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

## Overview

*To understand the military justice system of the Australian Defence Force (ADF) requires knowledge of the development of Australia's naval and military forces (collectively called the 'military') since commencement of colonization in 1788. This chapter briefly examines the historical development of each stage of military discipline from colonial times until the current period.*

*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.*

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## 1.1 Genesis of Military Justice

### 1.1.1 Background

Systems of military justice have existed since the first armies were raised in ancient times. One of the earliest recorded military courts was in Ancient

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Greece, in 330 BC, when a military tribunal condemned General Filotas to death for conspiring against Alexander the Great.<sup>1</sup> In the time of the Roman Empire, records reveal formalised troop discipline was maintained by enforcing the principle of '*who gives the orders sits in judgment*', ultimately presided over by the *Magister Militum*.<sup>2</sup> The Roman philosopher, lawyer and politician, Marcus Tullius Cicero, used the phrase "*silent leges inter arma*" ('*the laws are silent amidst arms*')<sup>3</sup> 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 were accompanied by formal structures of military justice. In Europe "*it seems that it is not possible to talk about military justice existing before the 15<sup>th</sup> and 16<sup>th</sup> centuries*".<sup>4</sup> From that period on, as Gilissen has observed, "*where there is an army, there is military justice*".<sup>5</sup> Although this has been disputed as an historical fact<sup>6</sup> that expression stands in support of the proposition that military

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1 "*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> (accessed 23 November 2015, link now removed).

2 This position was a reference to the senior military officer of the Roman Empire only subservient to the Emperor.

3 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.

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

5 Gilissen, *ibid*, p.39

6 Heniarti, Dini Dewi & Safei, Agus Ahmad, *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>

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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<sup>7</sup> suggests a means 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<sup>8</sup> 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.

Whichever way the systems of military justice may be classified, there are significant differences between the systems 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 case-by-case basis<sup>9</sup>, whereas standing military courts operate in civil law systems<sup>10</sup>. Since the turn of the 21<sup>st</sup> century, some common law countries have moved towards a system of standing military courts.<sup>11</sup> One of the main reasons for this move is to improve the independence of the military justice system from the chain of command.

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7 Gilissen, *ibid*, p.48.

8 *ibid.*, p.44 ff

9 For example, in Australia and in the United States of America

10 For example, in Cyprus, Bulgaria, Luxembourg, Greece, Spain and Italy

11 For example, in New Zealand and the United Kingdom. Australia purported to do so with the establishment of the Australian Military Court (which will be discussed in detail in Chapter 5.2).

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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. In some continental European countries<sup>12</sup>, where 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.<sup>13</sup>

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 as its core, the chain of command and a disciplinary code which attaches to it.

## 1.1.2 Important historical English military law structures

### 1.1.2.1 Courts martial

The date on which courts-martial began to be known as such is not clear but they are mentioned with the distinction of '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. There were differences between the earlier courts-martial and the statutory court-martial: in the earlier courts the general or governor of the garrison who convened the court ordinarily sat as president; the power of the court was

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12 Germany, Austria, Norway and Sweden

13 Andreu-Guzman, Federico, *Military Jurisdiction and International Law, Military courts and gross human rights Vol 1*, International Commission of Jurists, Colombian Commission of Jurists, 1990, P.158. However, their Constitutions still allow for the creation of such a system in wartime.

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absolute; and sentences were carried into execution without confirmation.

### 1.1.2.2 Judge Advocate

The term 'Judge Advocate', with its suggestion of completely opposite functions being performed by the same individual, is a curious and potentially misleading title. Until late in the 19th century, it was the dual function of the Judge Advocate at a naval court-martial to act as 'assessor,' that is, to advise the court on all points of law and practice which might arise, and also, when no prosecutor was appointed, to conduct the proceedings in support of the charge before the court on behalf of the public. In a debate in the House of Lords concerning the conduct of the Deputy Judge Advocate in an unfortunate court martial of an officer brought to England for trial for matters alleged in India, Lord Cranworth had this to say:<sup>14</sup>

*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.*

### 1.1.2.3 Articles of War

In the period of the Commonwealth, a passion for tidiness can be observed as well as a real need to restore and make effective discipline in the Navy. For

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<sup>14</sup> Hansard, Re Court Martial on Colonel Crawley – The Deputy Judge Advocate Question, 26 February 1864, Lord Sitting, Vol 173 cc1161-79 at 1172

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the first time rules of discipline were laid down and, in 1645, the Commissioners at the Navy Office produced an ordinance and articles concerning martial law for the government of the Navy. The Articles of War had officially arrived. *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 used to govern troops on active service from the time of the conquest and were not superseded until early in the nineteenth century. The Articles were severe, sanctioning death or loss of limb for almost every crime.<sup>15</sup>

#### 1.1.2.4 *The Mutiny Acts*

On 1 March 1689, following a message from William and Mary suggesting the suspension of Habeas Corpus, there was a debate in the House of Commons regarding the proper regulation of the Army. On 13th March leave was given to bring in a bill to punish mutineers and deserters from the army and a committee was appointed to prepare it. Almost at the same time 800 men enlisted by James II, having been ordered by William to embark for Holland, mutinied at Ipswich, declaring that James was their king and that they would live and die by him. This was reported to both Houses on 15th March, which may have facilitated the passing of the bill which was introduced into the House of Commons on 18th March; it passed through all its stages by 28th March, was passed by the House of Lords on the same day and received the Royal Assent on 3rd April. This passed into law as the first *Mutiny Act* (1 Will. & Mary, Ch. 5), and was prefaced by a preamble which stated that: (a) The

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<sup>15</sup> 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 formed the ground work of the *Articles of War* issued in 1878 which were consolidated with the *Mutiny Act* in the *Army Discipline and Regulation Act 1879* which was in turn replaced by the *Army Act 1881*.

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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 Their Majesties' service in the army. Power was given to Their Majesties or the general of their army to grant commissions for summoning courts-martial for punishing such offences and it was further provided that the Act should not exempt any officer or soldier from the ordinary process of law. Successive Mutiny Acts, with the exception of certain short intervals, were passed annually from the 1690 until 1878. The first period lasted till 1712. During this period the Mutiny Acts did not extend to the dominions of the Crown abroad, and the principal offences punishable under them were mutiny and desertion; the nation was at war during almost the whole period and the main body of the army was on active service and was governed by Articles of War issued by the Crown in pursuance of the prerogative so there was no difficulty with the narrow extent of the Act. From 1698 to 1702 the nation was at peace and the Mutiny Act was allowed to drop. The greater part of the army was disbanded at the same time and, though the King was allowed to maintain 7,000 troops in England and 12,000 in Ireland, no special powers were conferred upon him for their government. On the renewal of hostilities in 1702 the Mutiny Act was revived and extended in the next year with clauses added for the better enforcement of discipline abroad, providing that certain offences committed abroad should be triable in England as treason or felony. These clauses, however, were accompanied by a proviso saving the power of the Crown to



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make Articles of War and constitute courts-martial and inflict penalties by sentence or judgement of the same beyond the seas in time of war, and by a clause empowering the Crown to grant commissions for holding courts-martial within the realm, by which persons committing crimes out of the realm against the Articles of War, and not tried by courts-martial before their return, might be tried and punished according to the Articles of War.

#### *1.1.2.5 Naval Discipline Act 1866 (Imp)*

The *Naval Discipline Act 1866 (Imp)* brought the system of naval justice closely into line with the procedure of the English criminal law. It remained in force for 91 years, although there were numerous amendments to it passed during this time. The functions of the Judge Advocate were made more judicial and he was available to assist either defence or prosecution on points of law. For the first time, a Prisoner's Friend is heard of, though it took some years to remove the qualifications that he must be approved by the court, that if serving he must be junior to the President and that he could only address the court by permission of the President. Summary trials were still in the hands of

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the Captain, whose maximum punishment was ninety days imprisonment.<sup>16</sup>

#### 1.1.2.6 *Army Act 1881 (Imp)*

The Crown gradually acquired a complete statutory power for the government of the army in time of peace, whether at home or in the colonies by the *Mutiny Act* and the *Articles of War* made under the *Mutiny Act*. This existed alongside the prerogative power of governing troops in foreign countries during a time of war by the *Articles of War* made under the prerogative.<sup>17</sup>

In 1803, a change was made to extending the *Mutiny Act* and the statutory *Articles of War* to the Army whether in the dominions of the Crown or outside of them. This alteration was made on the occasion of the Peace of Amiens in

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<sup>16</sup> Then, as they still are, the Captain's powers of punishment were controlled by stringent regulations, the more serious punishments requiring the sanction of the Admiralty, Commander-in-Chief or Flag Officer depending on the circumstances. The Captain was given no power of punishment over Commissioned or Warrant officers. The following were some of the more important changes made during the period that this Act was in force. In 1871, flogging was suspended as a naval punishment in peacetime and, in 1897, it was suspended as a wartime punishment. It was not formally removed from the list of punishments until 1948, when corporal punishment for civil criminal offences was abolished by the *Criminal Justice Act 1948* (UK). In 1909, the punishment of detention was introduced for ratings, though it was not until 1911, when suitable detention quarters had been built, that this punishment became effective. The object of introducing this punishment was to prevent some ratings convicted of offences against the *Naval Discipline Act* being subjected to the stigma attaching to imprisonment. In this punishment, the Navy followed Army practice, where detention had been tried out some years previously and found to be satisfactory. In 1914, disciplinary courts were introduced for the trial of officers, for certain relatively minor offences committed in wartime only. The President was to be a Commander, with two other officers as members and the original instruction was that one of the members was to be of the same rank as the accused. These courts follow a modified court-martial procedure. In 1915, striking a superior officer became no longer a capital offence, and could therefore be tried summarily; in 1917, suspended sentences could be awarded.

<sup>17</sup> *Barwis v Keppel* (1766) 2 Wilson's Reports 314 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.

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order to provide for the government of the troops engaged in the war then concluded who had not yet been brought home, and who could no longer be governed by prerogative Articles. On the resumption of hostilities, the Act and statutory articles might have been restricted in their operation to the dominions of the Crown, and the troops engaged in foreign war might have been left to be governed as before by prerogative Articles. However, statutory Articles were applied in 1813 to the troops outside as well as to those within 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 law as then settled continued, and the Army both in peace and war was governed by the *Mutiny Act* and statutory Articles until the year 1879. 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*.

With 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.

## 1.2 Australian Military Justice – Background

### 1.2.1 Development of the Colonies

For at least 65,000 years<sup>18</sup>, the indigenous aboriginal and islander peoples occupied the Australian continent without external disturbance. However, from the perspective of its European colonisers, Australia's constitutional

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18 Clarkson, C, *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,

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history, commenced in 1770 when Lt James Cook RN took possession of the eastern part of the Australian continent on behalf of the British Crown.<sup>19</sup> In 1786, the King-in-Council designated New South Wales as a place to which British convicts might be transported in the future.<sup>20</sup> Two years later, in 1788, Governor Philip, as the personification of the authority of the British Crown, arrived to establish the penal colony of New South Wales accompanied by the First Fleet.<sup>21</sup> 1788 was also the year the thirteen British colonies in America united to declare their independence from the United Kingdom and establish the Constitution of the United States of America.

Governor Phillip was authorised to, and did in stages, establish a judicial system for the colony. 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 created by a separate instrument provided to the Governor, made under the *New South Wales Act 1787 (Imp)*.<sup>22</sup> 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*

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19 See generally Lumb, RD, *The Constitutions of the Australian States*, University of Queensland Press 4th Edition (1977), Chapter I.

20 *Declaration by Order in Council* in 1786 pursuant to 24 Geo III c 56 (1784).

21 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.

22 Long Title: 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)*.

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*misbehaviours*<sup>23</sup> 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 over whom it predominately had jurisdiction, that is, convicts, the court may be classified as Australia's first military court.

By 1809, just over two decades from its founding, the makeup 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 office had been filled by a lawyer.<sup>24</sup>

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

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

24 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 admit emancipist lawyers to practise before him. See: Cumming, Helen, *The Governor: Lachlan Macquarie 1810 to 1821*, State Library of New South Wales, 2010, 22

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into various matters relating to the colony.<sup>25</sup> In 1822, Bigge reported on those matters and the Imperial Parliament passed the *New South Wales Act 1823 (Imp)*<sup>26</sup> which gave effect to his recommendations.<sup>27</sup> This Act may be regarded as the first constitution for New South Wales and amounted to the first steps in the normalisation of the political and judicial institutions of the colony, now that the colony had a sizeable free population<sup>28</sup>. The Act created an appointed 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, the power to raise armed forces was, thereafter,

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25 His Royal Commission, issued on 5 January 1819, authorized 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 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*, 1966, Volume 1, MUP, entry: Bigge, John Thomas (1780-1843)

26 4 Geo. IV c. 96

27 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*, 1966, Volume 1, MUP, entry: Bigge, John Thomas (1780-1843)

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

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omitted from the commissions of subsequent Governors.

The *New South Wales Act 1823 (Imp)* authorised, by Letters Patent issued by the King<sup>29</sup>, 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.<sup>30</sup> The Act also empowered the Governor to establish Courts of General Session and Courts of Quarter Session. Governor 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<sup>31</sup> which reduced the Governor's autocratic powers as he was required to consult the new Council before exercising executive authority and had to

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29 *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 and for the admission of barristers and solicitors and for trial by jury.

30 Castles, Alex, *An Australian Legal History*, Law Book Company, Sydney, 1982

31 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.

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act upon its advice, except in certain circumstances. In 1842, a partly elective 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.<sup>32</sup>

In 1825, Van Diemen's Land<sup>33</sup> was established as a separate colony from New South Wales.<sup>34</sup> However, it was not until 1854 that representative government was actually extended to Van Diemen's Land as 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)*,<sup>35</sup> and established a bi-cameral legislature.<sup>36</sup> 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.<sup>37</sup>

In 1828, the Imperial Parliament passed the *Australian Courts Act 1828 (Imp)*<sup>38</sup> 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 further constitution for New South Wales.

In 1829, Western Australia was established as a colony by the Imperial

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32 5 & 6 Vict c 76 (1842).

33 Renamed Tasmania in 1856, *Order-in-Council*, 21 July 1855

34 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

<sup>35</sup> The Australian Constitutions Act 1850 (imp) granted the Colonies control over their own waste lands.

36 18 Vict No 17

37 *Order-in-Council*, 21 July 1855

38 9 Geo. IV C.83



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Parliament. However, it was not until passage of the *Constitution Act 1889* (WA) and its adoption by the Imperial Parliament<sup>39</sup> 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.<sup>40</sup> The *Constitution Act 1899* passed by the Western Australian Parliament consolidated its predecessor enactments.

In 1834, South Australia was created by Imperial statute,<sup>41</sup> as 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<sup>42</sup> which authorised the establishment of a bi-cameral legislature. In July 1851, a Legislative Council with representative government was established in South Australia.<sup>43</sup> In 1856, a Constitution was passed by the South Australian Legislature and received royal assent.<sup>44</sup>

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39 *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).

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

41 '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.

42 5 & 6 Vict c 61.

43 See fn 28

44 South Australian Constitution Act (No 2) 1855-56

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In 1850, following a report by a committee of the Privy Council<sup>45</sup> which inquired into the constitutional position of the Australian colonies, the *Australian Constitutions Act 1850 (Imp)*<sup>46</sup> was passed. This statute provided for the enactment and alteration by colonial legislatures of their own constitutions. It also provided for the separation of Victoria from New South Wales which took effect in January 1851.

In 1855, common form constitutions were established in New South Wales and Victoria. 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 separate colony, out of New South Wales, had been authorised by the *Australian Constitutions Act 1842 (Imp)*.<sup>47</sup> In 1859, the separation was effected by Letters Patent and an Order-in-Council<sup>48</sup> which established the constitution of the colony in terms similar to the New South Wales Constitution.

In the latter part of the 19<sup>th</sup> century, the movement to create a federation

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45 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

46 13 & 14 Vict c 59

47 On the Petition of householders, for the area of land above the 30 degree of south latitude

48 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

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of the Australian colonies made considerable advances. Conventions of colonial representatives met to discuss and draft an Australian Federal Constitution. The concerns which brought them together involved the need for mutual defence, foreign affairs, immigration, trade and commerce and industrial relations. 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 Vanuatu. Germany had colonised portions of New Guinea, in spite of an abortive attempt by the Premier of Queensland to annex it, an attempt disclaimed by government of the United Kingdom.<sup>49</sup>

In 1883, following an Intercolonial Convention held in Sydney, a significant step toward a federation of the colonies occurred when the Imperial Parliament established the Federal Council of Australasia.<sup>50</sup> 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 Australia briefly participated between 1889 and 1891. The Federal Council's authority was limited as it had no executive and no revenue. Sharwood has branded it

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49 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.

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

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“as a Victorian invention foisted on the other colonies.”<sup>51</sup>

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 to drafting a federal constitution. 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. The Constitution Bill was adopted by the 1891 Convention, however, 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.”<sup>52</sup>

In 1891, with the resignation of Parkes as Premier of New South Wales, 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.<sup>53</sup> Subsequently, in 1897–1898, an Australasian Constitutional Convention was held in Adelaide, attended by ten elected delegates from each

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51 Sharwood, *The Australian Federal Conference of 1890*, Craven (ed) *The Convention Debates - Commentaries, Indices and Guide Vol 6*, 41-42

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

53 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”.

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colony, except Queensland which did not attend.<sup>54</sup> The Convention was held over three sessions in three cities, over a total of 82 days. 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, the minimum number of voters required to vote in New South Wales did not turn out.

In January 1899, at a Premiers' conference held in Melbourne where all six colonies were represented, amendments were agreed. 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 the Bill to the Imperial Parliament together with addresses from their respective Legislatures.<sup>55</sup> Subject to changes required by the Imperial Parliament to covering clauses 5 and 6 and s 74 to 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 and on 9 July 1900. The *Commonwealth of Australia Constitution Act 1900 (Imp)* received Royal Assent and on 17 September

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54 In 1897 Queensland was involved in serious internal political debate about whether the colony should itself be divided into 3 parts; Southern, Central and Northern.

55 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, praying that Western Australia be included as an original State of the Commonwealth in the proclamation of the Constitution, were passed on 21 August 1890.

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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 awake and with that Australian naval and military forces were to be established.

The next part of the chapter examines the development of the naval and military forces of the colonies leading up to federation.

### 1.2.2 Development of the Colonies' military force

The earliest point in the development of Australia's colonial naval and military force commenced on 18 January 1788, when the First Fleet<sup>56</sup> under the command of Captain Arthur Phillip landed at Botany Bay in the new colony of New South Wales. The fleet comprised: 2 Royal Navy ships, HMS *Sirius* and HMS *Supply*; 3 store ships; 6 non-naval convict vessels carrying convicted persons; 4 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)*. At all other times whilst on shore, the Marines were subject to the *Marine Mutiny*

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56 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>)

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Act 1755 (Imp)<sup>57</sup> and the *Articles of War* made under that Act.

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:

*'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'.<sup>58</sup>*

During the period 1790 -1792, the Royal Marines were withdrawn 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* made under that Act.

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

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57 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 each 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 Halleck, Henry Wager, *Military Tribunals and Their Jurisdiction*, (1975) Mil. L. Rev. Bicent. Issue 14, p15

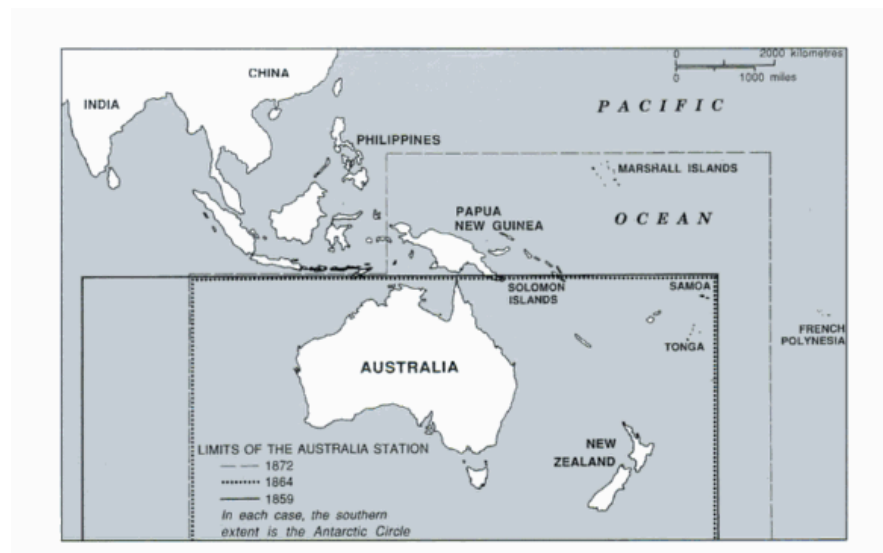
58 Migration Heritage Centre (NSW) 1787 *Draught Instructions for Governor Philip* (2010)

<http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/draughtinstructions/index.html>

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considered proposal from the Tasmanian government.<sup>59</sup> The Royal Navy's Australian command was to be separated from the East Indies station<sup>60</sup>, and named the Australia station,<sup>61</sup> to encompass Australia, New Zealand and the south-west Pacific Ocean. Two Royal Navy ships (instead of one) would be regularly stationed at Sydney and the rank of the senior officer was raised from captain to commodore.<sup>62</sup>

Map 1 Boundaries of the Royal Navy Australia Station, 1859 – 1872. (Boundaries were changed in 1893 and then again in 1908)<sup>63</sup>



In 1869, Earl Granville, Secretary for the Colonies, informed the Australian colonies of an imminent further reduction in the number of British troops stationed in the colonies to a single regiment of infantry and two batteries of

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59 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

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

61 Command was established in Port Jackson, Sydney

62 Macandie, GL, *Genesis of the Royal Australian Navy*, Sydney, Government Printer, 1949, 17

63 Grey, Jeffrey, *A Military History of Australia*, 3<sup>rd</sup> Ed, Cambridge University Press, 2008, 23



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artillery.<sup>64</sup> The time for the Australian colonies to take control of their own defences was drawing quickly upon them.

In the 19<sup>th</sup> 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.

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.<sup>65</sup> 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.<sup>66</sup>

With the withdrawal of British troops, the existing Australian colonial naval and military forces could only provide a very limited military defence of the

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64 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, could not accept the terms of the offer. The British troops were promptly withdrawn in August 1870. Cf fn 57

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

66 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.

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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 armies in the modern sense.<sup>67</sup>

In Australia, from the outset of the establishment of each colonial<sup>68</sup> naval and military force, Australian colonial legislation reveals a pattern of adoption of 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

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<sup>67</sup> Grey, Jeffrey, *A Military History of Australia*, Cambridge University Press, 3rd ed, 2008, 9; G. Walsh, 'The Military and the Development of the Australian Colonies, 1788-1888' in McKernan, M. and Browne, M. (eds), *Australia: Two Centuries of War & Peace*, Australian War Memorial, 1988, 44; Dawson, Sarah (ed), *The Penguin Australian Encyclopaedia*, Viking, 1990, 135; Australian Bureau of Statistics, 'Military system in Australia prior to Federation', *Year Book Australia*, 1909, Lewis, Arndell N., *Australian Military Law*, 1936; Healy, Frank B., 'The Military Justice System in Australia' (2002) 52 *Air Force Law Review* 93

<sup>68</sup> The colony of New South Wales was the first to establish its own permanent military force in 1871 with a battery of artillery and 2 companies of infantry. It also established 28 volunteer (militia) Rifles (infantry) companies and 9 batteries of volunteer Artillery. The colonies also operated their own navies. In 1856, Victoria received its first naval vessel, *HMCSS Victoria*. Following the arrival of the *HMCSS Victoria*, 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.

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the defence acts, all of which remained in force until federation.<sup>69</sup> The consequence of these acts was that courts martial in the colonial naval and military forces<sup>70</sup> continued to be governed by s.45 of the *Naval Discipline Act 1866 (Imp)*<sup>71</sup> and s.41 of the *Army Act 1881 (Imp)*<sup>72</sup> when the colonies federated

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<sup>69</sup> Discipline Act 1870 (Vic) and Defences and Discipline Act 1890 (Vic); Military and Naval Forces Regulation Act 1871 (NSW); Defence Act 1884 (Qld); Defences Act 1895 (SA); Defence Forces Act 1894 (WA); Defence Act 1885 (Tas).

<sup>70</sup> 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 8 battalions of the Australian Commonwealth Horse which had sailed to South Africa during the Boer War. As it transpired some 4 battalions arrived after the conclusion of the Boer War.

<sup>71</sup> *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.

<sup>72</sup> *Army Act 1881 (Imp)*, 44 & 45 Vict. c.58, Offences punishable by ordinary Law  
41. Offences punishable by ordinary law of England.

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in 1901.<sup>73</sup>

### 1.2.3 The Colonies 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

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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 *shall 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 when 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.

73 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.

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did not to occur until 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)<sup>74</sup> provided the various State Acts and the Act of the Federal Council of

<sup>74</sup> The former colonial naval and military forces legislation in force as at 1 January 1901:

Date or Number of Act	Title of Act	Where Act passed
31 Vict. No. 5	The Volunteer Force Regulation Act of 1867	New South Wales
34 Vict. No. 19	The Military and Naval Forces Regulation Act	
No. 1,083	Defences and Discipline Act 1890	Victoria
No. 1,248	Defences and Discipline Act 1891	
48 Vict. No. 27 55 Vict. No. 17	The Defence Acts 1884 to 1896	Queensland
60 Vict. No. 33		
49 Vict. No. 16	The Defence Act 1885	
53 Vict. No. 36	The Defence Act 1889	
61 Vict. No. 8	The Defence Amendment Act 1897	Tasmania
	The Defence Act 1900	
55 Vict. No. 7	Safety of Defences Act 1891	
57 Vict. No. 18	The Defence Act 1893	
56 Vict. No. 4		

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Australasia ceased to apply to the Naval and Military Forces of the Commonwealth so that members then came under the operation of the new *Defence Act 1903* (Cth).

On 1 March 1903, the commands of each State 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).<sup>75</sup> In 1911, the Commonwealth Government established the Royal Australian Navy, which absorbed the Commonwealth Naval Force.<sup>76</sup> In

	The Safety of Defences Act 1892	
58 Vict. No. 2	The Defence Forces Act 1894	Western Australia
59 Vict. No. 4	The Uniforms Act	
No. 307	The Naval Discipline Act 1884	South Australia
No. 643	The Defences Act 1895	South Australia
57 Vict. No. 1	Federal Garrison Act 1893	Federal Council of Australasia

75 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 ABS, above n25

76 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: MacDougal, A, *Australians at War: A Pictorial History*, Five Mile Press, 1991, 23

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1912, the Army established the Australian Flying Corps which in 1921, 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 were linked by a single chain of command. Each service reported to its own Federal Minister. Furthermore, each 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.

### 1.3 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)*,<sup>77</sup> 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<sup>78</sup>, 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*

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77 *Ibid*, ss55 and 56. The naval regime was continued by the *Naval Defence Act 1910 (Cth)* s77, which applied s45 of the *Naval Discipline Act 1866 (Imp)* as if "Australia" were inserted in lieu of "England".

78 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.

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*Military Regulations & Orders 1916* 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 by the *Australian Military Regulations 1927 (Cth)*.<sup>79</sup> The overall situation was summarised in the *Manual of Military Law*:<sup>80</sup>

*“Certain provisions of the Army Act have been applied by the law of the Commonwealth, save so far as they are inconsistent with the Defence Act and the 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.”*

For the Australian Navy, initially matters remained as provided for under the Imperial statutes until passage of the *Naval Defence Act 1910 (Cth)*<sup>81</sup> which provided for the continued application of Imperial law as modified by the

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<sup>79</sup> Creyke R, Stephens D and Sutherland P, *Military Law in Australia*, Federation Press, 2019, [2.3]

<sup>80</sup> 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* in 1914 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*.

<sup>81</sup> The *Naval Defence Act* made particular provisions for the Naval Forces of the Commonwealth. Section 5 provided that a number of provisions of the *Defence Act* (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.



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*Defence Act 1903 (Cth)*. In 1917, *the Defence Act 1903 (Cth)* was amended<sup>82</sup> 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)*<sup>83</sup> were applied with modifications.

This 'Imperial' network of adopted legislation continued to serve as the foundation of the disciplinary regime for the Australian services from 1901 through to 1985 with the coming into effect of the *Defence Force Discipline Act 1982 (Cth) (DFDA)* and Regulations.<sup>84</sup> 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

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82 Section 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.

83 7 & 8 Geo 5, c 51

84 currently the Defence Force Discipline Regulations 2018 (Cth)

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and regulations.<sup>85</sup>

By 1985 a change to the governance of the disciplinary system of Australia's military forces was well overdue since the Imperial Acts which Australian forces were operating under, had long ceased to apply to British forces.<sup>86</sup>

#### 1.4 Reorganisation of the naval, military and air forces

In 1976, a single Department of Defence, was created which covered all three services and the Department of Supply.<sup>87</sup> The reorganisation maintained the individual existence of each service and integrated their command structure<sup>88</sup> so that on 9 February 1976, the Australian Defence Force (**ADF**) was established.<sup>89</sup>

Until 2016, responsibility for the general 'control and administration' of the ADF under the *Defence Act 1903 (Cth)* resides in the Minister for Defence. This Act allows for the appointment of different service Chiefs: the Chief of

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

86 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.

87 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, Tange, Sir Arthur, *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)*.

88 *Defence Act 1903 (Cth)*, s17 provides that the Australian Defence Force consists of three service arms, namely, the Australian Navy, the Australian Army and the Australian Air Force.

89 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)*

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the Defence Force (**CDF**), the Vice Chief of the ADF, and a Chief for each of the Navy, Army and Air Force services.<sup>90</sup> As from 1 July 2016, the ultimate command of the ADF by the CDF and the role of the VCDF was formally established.<sup>91</sup> As from then the separate statutory authority of each Service Chief to command, was removed and from then the CDF and VCDF 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 Department of Defence jointly administer the ADF<sup>92</sup>. 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*'.<sup>93</sup> The diarchy are responsible for the administration of the ADF and both are answerable to the Minister.<sup>94</sup> 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 Chief.

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<sup>90</sup> *Defence Act* 1903 (Cth): CDF s9(1); VCDF s9(3); CoN s.18(1)(a); CoA s19(1)(a); CoAF s20(1)(a)

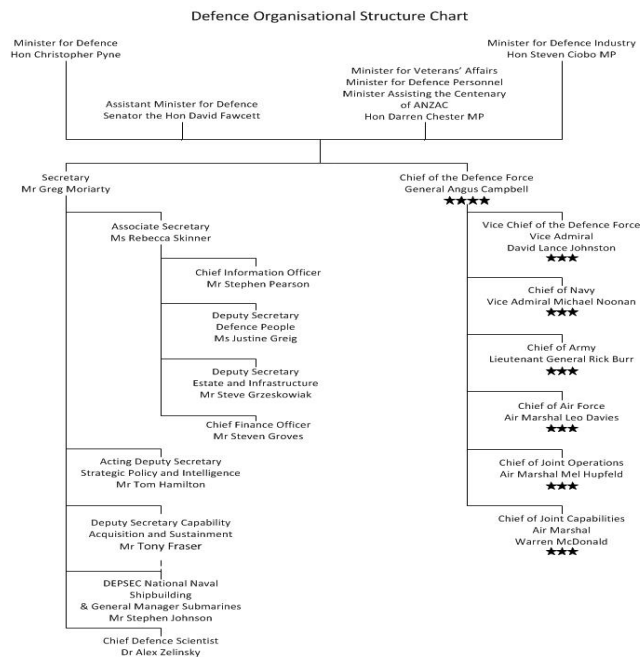
<sup>91</sup> Defence Legislation Amendment (First Principles) Act 2015 (Cth), Defence Regulation 2016 (Cth), rr12,13

<sup>92</sup> *Defence Act* 1903 (Cth), s10(1)

<sup>93</sup> Department of Defence (Cth), *The Diarchy*, [www.defence.gov.au/cdf/diarchy.asp](http://www.defence.gov.au/cdf/diarchy.asp)

<sup>94</sup> *Defence Act* 1903 (Cth), s 8(2)

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Table 1-1 Organisational Structure of the ADF – The Diarchy<sup>95</sup>

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.<sup>96</sup>

## 1.5 Australian Military Justice System: the DFDA regime

In 1982, the DFDA was passed by the Commonwealth Parliament and came into force in 1985 and since then the it has provided the legislative framework for the Australian military disciplinary system.<sup>97</sup> The DFDA has created service tribunals with jurisdiction to try members of the ADF on charges of 'service offences'<sup>98</sup> against the Act and provides these tribunals with powers to try

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

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

97 The disciplinary system will be analysed in detail in Chapters 2 and 3

98 DFDA, s 3 definition service offence means:

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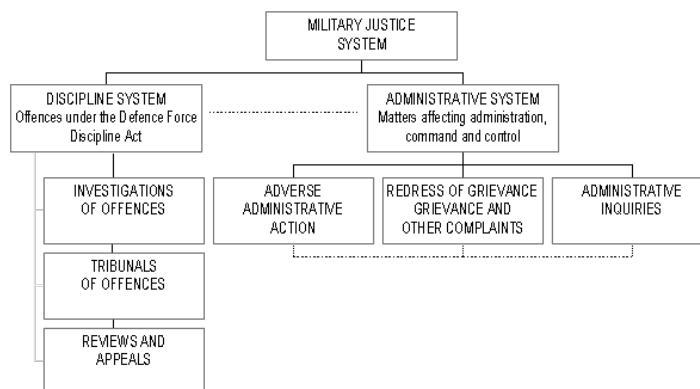
civilians who accompany the ADF on military operations.

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,

with both systems designed to support the chain of command and organisational structure of the ADF.

Diagram 1- Australian Military Justice System<sup>99</sup>



- 
- (a) an offence against this Act or the regulations;
- (b) an offence that:
- is an ancillary offence in relation to an offence against this Act or the regulations; and
  - 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.

99 Parliament of Australian, 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.

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The Discipline System<sup>100</sup> 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, a criminal court judge and jury (or magistrate) and Corrective Services, respectively.

The Administrative System<sup>101</sup> enables factual inquiries to determine what went wrong in an incident, and therefore hopefully prevent the same problem occurring again. 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 service they may belong to, and includes defence civilians.<sup>102</sup> Command is always involved in deciding guilt of a person charged, in imposing punishment, and in reviewing the conduct

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100 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.

101 *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, Chief of the Defence Force (CDF) Commissions of Inquiry and Inquiry Officer Inquiries.

102 '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.

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and sentences of trials before courts martial or Defence Force magistrates (DFM). 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, for example, absence without leave, conduct to the prejudice of military order, disobedience of a lawful order. '*Equivalent offences*' are similar to the civilian criminal laws, such as, theft of military property or assaulting another member of the service. '*Territory offences*', by operation of s61<sup>103</sup> 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, that is, be it, disciplinary, equivalent or Territory, the determination of that service offence will take place before a service tribunal. A service tribunal is one of two bodies: a summary authority, or, a court martial or alternatively, a Defence Force magistrate.

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103 DFDA, s61: "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.

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## 1.6 ADF Disciplinary Offices

### 1.6.1 Summary Authorities

There are three different levels of summary authority, they are: 'superior summary authorities', 'commanding officers' and 'subordinate summary authorities'.<sup>104</sup> The CDF and the Service Chiefs appoint<sup>105</sup> superior summary authorities<sup>106</sup> who are commanders (generally without legal qualifications). Under the DFDA, all Commanding Officers<sup>107</sup> are able to exercise disciplinary powers. In turn, commanding officers appoint subordinate summary authorities<sup>108</sup> who are generally of a lower rank.

Although strictly not a summary authority, the '*Discipline Officer Scheme*', (an officer or warrant officer), was established<sup>109</sup> as a special summary procedure confined to determination of minor charges levelled against officer cadets and ranks below Non-Commissioned Officers. Such a matter will proceed to determination where the charge is in respect of a minor disciplinary infringement,<sup>110</sup> the defence member admits the infringement and consents to the operation of the scheme. An advantage to the offender in proceeding under the scheme is that no permanent conduct record is created as records are kept for only 12 months.

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104 Director-General ADF Legal Service, *Overview of the Australian Military Discipline System*, Defence Legal, Department of Defence, 2 August 2013

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

106 '*superior summary authority*' is defined in DFDA s3(1)

107 '*commanding officer*' is defined in DFDA s3(11)

108 '*subordinate summary authority*' is defined in DFDA s 3(1) and 105(2)

<sup>109</sup> DFDA, Pt IXA, Special provisions relating to certain minor disciplinary infringements, s169B

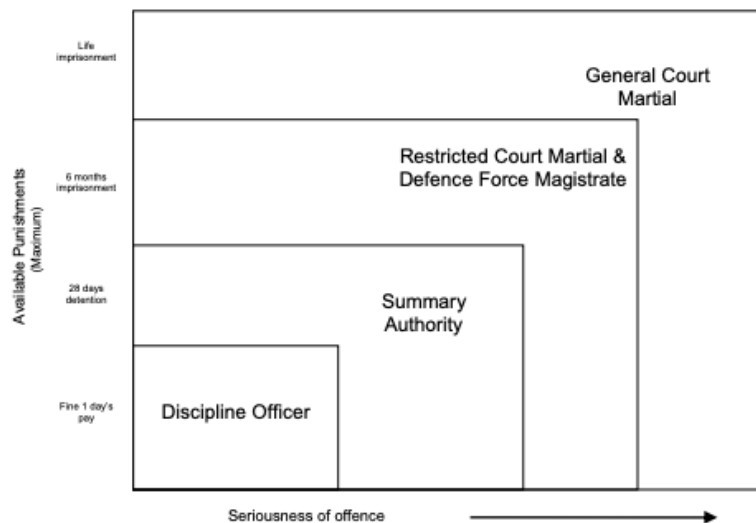
<sup>110</sup> Being DFDA: s23, absence from duty; s27, disobeying a lawful command; s29, failing to comply with a general order; s32(1) being absent, asleep or intoxicated when on guard or on watch; s35, negligence in performance of duty; s60, prejudicial conduct; or s24, absence without leave (for less than 3 hours).



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

Diagram 2 The relative breadth of jurisdiction of the Discipline Officer Scheme and Service Tribunals<sup>111</sup>



### 1.6.2 Defence Force magistrates

If a charge is to be heard before a DFM, that qualified legal practitioner officer decides both matters of fact and of law. DFM trials<sup>112</sup> 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 for a restricted Court Martial. A DFM hears charges generally not suited to be 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.

<sup>111</sup> 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]

<sup>112</sup> DFDA, ss135

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The *Court Martial and Defence Force Magistrate Rules*<sup>113</sup> (**CM&DF Rules**) provide the functions of a DFM at any proceeding is to ensure the proceeding is conducted in accordance with the DFDA and the CM&DF 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 a proper record is made of the proceeding and that the record of the proceeding and the exhibits (if any) 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.

### 1.6.3 Judge Advocate

When a court martial is convened to determine a charge, a Judge Advocate (**JA**) is appointed to sit in the court martial from the panel of JAs. (The JA does not preside as that is the role of the President, discussed below). 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.<sup>114</sup> JAs serve on the panel for no more than three years, but can be re-appointed to the panel for a further period or periods. Those members on the panel must be legal practitioners. 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&DF Rules.<sup>115</sup>

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<sup>113</sup> Select Legislative Instrument No 269, 2009, r31

<sup>114</sup> DFDA s 196

<sup>115</sup> CM&DF Rules, r27

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#### 1.6.4 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 is usually 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.<sup>116</sup>

#### 1.6.5 Courts martial

A court martial has jurisdiction to try any charge against any person, subject to certain exceptions.<sup>117</sup> Courts martial procedure has not really changed since commencement of the *Army Act 1881 (Imp)*. A court martial consists of panel members, who are all ADF members, the superior officer of which will be the presiding President. The functions<sup>118</sup> of the President of a court martial are to ensure that the proceedings are conducted in accordance with the DFDA and the CM&DF 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.

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<sup>116</sup> CM&DF Rules, r28

<sup>117</sup> DFDA, s115. Certain custodial offences may not be heard before a court martial.

<sup>118</sup> CM&DF Rules, r26

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An important difference to civilian criminal trials is that in a trial before a court martial, 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 similar position to civilian judges conducting criminal trials.

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 elects, to be tried by court martial or DFM.

There are two forms of court martial. *General Courts Martial* 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 (equivalent). They may impose punishments up to and including imprisonment for life. *Restricted Courts Martial* are constituted by a panel of not less than three officers, including a President of the panel who is of or above the rank of Lieutenant Colonel (equivalent). They can impose sentences of imprisonment or detention for a period not exceeding six months.

Detention is different to 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.<sup>119</sup> Detention is a form of rehabilitation which is appropriate in matters in which a service tribunal considers that an ADF member can and should be given the opportunity of rendering further service in the ADF.<sup>120</sup>

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<sup>119</sup> DFDA, s71

<sup>120</sup> Creyke R, Stephens D and Sutherland P, *Military Law in Australia*, Federation Press, 2019, [8.8]

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

#### **1.6.6 Judge Advocate General**

The 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. 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, appointment of 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 providing the highest level of legal reporting for reviewing authorities in instances where a reviewing authority seeks further legal advice to that initially provided by an ADF legal officer. DFMs are appointed by the JAG from the panel of JAs. The JAG also provides legal review of the previous system of courts martial and DFM trials. The JAG is required to submit an annual report to Parliament on the operation

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of the DFDA.

### 1.6.7 Director of Military Prosecutions

The office of the DMP was created by statute<sup>121</sup> 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, with impartiality. Since its creation, the DMP has held the rank of Brigadier equivalent (one star general). The DMP's military legal staff are provided on 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, for command, 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*'<sup>122</sup> which is a co-operative arrangement which underpins the statutory requirement for the Commonwealth Director of Public Prosecutions' consent to allow the DMP to

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<sup>121</sup> DFDA, Part XIA, s188G, 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.

<sup>122</sup> 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".

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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.

### 1.6.8 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. The DDCS has primary responsibility for the 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*<sup>123</sup> with the CDF being responsible for the selection and appointment of a senior military legal officer to the position. The DDCS is not to hold a rank lower than colonel or equivalent.<sup>124</sup> 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, as the DDCS. The DDCS is responsible for:<sup>125</sup>

- The provision of counsel and other assistance to the accused, at Commonwealth expense in disciplinary proceedings before the MCA, in particular:
- advice prior to trial and representation at trial;
- representation at appeals before the MCA (including cases stated and referral of questions of law after trial);
- the trial and appeal/petitions from residual service tribunals when used;
- and,

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<sup>123</sup> *Defence Act 1903* (Cth), Part VIIIID, ss110ZA – 110ZD

<sup>124</sup> Note, this rank is

<sup>125</sup> *Ibid*, S110ZB(1)

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- 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 Chief of the Defence Force commission of inquiry at Commonwealth expense.

#### **1.6.9 Number of Hearings: Courts martial, DFM and Summary Authorities**

The following diagram 3 sets out the number of court martial and DFM trials in the period 2011 to 2017. These numbers are instructive of the limited number of hearings actually have taken place across each of the Navy, Army and Air Force: 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.

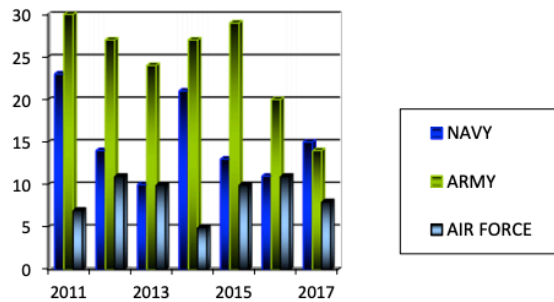
The diagram 3 also sets out the trending of matters under investigation by the DMP in the period 2010 – 2017. As at 31 December 2017, the DMP had 41 matters open for investigation in which decisions to prosecute had not yet been decided.

*Diagram 3 – Court martial and DFM hearings 2011 - 2017* <sup>126</sup>

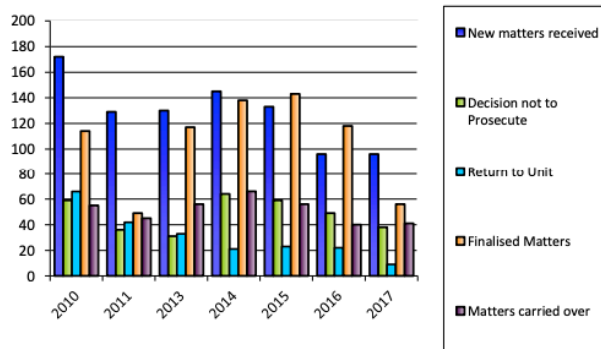


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### Court martial trial trends by service



### Outcome trends by year

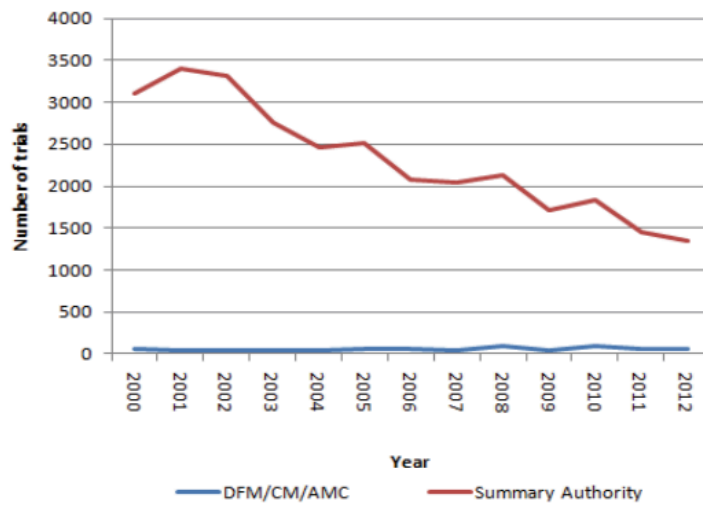


On the other hand, the number of trials before summary authorities, courts martial and the AMC in the period 2000 to 2017 is as follows:

Diagram 4: Trials before Summary Authorities v Courts Martial, DFM and AMC 2000-2012<sup>127</sup>

<sup>127</sup> Cavanagh B and Devereaux J, *Reconsidering Summary Discipline Law*, (2013) 32(2) UQLJ 295, 297

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The number of trials before summary authorities from 2013 until 2017 in Table 1 remains relatively similar to the declining trend disclosed in Diagram 4.

Table 1 – Discipline Trials before Summary Authorities 2013 - 2017<sup>128</sup>

2013	1423
2014	1392
2015	1241
2016	1129
2017	1189

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

## 1.7 DFDA Sentencing Options

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

<sup>128</sup> JAG Annual Reports for each of the years 2013 to 2017, Appendix E thereof

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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:
  - 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—\$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;
- (na) extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days; and
- (p) reprimand.

Schedule 2 to the DFDA<sup>129</sup> further defines sentencing options by providing which punishments may be imposed upon which ranks by the court martial, DFM or AMC (as the case may have been). Thus, an Officer may be imprisoned, dismissed, have his or her rank reduced, forfeiture of service for promotion purposes, forfeiture of seniority, be fined or reprimanded. A member of the ADF, who is not an officer, may be sentenced to any of these options, 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 2 years. Persons who are not ADF members may only be imprisoned and/or fined. Table 2 sets out the punishments available to a

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<sup>129</sup> Annexure 8

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court martial and a DFM according to the convicted person's rank.

*Table 2 Punishments that may be imposed by a court martial or a DFM by rank<sup>130</sup>*

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

The kind of service tribunal hearing the matter also has an effect on which punishment may be imposed on the guilty person. Thus, a Superior Summary Authority may only impose a fine or reprimand. A Commanding Officer may fine or reprimand, but the Commanding Officer 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 ranks: the Commanding Officer may sentence the prisoner to detention, reduction in rank, forfeiture of seniority, fines, reprimands, restriction of privileges, extra duties, extra drill

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130 Source: Schedule 2, DFDA (as at December 2018), see also Annexure 8

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and stoppage of leave. A Subordinate Summary Authority may fine, reprimand, stop leave, restrict privileges, impose extra drill, or impose extra duties. Appendix 9 summarises the sentencing options for each of the summary authorities.

## 1.8 The Chain of Command

### 1.8.1 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<sup>131</sup> and the Minister

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131 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'.

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for Defence<sup>132</sup> having 'general control and administration' of the ADF. However, the CDF and the VCDF<sup>133</sup> sit at the apex of the ADF chain of command, that is, command of the ADF.

The chain of command is an expression which is descriptive of how 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.

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132 *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 Australian Defence Force); and Chapter 6, (in relation to treatment for injuries and diseases of serving members of the Australian Defence Force), 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*

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

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

Commanding officers have the primary responsibility for 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.<sup>134</sup>

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

Administratively this ensures that subordinates receive only one set of orders and it has the effect of avoiding the possibility of conflicting orders being given. This operation of the chain of command lessens the possibility for breaches of military discipline.

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<sup>134</sup> Creyke R, Stephens D and Sutherland P, *Military Law in Australia*, Federation Press, 2019, [3.3.7]

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Table 3 ADF Chain of Command<sup>135</sup>*Equivalent military ranks*

<b>Navy</b>	<b>Army</b>	<b>Air Force</b>
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

General Peter Cosgrove, as CDF (before he became Governor-General of Australia), described discipline within the ADF in the following terms:

*“Essential to command - a non-negotiable requirement for operational effectiveness. For this reason, the control of the*

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135 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>



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*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" (emphasis added).<sup>136</sup>*

All personnel fit within the chain of command, and consequently, 'all members of the ADF are under command of some nature' (emphasis added).<sup>137</sup> It is an important concept, as protecting and ensuring its integrity is often cited<sup>138</sup> by those who argue for a separate military justice system. Accordingly, in the military the position of rank is most important to its hierarchy and the discharge of responsibilities in aid of the accomplishment of a mission, whatever that mission may be. General Cosgrave, who is as a principal proponent of a separate military justice system being one separate from the civilian system, has maintained 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.<sup>139</sup>

Therefore, the chain of command may be seen as a hierarchical system designed to ensure 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.<sup>140</sup> Consequently, the military justice system also operates

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136 Cosgrove, PJ, 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.

137 *Ibid.*, [2.5]

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

139 Cosgrove, *ibid*, [2.2] - [2.4]

140 DFDA, s27

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as a management tool.<sup>141</sup> 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 comfort in 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), and decisions under the DFDA are excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>142</sup>

### 1.8.2 The Reviewing Authority

As an essential element of the exercise of command within the ADF disciplinary system, the DFDA<sup>143</sup> provides for an internal ADF review of decisions of all service tribunal proceedings no matter whether they are summary authorities, DFM trials or courts martial. Just as a commanding officer reviews<sup>144</sup> 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<sup>145</sup> automatically considers convictions made by all other service tribunals and a legal report<sup>146</sup> is to be obtained by the reviewing authority before the actual commencement of the review.

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<sup>141</sup> 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.

<sup>142</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), Sch 1(o). 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 ULR* 456 at 460

<sup>143</sup> DFDA, ss150-153

<sup>144</sup> DFDA, s151

<sup>145</sup> DFDA, s152

<sup>146</sup> DFDA, s154

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A reviewing authority must consider the following grounds<sup>147</sup> 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<sup>148</sup> by a reviewing authority. The CDF or a Service Chief may also decide<sup>149</sup> to conduct a further review.

This element of the exercise of the 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.<sup>150</sup>

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<sup>147</sup> DFDA, s158(1)

<sup>148</sup> DFDA, s153

<sup>149</sup> DFDA, s155

<sup>150</sup> *Lane v Morrison* (2009) 239 CLR 230 discussed in Chapter 5 below