below.
  ADF Response — The discipline officer scheme will be extended to apply to officers up to the rank of Captain (Army) equivalent undergoing initial training.

2 APPENDIX 2: SUMMARY OF 1998 OMBUDSMAN'S REPORT – RECOMMENDATIONS & ADF RESPONSE

Source: Joint Standing Committee on Foreign Affairs, Defence and Trade Report on Military Justice Procedures in the Australian Defence Force, Appendix D; see also Brasch, (n. 412), app 7

- Investigating officers conducting administrative investigations under Defence (Inquiry) Regulations should not be entitled to find that a criminal offence has been committed, although it may be necessary to inquire into the circumstances of the criminal allegation in order to deal with a matter appropriately. Accordingly, the ADF should consider:
  - ~ amending Defence Instruction (General) Administration 34–1 Inquiries into Matters Affecting the Defence Force to the effect that it is not appropriate for Investigating Officers, Boards or Courts of Inquiry to make a finding that a criminal offence has been committed, and where there is sufficient evidence to suggest that an offence has been committed, the matter should be referred to the appropriate authority for investigation under the DFDA and/or the civil criminal law; and

  ADF Response — This recommendation has been incorporated, for BOI and Investigating Officers in the draft manual Administrative Inquiries in the ADF.

  - ~ amending the sample Terms of Reference in Defence Instruction (General) Administration 34–1 Inquiries into Matters Affecting the Defence Force (and in single Service instructions where they exist) to the same effect.

  ADF Response — This recommendation has been incorporated part in the draft manual Administrative Inquiries in the ADF. Model Terms of Reference for BOI and Investigating Officers advise that recommendations may be made 'whether the conduct of any person warrants further investigation by service or civilian police.'

- The ADF consider whether amendments are necessary to the guidance on when to choose a BOI rather than an Investigating Officer, in order to encourage consistency and to minimise any perceptions that complaints are not being treated sufficiently seriously.

  ADF Response — Specific guidance, both in descriptive and tabular form is provided in the draft manual Administrative Inquiries in the ADF.

2.70 The ADF:

(3) consider the adequacy of the training in the use and value of alternative dispute resolution techniques;

(4) review the Defence Instructions on the management of complaints to HREOC of sexual and racial discrimination, or under Redress of Grievance procedures to ensure that a consistent emphasis is placed on resolving complaints by alternative dispute resolution mechanisms;

(5) collect data (in a format similar to that for unacceptable sexual behaviour) for all complaints of discrimination and harassment, and when reported, require units to indicate whether resolution of the complaint by alternative dispute resolution mechanisms was considered, and if not, why not; and

(6) expand the reporting requirements for incidents of unacceptable sexual behaviour to require the same data for incidents of that nature.

ADF Response — The ADF has agreed that a greater emphasis should be placed on alternative dispute resolution techniques in general and on mediation in particular. The issue of alternative dispute resolution is addressed in the draft manual Administrative Inquiries in the ADF. Advice on various types of alternative dispute resolution, including mediation, has been included in the latest amendment of Defence Instruction (General) Personnel 35–3 Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force.

- To ensure that the preliminary inquiry processes are managed properly in the future, the ADF should:

  ~ consider removing all reference to 'informal investigations' in the guidance;

  ADF Response — This recommendation has been incorporated in the draft manual Administrative Inquiries in the ADF. Such investigations are now called 'Routine Inquiries'. 'Situations will occur when this level of inquiry will resolve the matter without the need to initiate a further, formal inquiry under D(I)R.

- amend the Defence Instructions to provide clear guidance on the purpose of preliminary inquiries and the extent to which they can be used; and

  ADF Response — Clear guidance on the use of 'Routine Inquiries' is provided in the draft manual Administrative Inquiries in the ADF.

- amend the Defence Instructions to provide clear guidance on accountability requirements for preliminary inquiries.

  ADF Response — Accountability requirements for 'Routine Inquiries' have been incorporated in the draft manual Administrative Inquiries in the ADF.

4.51 The ADF revise its Instructions:

- on the handling of complaints and grievances, and on the conduct of investigations to include reminders of the factors to be considered when selecting or appointing an Investigating Officer. Where particular expertise may be required, the Commanding Officer should be advised to ensure that the Investigating Officer has the appropriate expertise, or that the Investigating Officer consults with individuals with the relevant expertise (preferably before commencing the investigation);

  ADF Response — The draft manual Administrative Inquiries in the ADF provides detailed guidance on the selection of appropriate Investigating Officers and members of BOI.

- to require that all Investigating Officers, under both the DFDA and Defence (Inquiry) Regulations (and members of Board or Courts of Inquiry), declare any actual or potential conflict of interest before commencing an investigation; and

  ADF Response — Advice on conflict of interest and prior involvement in matters under inquiry is detailed in the draft manual Administrative Inquiries in the ADF.

- to ensure that Commanding Officers are provided with guidance on how to develop terms of reference, and in particular, the requirement for terms of reference to be outcome focussed and to address context management issues.

  ADF Response — Context management issues are explained, and general advice is provided in the draft manual Administrative Inquiries in the ADF.

5.57 The ADF should:

- develop a training strategy for officers who conduct investigations under the Defence (Inquiry) Regulations.

  ADF Response — A study of the needs and requirements for the training of Investigating Officers under D(I)R has been completed by an ADF joint training needs analysis team. Pilot courses were scheduled for the period March June 1999 with the initial courses planned for September October 1999. The four levels of training which have been identified are:

  ~ General awareness for all Service personnel;
  ~ Training for Investigating Officers who will conduct 'simple inquiries';
  ~ Training for Investigating Officers who will conduct 'complex inquiries'; and
  ~ Training for Appointing Authorities.

- Officers should not be appointed to conduct investigations under the Defence (Inquiry) Regulations unless they have received training or have other experience or expertise which makes them suitably qualified to do so.
  ADF Response — The draft manual Administrative Inquiries in the ADF provides detailed guidance on the selection of appropriate Investigating Officers including requirements for qualification, experience, competence and other qualities.

- Guidance on investigations under Defence (Inquiry) Regulations should be revised to provide advice to Commanding Officers and Investigating Officers on how to plan and conduct investigations.
  ADF Response — The draft manual Administrative Inquiries in the ADF provides advice on scoping and planning inquiries.

- Defence Instruction (General) Administration 34–1 Inquiries into Matters Affecting the Defence Force (and in single Service instructions where they exist) should be amended to clearly indicate that an Investigating Officer investigating under Defence (Inquiry) Regulations cannot compel a witness to answer questions where the answer may tend to incriminate them for a criminal or Service offence, and to indicate that assistants to an Investigating Officer do not have the power to question witnesses.
  ADF Response — The draft manual Administrative Inquiries in the ADF provides detailed guidance on the rights of a witness before an Investigating Officer regarding excuse provisions for not answering questions. Self-incrimination is one reasonable excuse. The draft manual also includes advice for Investigating Officers should a witness decline to answer a question. The ADF no longer appoint assistants to Investigating Officers.

6.36 The ADF should:

- implement a process whereby investigating bodies report periodically on the progress of the investigation (if the investigation is to take more than one month), and which allows for an assessment of whether the investigation is being conducted appropriately; and
  ADF Response — Detailed requirements for the monitoring and reporting of inquiries have been incorporated in the draft manual Administrative Inquiries in the ADF.

- amend the present guidance to investigators to provide advice on the development of investigation reports and recommendations, and the limitations to their authority in this respect.

ADF Response — Detailed guidance on the development of reports and recommendations has been incorporated in the draft manual Administrative Inquiries in the ADF.

7.68 The ADF amend relevant Instructions to:

- provide Commanding Officers with information regarding the particular support requirements of survivors of sexual incidents or offences and a list of contact points or organisations where the necessary specialist help can be obtained;
  ADF Response — The ADF provides personnel with support services, such as counsellors and psychologists in their normal professional capacity. In addition, the draft manual Administrative Inquiries in the ADF provides for the provision of such services, including to the next of kin of deceased members. The issue has also been addressed in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35–3 Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force.

- advise Commanding Officers that, in relation to sexual incidents or offences, evidence can be collected up to 72 hours after the event, and within that time frame the survivor (and the alleged offender, if appropriate) should be referred to the authorities immediately so that forensic evidence can be collected;
  ADF Response — This recommendation has been incorporated in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35–3 Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force.

- clearly state the ADF's policy on compassionate travel for members (and their partners or next of kin) where serious offences occur;
  ADF Response — This recommendation has been incorporated, in part, in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35–3 'Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force' which refers to ADF policy INDMAN 2603 'Leave for Special Purposes'. Entitlement to compassionate leave where serious sexual offences occur is not clearly articulated in INDMAN 2603 'Leave for Special Purposes'

- advise Commanding Officers of the need to allow survivors of sexual incidents or offences to make their own decisions whenever possible, and particularly in relation to their movement after an offence has occurred; and
  ADF Response — There is no evidence to suggest that this recommendation has been addressed in either in the draft manual Administrative Inquiries in

the ADF or Defence Instruction (General) Personnel 35–3 Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force.

- provide a critical incident stress management checklist for managers and supervisors to assist with observing personnel after an incident to ensure they are receiving adequate support.

  ADF Response — In her 1998 report, the Ombudsman noted that the Operational Stress Management Manual issued in 1997 incorporates appropriate stress management procedures.

8.69 The ADF should:

- extend its monitoring of trends in the incidence of sexual harassment and offences to include comparisons among the Services;
- undertake regular trend analysis of DFDA and Defence (Inquiry) Regulations investigations;
- consider analysing any correlation between alcohol and/or drug abuse and serious incidents; and
- ensure that information and expertise can be readily shared between the Services.

  ADF Response — In her 1998 report, the Ombudsman acknowledged that the trend monitoring and analysis mechanisms in place for DFDA matters were adequate. Trend monitoring of D(I)R inquiries have been established in the draft manual Administrative Inquiries in the ADF. This will allow the Defence Legal Office to monitor trends and provide advice on an ADF wide basis. For discrimination, harassment, sexual offences, fraternisation and other unacceptable behaviour reporting mechanisms are detailed in Defence Instruction (General) Personnel 35–3 Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force. The Defence Equity Organisation is responsible for maintaining statistical data and identifying trends within the ADF.

8.69 The ADF should:

- spell out in Defence (Inquiry) Regulations and Instruction, and particularly for Investigating Officers, the principles of procedural fairness and rights of review; and

  ADF Response — Issues of procedural fairness and review within the inquiry system have been addressed in the draft manual Administrative Inquiries in the ADF.

- ensure that members are advised of the outcome of any DFDA proceedings which affects them.

ADF Response — Amendments to the Discipline Law Manual ADFP 201 have been drafted to include a requirement that members be advised of any DFDA proceedings that affect them.

8.69 The ADF should consider including in the guidance advice about the desirability of forewarning a member of any public statement which may affect him/her personally.

ADF Response — As noted in the Ombudsman's 1998 report it is standard practice not to mention the names of individuals in statements to the press. Where the media requests information about an individual, that person is contacted and advised by the Directorate of Public Information. With respect to Boards of Inquiry, the draft manual Administrative Inquiries in the ADF requires all persons, including the next of kin of deceased members who may be affected by the outcome of the inquiry, to be advised of all matters relevant to them as soon as possible after decisions have been made.

3 APPENDIX 3: 1999 MILITARY JUSTICE REPORT – RECOMMENDATIONS

Source: Military Justice Report 1999 Summary of Recommendations; see also Brasch, (n. 412), app 8

Recommendation 46

The Committee recommends that, after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed.

Recommendation 47

The Committee recommends that consideration should be given to reviewing current arrangements to allow the ADF to deal with all cases involving straightforward acts of indecency without requiring the consent of the Director of Public Prosecutions.

Recommendation 48

The Committee recommends that the ADF ensure that existing guidelines on the right to privacy are adhered to in the conduct of DFDA action.

Recommendation 49

The Committee recommends that the ADF undertake a formal training needs analysis with respect to the use and implementation of the DFDA as a basis for the development and introduction of appropriate education and training courses.

Recommendation 50

The Committee recommends that the ADF consider the introduction of structured continuation training for Defence Force Magistrates and Judge Advocates on the DFDA.

Recommendation 51

The Committee recommends that, as part of a comprehensive public disclosure of the matter of AAT, the Meecham report, a comprehensive report on the matter of AAT and any relevant documents relating to AAT should be tabled in the Parliament.

Recommendation 52

The Committee recommends that the report on the operation of the DFDA should be tabled in a more timely manner.

4 APPENDIX 4: SUMMARY – 2001 PARACHUTE BATTALION REPORT – RECOMMENDATIONS & GOVERNMENT RESPONSE

Source: 2001 Parachute Battalion Recommendations and ADF Response; see also Brasch, (n. 412), app 9

Recommendation 1

We recommend that educating Defence personnel of their rights and responsibilities be part of an ongoing program, commencing at recruit training.

Response

Defence provides extensive equity and diversity training, from recruit training to Commanding Officer Designate courses. Additionally, all ADF members and Departmental staff are required to undergo annual equity and diversity refresher training. The equity and diversity workplace competencies are currently being introduced into all through-career training.

Army has completed a major review of its equity and diversity training. This review has led to the integration of equity and diversity competencies into training packages to be delivered to officers and soldiers on their career courses. This action will be completed by August 2002. As an interim measure, equity and diversity training is to be delivered to unit commanders and Regimental Sergeant Majors for them to deliver, in turn, to officers and soldiers under their command.

Formal equity and diversity courses have been part of Navy training since 1999. All Navy personnel must undergo such training on joining and annually thereafter. In 2001 an interim, tailored, course was introduced for senior officers. In addition, it is now mandatory that prior to consideration for appointment as Commanding Officers and Executive Officers and to most instructional appointments, Navy personnel have undergone equity training in the previous 12 months.

Air Force conducts equity and diversity training at all levels of its leadership and management continuum, from initial entry training to senior appointments. This training is fully integrated into broad competencies.

A major portfolio evaluation report of Equity and Diversity in Defence will shortly be tendered to the Departmental Inspector General. In due course once senior Defence managers have considered the evaluation report; the Committee may consider a briefing on the outcomes of this comprehensive evaluation.

Recommendation 2

We recommend that officers in the direct chain of command and SNCO's responsible for the discipline system in units not be appointed as Equity Officers. The two roles cannot be adequately reconciled.

Response

This recommendation is broadly supported. Equity Advisers are responsible for providing support, information, advice and options for resolution to ADF members who are complainants or respondents, and management on matters relating to all forms of unacceptable behaviour.

As far as practicable, those holding command appointments are not appointed as Equity Advisers, however, the vast majority of personnel holding rank are in the direct chain of command or are responsible for discipline. The Government believes that the intention of the Committee's recommendation can be accommodated if sufficient, appropriately trained, Equity Advisers are appointed to enable all members of a unit or ship access to an Equity Adviser outside of their own direct chain of command. Army's Land Command has established, as a benchmark, a ratio of one Equity Adviser to every 50 personnel, to accommodate the number of sources of equity advice to those involved in unacceptable behaviour issues.

Recommendation 3

We recommend that Army establish a pool of investigators held centrally for the conduct of larger investigations. These investigators should not be routinely drawn from outlying areas.

Response

The Government does not support the recommendation that a pool of investigators be established and held centrally for the conduct of larger investigations. Whilst the number and complexity of major investigations conducted over the previous year would warrant serious consideration being given to the establishment of a central pool of investigators, this need has not been evident in previous years. Prior to FY 2000/2001 there was an average of only two Major Investigations Teams (MIT) formed per year for investigations

in excess of several months. The composition of a MIT is dependent on the type, sensitivity and complexity of the investigation. As required, Army has drawn on the investigative effort from Navy and Air Force to form a MIT, and on occasions, sought the technical assistance and advice of the Australian Federal Police. The Government believes that the current arrangement is more flexible in the use of these scarce and valuable resources.

The role and establishment of the 5th Military Police Company (SIB), headquartered in Canberra was examined in late 2001. At this point in time Army's preferred approach is to increase the number of more senior investigators on the staff of the 5th Military Police Company (SIB) which should enable better co-ordination and management of investigations and continue to draw more junior and specialist investigators from regional areas as required. Action is subsequently in hand to increase the number of more senior investigators of Headquarters 5th Military Police Company (SIB).

Recommendation 4

We recommend that Army investigate the feasibility of placing MP's with Federal, State and Territory Police Forces as part of their training.

Response

The Government supports this recommendation. A Memorandum of Understanding has already been signed by Army and the Victoria Police. It is planned to enter similar agreements with other police services including the Australian Federal Police. Additionally, Army is looking to extending the range of civil police and tertiary training courses currently attended by Military Police (MP) personnel.

Recommendation 5

The Committee further recommends that Army review the conditions for reserve Military Police, with the view to better utilising the investigative skills in the Military Police Reserve units, especially for major cases.

Response

The Government agrees the Committee's recommendation. The Government values the contribution of Army Reserve MP's, many of whom have acquired specialist investigation skills in their civilian employment. Army is currently developing a Trade Management Plan for the Corps of Military Police, which will outline a framework for the employment of Reservists. In developing the Plan, Army will examine means to better utilise the investigative skills in MP

Reserve and integrated units, especially for major cases. The Plan is due for completion in June 2002.

Recommendation 6

The Committee recommends there be a formal review of the Defence Legal Office, with terms of reference and timetable for completion, and that the review be made public.

Response

This recommendation by the Committee arose in the context whether the Military Justice System is too slow. At issue are the formal processes which comprise the Military Justice System; and the organisational arrangements for the in-house delivery of legal services.

Military Justice System

The Government fully agrees that the entire legal process surrounding the incidents at 3 RAR took far too long. A much more efficient system is required to centrally track and monitor the progress of all matters dealt with in the Military Justice System. The most efficient way to achieve this is through the establishment of a Registrar of Military Justice. This has been implemented within the office of the Judge Advocate General, whose statutory responsibility it is to report annually to Parliament on the implementation of Defence Force Discipline Act. The Registrar of Military Justice is implementing a case management system (with requisite Information Technology support) to capture all ADF inquiries and matters of Defence Force discipline. This information also will be available to the Inspector General of the ADF to support that office in ensuring compliance with due processes, timeliness, transparency and standards in military justice.

In addition, the Judge Advocate General has implemented a standard step in the conduct of more complex disciplinary proceedings in the form of Directions Hearings. All those responsible for bringing matters to trial will be required to appear before a judicial officer for the purpose of explaining what is involved, and how long it should take to conclude. This will provide an additional process stimulus to expedite all disciplinary proceedings.

Coupled with strong recommendations by Mr Burchett for much enhanced training in military procedures (presently in the design phase through the Military Law Centre), these measures, when fully effective, should make for the more timely, streamlined and controlled administration of military justice.

Review of The Defence Legal Service

The Defence Legal Service has been undergoing a continuous program of integration and reform since the amalgamation of all in-house legal services in 1997.

In 1997 a military Director General was appointed in charge, to lead and manage the national in-house provision of legal services across Defence. A civilian General Counsel was appointed within The Defence Legal Service to provide high level legal advice across the Defence Organisation.

Studies were conducted into the provision of legal services to all bases, commands and regions in 1997. The central office in Canberra was fundamentally reviewed in 1998–99. The roles of Reserve Legal Officers were reviewed in 2001. This important review will result in a much closer relationship between the permanent and reserve officers of The Defence Legal Service. Moreover, the Reserve officers will be more closely integrated with their respective services, ideally through appointments within major formations and force element groups. The relevant Papers from each of these studies can be made available to the Committee, should this be required.

Finally, the incoming Director General undertook a national field survey of the entire organisation in 2001 and has made substantial internal organisational changes aimed at uniting all the legal resources available to the Defence Organisation into arguably the largest national in-house law firm in Australia. The shaping vision is set at "professional excellence", in all aspects of performance. The Defence Legal Office was renamed The Defence Legal Service in March 2001.

The demand for in-house legal services seems to be outstripping available resources. Significantly, the Burchett Audit of Military Justice observed: "It was frequently suggested that the Defence Force should have more lawyers because there are not enough in-house resources to meet the demand (para 180)."

Burchett recommended that the total number of legal officers and their location and organisation required in the modern Defence Force be reviewed. This recommendation will be actioned as part of the general implementation of all the Burchett recommendations in 2002, with special emphasis accorded to the geographical placement of ADF legal officers to ensure that it reflects sufficiently the demands on The Defence Legal Service nationally.

Should the Committee require, an extensive briefing on the reform of the Defence Legal Service can readily be provided. The Government considers that these changes need to be given further time to take effect, before any further formal review is considered.

Recommendation 7

The Committee recommends that officers transferring to the Defence legal specialisation on completion of a law degree necessitate relinquishment of rank commensurate with their legal expertise and experience.

Response

This recommendation is broadly supported. The remuneration and professional development of the legal specialisation within the ADF elements of The Defence Legal Service is based on legal competencies. Clients are entitled to expect that rank and legal skills are reflective of actual experience. The most usual form of entry to the legal specialisation will remain through undergraduate and graduate recruitment to the most junior officer ranks.

Transfer to the legal specialisation as late as the rank of Major (or equivalent rank) would only be in exceptional circumstances. There will be some officers at this level whose command and management experience has required them to deal extensively with legal issues as a matter of course. This experience, coupled with legal training, will enhance their capacity to contribute effectively to The Defence Legal Service. It may be necessary for certain of these officers to be held longer at the Major (or equivalent rank) level to enable them to consolidate their legal experience before they are eligible for promotion. All of these considerations would be taken into account by the Career and Professional Development Committee, which has been established to regulate the professional management of officers in the Defence Legal Service.

Recommendation 8

The Committee further recommends that legal officers' selection boards have a legal officer on the panel.

Response

This is fully endorsed.

Dissenting Report Recommendation

In light of the recurrence of issues relating to brutality and Military Justice, and noting the recommendations of the committee's previous report into Military Justice procedures in the ADF, those dissenting members now strongly recommend that the ADF establish a statutory office of the Director of Military Prosecutions, for Defence Force Magistrate trials and Courts-Martial (for criminal and quasi criminal matters).

Response

As has been announced and advised to the Committee previously, a DMP will be established after selection of an appropriate model suitable to the ADF needs, and when the necessary legislation is in place.

5 APPENDIX 5: 2001 MILITARY JUSTICE REPORT – RECOMMENDATIONS

Source: The Report pp 29–41; see also Brasch, (n. 412), app 10

RECOMMENDATIONS

It is recommended that:

Training in relation to the Defence Force Discipline Act

- Common legal training courses in Disciplinary Law should be produced for Australian Defence Force personnel at all levels as soon as practicable.
- In particular, a course for all officers covering basic legal principles should be introduced.
- The training for officers about to assume command appointments should, for all services, include a component comparable to that presently provided in the case of the Air Force in respect of Disciplinary Law.
- Competency Standards should be devised and introduced for personnel involved in the disciplinary process at the summary level (for example, Defending Officers might be required to complete an interactive module on pleas of mitigation and attend a summary hearing before being available to represent someone).
- Steps should be taken to encourage a closer involvement of junior officers in the disciplinary process.
- The introduction of annual awareness training in military justice issues should be considered.

Discipline Officer Scheme

- Consideration should be given to making the appointment of a Discipline Officer mandatory in all units.
- The ranks subject to the Discipline Officer Scheme should be all ranks to and including Captain equivalent.
- The record of matters dealt with under the Discipline Officer Scheme for an individual member should be discarded not, as at present, upon departure from his or her unit or after twelve months, but upon promotion to a higher rank.

- The period allowed for members to elect to be dealt with by a Discipline Officer should be reduced from 7 days to 1 day, subject to a discretion in the officer who would bring the formal charge (if one were to be brought) to extend the time up to 7 days.
- The offences to which the Discipline Officer Scheme relates, and also the maximum penalties, should be reviewed if the scheme is extended to higher ranks.

Extras

- The nature, purpose and sphere of extras should be clarified by tri-service guidelines, so as to ensure that they may be lawfully imposed.
- The guidelines should make it clear that, as a matter of policy, extras are to be regarded as an administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the Defence Force Discipline Act.
- The guidelines should address the questions who may award extras, upon whom they may be imposed, monitoring arrangements, the types of activity covered and the nature of the failure on account of which an order for extras may be made.
- The power to award extras should not be delegated below the rank of Corporal equivalent in respect of subordinates within his or her command.
- All ranks up to and inclusive of Captain equivalent should be subject to orders for extras made by a superior.

Utility of Punishments

- Consideration should be given to reviewing:
  - ~ the nature of the punishments which may be imposed under the Defence Force Discipline Act in the light of contemporary standards;
  - ~ whether some form of Service oriented community work could usefully be made an alternative sanction;
  - ~ whether the Act should be amended to confer a power, not merely to impose no punishment, but also, for a special reason, to decline to enter a conviction.
- The question be examined whether a separate scale of punishments for Navy members is any longer necessary.
- A review be undertaken of the applicability of the present scale of punishments to Reservists who are not on full time service or undergoing periods of continuous training.

Time Taken for Commencement and Review of Summary and Other Trials

- The feasibility be investigated of securing a "readiness" undertaking from Reserve legal officers offering themselves for Australian Defence Force work.
- A mandatory requirement be introduced for a prosecutor to provide a statement specifying the time taken to bring a matter to trial, together with a statement of the reasons for any delay.

Training Charges

- Consideration should be given to the establishment by regulation of the concept of a training charge, and to its definition and scope.

Administrative Consequences and Administrative Action in relation to Disciplinary Breaches

- The policy work currently being undertaken to achieve standardisation of application and outcome of administrative sanctions, should be regarded as requiring an urgent resolution.
- Steps should be taken to improve the dissemination of information upon the true career effects of convictions under the Defence Force Discipline Act and of various administrative sanctions.

Equity and Diversity Issues

- Having regard to the repeated comments of NCOs, and particularly junior NCOs, about the influence of training in equity and diversity at initial entry institutions, consideration should be given to providing more balancing emphasis in that training on the obligations of discipline enshrined in the Defence Force Discipline Act.

Unequal Treatment and Consistency of Punishments

- Consideration should be given to the institution of a system of traffic tickets in military bases for minor infringements of general orders and traffic regulations.
- Consideration should be given to the issue of policy guidance on summary punishments including the dissemination of information as to the general level of punishments for particular offences while making it clear a CO's discretion would not thereby be limited.
- Complete and accurate statistics concerning prosecutions under the Defence Force Discipline Act and administrative action having punitive effect be compiled on a common basis for all three services and be made available to legal and administrative agencies of the ADF.

Transparency and Victim Feedback

- Ways of achieving fair and effective transparency of military justice outcomes (in relation both to prosecutions and administrative actions) be investigated and appropriate steps be taken.
- Guidelines be issued to commanders designed to ensure effective feedback to complainants, victims and offenders in relation to administrative action or summary proceedings.

Access to Legal Advice

- The policy regarding the provision of legal assistance to members be reviewed.
- Steps be taken to reduce the incidence of conflict of interest situations arising out of the location of a single legal officer without an alternative.
- The total number of legal officers and their location and organisation required in the modern Defence Force be reviewed.

Legal Officers at Summary Proceedings

- The Defence Force Discipline Rules be amended to provide that a member who desires to be legally represented at a summary trial must first obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate.
- Pre-command legal training of commanding officers should include guidance on the factors to be taken into account in deciding whether to grant leave for legal representation at summary trials.

Need of Commanding Officers to Seek Legal Advice During Trial

- Pre-command legal training of commanding officers should include clear guidance on how legal assistance during the course of a summary trial may be sought without prejudice to the rights of the parties.

Effects of Defence Reorganisation

- Command and line management responsibility for the discipline of personnel in joint and integrated organisations, and the dissemination of information about it, be reviewed.
- Rationalisation of command and line management responsibility for the discipline of personnel in joint and integrated organisations take account so far as possible of geographic convenience.
- Common familiarisation training on military justice issues and civilian disciplinary processes be developed for use in joint and integrated organisations.

Investigation Issues

- The level of resources available for police investigative work across the three Services be reviewed.
- A register of suitable persons to act as Investigating Officers under the Defence (Inquiry) Regulations be developed (as to which see the Role and Functions identified for the Military Inspector General).

Peer Group Discipline

- Specific guidance on the use of peer group discipline be included in pre-command training of COs and in standing orders for training institutions

Drug Policy

- Section 59 of the Defence Force Discipline Act be reviewed in conjunction with DI(G) PERS 15–2, with a view to the amendment of the legislation to enable military tribunals to deal with charges in respect of small quantities of all appropriate illegal drugs.
- In the meantime, consideration be given to prosecuting in cases involving cannabis where the civilian police regard the quantity as too small, limiting the military prosecution to the statutory quantity of 25 grams.

Presumption of Guilt

- Greater emphasis should be placed on the concept of a *prima facie* case in the training of NCOs, WOs and officers in relation to summary proceedings under the Defence Force Discipline Act.
- The training of prosecutors in summary proceedings should emphasise the principle, which civilian prosecutors are required to observe scrupulously, that a prosecutor does not seek a conviction at any price, but with a degree of restraint so as to ensure fairness.

Director of Military Prosecutions and Administration of Courts Martial and Defence Force Magistrate Hearings

- An independent Australian Defence Force Director of Military Prosecutions, with discretion to prosecute, be established.
- A Registrar of Courts Martial be established for the Australian Defence Force.

Keeping Things "In-House"

- Guidance be included in (a) Command Directives at all levels, and (b) pre-command training courses, designed to discourage any tendency to conceal potential military justice problems from higher authority

Availability of Avenues of Complaint

- Consideration be given to reviewing what means (if any) exist for achieving closure on the cases of chronic complainants.

Professional Reporting – The "Whistleblower" Scheme

- Current policy covering treatment of "Whistleblowers" be reviewed as to its applicability to deal with more general military justice issues.

Regional DFDA Units

- Consideration be given to the usefulness of establishing a regional DFDA unit in a particular location where the ordinary arrangements are difficult to implement in practice.

Medical Issues

- General guidance be provided to Commanders (and included in appropriate training courses) concerning the weight to be given to medical certificates, and the course to be taken if there is reason to be doubtful about a particular certificate.

Procedural Fairness and Command Prerogative

- General policy guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith.

Military Inspector General

A Military Inspector General be appointed with the following role and functions:

Role

The role of the Military Inspector General is to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the Australian Defence Force in order to ensure its health and effectiveness; and to provide an avenue by which any failure of military justice may be examined and exposed, not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available, and that systemic causes of injustice (if they arise) are eliminated.

Functions

The functions of the Military Inspector General should be:

- To investigate, as directed by the CDF, or as may be requested by a Service Chief, such matters as may be referred to the Military Inspector General, or to investigate a matter of his or her own motion, concerning the operation of the military justice system;
- To provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint;
- To take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities; and, following any referral, to receive and, if necessary, to report to the CDF upon, the response of the authority to whom the matter was referred;
- To act as an Appointing Authority for investigations (not including Boards or Courts of Inquiry) under the Defence (Inquiry) Regulations;
- To maintain a Register of persons who would be suitable to act as members of inquiries or as Investigating Officers;
- To advise Appointing Authorities under the Defence (Inquiry) Regulations on the conduct and appointment of inquiries;
- To monitor key indicators of the military justice system for trends, procedural legality, compliance and outcomes, including:
  - ~ Service Police investigation reports;
  - ~ Significant administrative inquiries and investigations;
  - ~ Service discipline statistics;
  - ~ Records of significant administrative action taken for disciplinary purposes;
  - ~ Records of Grievances;
  - ~ Reports of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process.
- To conduct a rolling audit by means of spot checks of Unit disciplinary records, procedures, processes, training and competencies relevant to military justice;
  - ~ To promote compliance with the requirements of military justice in the ADF;
  - ~ To liaise with other agencies and authorities with interest in the military justice system in order to promote understanding and co-operation for the common good;
  - ~ To consult with overseas agencies and authorities having similar or related functions;

~ To make to the CDF such reports as may seem desirable or as the CDF may call for;
~ To receive documents which were submitted to this Inquiry and finalise complaints brought to the attention of this Inquiry which may require further action.

6 APPENDIX 6: THE 2005 SENATE REPORT – RECOMMENDATIONS & GOVERNMENT RESPONSE

Sources: The 2005 Report, and Reforms to Australia's military justice system — Second progress report, Appendix 2, 29 March 2007, Senate Foreign Affairs, Defence and Trade Committee; see also Brasch, (n. 412), app 11

RECOMMENDATIONS

The committee has made a number of major recommendations designed to restructure Australia's military justice system giving particular emphasis to ensuring the objectivity and independence of disciplinary processes and tribunals and administrative investigations and decision making. It has also made a number of additional recommendations intended to improve other aspects of the military justice system concerned mainly with raising the standards of investigations and decision making taken in the chain of command.

The discipline system

The major disciplinary recommendations provide for the referral of all civilian equivalent and Jervis Bay Territory Offences to the civilian authorities. The additional recommendations provide for the reform of current structures, in order to protect service personnel's rights in the event that the civilian authorities refer criminal activity back to the military for prosecution. The additional recommendations cover the prosecution, defence and adjudication functions, recommending the creation of a Director of Military Prosecutions, Director of Defence Counsel Service and a new tribunal system. All recommendations are based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.

Recommendation 1

3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

Government Response: Not Agreed.

Recommendation 2

3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.

Government Response: Not Agreed.

Recommendation 3

The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.

Government Response: Not Agreed.

Recommendation 4

The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Government Response: Agreed in part.

The Government agrees in part, noting that the ADF makes an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution. This determination is based on an assessment of whether dealing with the matter under the DFDA can be reasonably regarded as substantially serving the purpose of maintaining and enforcing Service discipline. Where civilian police do not pursue a matter and it can be regarded as substantially serving the purpose of maintaining and enforcing Service discipline, then the matter may be dealt with under the DFDA. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and

territories for referral of offences. Defence also intends to establish a common database for tracking referrals.

Recommendation 5

The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:

- Fully implementing the recommendations contained in the Ernst & Young Report;
- Encouraging military personnel secondments and exchanges with civilian police authorities;
- Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;
- Increasing participation in civilian investigative training courses; and
- Designing clearer career paths and development goals for military police personnel

Government Response: Agreed in part.

The Government agrees this recommendation with one exception. The Ernst and Young Report was a review of the Army police investigation service and did not address the Navy and Air Force police investigation services. Army accepted 53 of the 55 of Ernst and Young recommendations. Two were not accepted on the basis that they appeared to infringe on the individual rights of ADF members. Work to implement the 53 agreed recommendations commenced in August 2004 and is progressing well. 33 recommendations, including the two that are not accepted, are complete, including establishment of the Provost Marshal — Army in January 2005. 22 recommendations are pending additional work which is being progressed by Army.

Some of the recommendations are specific to the Army and not directly relevant to the Navy and Air Force. The Government agrees that all Service police will act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service.

Recommendation 6

3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations' services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.

Government Response: Agreed.

The Government will conduct a tri- service audit of Service police to establish the best means for developing investigative capability. Defence acknowledges that the current military police investigation capability has significant shortcomings and is inadequate for dealing with more serious offences that are not referred to civilian authorities. As identified by the Senate Committee, Defence has begun to rectify shortfalls as part of the implementation of agreed recommendations from the recent Ernst and Young review into Army military police, including the establishment of the Provost Marshal — Army. Navy and Air Force have completed or are conducting similar reviews to build on the outcomes of the Ernst and Young review. The recommended audit will bring together this work and establish the best way to develop the investigative capability of all Service police.

To supplement this, Defence will establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The ADF began work to form a Serious Crime Investigation Unit in February 2004. Establishment of the unit has been in abeyance pending the outcomes of this Review. In-principle agreement has been reached with the AFP for a senior AFP officer to be seconded to mentor and provide oversight of this team, and implementation will now proceed. The unit will be headed by a new ADF Provost Marshal outside single Service chains of command. Service police may be supplemented by civilian investigators. The unit will deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. Greater numbers of more skilled investigators will be available to investigate complex and serious issues in operational environments and contingencies inside and outside Australia.

Recommendation 7

6.1 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Government Response: Not Agreed.

Recommendation 8

6.2 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Government Response: NOT AGREED.

Recommendation 9

6.3 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Government Response: Not Agreed.

Recommendation 10

6.4 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Government Response: Agreed.
The Government agrees, noting that action has already commenced to establish the Director of Military Prosecutions as a statutory position. The statutory appointment will allow the Director of Military Prosecutions to operate independently and free from perceptions of command influence. It will also promote confidence among ADF members in the independence and impartiality of the appointment and in the functions of the Office.

Recommendation 11

6.5 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Government Response: Agreed.
The Government agrees. The Office of Director of Military Prosecutions was established on an interim basis in July 2003; it is timely to review the Office to ensure that it has sufficient resources to meet current and future workloads and is able to respond to operational requirements.

Recommendation 12

6.6 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Government Response: Agreed.
The Government notes that the Committee recognised that the ODMP had been performing an admirable job and agrees to review the training requirements for permanent legal officers assigned to the Office of the DMP. The review will be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.

Recommendation 13

6.7 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Government Response: Agreed.
The Government notes that the ODMP has been actively engaged in increasing its profile over the last eighteen months and agrees action should continue to raise the awareness and profile of the Office. Increased awareness and profile will help ADF members understand the role of the DMP and ensure that Commanders have ready access to impartial and independent advice on the proper investigation and prosecution of Service offences, especially those that are serious criminal offences.

Recommendation 14

6.8 The committee recommends that the Director of Military Prosecutions be appointed at one-star rank.

Government Response: Agreed.
The Government agrees to the statutory appointment of the Director of Military Prosecutions at the one-star rank.

Recommendation 15

6.9 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Government Response: Agreed.

The Government agrees to appropriate remuneration for the appointment of the Director of Military Prosecutions. In accordance with the Government's response to Recommendation 10, action is being taken to create a statutory appointment of the DMP. Remuneration of the statutory appointment will be determined by the Remuneration Tribunal (Cth).

Recommendation 16

The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Government Response: Agreed in principle.

The Government notes the Committee's underlying concern that the current ADF structures could give rise to a perception that ADF legal officers may not always exercise their legal duties independently of command influence.

The independence of the ADF permanent legal officers was criticised in the ACT Supreme Court in *Vance v The Commonwealth* (2004). In part, the case concerned legal professional privilege. A significant factor in the case was that ADF and Department of Defence legal officers do not normally have practising certificates and this was seen as an indication that they were not independent and impartial and entitled to legal professional privilege. In May 2005, the Commonwealth appealed the decision, and the ACT Court of Appeal unanimously upheld the appeal on 23 August 2005.

Although there are practical difficulties in implementing Practising Certificates, the legal officers in the office of the DMP will be required to hold them, and other permanent legal officers will be encouraged to take them out. The matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society).

Recommendation 17

The committee recommends that the ADF establish a Director of Defence Counsel Services.

Government Response: Agreed.

The Government agrees to establish a Director of Defence Counsel Services (DDCS) to improve the availability and management of defence counsel services to ADF personnel. The DDCS will be established as a military staff position within the Defence Legal Division to coordinate and manage the access to

and availability of defence counsel services by identifying and promulgating a defence panel of legal officers, permanent and reserve.

Recommendation 18

The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Government Response: Agreed.

The Government agrees to create a permanent military court to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court will be established under appropriate Defence legislation. The court will satisfy the principles of impartiality and judicial independence through the statutory appointment of judge advocates with security of tenure (five-year fixed terms with a possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). During the period of their appointment, the judge advocates will not be eligible for promotion, to further strengthen their independence from the chain of command. The appointments will be made by the Minister for Defence.

The appointment of new military judge advocates would see the need to consider further, during implementation, the position of the Judge Advocate General. The remaining functions of the Judge Advocate General would be transferred to the Chief Judge Advocate and the Registrar of Military Justice. The Australian military court would consist of a Chief Judge Advocate and two permanent judge advocates, with a part- time reserve panel. The panel of judge advocates would be selected from any of the available qualified full or part-time legal officers. The court would be provided with appropriate para-legal support sufficient for it to function independent of the chain of command. In meeting all of the requirements of military justice, the court would include options for judge advocates to sit alone or, in more serious cases, with a military jury. The use of a jury would be mandatory for more serious military offences, including those committed in the face of the enemy, mutiny, desertion or commanding a service offence.

Recommendation 19

The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

1. Judges should be appointed by the Governor-General in Council;
2. Judges should have tenure until retirement age.

Government Response: Not Agreed.

In response to Recommendation 18, the Government agreed to the option to establish an Australian military court. The Government does not support the creation of a permanent military court under Chapter III of the Constitution. Current advice is that there are significant policy and legal issues raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.

Importantly, a military court is not an exercise of the ordinary criminal law. It is a military discipline system, the object of which is to maintain military discipline within the ADF. It is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force, both in Australia and on operations and exercises overseas. The judicial authority must be able to sit in theatre and on operations. It must be deployable and have credibility with, and acceptance of, the Defence Force. The principal factor peculiar to the Defence Force is the military preparedness requirements and the physical demands of sitting in an operational environment. The Chapter III requirements are not consistent with these factors, and the Government does not support the Chapter III features for a military court.

In addition, a Chapter III court would require its military judicial officers to be immune from the provisions of the DFDA subjecting them to military discipline. While this is appropriate regarding the performance of their judicial duties, the Government does not support making them exempt from military discipline in the performance of their non-judicial duties such as training.

The limitations resulting from those constraints means that having a separate military court outside Chapter III is preferable to bringing the military justice system into line with Chapter III requirements.

The Government will instead establish a permanent military court, to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court would be established under appropriate Defence

legislation and would satisfy the principles of impartiality and judicial independence through the statutory appointment of military judge advocates by the Minister for Defence, with security of tenure (fixed five-year terms with possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). To enhance the independence of military judge advocates outside the chain of command, they would not be eligible for promotion during the period of their appointment.

Advice to the Government indicates that a military court outside Chapter III would be valid provided jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

Government Response: Not Agreed.

The Australian military court will have a permanent panel of military judge advocates with legislated independence. Appointment should be based on the same professional qualifications and experience that apply to other judicial appointments such as those applicable to a Federal Magistrate as set out in the *Federal Magistrates Act* 1999 (Cth) Schedule 1 clause 1 (2). While recent civilian experience could be a factor to be taken into account, other qualified military legal practitioners should not be excluded on the basis that they do not have recent civilian experience.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

Government Response: Agreed in principle.

The Government agrees that judge advocates appointed to the Australian military court should have appropriate experience and that appointments should be based on the same professional qualifications and experience that apply to other judicial appointments, such as those applicable to a Federal Magistrate as set out in the *Federal Magistrates Act* 1999 (Cth) Schedule 1 clause 1 (2).

The Australian military court will have a permanent panel of military judge advocates with legislated independence. The Government notes that military judge advocates will predominantly be drawn from the Reserve and would have adequate civilian and military experience. Nevertheless, other qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience.

Recommendation 22

5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

Government Response: Agreed in principle.
The Government agrees in principle with the concept of a right to elect trial. The form of that right and appropriate thresholds will need to be determined once the structure of the Australian military court is established but will be based on existing determinations that certain classes of serious offence must be tried by a court incorporating a military jury.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

Government Response: Agreed.
The Government agrees with the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian military court. The current process of review will be discontinued. The existing right of appeal from Courts Martial and Defence Force Magistrates (to be the Australian military court) to the DFDA Tribunal will be retained. Currently, the DFDAT may only hear appeals on conviction on points of law and may quash a conviction or substitute a conviction on an alternative offence. This will be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.

Recommendation 24

7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that: the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).

Government Response: Agreed.

The Government will continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. Defence uses the Australian Standard for Whistleblower Protection Programs AS 8004–203, and the scheme is currently undergoing a comprehensive review by the Defence Inspector General. This review and its implementation will emphasise the present provisions against reprisals in the current Defence Whistleblower instruction. The Government supports annual reporting of the operation of the scheme against documented performance standards.

Recommendation 25

7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.

Government Response: Agreed in part.

The Government notes that Defence already reports statistics on reporting unacceptable behaviour in its annual report. The Government agrees that Defence will continue to include this data in the Defence annual report. The Government does not agree to report on potential under-reporting of unacceptable behaviour, as an exercise necessarily speculative in nature. Defence does, however, have in place a range of initiatives to manage and coordinate its complaints processing function to raise awareness and encourage reporting as appropriate.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

Government Response: Agreed.

The Government will amend the Administrative Inquiries Manual to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of administrative inquiries. The Manual will provide improved guidance on the use of quick assessments.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clearer in its advice on the selection of an investigating officer.

Government Response: Agreed.

The Government will amend the Administrative Inquiries Manual to improve guidance to Commanders who are responsible for the selection of inquiry officers to carry out administrative inquiries, such as routine unit inquiries or those appointed as Investigating Officers under the Defence (Inquiry) Regulations. This will improve independence and impartiality, as well as enhance the quality of inquiry outcomes.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers: Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry. A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report. The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation. The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.

Government Response: Agreed in part.

The Government agrees to consider proposals to enhance the transparency and accountability in the appointment of investigating officers. The Government agrees that investigating officers be required to produce statements of independence and to make known any potential conflicts of interest. The Government does not support the proposal that conflict of interest reports

be included in reports to the Commanding Officer, rather, the Government will direct Defence to amend the Administrative Inquiries Manual to require that investigating officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the appointing authority to any potential conflict of interest or objection to an investigating officer. Resolution of any conflict would then occur prior to the commencement of the investigation.

Recommendation 29

11.67 The committee makes the following recommendations—

The committee recommends that:

- the Government establish an Australian Defence Force Administrative Review Board (ADFARB);
- the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;
- the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;
- the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;
- all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;
- the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;
- the CDF be required to give a written response to ADFARB findings/recommendations; if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
- the ADFARB be required to make an annual report to Parliament.

The committee recommends that this report:

- contain information that will allow effective scrutiny of the performance of the ADFARB;
  - ~ provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
  - ~ comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.

The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:

- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
- where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.

The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.

- The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:
- the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and
- although, in the interest of individual privacy, hearings are held in- camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.

The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:

- improving the training of investigating officers;
- maintaining a register of investigating officers, and
- developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.

To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends

that the ADFARB receive reports and complaints directly from ADF members where:

- the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;
- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
- the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.
- The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

Government Response: Not Agreed.

The Government agrees there is a need to improve the complaints and redress of grievance management system and proposes that the shortfalls in the existing system would best be met by streamlining the existing ADF complaints management and redress of grievance system and retaining independent internal and external review and oversight agencies. The committee's recommended ADF Administrative Review Board (ADFARB) would not support the relationship between command and discipline, would reduce contestability and introduce duplication.

The ADFARB concept proposed by the Senate Committee is based on the Canadian Forces Grievance Board (CFGB). The CFGB deals with only about 40 per cent of Canadian Defence Force grievances, is highly resource intensive and does not replace the Canadian internal complaints resolution body, or the Canadian Forces Ombudsman. Defence is concerned that the ADFARB concept would reduce contestability in the system by absorbing the ADF's only independent review authority, noting the proposal that the ADFARB take responsibility for and continue the work of the IGADF. As proposed, the ADFARB would also duplicate the role of the Defence Force Ombudsman.

The Government does not agree to establish an ADFARB on the basis that it would be a costly exercise 19 that would not provide real benefits in terms of increasing perceived independence. The Government is also concerned that an ADFARB would remove the responsibility and accountability of commanders for the well-being of ADF personnel in their command.

The Government proposes instead to reform and streamline the complaints and redress of grievance management system, in line with the recommendations

of a joint Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. Implementation of these recommendations has commenced in line with a CDF Directive 2/2005. Changes to the system will improve the rigour, impartiality and timeliness of processing complaints.

The overarching principle guiding the redress of grievance system remains that complaints should be resolved at the lowest effective level and in the quickest possible time. Primary responsibility to resolve complaints remains with the unit commanders.

Defence's Complaint Resolution Agency (CRA) — an existing body which is established outside the ADF –will become the lead agency in the coordination of complaints and redresses of grievance.

In its expanded role, the CRA will have three major functions.

- The CRA will initially provide advice to commanding officers on the management of every application for redress of grievance and monitor the handling of those redress applications at the unit level. It will have an enhanced advisory and oversight function of every application.
- The CRA will have the authority to advise on appropriately trained and qualified investigating officers at this initial stage and, if necessary, will require an alternative investigating officer to that nominated by the commander.
- Where ADF personnel refer their complaint to the Service Chief or the Chief of the Defence Force following the decision of the commanding officer, the Complaint Resolution Agency, as in the present situation, will conduct an independent review of the matter and provide recommendations to the decision maker.

All complaints will be registered with the Complaint Resolution Agency within five days of initiation and it will be empowered to take over the management of all cases unresolved by commanders 90 days after lodgment. In all cases, the Agency will be the central point for monitoring progress and resolution. A single register for tracking complaints across the ADF will be implemented.

Other improvements to the ROG system being implemented include improvements in training of commanding officers and investigating officers, consolidating Defence complaint mechanisms, and managing centrally the various complaint hotlines operating in Defence.

For those ADF personnel who, for whatever reason, do not wish to use the chain of command, there will remain two alternative avenues of complaint—the Inspector General of the ADF and the Defence Force Ombudsman.

The existing Inspector General of the ADF was established as recommended by Mr Burchett QC to deal exclusively with military justice matters. The IGADF was established to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system 20 independent of the ordinary chain of command and an avenue by which failures and flaws in the military justice system can be exposed and examined so that any cause of any injustice may be remedied.

Although it is not a general complaint handling agency like the CRA, it does provide an avenue for those with complaints about military justice, who are, for some reason, unable to go through their chain of command, to have their complaints investigated and remedied. The Government has drafted legislation to establish the Inspector General of the ADF as a statutory appointment in order to further strengthen its independence.

In addition to this review mechanism and completely external to the ADF is recourse to the Defence Force Ombudsman. This position will retain legislative authority to receive and review complaints and to initiate on its own motion investigations into ADF administration processes. The Defence Force Ombudsman has statutory power to investigate a matter, make findings and recommend a course of action to the appropriate decision maker and to table a report in Parliament if deemed necessary.

Recommendation 30

11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.

Government Response: Agreed.

The Government has taken action to clear the backlog of grievances, in line with recommendations from Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. This is scheduled to be completed by the end of 2005, with no requirement for additional funding or a task force.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

Government Response: Agreed.

The Government will amend the Administrative Inquiries Manual to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not

present at the hearings. It will be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

Government Response: Agreed.
The Government will amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorised to appear before the Board and will have the right to appoint a legal practitioner to represent them.

Government Response: Agreed in part.
The Government notes that the substance of this recommendation was agreed to following the 1999 senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence (Inquiries) Regulation 33. The Government agrees that in cases where either the appointing authority, before the inquiry starts, or the President of a Board of Inquiry makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons will be entitled to appear before the Board and will have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish. Further, the Government agrees that where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation will be provided at Commonwealth expense, in accordance with standing arrangements. The Government also agrees that the representatives of the estate of deceased persons, who have died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, will be entitled to be legally represented before the Board of Inquiry into that incident. Consistently, the Government agrees that where the representative of the estate of such persons chooses to be represented before

the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation will be provided at Commonwealth expense, in accordance with standing arrangements. It is noted that the identification of 'persons adversely affected' involves the application of the principles of natural justice; it does not automatically encompass every person who is, or may be, a witness or has some other interest in the inquiry.

Recommendation 34

12.120 The committee recommends that: all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry; the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary); the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle; the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.

Government Response: Not agreed.

The Government agrees that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government will propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry. CDF shall appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in service. The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience will be the President. This form of inquiry will be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry.

External independent legislative oversight by Comcare will continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process.

State and Territory Coroners will continue to review the outcomes of ADF inquiries into deaths of personnel. The ADF is working towards completing a Memorandum of Understanding with State and 21 Territory Coroners. The

Defence Force Ombudsman will continue to provide external independent legislative review of the conduct of ADF inquiries. This may occur as a consequence of a complaint or by own motion independently of the ADF.

The Government does not support the concept of an ADFARB, as reflected in the response to recommendation 29, and so cannot agree to refer notifiable incidents, including suicide, accidental death or serious injury to an ADFARB for investigation/inquiry.

Recommendation 35

13.19 Building on the report by the Australian Law Reform Commission, Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.

Government Response: Agreed in principle.

The report of the Australian Law Reform Commission Principled Regulation: Federal Civil and 13 Administrative Penalties in Federal Jurisdiction is focused on commercial and corporate law matters, and not the employment of personnel. Any review of the military justice system would require a broader basis that allows examination of all aspects of the military justice system.

The Government agrees that in addition to ongoing internal monitoring and review, Defence will commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation period.

Recommendation 36

13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.

Government Response: Agreed in principle.

The Government agrees to examine the combination of criminal law and administrative action in terms of best-practice military justice, noting that such a review will also satisfy a recommendation from the Burchett Report to review the nature of the punishments that may be imposed in the light of contemporary standards. This review will be undertaken outside the broad review proposed at recommendation 35 and will be completed within the two-year implementation period.

Recommendation 37

13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):

(ii) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.

(iii) The workload and effectiveness of various bodies within the military justice system, such as but not limited to:

a. Director of Military Prosecutions;
b. Inspector General of the ADF;
c. The Service Military Police Branches;
d. RMJ/CJA;
e. Head of Trial Counsel;
f. Head of ADR.

Government Response: Agreed.

The Government supports the need for transparency and parliamentary oversight of the military justice system and will provide, in the Defence annual report, reporting on the state of health of the military justice system. Reporting will include progress in the implementation and effectiveness of reforms to the military justice system, arising both from this report and previous reviews under implementation, and the workload and effectiveness of the key bodies within the military justice system. Defence will also amend the Defence (Inquiry) Regulations to provide for an annual report on the operation of the D(I)R, fulfilling a recommendation of the Burchett report. Defence will also report twice a year to the Senate committee, on progress of the reforms throughout the two-year implementation process.

Recommendation 38

(a) To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.

Government Response: Agreed

The Government agrees to commission an expert to examine whether the human rights of children are being respected. The Government also notes that Defence has already implemented significant policy initiatives under the

Government's Cadet Enhancement Program to address shortcomings in the care and control and rights of minors in the ADF Cadets, including:

i. implementation of a behaviour policy, providing training and materials on the expected standards of behaviour, and including guidance and advice on the handling of sexual misconduct;
ii. development of a wellbeing program, specifically targeted at the mental health wellbeing of ADFC cadets;
iii. introduction of an ADFC cadet and adult cadet staff training enhancement program;
iv. a review of child protection policy and processes in line with State and Territory legislation;
v. a review of screening processes for new staff; and
vi. production of a youth development guide for adult cadet staff.

Recommendation 39

(a) The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.

Government Response: Agreed

The Government agrees, noting that as part of the significant work initiated under the Government's Cadet Enhancement Program, Defence is finalising amendments to the regulations that will more than meet the Committee's recommendations on the human rights of minors.

Recommendation 40

(b) The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.

Government Response: Agreed

The Government agrees and notes that the Service Chiefs have already provided additional resources to the ADF Cadets to improve administrative support.

*The Government does not agree to the recommendations (1, 2, 3, 7, 8, and 9) that taken together propose the automatic referral of investigation and prosecution of criminal offences with a Service connection to civilian authorities.

The purpose of a separate system of military justice is to allow the ADF to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, sometimes, dealt with more severely than would be the case if a civilian engaged in such conduct.

The maintenance of effective discipline is indivisible from the function of command in ensuring the day-to-day preparedness of the ADF for war and the conduct of operations. Justices Brennan and Toohey of the High Court in *Re Tracey; Ex parte Ryan* (1989) (and repeated by Justice McHugh in *Re Colonel Aird; Ex parte Alpert* (2004)) said *'Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful authority and the enhancing of efficiency in the performance of service functions.'*

As a core function of command, military justice cannot be administered solely by civilian authorities. Recourse to the ordinary criminal courts to deal with matters that substantially affect service discipline would be, as a general rule, inadequate to serve the particular disciplinary needs of the Defence Force. Further, the capacity to investigate and prosecute offences under the Defence Force Discipline Act 1982 is necessary to support ADF operations both within and outside Australia. The Government does not accept that the DFDA—or more broadly the system of military justice—is a "duplication" of the criminal system.

Importantly, jurisdiction under the DFDA for any offence may only be exercised where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline—a purpose different to that served by the criminal law. Moreover, extensive guidelines for the exercise of DFDA jurisdiction and the satisfaction of this service connection test are set out in comprehensive Defence instructions. It is a core element of the DFDA that not all criminal activity is or should be dealt with by the military police.

The Government is also concerned that the civil code does not have the disciplinary provisions required to keep order and encourage discipline and cohesive teamwork, and may actively undermine the ability of commanding officers to address disciplinary issues through the more expeditious summary action 15 available under the DFDA. This particularly applies to those cases that may be considered insignificant in a civilian context—petty theft for instance—that may have serious implications for service discipline and morale, and

may seriously undermine the authority of a commanding officer to maintain effective discipline. The proposed enhancements to the military justice system seek to provide a balance between military effectiveness and external oversight by ensuring that the system meets legal standards, conforms as far as possible to community expectations, and provides reassurance to the Parliament and the community that ADF members' rights are being protected without compromising the ADF's ability to remain an effective fighting force. It is based on the premise of maintaining effective discipline and protecting individuals and their rights, administered to provide impartial, timely, fair and rigorous outcomes with transparency and accountability. Where Defence prosecution substantially serves the purpose of maintaining and enforcing Service discipline, offences in Australia will be dealt with under the DFDA.

Past challenges to the system of retention or referral of cases in the High Court have been unsuccessful and the current system and thresholds will be maintained, with determination decisions undertaken by the Director of Military Prosecutions. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.

The Government is also of the view that outsourcing the criminal investigative function would complicate proposed efforts to address the problem of the capability of the military police. Military police will still be required to perform criminal investigative roles if, for instance, civilian authorities decline to investigate a matter, and subsequently referred it back to the military police.

The Government has accepted recommendations 5 and 6, to improve the quality of criminal investigations conducted by Service police, including through the establishment of an ADF Joint Investigation Unit.

7 APPENDIX 7: SERVICE OFFENCES AND PUNISHMENTS

7.1 List of 'Service Offences'

Source: Court Martial and Defence Force Magistrate Rules 2009 (Cth), Legislative Instrument No 296, Schedule 1

Part 1 – Offences against DFDA 1982

Item	Provision	Offence
1	Section 15	Abandoning or surrendering a [*place*][*post*][*service ship*] [*service aircraft*][*service armoured vehicle*]
2	Section 15A	Causing the capture or destruction of a [*service ship*] [*service aircraft*][*service armoured vehicle*]
3	Section 15B	Aiding the enemy while captured
4	Section 15C	Providing the enemy with material assistance
5	Section 15D	Harbouring enemies
6	Subparagraph 15E(1)(b)(i)	Giving false communication
7	Subparagraph 15E(1)(b)(ii)	Altering or interfering with communication
8	Subparagraph 15E(1)(b)(iii)	Altering or interfering with apparatus for giving or receiving communication
9	Section 15F	Failing to carry out orders
10	Section 15G	Imperilling the success of operations
11	Section 16	Communicating with the enemy
12	Section 16A	Failing to report information received from the enemy
13	Section 16B	Committing the offence of [*name of offence against sections 15 to 16A (other than section 15B or 15C*)] with intent to assist the enemy
14	Paragraph 17(1)(a)	Leaving [*post*][*position*][*place*] in connection with operations

Item	Provision	Offence
15	Paragraph 17(1)(b)	Abandoning [*weapons*][*other equipment*] in connection with operations
16	Paragraph 17(1)(c)	Failing to properly perform duty in attacking, or defending against, the enemy
17	Subsection 18(1)	Endangering morale
18	Subsection 18(2)	Endangering morale in connection with operations
19	Subsection 19(1)	Failing to rejoin force
20	Subsection 19(2)	Preventing another rejoining [*his*][*her*] force
21	Subsection 19(3)	Securing favourable treatment to detriment of others
22	Subsection 19(4)	Ill-treating other persons over whom member has authority
23	Subsection 20(1)	Mutiny
24	Subsection 20(2)	Mutiny in connection with service against enemy
25	Subsection 21(1)	Failing to suppress mutiny
26	Subsection 21(2)	Failing to suppress mutiny in connection with service against enemy
27	Subsection 22(1)	Absence from place of duty with intention to avoid active service
28	Subsection 22(2)	Absence without leave with intention to avoid active service
29	Subsection 23(1)	Absence from duty—failure to attend
30	Subsection 23(2)	Absence from duty—ceasing to perform
31	Section 24	Absence without leave
32	Section 25	Assaulting a superior officer
33	Subsection 26(1)	Engaging in [*threatening*][*insubordinate*][*insulting*] conduct
34	Subsection 26(2)	Using [*threatening*][*insubordinate*][*insulting*] language
35	Section 27	Disobeying lawful command
36	Section 28	Failing to comply with direction of person in command of [*service ship*][*service aircraft*][*service vehicle*]
37	Section 29	Failing to comply with general order
38	Subsection 30(1)	Assaulting a guard

Item	Provision	Offence
39	Subsection 30(2)	Assaulting a guard in connection with operations against the enemy
40	Subsection 31(1)	Obstructing a police member
41	Subsection 31(2)	Refusing to assist a police member
42	Paragraph 32(1)(a)	Sleeping [*at post*][*on watch*] while on [*guard duty*][*watch*]
43	Paragraph 32(1)(b)	Sleeping on duty while on [*guard duty*][*watch*]
44	Paragraph 32(1)(c)	Being intoxicated while on [*guard duty*][*watch*]
45	Paragraph 32(1)(d)	[*Leaving post*] [*absence from place of duty*] while on [*guard duty*] [*watch*]
46	Subsection 32(3)	Committing the offence of [*name of offence against paragraph 32(1)(a), (b), (c) or (d)*] in connection with service against enemy
47	Paragraph 33(a)	Assaulting another person [on *service land*] [*in service ship*] [*in service aircraft*] [*in service vehicle*] [*in a public place*]
48	Paragraph 33(b)	Creating a disturbance [*on service land*] [*in service* ship] [*in service aircraft*] [*in* service *vehicle*] [*in a public* place]
49	paragraph 33(c)	Engaging in obscene conduct [*on service land*] [*in service* ship] [*in service aircraft*] [*in service vehicle*] [*in a public place*]
50	Paragraph 33(d)	Using [*insulting*] [*provocative*] words [*on service land*] [*in service ship*] [*in service aircraft*] [*in service vehicle*] [*in a public place*]
51	Section 34	Assaulting a subordinate
52	Section 35	Negligent performance of duty
53	Subsection 36(1)	Dangerous conduct with knowledge of consequences
54	Subsection 36(2)	Dangerous conduct with recklessness as to consequences
55	Subsection 36(3)	Dangerous conduct with negligence as to consequences
56	Section 36A	Unauthorised discharge of weapon
57	Section 36B	Negligent discharge of weapon
58	Section 37	Being intoxicated [*while on duty*] [*when reporting for duty*] [*when required to report for duty*]
59	Paragraph 38(1)(a)	Malingering—self injury
60	Paragraph 38(1)(b)	Malingering—prolonging sickness or disability

Item	Provision	Offence
61	Subsection 38(2)	Malingering—falsely representing oneself as suffering from physical or mental condition
62	Subsection 39(1)	Intentionally causing [*loss of*] [*stranding of*] [*hazarding of*] service ship
63	Subsection 39(2)	Recklessly causing [*loss of*] [*stranding of*] [*hazarding of*] service ship
64	Subsection 39(3)	Negligently causing [*loss of*] [*stranding of*] [*hazarding of*] service ship
65	Subsection 40(1)	Driving a service vehicle while intoxicated
66	Subsection 40(2)	Driving a vehicle on service land while intoxicated
67	Subsection 40A(1)	Dangerous driving of a service vehicle
68	Subsection 40A(2)	Dangerous driving of a vehicle on service land
69	Paragraph 40C(1)(a)	Driving a service vehicle while not authorised
70	Paragraph 40C(1)(b)	Using a service vehicle for an unauthorised purpose
71	Subsection 40D(1)	Driving a service vehicle without due care and attention or without reasonable consideration
72	Subsection 40D(2)	Driving a vehicle on service land without due care and attention or without reasonable consideration
73	Section 41	Flying a service aircraft below the minimum height
74	Section 42	Giving inaccurate certification to a matter affecting a [*service ship*] [*service aircraft*] [*service vehicle*] [*service missile*] [*service weapon*]
75	Subsection 43(1)	Intentionally [*destroying*] [*damaging*] service property
76	Subsection 43(2)	Recklessly [*destroying*] [*damaging*] service property
77	Subsection 43(3)	Negligently [*destroying*] [*damaging*] service property
78	Section 44	Losing service property
79	Section 45	Unlawful possession of service property
80	Section 46	Possession of property suspected of having been unlawfully obtained
81	Section 47C	Theft
82	Section 47P	Receiving stolen property
83	Subsection 48(1)	Looting
84	Subsection 48(2)	Receiving looted property

Item	Provision	Offence
85	Section 49	Refusing to submit to arrest
86	Section 49A	Assault against arresting person
87	Subsection 50(1)	Delaying or denying justice by failing to take action to have charge dealt with
88	Subsection 50(2)	Delaying or denying justice by failing to take action to [*release*] [*order release*] of a person
89	Section 51	Escaping from custody
90	Section 52	Giving false evidence before a service tribunal
91	Subparagraph 53(1)(b)(i)	Failing to appear before a service tribunal as required by [*summons*] [*order*]
92	Subparagraph 53(1)(b)(ii)	Failing to appear and report when not excused by service tribunal
93	Paragraph 53(2)(a)	Refusing to take an oath or make an affirmation before a service tribunal
94	Paragraph 53(2)(b)	Refusing to answer a question before a service tribunal
95	Paragraph 53(2)(c)	Refusal to produce a document required by [*summons*] [*order*] before a service tribunal
96	Paragraph 53(4)(a)	Insulting a [*member of a court martial*] [*judge advocate*] [*Defence Force magistrate*] [*summary authority*]
97	Paragraph 53(4)(b)	Interrupting proceedings of a service tribunal
98	Paragraph 53(4)(c)	Creating a disturbance [*in*] [*near*] a service tribunal
99	Paragraph 53(4)(d)	Engaging in conduct that would constitute contempt of a service tribunal
100	Subsection 54(1)	Intentionally allowing a person in custody to escape
101	Subsection 54(2)	Unlawfully releasing a person in custody
102	Subsection 54(3)	Facilitating escape of a person in custody
103	Subsection 54(4)	Conveying a thing into place of confinement with intent to facilitate escape of a person
104	Paragraph 54A(1)(a)	Detainee making unnecessary noise
105	Paragraph 54A(1)(b)	Detainee committing a nuisance
106	Paragraph 54A(1)(c)	Detainee being [*idle*] [*careless*] [*negligent*] at work
107	Paragraph 54A(1)(d)	Detainee unlawfully communicating with another person
108	Paragraph 54A(1)(e)	Detainee unlawfully [*giving*] [*receiving*] any thing

Item	Provision	Offence
109	paragraph 54A(1)(f)	Detainee unlawfully being in possession of any thing
110	Paragraph 54A(1)(g)	Detainee unlawfully [*entering*] [*leaving*] cell
111	Subsection 54A(2)	Detainee failing to comply with a condition of grant of leave of absence
112	Subsection 54A(6)	Aiding, abetting etc the commission of [*name of offence against subsection 54A(1) or (2)*]
113	Paragraph 55(1)(a)	[*Making*] [*signing*] false service document
114	Paragraph 55(1)(b)	Making false entry in service document
115	Paragraph 55(1)(c)	Altering a service document
116	Paragraph 55(1)(d)	[*Suppressing*] [*defacing*] [*making away with*] [*destroying*] a service document
117	Paragraph 55(1)(e)	Failing to make an entry in a service document
118	Subsection 56(1)	Knowingly making false or misleading statement in relation to application for benefit
119	Subsection 56(4)	Recklessly making false or misleading statement in relation to application for benefit
120	Paragraph 57(1)(a)	Person giving false answer to a question in a document relating to appointment or enlistment
121	Paragraph 57(1)(b)	Person giving false information or document in relation to appointment or enlistment
122	Paragraph 57(1)(c)	Person failing to disclose prior service
123	Paragraph 57(2)(a)	Member giving false answer to question in a document relating to appointment or enlistment
124	Paragraph 57(2)(b)	Member giving false information or document in relation to appointment or enlistment
125	Paragraph 57(2)(c)	Member failing to disclose prior service
126	Section 58	Unauthorised disclosure of information
127	Subsection 59(1)	[*Selling*] [*dealing*] [*trafficking*] in narcotic goods outside Australia
128	Subsection 59(3)	Possession of narcotic goods outside Australia
129	Subsection 59(5)	Administering prohibited drug outside Australia
130	Subsection 59(6)	Administering prohibited drug in Australia
131	Subsection 59(7)	Possession of non-trafficable quantity of prohibited drug in Australia

Item	Provision	Offence
132	Section 60	Prejudicial conduct
133	Subsection 61(1)	Engaging in conduct in the Jervis Bay Territory that is a Territory offence [*name of offence and provision of law contravened*]
134	Subsection 61(2)	Engaging in conduct in a public place outside the Jervis Bay Territory that is a Territory offence [*name of offence and provision of law contravened*]
135	Subsection 61(3)	Engaging in conduct outside the Jervis Bay Territory that is a Territory offence [*name of offence and provision of law contravened*]
136	Section 62	Commanding or ordering commission of service offence
137	Subsection 101QA(1)	Failing to submit to medical examination
138	Subsection 101QA(2)	Failing to submit to the taking of a specimen

Part 2 – Offences against DFD Regulations 1985

Item	PROVISION	OFFENCE
1	Subregulation 25B(2)	[*Tampering with*][*causing damage to*][*interferes with*] radar device

Part 3 – Offences against the Criminal Code

Item	Provision	Offence
1	Section 11.1	Attempt to commit [*name of offence against the* Defence Force Discipline Act 1982 ***or the*** Defence Force Discipline Regulations 1985]
2	Section 11.2	Aiding, abetting etc the commission of [*name of offence against the* Defence Force Discipline Act 1982 *(other than subsection 54A(1) or (2)) or the* Defence Force Discipline Regulations 1985]
3	Section 11.3	Procuring conduct of another person that would have constituted the offence of [*name of offence against the* Defence Force Discipline Act 1982 *or the* Defence Force Discipline Regulations 1985] on the part of procurer
4	Section 11.4	Incitement to [*name of offence against the* Defence Force Discipline Act 1982 ***or the*** Defence Force Discipline Regulations 1985]
5	Section 11.5	Conspiracy to commit [*name of offence against the* Defence Force Discipline Act 1982 ***or the*** Defence Force Discipline Regulations 1985]

7.2 DFDA Schedule 2 – Punishments that may be imposed by a court martial or DFM

66 Punishment or order to be in respect of a particular conviction

- Each punishment imposed, and each order made, by a service tribunal shall be imposed or made, as the case may be, in respect of a particular conviction and no other conviction.
- In this section, order means a restitution order, a reparation order or an order under subsection 75(1).

67 Authorised punishments

- A court martial or a Defence Force magistrate must not impose a punishment in respect of a conviction except in accordance with this Part and Schedule 2.
- A summary authority shall not impose a punishment in respect of a conviction except in accordance with this Part, Schedule 3 and Schedule 3A.

68 Scale of punishments

(1) Subject to sections 68A and 68C, the only punishments that may be imposed by a service tribunal on a convicted person are, in decreasing order of severity, as follows:

(a) imprisonment for life;

(b) imprisonment for a specific period;

(c) dismissal from the Defence Force;

(d) detention for a period not exceeding 2 years;

(e) reduction in rank;

(f) forfeiture of service for the purposes of promotion;

(g) forfeiture of seniority;

(h) fine, being a fine not exceeding:

(i) where the convicted person is a member of the Defence Force—the amount of his or her pay for 28 days; or

(ii) in any other case—15 penalty units;

(j) severe reprimand;

(k) restriction of privileges for a period not exceeding 14 days;

(m) stoppage of leave for a period not exceeding 21 days;

(n) extra duties for a period not exceeding 7 days;

(na) extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days;

(p) reprimand.

(2) The Chief of the Defence Force or a service chief may, by legislative instrument, make rules with respect to the consequences, in relation to a member of the Defence Force, that are to flow from the imposition by a service tribunal on that member of any of the following punishments:

(a) reduction in rank;

(b) forfeiture of service for the purposes of promotion;

(c) forfeiture of seniority;

(d) restriction of privileges for a period;

(e) stoppage of leave for a period;

(f) extra duties for a period;

(g) extra drill for a period.

(3) The commanding officer of a convicted person subject to a punishment specified in paragraph (2)(d) or (f) may moderate the consequences of that punishment in relation to the convicted person in such manner as the commanding officer considers appropriate having regard to the particular circumstances of the case and to any directions, in writing, of the Chief of the Defence Force or a service chief.

(4) Notwithstanding that a convicted person is subject to a punishment of stoppage of leave, the commanding officer of the person may, if he or she is satisfied that it is appropriate to do so, grant leave of absence to the person.

Note

- Subject to clause 2, a court martial or a Defence Force magistrate may impose punishments on convicted persons in accordance with the table in this Schedule.
- A restricted court martial or a Defence Force magistrate shall not impose any of the following punishments:
  - ~ imprisonment for life;
  - ~ imprisonment for a period exceeding 6 months;
  - ~ detention for a period exceeding 6 months.

TABLE OF PUNISHMENTS	
Column 1 **Convicted person**	**Column 2** **Punishment**
Officer	Imprisonment Dismissal from the Defence Force Reduction in rank Forfeiture of service for the purposes of promotion Forfeiture of seniority Fine of an amount not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Reprimand
Member of the Defence Force who is not an officer	Imprisonment Dismissal from the Defence Force Detention for a period not exceeding 2 years Reduction in rank Forfeiture of seniority Fine not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Reprimand
Person who is not a member of the Defence Force	Imprisonment Fine not exceeding 15 penalty units

7.3 DFDA Schedule 3 – Punishments that may be imposed by a summary authority

Note; see also Brasch, (n. 412), app 1

1 Punishments that may be imposed by a superior summary authority

Punishments that may be imposed on certain officers

(1) A superior summary authority may impose a punishment set out in column 2 of an item of Table A of this Schedule on an officer referred to in column 1 of that item who has been convicted of an offence.

TABLE A–PUNISHMENTS THAT MAY BE IMPOSED BY A SUPERIOR SUMMARY AUTHORITY ON CERTAIN OFFICERS		
Item	**Column 1 Convicted person**	**Column 2 Punishment**
1	Officer: (a) of or below the rank of rear admiral but above the rank of lieutenant commander; or (b) of or below the rank of major-general but above the rank of major; or (c) of or below the rank of air vice-marshal but above the rank of squadron leader	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand

Punishments that may be imposed on other persons

(2) A superior summary authority may impose an elective punishment, or a punishment set out in column 3 of an item of Table B of this Schedule, on a person referred to in column 1 of that item who has been convicted of an offence (other than a Schedule 1A offence).

(3) A superior summary authority may impose a punishment set out in column 3 of an item of Table B of this Schedule on a person referred to in column 1 of that item who has been convicted of a Schedule 1A offence.

(4) A superior summary authority may impose an elective punishment on a person referred to in column 1 of an item of Table B of this Schedule who has been convicted of a Schedule 1A offence (other than a custodial offence) only in accordance with subsection 131AA(8).

TABLE B—PUNISHMENTS THAT MAY BE IMPOSED BY A SUPERIOR SUMMARY AUTHORITY ON OTHER PERSONS			
Item	**Column 1 Convicted person**	**Column 2 Elective punishment**	**Column 3 Other punishment**
1	Officer of or below the rank of lieutenant commander, major or squadron leader Warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
2	Person who is not a member of the Defence Force	Fine not exceeding 7 penalty units	Fine not exceeding 3 penalty units

2 Punishments that may be imposed by a commanding officer

- A commanding officer may impose an elective punishment, or a punishment set out in column 3 of an item of Table C of this Schedule, on a person referred to in column 1 of that item who has been convicted of an offence (other than a Schedule 1A offence).
- A commanding officer may impose a punishment set out in column 3 of an item of Table C of this Schedule on a person referred to in column 1 of that item who has been convicted of a Schedule 1A offence.
- A commanding officer may impose an elective punishment on a person referred to in column 1 of an item of Table C of this Schedule who has been convicted of a Schedule 1A offence (other than a custodial offence) only in accordance with subsection 131AA(8).

TABLE C—PUNISHMENTS THAT MAY BE IMPOSED BY A COMMANDING OFFICER ON CONVICTED PERSONS			
Item	**Column 1 Convicted person**	**Column 2 Elective punishment**	**Column 3 Other punishment**
1	Officer of or below the naval rank of lieutenant, the rank of captain in the Army or the rank of flight lieutenant Warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand

TABLE C—PUNISHMENTS THAT MAY BE IMPOSED BY A COMMANDING OFFICER ON CONVICTED PERSONS			
Item	**Column 1 Convicted person**	**Column 2 Elective punishment**	**Column 3 Other punishment**
2	Non-commissioned officer	Reduction in rank by one rank or, in the case of a corporal of the Army, reduction in rank by one or 2 ranks Forfeiture of seniority Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
3	Member below non-commissioned rank who, at the time he or she committed the service offence of which he or she has been convicted, was on active service	Detention for a period exceeding 14 days but not exceeding 42 days Fine exceeding the amount of the convicted person's pay for 14 days but not exceeding the amount of the convicted person's pay for 28 days	Detention for a period not exceeding 14 days Fine not exceeding the amount of the convicted person's pay for 14 days Severe reprimand Restriction of privileges for a period not exceeding 14 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand
4	Member below non-commissioned rank who, at the time he or she committed the service offence of which he or she has been convicted, was not on active service	Detention for a period exceeding 7 days but not exceeding 28 days Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 28 days	Detention for a period not exceeding 7 days Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Restriction of privileges for a period not exceeding 14 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

TABLE C—PUNISHMENTS THAT MAY BE IMPOSED BY A COMMANDING OFFICER ON CONVICTED PERSONS			
Item	**Column 1 Convicted person**	**Column 2 Elective punishment**	**Column 3 Other punishment**
5	Person who is not a member of the Defence Force	Fine not exceeding 7 penalty units	Fine not exceeding 3 penalty units

3 Punishments that may be imposed by a subordinate summary authority

A subordinate summary authority may impose a punishment set out in column 2 of an item of Table D of this Schedule on a person referred to in column 1 of that item who has been convicted of an offence.

TABLE D—PUNISHMENTS THAT MAY BE IMPOSED BY A SUBORDINATE SUMMARY AUTHORITY ON CONVICTED PERSONS		
Item	**Column 1 Convicted person**	**Column 2 Punishment**
1	Non-commissioned officer of, or below, the rank of leading seaman or corporal	Fine not exceeding the amount of the convicted person's pay for 3 days Severe reprimand Reprimand
2	Member below non-commissioned rank	Fine not exceeding the amount of the convicted person's pay for 3 days Severe reprimand Restriction of privileges for a period not exceeding 7 days Stoppage of leave for a period not exceeding 7 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

7.4 DFDA: Schedule 6 – Alternative offences

142 Alternative offences

(1) For the purposes of this section:

(a) an offence against this Act (other than section 61) is an alternative offence in relation to another such offence if the first-mentioned offence is specified in column 2 of Schedule 6 opposite to the reference to the other offence in column 1 of that Schedule; and

(b) an offence against section 11.1 of the Criminal Code, being a service offence that is an ancillary offence in relation to an offence against this Act (other than section 61) or the regulations is an alternative offence in relation to that offence against this Act or the regulations; and

(ba) an offence against section 61 that is based on an ancillary Territory offence against section 11.1 of the Criminal Code, or section 44 of the Criminal Code 2002 of the Australian Capital Territory, in relation to another Territory offence (the first Territory offence), is an alternative offence in relation to another offence against section 61 that is based on the first Territory offence; and

(c) an offence against section 61 is an alternative offence in relation to another such offence if the relevant Territory offence in relation to the first-mentioned offence is an alternative offence in relation to the relevant Territory offence in relation to the other offence against section 61; and

(d) a Territory offence is an alternative offence in relation to another Territory offence if a court exercising jurisdiction in or in relation to the Jervis Bay Territory could, in a trial of a person on a charge of the other Territory offence, convict the person of the first-mentioned Territory offence.

(2) Where a service tribunal acquits a person of a service offence but is satisfied beyond reasonable doubt of facts that prove that the person is guilty of another service offence that is an alternative offence in relation to the offence of which the person has been acquitted, the service tribunal may convict the person of that other offence.

(3) Where:

(a) a person is charged with a service offence;

(b) the person pleads not guilty to the charge but guilty to another service offence that is an alternative offence in relation to the first-mentioned service offence; and

(c) the prosecution consents to the acceptance of the last-mentioned plea;

the trial shall proceed as if the person:

(d) had been charged with the other service offence;

(e) had pleaded guilty to a charge of the other service offence; and

(f) had not been charged with the first-mentioned offence.

Item	Column 1 Offence	Column 2 Alternative offence
1	Offence against section 16B relating to an act or omission	Offence against section 15, 15A, 15D, 15E, 15F, 15G, 16 or 16A relating to that act or omission
3	Offence against subsection 18(2)	Offence against subsection 18(1)
4	Offence against subsection 20(1)	Offence against subsection 21(1)
5	Offence against subsection 20(2)	Offence against subsection 21(2)
6	Offence against section 22	Offence against section 24
6A	Offence against section 23	Offence against section 24
7	Offence against section 24	Offence against section 23
8	Offence against section 25	Offence against section 33 relating to an act or omission of the kind referred to in paragraph 33(a) or (b)
9	Offence against section 26	Offence against section 33 relating to an act or omission of the kind referred to in paragraph 33(b) or (d)
10	Offence against subsection 30(1)	Offence against section 33 relating to an act or omission of the kind referred to in paragraph 33(a) or (b)
11	Offence against subsection 30(2)	(a) Offence against subsection 30(1) (b) Offence against section 33 relating to an act or omission of the kind referred to in paragraph 33(a) or (b)
12	Offence against subsection 31(1)	Offence against section 33 relating to an act or omission of the kind referred to in paragraph 33(a) or (b)
13	Offence against subsection 32(1) relating to an act or omission of the kind referred to in paragraph 32(1)(c)	Offence against section 37 relating to being intoxicated on duty
14	Offence against subsection 32 (1) relating to an act or omission of the kind referred to in paragraph 32(1)(d)	Offence against section 23
15	Offence against subsection 32(3) relating to an act or omission	Offence against subsection 32(1) relating to that act or omission

Item	Column 1 Offence	Column 2 Alternative offence
16	Offence against subsection 32(3) relating to an act or omission of the kind referred to in paragraph 32(1)(c)	Offence against subsection 37(1) relating to being intoxicated on duty
17	Offence against subsection 32(3) relating to an act or omission of the kind referred to in paragraph 32(1) d)	Offence against section 23
18	Offence against section 34	Offence against section 33 relating to an act or omission of the kind referred to in paragraph 33(a) or (b)
19	Offence against subsection 36(1)	(a) Offence against subsection 36(2) (b) Offence against subsection 36(3)
20	Offence against subsection 36(2)	Offence against subsection 36(3)
20A	Offence against section 36A	Offence against section 36B
20B	Offence against section 36B	Offence against section 36A
21	Offence against subsection 39(1)	(a) Offence against subsection 39(2) (b) Offence against subsection 39(3)
22	Offence against subsection 39(2)	Offence against subsection 39(3)
23	Offence against subsection 40A(1)	Offence against subsection 40D(1)
24	Offence against subsection 40A(2)	Offence against subsection 40D(2)
27	Offence against subsection 43(1)	(a) Offence against subsection 43(2) (b) Offence against subsection 43(3)
28	Offence against subsection 43(2)	Offence against subsection 43(3)
29	Offence against section 46	Offence against section 45
30	Offence against section 47C	(a) Offence against section 47P (b) Offence against section 45 (c) Offence against section 46
31	Offence against subsection 48(1)	Offence against subsection 48(2)
31A	Offence against subsection 56(1)	Offence against subsection 56(4)
32	Offence against subsection 59(1)	Offence against subsection 59(3)

8 APPENDIX 8: SENTENCING OPTIONS: SUMMARY AUTHORITIES

DFDA, Schedule 3

A superior summary authority may impose a punishment set out in column 2 of an item of Table A of this Schedule on an officer referred to in column 1 of that item who has been convicted of an offence.

8.1 Table A: Punishments that may be imposed by a superior summary authority on certain officers

Item	Column 1 Convicted person	Column 2 Punishment
1	Officer: (a) of or below the rank of rear admiral but above the rank of lieutenant commander; or (b) of or below the rank of major-general but above the rank of major; or (c) of or below the rank of air vice-marshal but above the rank of squadron leader	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand

- Punishments that may be imposed on other persons
- A superior summary authority may impose an elective punishment, or a punishment set out in column 3 of an item of Table B of this Schedule, on a person referred to in column 1 of that item who has been convicted of an offence (other than a Schedule 1A offence).
- A superior summary authority may impose a punishment set out in column 3 of an item of Table B of this Schedule on a person referred to in column 1 of that item who has been convicted of a Schedule 1A offence.
- A superior summary authority may impose an elective punishment on a person referred to in column 1 of an item of Table B of this Schedule who has been convicted of a Schedule 1A offence (other than a custodial offence) only in accordance with subsection 131AA(8).

8.2 Table B – Punishments that may be imposed by a superior summary authority on other persons

Item	Column 1 Convicted person	Column 2 Elective punishment	Column 3 Other punishment
1	Officer of or below the rank of lieutenant commander, major or squadron leader Warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
2	Person who is not a member of the Defence Force	Fine exceeding $100 but not exceeding $250	Fine not exceeding $100

- Punishments that may be imposed by a commanding officer
- A commanding officer may impose an elective punishment, or a punishment set out in column 3 of an item of Table C of this Schedule, on a person referred to in column 1 of that item who has been convicted of an offence (other than a Schedule 1A offence).
- A commanding officer may impose a punishment set out in column 3 of an item of Table C of this Schedule on a person referred to in column 1 of that item who has been convicted of a Schedule 1A offence.
- A commanding officer may impose an elective punishment on a person referred to in column 1 of an item of Table C of this Schedule who has been convicted of a Schedule 1A offence (other than a custodial offence) only in accordance with subsection 131AA(8).

8.3 Table C — Punishments that may be imposed by a commanding officer on convicted persons

Item	Column 1 Convicted person	Column 2 Elective punishment	Column 3 Other punishment
1	Officer of or below the naval rank of lieutenant, the rank of captain in the Army or the rank of flight lieutenant Warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
2	Non-commissioned officer	Reduction in rank by one rank or, in the case of a corporal of the Army, reduction in rank by one or 2 ranks Forfeiture of seniority Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
3	Member below non-commissioned rank who, at the time he or she committed the service offence of which he or she has been convicted, was on active service	Detention for a period exceeding 14 days but not exceeding 42 days Fine exceeding the amount of the convicted person's pay for 14 days but not exceeding the amount of the convicted person's pay for 28 days	Detention for a period not exceeding 14 days Fine not exceeding the amount of the convicted person's pay for 14 days Severe reprimand Restriction of privileges for a period not exceeding 14 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

Item	Column 1 Convicted person	Column 2 Elective punishment	Column 3 Other punishment
4	Member below non-commissioned rank who, at the time he or she committed the service offence of which he or she has been convicted, was not on active service	Detention for a period exceeding 7 days but not exceeding 28 days Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 28 days	Detention for a period not exceeding 7 days Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Restriction of privileges for a period not exceeding 14 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand
5	Person who is not a member of the Defence Force	Fine exceeding $100 but not exceeding $250	Fine not exceeding $100

A subordinate summary authority may impose a punishment set out in column 2 of an item of Table D of this Schedule on a person referred to in column 1 of that item who has been convicted of an offence.

8.4 Table D – Punishments that may be imposed by a subordinate summary authority on convicted persons

Item	Column 1 Convicted person	Column 2 Punishment
1	Non-commissioned officer of, or below, the rank of leading seaman or corporal	Fine not exceeding the amount of the convicted person's pay for 3 days Severe reprimand Reprimand
2	Member below non-commissioned rank	Fine not exceeding the amount of the convicted person's pay for 3 days Severe reprimand Restriction of privileges for a period not exceeding 7 days Stoppage of leave for a period not exceeding 7 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

8.5 Powers of discipline officer in respect of disciplinary infringements

A relevant discipline officer, in relation to a prescribed defence member referred to in column 1 of an item of the following table, may impose on the prescribed defence member, in respect of a disciplinary infringement, a punishment set out in column 2 of that item. Defence Force Discipline Act 1982, s 169F.

PUNISHMENTS THAT MAY BE IMPOSED IN RESPECT OF DISCIPLINARY INFRINGEMENTS		
Item	Column 1 Prescribed defence member	Column 2 Punishment
1	Junior officer Warrant officer Non-commissioned officer	Fine not exceeding the amount of the defence member's pay for one day Reprimand
2	Officer cadet Member below non-commissioned rank	Fine not exceeding the amount of the defence member's pay for one day Restriction of privileges for a period not exceeding 2 days Stoppage of leave for a period not exceeding 3 days Extra duties for a period not exceeding 3 days Extra drill for no more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

- A discipline officer may decide not to impose a punishment in respect of a disciplinary infringement that the discipline officer considers trivial. If a discipline officer thinks a disciplinary infringement is too serious to be dealt with under this Part, the discipline officer may decline to deal with the defence member under this Part.
- A discipline officer exercising jurisdiction under this section is not to be taken to be a service tribunal for the purposes of this Act.
- A discipline officer must not impose a punishment except in accordance with this Part.

9 APPENDIX 9: FORMER CLASSES OF OFFENCES UNDER THE DFDA APPLYING TO THE AMC

9.1 Class 1, Class 2 and Class 3 offences

DFDA Schedule 7—Class 1, class 2 and class 3 offences; see also Brasch, (n. 412), app 2. Note: See subsection 3(1) for definitions of class 1 offence, class 2 offence and class 3 offence.

1 Classes of offences

The following table sets out whether a service offence is a class 1 offence, class 2 offence or class 3 offence. The consequence of classification is set out in Appendix 9.2 as it affects the size of the military jury.

CLASS 1, CLASS 2 AND CLASS 3 OFFENCES		
Item	**An offence against this provision:**	**is the follow/ing class of offence:**
1	subsection 15(1)	class 1
2	subsection 15A(1)	class 1
3	subsection 15B(1)	class 1
4	subsection 15C(1)	class 1
5	subsection 15D(1)	class 1
6	subsection 15E(1)	class 1
7	subsection 15F(1)	class 1
8	subsection 15G(1)	class 1
9	subsection 16(1)	class 1
10	subsection 16A(1)	class 1
11	subsection 16B(1)	class 1
12	subsection 17(1)	class 3
13	subsection 18(1)	class 3
14	subsection 18(2)	class 3

CLASS 1, CLASS 2 AND CLASS 3 OFFENCES		
Item	**An offence against this provision:**	**is the follow/ing class of offence:**
15	subsection 19(1)	class 3
16	subsection 19(2)	class 3
17	subsection 19(3)	class 3
18	subsection 19(4)	class 3
19	subsection 20(1)	class 1
20	subsection 20(2)	class 1
21	subsection 21(1)	class 3
22	subsection 21(2)	class 1
23	subsection 22(1)	class 1
24	subsection 22(2)	class 1
25	subsection 23(1)	class 3
26	subsection 23(2)	class 3
27	subsection 24(1)	class 3
28	subsection 25(1)	class 3
29	subsection 26(1)	class 3
30	subsection 26(2)	class 3
31	subsection 27(1)	class 3
32	subsection 28(1)	class 3
33	subsection 29(1)	class 3
34	subsection 30(1)	class 3
35	subsection 30(2)	class 3
36	subsection 31(1)	class 3
37	subsection 31(2)	class 3
38	subsection 32(1)	class 3
39	subsection 32(3)	class 3
40	Section 33	class 3

CLASS 1, CLASS 2 AND CLASS 3 OFFENCES		
Item	**An offence against this provision:**	**is the follow/ing class of offence:**
41	subsection 34(1)	class 3
42	subsection 35(1)	class 3
43	subsection 36(1)	class 2
44	subsection 36(2)	class 3
45	subsection 36(3)	class 3
46	Section 36A	class 3
47	Section 36B	class 3
48	subsection 37(1)	class 3
49	subsection 38(1)	class 3
50	subsection 38(2)	class 3
51	subsection 39(1)	class 3
52	subsection 39(2)	class 3
53	subsection 39(3)	class 3
54	subsection 40(1)	class 3
55	subsection 40(2)	class 3
56	subsection 40A(1)	class 3
57	subsection 40A(2)	class 3
58	subsection 40C(1)	class 3
59	subsection 40D(1)	class 3
60	subsection 40D(2)	class 3
61	subsection 41(1)	class 3
62	Section 42	class 3
63	subsection 43(1)	class 3
64	subsection 43(2)	class 3
65	subsection 43(3)	class 3
66	subsection 44(1)	class 3

CLASS 1, CLASS 2 AND CLASS 3 OFFENCES		
Item	**An offence against this provision:**	**is the follow/ing class of offence:**
67	subsection 45(1)	class 3
68	subsection 46(1)	class 3
69	subsection 47C(1)	class 3
70	subsection 47P(1)	class 3
71	subsection 48(1)	class 3
72	subsection 48(2)	class 3
73	subsection 49(1)	class 3
74	subsection 49A(1)	class 3
75	subsection 50(1)	class 3
76	subsection 50(2)	class 3
77	Section 51	class 3
78	subsection 52(1)	class 3
79	subsection 53(1)	class 3
80	subsection 53(2)	class 3
81	subsection 53(4)	class 3
82	subsection 54(1)	class 3
83	subsection 54(2)	class 3
84	subsection 54(3)	class 3
85	subsection 54(4)	class 3
86	subsection 55(1)	class 3
87	subsection 56(1)	class 3
88	subsection 56(4)	class 3
89	subsection 57(1)	class 3
90	subsection 57(2)	class 3
91	subsection 59(1)	class 1
92	subsection 59(3)	class 2

CLASS 1, CLASS 2 AND CLASS 3 OFFENCES		
Item	**An offence against this provision:**	**is the follow/ing class of offence:**
93	subsection 59(5)	class 2
94	subsection 59(6)	class 2
95	subsection 59(7)	class 2
96	subsection 61(1), if clause 2 of this Schedule is satisfied	class 1
97	subsection 61(1), if clause 3 of this Schedule is satisfied	class 2
98	subsection 61(1), if clause 4 of this Schedule is satisfied	class 3
99	subsection 61(2), if clause 2 of this Schedule is satisfied	class 1
100	subsection 61(2), if clause 3 of this Schedule is satisfied	class 2
101	subsection 61(2), if clause 4 of this Schedule is satisfied	class 3
101A	subsection 61(3), if clause 2 of this Schedule is satisfied	class 1
101B	subsection 61(3), if clause 3 of this Schedule is satisfied	class 2
101C	subsection 61(3), if clause 4 of this Schedule is satisfied	class 3
102	subsection 62(1)	class 1
103	subsection 101QA(1)	class 3
104	subsection 101QA(2)	class 3

2 Section 61 offences that are class 1 offences

This clause is satisfied if:

(a) for an offence against subsection 61(1)—section 63 applies to the offence; or

(b) for an offence against subsection 61(2) or (3)—section 63 applies to the offence or would apply if the offence were committed in Australia.

3 Section 61 offences that are class 2 offences

This clause is satisfied if clauses 2 and 4 are not satisfied.

4 Section 61 offences that are class 3 offences

This clause is satisfied if:

(a) section 63 does not apply to the offence; and

(b) any of the following apply:

(i) the offence has a maximum penalty of not greater than 5 years imprisonment;

(ii) the offence is not punishable by imprisonment;

(iii) the offence may be heard and determined by a civil court of summary jurisdiction.

9.2 AMC requirements for Military Juries

(Provisions of the DFDA upon commencement of the AMC before it was declared invalid)

122 Constitution of a military jury

(1) There are to be:

(a) 12 members on a military jury for a trial of a class 1 offence; and

(b) 6 members on a military jury for a trial of a class 2 offence or class 3 offence.

(2) At least one member of the jury must hold a rank that is not lower than the naval rank of commander or the rank of lieutenant-colonel or wing commander.

(3) The requirements of subsection (2) apply only if, and to the extent that, the exigencies of service permit.

123 Eligibility to be a member of a military jury

Eligibility where accused is an officer or a defence civilian

(1) Where the accused person is an officer or a defence civilian, a person is eligible to be a member, or a reserve member, of a military jury for the trial of the accused person if:

(a) the person is an officer; and

(b) the person has been an officer for a continuous period of not less than 3 years or for periods that total no less than 3 years; and

(c) if the accused person is an officer—the person holds a rank that is not lower than the rank held by the accused person.

Eligibility where accused is not an officer or a defence civilian

(2) Where the accused person is not an officer or a defence civilian, a person is eligible to be a member, or a reserve member, of a military jury for the trial of the accused person if:
  (a) the person:
    (i) is an officer; or
    (ii) holds a rank not lower than the naval rank of warrant officer, the army rank of warrant officer class 1, or the air force rank of warrant officer; and
  (b) the person has been an officer, or held a rank not lower than warrant officer or warrant officer class 1, for a continuous period of not less than 3 years or for periods that total no less than 3 years.
(3) The requirements of this section apply only if, and to the extent that, the exigencies of service permit.

124 Determination of questions by a military jury

(1) In a trial of a charge of a service offence that is to be tried by Military Judge and military jury, the military jury is responsible for deciding the questions whether the accused person:
  (a) is guilty or not guilty of the offence; and
  (b) at the time of the act or omission the subject of the charge, was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission.
(2) A decision of a military jury on the questions in subsection (1) is to be made by:
  (a) unanimous agreement of the jury members; or
  (b) if the conditions in subsection (3) are met—five-sixths majority agreement of the jury members.
(3) The conditions are:
  (a) the jury has deliberated for at least 8 hours; and
  (b) the jury does not have unanimous agreement after that time but does have five-sixths majority agreement; and
  (c) the Australian Military Court is satisfied that:
    (i) the period of time for deliberation is reasonable, having regard to the nature and complexity of the case; and
    (ii) after examination on oath or affirmation of one or more of the jurors, it is unlikely that the jurors would reach unanimous agreement after further deliberation.
(4) A military jury must sit without any other person present when deciding the questions in subsection (1).

10 APPENDIX 10: DFDA MILITARY OFFENCES AND CIVILIAN EQUIVALENTS

Civilian offences having an equivalency to (former) DFDA Class 3 offences (see Appendix 9.1) which applied in the determination of selection of a 12 member military jury in the former AMC. The three former Classes (1, 2 and 3) are proposed to be reintroduced by this thesis in the constitution of the ACMT. All civilian Act references are to Commonwealth Acts unless otherwise stated. See also Brasch (n. 412), 367.

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
17	Leaving a post, abandoning equipment or otherwise failing to perform duty	5 years	*Public Service Act* 1999 s13(5) failing to comply with directions s13(2) failing to act with care and diligence *Fair Work Act* 2009 ss43–45, 50 contravening terms and conditions of employment, including leave without approval	s15 terminate employment; reduction in classification; re- assignment of duties; fines; reprimand s539 up to 60 penalty units. (1 *pu* =$110, s 4AA Crimes Act 1914)
18	Endangering morale	2–5 years	*Australian Federal Police Act* 1979 s40K(1) conduct or behaviour that is serious misconduct and is having, or likely to have, a damaging effect on the professional self-respect or morale of employees	-s28 employment terminated
19	Conduct after capture by the enemy	5 years	*While there is no specific equal, 'capture' is well known to the common law, e.g.* – *ss27 & 33 Shipping Registration Act 1981* – *s270.3 Criminal Code*	
21(1)	Failing to suppress mutiny	2 years	*While there is no specific equal 'mutiny' features in the Crimes Act 1914, eg, s25.*	

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
23	Absence from duty	12 months	*Public Service Act 1999 – ss 13(2) and (5) as above* *Fair Work Act 2009 - ss43–45, 50 as above*	s15 as above s539 as above
24	Absence without leave	12 months	*Public Service Act 1999 – ss13(2) and (5) as above* *Fair Work Act 2009 – ss43–45, 50 as above*	s15 as above s539 as above
25	Assaulting a superior	2 years	*Crimes Act 1900 – s26 common assault*	2 years
26	Insubordinate conduct	6 months	*Public Service Act 1999 – ss13(2) and (5) as above* *Fair Work Act 2009 – ss43–45, 50 as above*	s15 as above s539 as above
27	Disobeying a lawful command	2 years	*Public Service Act 1999 – ss13(2) and (5) as above* *Fair Work Act 2009 – ss43–45, 50 as above*	s15 as above s539 as above
28	Failing to comply with a direction in relation to a ship, aircraft or vehicle	2 years	*Public Service Act 1999 – ss13(2) and (5) as above* *Fair Work Act 2009 – ss43–45, 50 as above*	s15 as above s539 as above
29	Failing to comply with a general order	12 months	*Public Service Act 1999 – ss13(2) and (5) as above* *Fair Work Act 2009 – ss43–45, 50 as above*	s15 as above s539 as above
30	Assaulting a guard	2–5 years	*Criminal Code Act 1995 – s149.1 obstruct C'th public officials*	2 years
31	Obstructing a police member	12 months	*Criminal Code Act 1995 – s149.1 obstruct C'th public officials*	2 years
32	Person on guard or on watch sleeps, drunk etc	12 months –5 years	*Public Service Act 1999 – ss13(2) and (5) as above* *Fair Work Act 2009 – ss43–45, 50 as above*	s15 as above s539 as above
33	Assault, insulting or provocative words etc	6 months	*Crimes Act 1900 -s26 Common assault*	2 years
34	Assaulting a subordinate	2 years	*Crimes Act 1900 – s26 Common assault*	2 years

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
35	Negligence in performance of a duty	3 months	*Public Service Act 1999* *– ss13(2) and (5) as above* *Fair Work Act 2009* *– ss43–45, 50 as above*	s15 as above s539 as above
36	Dangerous conduct	2–10 years	*Crimes Act 1900 s27 acts endangering life*	10 years
36A	Unauthorised discharge of weapon	6 months	*Crimes Act 1914* *– s89A discharge firearms*	6 months
36B	Negligent discharge of weapon	6 months	*Crimes Act 1914* *– s89A discharge of firearms*	6 months
37	Intoxicated while on duty etc	6 months	*Public Service Act 1999* *– ss13(2) as above* *Fair Work Act 2009* *– ss43–45, 50 as above*	s15 as above s539 as above
38	Malingering	12 months	*Public Service Act 1999* *– ss13(5) as above* *Fair Work Act 2009* *– ss43–45, 50 as above*	s15 as above s539 as above
39	Loss of, or hazard to, service ship	6 months – 5 years	*Crimes (Aviation) Act 1991* *– s22 endanger safety of aircraft*	7 years
40	Driving while intoxicated	12 months	*Road Transport (Alcohol and Drugs) Act 1977 s24A driver etc intoxicated*	6 months
40A	Dangerous driving	6 months	*Crimes Act 1900* *– s29 culpable driving of motor vehicle*	5–9 years
40C	Driving a service vehicle for unauthorised purpose	3 months	*Public Service Act 1999* *– s13(8) use of C'th resources in a proper manner*	s15 as above
40D	Driving without due care and attention	7 days' pay	*Public Service Act 1999* *– ss13(2)* *Fair Work Act 2009* *– ss43--45, 50 as above*	s15 as above s539 as above
41	Low flying	12 months	*Civil Aviation Act 1988* *– s20A reckless operation of aircraft*	$1000 fine and/or six months

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
42	Inaccurate certification in relation to ships, aircraft, vehicles etc	12 months	*Shipping Registration Act 1981* *– s25 use of improper certificate* *– s73 false statements*	$1000 fine and/or six months
43	Destroying or damaging service property	6 months – 5 years	*Crimes (Aviation) Act 1991* *– s17 destruction of aircraft* *Crimes (Ships and Fixed Platforms) Act 1992* *– s10 destroy or damage a ship* *Crimes Act 1914* *– s29 destroy or damage C'wealth property*	14 years Life 10 years
44	Losing service property	6 months	*Public Service Act 1999* *– s13(8) as above*	s15 as above
45	Unlawful possession of service property	6 months	*Public Service Act 1999* *– s13(8) as above*	s15 as above
46	Possession of property suspected of having been unlawfully obtained	6 months	*Public Service Act 1999* *– s13(8) as above* *Summary Offences Act 2005 (Qld)* *– s16 unlawful possession of suspected stolen property*	s15 as above 20 penalty units or 1 year prison
47C	Theft	5 years	*Criminal Code 1995* *– s131.1 theft*	10 years
47P	Receiving	5 years	*Criminal Code 1995* *– s132.1 receiving*	10 years
48	Looting	5 years	*Criminal Code 1995* *– s268.54 pillaging*	15 years
49	Refusing to submit to arrest	12 months	*Criminal Code 1899 (Qld)* *– s340 serious assaults includes preventing lawful arrest of self*	7 years
50	Delaying or denying justice	12 months	*Crimes Act 1914* *– s43 attempting to pervert justice* *– s42 conspire to defeat justice*	5 years 5 years
51	Escaping from custody	2 years	*Crimes Act 1914* *– s47 escape from custody*	5 years

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
52	Giving false evidence	5 years	*Crimes Act 1914* – *s35 giving false testimony*	5 years
53	Contempt of service tribunal	6 months	*Criminal Code 1995* – *s261.2 contempt of court*	Gaoled until contempt purged
54	Unlawful release etc. of person in custody	12 months – 2 years	*Crimes Act 1900* – *s163 permit escape*	5 years
55.	Falsifying service documents	2 years	*Criminal Code 1995* – *s145.4 falsification of documents etc.*	7 years
56	False statement in relation to application for a benefit	12 months	*Criminal Code 1995* – *s136.1 false or misleading statements in applications*	12 months
57.	False statement in relation to appointment or enlistment	3 months	*Criminal Code 1995* – *s136.1 false or misleading statements in applications*	12 months
61(1), (2) & (3)	Territory offences	These offences import civilian criminal law into the military; therefore they are directly referable.		
101QA	refusing to submit to medical examination etc	6 months	*Road Transport (Alcohol and Drugs) Act* 1977 – s23 refusing blood test etc, include medical exam	30 penalty units

11 APPENDIX 11: JAG RECOMMENDATIONS

JAG, Annual Report, 2017, Annexure P

1	2009 2010	Amend Defence Force Discipline Act s 66 to permit the imposition of a general sentence to be imposed for the entirety of the wrongdoing on which the offender stands convicted. Section 77 might provide a basis on which to structure a general sentencing option
2	2011	Review DFDA s 36 to clarify scope and intended operation of the offence of 'dangerous conduct'
3	2011	Amend DFDA s 141 to also allow submission of pre-trial applications by the prosecution.
4	2011	Amend DFDA s 139 to allow for the accused to be absent from court during purely procedural hearings
5	2011	Amend DFDA s 78 to permit Service tribunals to suspend sentences of detention for one course of conduct but determine for other reasons that the sentence should not be suspended for another course of conduct
6	2011 2013 2014	Review appropriateness of a court martial President exercising judicial discretions. Ideally, consistent with the approach in DFDA s 134(1), all discretions that would ordinarily be given or exercised by a judge sitting with a jury in a civil criminal proceedings should be vested in the Chief Judge Advocate and Judge Advocates
7	2011 2013 2014 2015 2016	Legislation for a permanent military discipline system
8	2012 2013 2015	Report convictions and acquittals recorded by courts martial and Defence Force magistrates in Service newspapers
9	2012	Amend DFDA s 162 to permit a reviewing authority, in reviewing whether the punishment should be approved, to consider evidence not presented at the trial, only where the evidence was not reasonably available during the proceedings
10	2012	Amend DFDA s 188FM to clarify that the rank specified (Lieutenant Commander, Major or Squadron Leader) is only a minimum qualification for the delegation of the Registrar of Military Justice's powers and functions

11	2013 2014	Appointment of third full-time and permanent Judge Advocate
12	2013	Clarify by way of legislation the legal uncertainty as to whether the rules of evidence to be applied by superior Service tribunals should be governed by the Evidence Act 1995 (Cth) or by the provisions of the relevant ACT legislation by virtue of the operation of DFDA s 146
13	2013 2016	Afford Judge Advocates greater independence, eg. by way of permanent appointment for a term of years by the Governor General in Council in a way that is analogous to that adopted for the Military Judges of the former Australian Military Court
14	2013	Adjust the respective roles of the Judge Advocate and the President of a court martial. An option for consideration is that the Judge Advocate presides and the panel of officers appointed as members of the court martial have a role analogous to that of a jury in a civilian trial. The court martial panel would be the sole arbiters of matters of fact with a clear distinction between the conduct of the trial according to law and the adjudication of guilt or innocence. If the Judge Advocate were to preside, this would offer significant advantages in terms of dealing with pre-trial matters.
15	2013 2014	Afford Judge Advocates more direct involvement in the sentencing process under Part IV of the DFDA for courts martial. Judge Advocates should preside over the sentencing process and be part of the private deliberative processes of the court martial. Judge Advocates should have a second or casting vote if a simple majority cannot otherwise be achieved. Courts martial should also be required to give reasons for sentence to increase the transparency of the process.
16	2011 2014	Review the powers of the court martial president to make protective and non-publication orders, consistent with civil criminal courts
17	2013 2014	Create a permanent court martial that can deal with pre-trial issues
18	2014	Amend DFDA s 153 to preclude a reviewing authority from considering a petition against the severity of punishment, where that reviewing authority has already conducted an earlier review
19	2015	Review the arrangements for the early release of a Defence member sentenced to imprisonment on condition of good behaviour in view of the removal of recognisance release orders
20	2015	Amend the election scheme in summary authority proceedings to allow an accused a right to elect trial by a superior Service tribunal at only one point in the dealing and trial processes

21	2016	Introduce provisions into the DFDA to reduce delay and inefficiency in the conduct of criminal trials as have long been used in civilian criminal courts eg. Criminal Procedure Act 1986 (NSW) Ch 3 Pt 3 Div 3
22	2016	Three levels of internal review of guilty findings (automatic review by command, petition for review by a reviewing authority and request for further review by CDF / Service Chief) and an external appeal process (Defence Force Discipline Appeals Tribunal) does not represent best practice and requires further consideration

PART D

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Defence Inquiry Regulations 1985 (Cth)
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3RAR	3rd Battalion, Royal Australian Regiment
AAT	Administrative Appeals Tribunal (Cth)
Abadee	Brigadier, the Hon Justice A. Abadee
ACMT	Australian Court Martial Tribunal
ACT	Australian Capital Territory
ADF	Australian Defence Force
AMC	Australian Military Court
Backup System	Transitional Provisions Bill
Burchett	Hon J.C.S. Burchett, QC
CDF	Chief of Defence Force
CJA	Chief Judge Advocate
CJM	Chief Justice of the military court
CM & DFM Rules	*Court Martial & Defence Force Magistrate Rules* 2009 (Cth)
CO	Commanding Officer
CoA	Chief of Army
CoAF	Chief of Air Force

Commonwealth Criminal Code	*Criminal Code Act* 1995 (Cth)
CoN	Chief of Navy
Cth	Commonwealth
D-P	Deputy-President of the ACMT
DDCS	Director of Defence Counsel Services
Deputy-President	Deputy-President of the ACMT
DFDA	*Defence Force Discipline Act* 1982 (Cth)
DFDAA	*Defence Force Discipline Appeals Act* 1955 (Cth)
DFDAT	Defence Force Discipline Appeals Tribunal
DFM	Defence Force Magistrate
DLAA	*Defence (Legislation Amendment) Act* 2006 (Cth)
DLAB	Defence (Legislation Amendment) Bill 2006 (Cth)
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
FamCA	Family Court of Australia
FCA	Federal Court of Australia
FCCA	Federal Circuit Court of Australia
FMC	Federal Magistrates' Court of Australia
General Division	MCA General Division
Government Response	Department of Defence, Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, '*Report on the Effectiveness of Australia's Military Justice System*', October 2005
HMAS	Her Majesty's Australian Ship
HMCS	Her Majesty's Colonial Ship
HMCSS	Her Majesty's Colonial Steam Ship
HMVS	Her Majesty's Victorian Ship
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
Imp	Imperial Act of Parliament at Westminster
JA	Judge Advocate
JAG	Judge Advocate General
Judge	Judge of the FCCA
Justice	Judge of the FCA
MCA	'Military Court of Australia' proposed under MCAB 2012
MCAB 2010	Military Court of Australia Bill 2010 (Cth)
MCAB 2012	Military Court of Australia Bill 2012 (Cth)
military court	The military court proposed in this thesis
MJ	Military Judge of AMC
MML	Manual of Military Law
Peacetime cases	*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *McWaters v Day* (1989) 168 CLR 289; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570; *Lane v Morrison* (2009) 239 CLR 230

President	President of the ACMT
QC	Queen's Counsel
RAAF	Royal Australian Air Force
RAF	Royal Air Force
RAN	Royal Australian Navy
RMJ	Registrar of Military Justice
SC	Senior Counsel
Schedule 1 Offences	MCAB 2012: Schedule 1 — Service Offences
SOFA	Status of Forces Agreement
Superior Division	MCA Appellate and Superior Division
Transitional Provisions Bill	Military Court (Transitional Provisions & Consequential Amendments) Bill 2012 (Cth)
UCMJ	Uniform Code of Military Justice (United States)
V-P	Vice-President of the ACMT
VCDF	Vice Chief of the Defence Force
Vic or Vict	Victoria
Vice-President	Vice-President of the ACMT
Wartime cases	*Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, *R v Cox; Ex parte Smith* (1945) 71 CLR 1