Military Court Systems: Can They Still be Justified in This Age?

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The Honourable Justice Logan, RFD[1] 10 September 2018

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A decade ago, in Afghanistan, a Canadian Operational Mentor and Liaison Team (OMLT), deployed in an advisory role with the Afghan National Army, was on patrol with the Afghan army unit it supported. The unit was ambushed by a superior Taliban force. The OMLT called in fire support from a helicopter gunship armed with 30 mm cannon. The gunship strafed the ambush party to devastating effect. In clearing the ambush position, the unit encountered a scene littered with the remains or partial remains of Taliban insurgents. The OMLT commander, a Canadian Army Captain, later recalled wondering, at one particular moment, why a string of sausages was hanging from a tree, until he realised it was someone's intestines. Nearby was a mortally wounded Taliban, for all intents and purposes cut in half with a hole about the size of a dinner plate through his midsection and one of his legs shattered. Afghan soldiers passing this insurgent commented, "Allah will look after him" and moved on. The Canadian officer chose not to do this. He stopped and fired two rounds into the dying or already dead insurgent before quickly catching up with the unit. This occurred in the space of about 10 seconds.[2]

That Canadian officer was Captain Robert Semrau of the Royal Canadian Regiment. Some 17 months later, Captain Semrau faced court martial proceedings, the principal charge being second-degree murder. After seven months, the court martial acquitted him of that charge but found him guilty of disgraceful conduct, sentencing him to reduction in rank and dismissal from the Canadian Army.[3]

Captain Semrau was an infantry officer. The role he was undertaking is typical of that undertaken in modern times by the infantry. So, too, is the jeopardy in which he found himself because of a brief value judgement made by him in the field when undertaking that role.

Under Australian military doctrine, the role of the Royal Australian Infantry Corps is:

"to seek out and close with the enemy, to kill or capture him, to seize hold ground and to repel attack, by day or night, regardless of season weather or terrain".[4]

Each of the other Corps in the Australian Army have roles that support or complement this infantry role. Unsurprisingly, the role and place of the infantry in the Canadian Army is no different.[5] The statement of that infantry role is, in turn, generally descriptive of the features which attend the raison d'être of any organised military force – warfighting.

The curriculum of Australia's Royal Military College,[6] and of other officer cadet training units established as required,[7] centres on imparting the necessary basic skills to command an infantry

platoon in war or peace and in determining whether a candidate for commissioning as a general service officer has the requisite qualities to undertake that role. Such skills may come to be studied and practised in greater depth in the event that, on graduation, an officer cadet is commissioned into the Infantry. Nevertheless, no officer cadet is commissioned as a general service officer unless those requisite, basic command qualities are assessed as present.

Soldiers can, and do, undertake other roles – aid to the civil power in times of natural disaster or, happily very infrequently in Australia, in times of civil unrest or terrorist activity, humanitarian aid duty and peacekeeping duty. Nevertheless, each of these is subordinate to the warfighting role just mentioned.

A like point may be made in relation to the respective roles of the navy and the air force.

The ramifications of warfighting for those exercising military command functions and for those under command were accurately and authoritatively addressed by Sir David Fraser, a senior British general officer of the modern era, in this way:

Few men are born heroes. Few are incorrigible cowards. Most can be either; and to help them towards the former rather than the latter state an army uses leadership, discipline and training – a mix which produces confidence and pride. The man well-led can believe there is sense in what he is ordered to do, and that his commander both cares for him and knows his own job. The disciplined man knows that the habit of obedience and united action distinguishes a self-respecting body of soldiers from a mob. The trained man knows his profession enough to do what he has to do, and do it by instinct amidst great dangers. Without these characteristics in the body to which they belong soldiers cannot behave well in battle; and when they fail the fault is not theirs but lies in the system which has placed them there unprepared.[8]

...

No army can function on the basis that its members require rational explanations before they obey: obedience must be absolute, immediate and enforced. But although, in practice, men had "blindly" to obey, they needed to feel they were not blind – that they knew as much as could be managed, and that it made sense. They needed to know, above all, that their destinies were in good hands.[9]

Fraser was well placed by experience to make these observations. Over the course of his 40-year military career, he experienced, as a junior officer, high intensity combat operations in North-West Europe during the Second World War, followed by war-like operations in Malaya, Suez and Cyprus in the period that saw the transition of the British Empire to the modern Commonwealth of Nations. Thereafter, he assumed responsibility during the Cold War as a formation commander within the British Army of the Rhine for the contingency of conflict with Group Soviet Forces Germany and its Warsaw Pact allies. The culmination of his career entailed his assumption of senior, tri-service, strategic command, defence policy and high level staff training roles .[10]

Fraser's observations and Captain Semrau's experience on operations highlight why the exercise of command in war, and in training for war, is so very different to the exercise of civilian, management powers.

A civilian manager who deliberately directed an employee to engage in a known life threatening activity may not just be negligent but criminally so. Civilian managers do not direct employees to kill another human being or plan operations around that.

Conversely, soldiers are not employees at all.[11] Officers serve in accordance with the terms of their commission and other ranks serve in accordance with the terms of their enlistment. At common law, their service was determinable at will and for any reason or even no reason.[12] There remain echoes of this common law position in the Australian regulatory provision for early termination of a defence member's service in that it may be terminated on the basis of nothing more than satisfaction that "retention of the member's service is not in the interests of the Defence Force".[13]

A military commander who deliberately refrained from directing a soldier to engage in a life threatening activity necessary to fulfil the role of the infantry on a given mission would be grossly derelict in his duty. In tasking the gunship to attack the Taliban ambush position with the results described, Captain Semrau's OMLT was likewise fulfilling a role of the infantry. In the course of employment, a civilian may be injured, fatally or otherwise, in a workplace accident; a soldier, on the other hand, may be killed or wounded in action. Even to conceive of a theatre of operations as a "workplace", much less to assimilate the two, is fundamentally to misunderstand the absolute and immutable centrality for the army of the role of the infantry.

None of this is to suggest that some styles of military command may not, at times, in training for war or on operations, mimic or even draw inspiration from civilian management practices. For example, the absolute and immediate obedience described by Fraser, so very necessary for a force in close contact with an enemy, may be ill suited to the production by an intelligence staff of the best predictive analysis of future enemy operations and intentions. In that circumstance, a frank and free flowing exchange of views between superiors and subordinates may be the best way of avoiding an uncritical "group-think". However, even in that situation, there will come a time when a command value judgement must be made as to the analysis to adopt for the purpose of briefing a commander.[14] Within Special Forces, where teamwork and co-operation by small patrol groups is essential, a form of collaborative decision-making known as a "Chinese Parliament", successfully pioneered within the United Kingdom's Special Air Service Regiment, is often employed to good mission effect.[15]

Nor is it to suggest that any and every military activity is, ipso facto, immune from giving rise to a duty of care at common law for the breach of which there is a remedy in damages. They are not. Any doubt as to the absence of such absolute immunity has long been resolved in Australia.[16] The immunity extends only to combat operations and to training activities directed to the conduct of such operations.[17]

There is a necessary interplay between leadership, discipline and training, Fraser's three essential elements for the transformation of a civilian recruit into a soldier. Effective military leadership is

impossible unless the leader's commands are obeyed. Hence the need, as Fraser highlights, for obedience to be "enforced". In the military, an enforced disciplinary system is a corollary of command. In turn, training, Fraser's third element, must entail the learning and practising in peacetime of the skills necessary for warfighting, culminating in military exercises that replicate, as closely as possible, warfighting, including the practice of leadership in war. It is axiomatic that an army must train for war, not peace. It necessarily follows that the means by which military discipline is enforced must be suitable for war, not peace, and practised in peace in order to be prepared for its use in war.

All of these propositions may seem elementary, and they are. Nevertheless, in my experience, there is a tendency in contemporary academic consideration of military justice systems either to misunderstand them or not to confront the ramifications of these propositions for those systems.

The University of Southern Queensland's Associate Professor Pauline Collins' recently published work, "Civil-Military 'Legal' Relations"[18] offers, with all due respect, a paradigm example of this tendency in academia.[19] Collins offers an historical and contemporary survey and analysis of the military justice systems of the United Kingdom, the United States of America and Australia. She prefaces her work with the following conclusion that she draws from her survey and analysis:

The case studies lead to the conclusion that the highest civil courts in the three states compared still adopt a reduced control (RC) deferential approach. ...

*When civilian courts adopt a RC deferential approach, they shirk their role in the structure of the constitutional pact in a manner potentially damaging to the civil-military relationship. For this reason, consideration of the courts need to be included in any future development of an evaluative theory of the civil-military relationship. The courts also need improved capacity to take account of the impact their decisions may have on the civil control of the military. This is essential in order to discourage militarisation of the civilian domain and avoid a breakdown in the fundamental institutional roles of the three organs of government in liberal democracies, in which individual rights and control of states' power are important in providing civilian management of the military.**[20]***

Insofar as the Commonwealth of Australia is concerned, there are several manifest errors in Associate Professor Collins' conclusion and her expansion upon that conclusion in the passage just quoted.

The Australian "constitutional pact" to which Collins refers undoubtedly envisages civilian control of the military.[21]

Section 68 of The Constitution vests the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Queen's representative. In accordance with constitutional convention, that command in chief is exercised by the Governor General on the advice of the Federal Executive Council.[22] The command is a titular one but not without significance in that it constitutionally entrenches and thereby emphasises the subordination of each and every member of the Australian Defence Force (ADF), no matter how senior their rank,

to the civil power.[23] Section 68 anticipates that the Commonwealth will have naval and military forces but it does not itself establish them. Rather, s 51(vi) of the Constitution grants to the Commonwealth Parliament legislative power in respect of "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth". It was pursuant to this grant of legislative power that the naval and military forces of the Commonwealth were originally established.[24] The present provision for the existence of the ADF remains statutory.

As to that statutory provision, the Defence Act 1903 (Cth) vests the "general control and administration" of the ADF in a civilian, the "Minister".[25] The Minister responsible (subject to some presently immaterial exceptions) for the administration of the Defence Act is the Minister for Defence.[26]

The Defence Act distinguishes between the command of the ADF and its administration.

The command of the ADF is consigned to the Chief of the Defence Force.[27] In that command, the Chief of the Defence Force is assisted by the Vice Chief of the Defence Force,[28] who is obliged to comply with any directions of the Chief of the Defence Force.[29] The Chief of the Defence Force is also tasked with advising the Minister "on matters relating to the command of the Defence Force".[30]

The administration of the ADF is consigned to a diarchy comprising the Secretary and the Chief of the Defence Force.[31] The Defence Act contemplates that the Vice Chief of the Defence Force will assist with the administration of the Defence Force, as directed by the Chief of the Defence Force.[32]

These basal features of the Australian Constitution and, in turn, the Defence Act in relation to a standing military force and its command and control reflect our British heritage. In the United Kingdom, these features were the result of both revolution and evolution, of the experience, in the 17th and early 18th centuries, of, successively, Royalist absolutism, a dreadful civil war as between Royalists and those adherent to parliamentary supremacy, military dictatorship during the Protectorate, and an eventual rapprochement. That rapprochement yielded the checks and balances and separation of legislative, executive and judicial powers in a constitutional monarchical system of government, known as "the Westminster system", that has proved enduringly successful in the delivery of peace, order and good government in that country, in Australia and elsewhere in the Commonwealth of Nations. The subjection of the military to the civil power is another of the key features of that system.

There is no constitutional provision for the command and control or administration of the ADF by the judiciary. This is a reflection both of our heritage as well as of common sense. By neither training nor resources is the judicial branch of government equipped to undertake that role. Rather, Chapter III of the Australian Constitution vests the exercise of federal judicial power in the High Court of Australia, other courts created by the national parliament and in such State courts as that parliament chooses by legislation to invest with federal jurisdiction.[33] Within Chapter III, s 75(v) entrenches a jurisdiction exercisable by the High Court to issue writs of prohibition and mandamus directed to officers of the Commonwealth, thereby providing an

irreducible minimum means by which they can be required, by an exercise of judicial power, to act according to law.[34] A court martial constituted by Australian military officers or a military prison custodian relying upon a warrant issued by a court martial comprised of such officers is amenable to such writs but they lie only for jurisdictional error. The jurisdiction conferred in much narrower than that of a Court of Criminal Appeal. It has been invoked both in war[35] and in peace[36] in respect of alleged errors of jurisdiction by courts martial. In this sense, Collins' "RC" deferential approach is nothing more than a manifestation of the distinction between the judicial review of the decisions of officers of the Executive in respect of legality and the review of the merits of those decisions. The latter is not the province of the judiciary.[37]

In her survey of the Australian position, Collins refers to,[38] but her conclusion indicates she does not understand, just how fundamental, in terms of civilian control of military justice, was the legislative provision in the 1950's for an appeal to a civilian tribunal against convictions by courts martial, extended since then to convictions by Defence Force Magistrates (DFM).

In the aftermath of the Second World War, a need for a right of appeal to a legally qualified tribunal, sitting in public and outside the military chain of command, in respect of the lawfulness of court martial proceeding outcomes was recognised both in the United Kingdom, Australia, in comparable Commonwealth jurisdictions as well as in the United States.[39] Hitherto, court martial verdicts were reviewed within the chain of command, increasingly often with the benefit of legal advice, but were only amenable to external scrutiny via writs and on the narrow basis mentioned. Such scrutiny was rare.

In response and following a like initiative taken by the United Kingdom that same decade,[40] Parliament enacted the *Courts-Martial Appeals Act 1955* (Cth),[41] since renamed the *Defence Force Discipline Appeals Act 1955* (Cth).

As enacted,[42] that legislation conferred upon a person convicted by court martial the following right of appeal:

(a) that the finding of the court martial-

(i) is unreasonable, or cannot be supported, having regard to the evidence; or

(ii) involves a wrong decision of a question of law; or

(b) that, on any ground, there was a miscarriage of justice.

This right of appeal was much wider in scope than review for jurisdictional error as provided for by s 75(v) of the *Constitution*.

The current right of appeal[43] is even broader than the original:

(1) Subject to subsection (5), where in an appeal it appears to the Tribunal:

(a) that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;

(b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;

(c) that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred; or

(d) that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory;

it shall allow the appeal and quash the conviction or the prescribed acquittal.

(2) Subject to subsection (5), where in an appeal it appears to the Tribunal that there is evidence that:

(a) was not reasonably available during the proceedings before the court martial or the Defence Force magistrate;

(b) is likely to be credible; and

(c) would have been admissible in the proceedings before the court martial or the Defence Force magistrate;

it shall receive and consider that evidence and, if it appears to the Tribunal that the conviction or the prescribed acquittal cannot be supported having regard to that evidence, it shall allow the appeal and quash the conviction or the prescribed acquittal.

(3) Subject to subsection (5), where in an appeal against a conviction it appears to the Tribunal that, at the time of the act or omission the subject of the charge, the appellant was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission, the Tribunal shall:

(a) allow the appeal and quash the conviction;

(b) substitute for the conviction so quashed an acquittal on the ground of unsoundness of mind; and

(c) direct that the person be kept in strict custody until the pleasure of the Governor-General is known.

(4) Where in an appeal it appears to the Tribunal that the court martial or the Defence Force magistrate should have found that the appellant, by reason of unsoundness of mind, was not able to understand the proceedings against him or her and accordingly was unfit to stand trial, the

Tribunal shall allow the appeal, quash the conviction or prescribed acquittal and direct that the appellant be kept in strict custody until the pleasure of the Governor-General is known.

(5) The Tribunal shall not quash a conviction under subsection (3) or (4) if there are grounds for quashing the conviction under subsection (1) or (2).

(6) Section 194 of the *Defence Force Discipline Act 1982* (Cth) applies to a direction under subsection (3) or (4) of this section as if that direction were a direction to which that section applied.

In Australia, the appellate jurisdiction was, deliberately, conferred not on a court established under Chapter III of the Constitution but rather on a statutory tribunal, now termed the Defence Force Discipline Appeal Tribunal (DFDAT), established under the legislation for that purpose. Regard to the Second Reading Speech of the then Minister for Defence, the Honourable Sir Philip McBride, discloses that the reasons for this did not stem from any reservation as to any constitutional invalidity which would attend the conferral of the jurisdiction on a court. Rather, those reasons were pragmatic, albeit informed by constitutional considerations concerning judicial tenure.

The constitutional consideration was the requirement, flowing from the settled understanding of the meaning of s 72 of the Constitution as it then stood, that those exercising the judicial power of the Commonwealth had to be appointed for life.[44] This and the pragmatic considerations are evident in the explanation which the Minister gave for why, in contrast with the United Kingdom, the jurisdiction was not being consigned to a civilian court:

In Australia, on the other hand, we were faced by the constitutional requirement that judges exercising the judicial power of the Commonwealth must hold life tenure of office. However, the kind of body which was needed was one of a flexible character, able to function satisfactorily under all conditions in time of war as well is in time of peace. Under active service conditions a fairly large complement of members might at times be required, whereas in normal conditions a relatively few members would suffice. In these circumstances, a civilian court, all of whose members would, in accordance with the Constitution, have to be appointed for life, was not an appropriate choice.[45]

An advantage which the Minister particularly commended to the House in respect of the new appeal system, in contrast with the then existing conviction review system, was that the proposed tribunal would sit in public, enabling the appellant and others to attend and observe the hearing of his or her appeal.

To maximise the opportunity for practical voice to be given to this aspiration, the practice of the DFDAT is to hear an appeal at or as close as possible to the locale where the appellant is stationed. The *Defence Force Discipline Appeals Act* contemplates that the DFDAT may sit at any place within or outside Australia as determined by its President.[46]

To date, the DFDAT has never sat overseas.[47] The nature of appellate jurisdiction and of ADF overseas deployments since the establishment of the DFDAT have not warranted this. The

position may well be different were there ever in the future large scale deployments overseas of the kind seen in the First and Second World Wars. Were such a need to arise, it would be necessary for provision to be made for terms and conditions of both DFDAT members and staff. For tribunal members, this might be done by the Remuneration Tribunal by determination pursuant to s 10 of the *Defence Force Discipline Appeals Act*.[48]

Some noteworthy features of the first Courts-Martial Appeal Tribunal appointed under that Act were:

(a) each of its members had served during the Second World War; and,

(b) its membership was not drawn exclusively from the federal judiciary or, for that matter, the judiciary alone.

As originally enacted, the Australian legislation required that a presidential member of the tribunal be or have been a member of a federal court or a State supreme court or one of Her Majesty's Counsel.[49] At that time, the only federal courts[50] were each, in the technical sense, superior courts of record. In expressly referring to Queen's Counsel, the legislation recognised the class from which, traditionally and for good reason, superior court judges were usually appointed in the United Kingdom and, by then, in the principal Australian jurisdictions,[51] even if governing legislation provided for lesser appointment criteria.

Originally, the other tribunal members were drawn from those eligible to be presidential members, as well as other legal practitioners or those of suitable legal experience.[52]

In respect of these original appointment qualifications, the Defence Minister opined that, "it can, I think, fairly be predicted that the tribunal will command, in the military sphere, a status corresponding to that of a supreme court of a State or Territory exercising criminal appellate jurisdiction".[53]

There is every reason to conclude that the Minister's prediction has amply been fulfilled over the 60 years of the existence of the DFDAT with a related, sustained and beneficial improvement in the standard of trials before service tribunals.

As early as 1963, the Chief Legal Officer of the Australian Army's then Eastern Command, Lieutenant-Colonel E P T Raine, after completing a two-day hearing before the DFDAT, wrote to all legal officers in that Command expressing his belief that it was "minded to set up and maintain the highest standards".[54] He made particular reference to the scrutiny by the DFDAT in the course of the hearing of the appeal of the adequacy of the summing up of the Judge Advocate as well as of the conduct of the prosecuting officer. A year later, similar views were expressed about the effect of the DFDAT by a civilian legal commentator and future Commonwealth Attorney-General and later New South Wales Supreme Court judge, the then Mr Kep Enderby.[55]

The experience over that 60-year period is that the system of appeals to the DFDAT is well adapted both to peacetime and to the wartime and other overseas deployments conducted to date by the ADF.

To date, the largest overseas deployment since the establishment of the DFDAT has been the Vietnam War. The volume of appeal cases yielded from that war by the deployment, over a sustained period of years, of a task force comprising what these days would be termed a joint force headquarters commanding a reinforced brigade group, a logistic support base and significant air and naval components, was readily dealt with by the DFDAT's part-time membership. These cases included appeals in respect of convictions for offences up to and including murder.[56] There is no reason to think that this establishment would not be sufficient to meet the demands of any present like deployment.

Eligibility for membership of the DFDAT has, since its first establishment, been made even more rigorous. This occurred pursuant to legislative amendments made in 1982,[57] when the class of those eligible to be appointed as presidential members was narrowed to superior court judges of the Commonwealth, the States and Territories. At the same time and apart from those eligible to be appointed presidential members, the class eligible to be appointed as members was narrowed to District or County Court judges.[58] In practice and most desirably, only superior court judges have been appointed as presidential or other members of the DFDAT since these 1982 amendments commenced. The provision for members to be drawn from District or County Court judges is a useful "surge" capacity in the event of a volume of cases greater than that which can be accommodated just by drawing upon available superior court judicial resources. This wider class certainly has criminal trial experience within it but its members do not sit on Full Courts or Courts of Appeal in the exercise of appellate jurisdiction.

In practice and even though the *Defence Force Discipline Appeals Act* has always been silent in this regard, it remains a feature of the DFDAT's membership that each of its members has had military experience. My experience is that prior military service experience is desirable. That is not just because that experience gives one a disposition to accept an additional commission on the DFDAT. It is because that experience brings with it a greater likelihood of an understanding of service terms, conditions and context and more ready assimilation of service publications and other documentary evidence. The appointment practice doubtless also adds to the credibility of the DFDAT in defence circles, senior and junior.

What is termed an "appeal" lies on a question of law involved in a decision of the DFDAT to the Full Court of the Federal Court of Australia.[59] Strictly speaking, such an "appeal" is a proceeding in the Court's original jurisdiction. A further appeal to the High Court is possible only by special leave of that court.[60]

In short, ever since the late 1950's, each person convicted by a service tribunal of a service offence has been able to challenge that conviction before a civilian tribunal on grounds akin to those available in civilian criminal appeals. Such convictions can be and in practice are quashed by the DFDAT whenever a ground of appeal is upheld. This, too, is hardly a "RC" deferential approach. There is no warrant for any apprehension as to deference to the military in relation to the exercise of appellate jurisdiction in relation to convictions by service tribunals.

But what of the determination of whether to convict at all? Under Australia's present military justice system, civilian judicial officers do not determine whether to convict a person of a service offence. Following a model found in the *Army Act 1881* (UK), the *Defence Force Discipline Act 1982* (Cth) (DFDA), expressly creates a number of service offences uniquely related to military service. It also incorporates by reference and as a code of proscribed and punishable behaviour also made a service offence conduct which would amount to an offence against a nominated body of criminal law.[61]

The DFDA[62] distributes the jurisdiction to determine whether a service offence has been committed between particular officers, termed "superior summary authorities", appointed by the Chief of the Defence Force, commanding officers, other officers, termed "subordinate summary authorities", appointed by commanding officers, DFM appointed by the Judge Advocate General (JAG)[63] and one or the other of two types of courts martial. The two types of courts martial are a Restricted Court Martial and a General Court Martial. Each type is constituted by a panel of a specified number of officers assisted by a Judge Advocate[64] whose rulings as to matters of law are binding. The panel determines both whether a charge is proved and, if so, the punishment to be imposed.

Who or which of these persons or service tribunals comes, in a given case, to determine whether a charge is proved is dependent on a range of factors - an election by the accused, a value judgement by a superior or subordinate summary authority or commanding officer as to the aptness of an available range of punishments or a value judgement by the Director of Military Prosecutions[65] and the seriousness of the offence itself and related applicable punishments.

In its provision for trial by court martial or DFM, the present Australian system entails a restoration of a system that existed prior to the establishment, by amendment of the DFDA, of the "Australian Military Court" (AMC). The members of the AMC were officers of the ADF. They were given singular independence from the chain of command in their adjudicative function but they were not given tenure during capacity and good behaviour until a specified age of the kind afforded those exercising Commonwealth judicial power by s 72 of the Constitution.

The origin of the AMC lay in the response of the then government to a June 2005 report by the Senate's Foreign Affairs, Defence and Trade References Committee (Senate Committee) into the effectiveness of Australia's military justice system.[66] In its report, the Senate Committee had recommended the establishment of "[t]he Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality" (Senate Report).[67] This court was to replace the then existing system for the trial of service offences by court martial or DFM.[68] Though the government's response to this report accepted the replacement of the trial of service offences by court martial or DFM by a military court, that institution was, deliberately, not established as a court whose members had tenure in accordance with Chapter III of the Constitution.[69] The flaw in that compromise response was exposed by the High Court in *Lane v Morrison*.[70]

For present purposes, there are two noteworthy features of the Senate Report.

Firstly, the report conflated, under the rubric "military justice", service inquiries and investigations on the one hand and the trial of service offences and related appeals on the other. To adopt a civilian analogy, this is akin to grouping police investigations and coronial inquiries on the one hand with trials by magistrates and judges and juries and related appeals on the other. At a general level of abstraction, these might, perhaps, be grouped under the rubric, "criminal justice" but it would be odd to abolish the latter on the basis of concerns about the former.

Secondly, insofar as there were concerns about the then existing system for the trial of service offences by courts martial and DFM, a reading of the Senate Report would suggest that the foremost of these was an apprehension that this system might contravene Chapter III of the Constitution. Further, that same reading[71] suggests that these concerns were heightened by some comments from the bench made in the course of argument in the High Court in the then recently decided *Re Aird; Ex parte Alpert*.[72]

As to this and with all due respect, even at the time, these concerns were over-stated and later authority demonstrates them to be baseless.

Comments made in the course of argument in the High Court by some members of the bench are of no authority. Further, the validity of the court martial which was to try Private Alpert, in terms of whether that would entail a contravention of Chapter III, was not in issue in that case. That was not happenstance. I was senior counsel for Private Alpert. Though the point may have been arguable, to raise it would have required leave to re-open earlier authority.[73] I considered that that argument had no reasonable prospect of success. The correctness of that assessment was later emphatically vindicated in the High Court in *White v Director of Military Prosecutions* (*White's Case*).[74]

There certainly was once a school of thought in Australia that service tribunals as constituted under the DFDA prior to the establishment of the AMC invalidly exercised the judicial power of the Commonwealth. That was never a view which commanded a majority of the High Court. It has now been so comprehensively rejected by the High Court in *White's Case* that it may be consigned to history.

It would also be a mistake to consider that the pre-*Lane v Morrison* trial system failed to meet some existing *Australian* constitutional norm in relation to impartiality and independence. In *Re Tyler; Ex parte Foley*,[75] a majority of the High Court was of the opinion that, if there were to be found in the *Constitution* a requirement of sufficiency of independence on the part of service tribunals exercising disciplinary powers, a general court martial constituted under the DFDA met those requirements. Overseas authority[76] which, on the basis of different norms, has held to the contrary in relation to like such tribunals is of no relevance to the Australian position. It is evident from her commentary in respect of the Australian position that Associate Professor Collins is unable to accept this.

In *Lane v Morrison*, the High Court held that the AMC could not validly exercise the judicial power of the Commonwealth. That was because its members did not enjoy constitutionally ordained tenure. An irony about that case is that a feature of the AMC which was, at the time of

its establishment, seen as desirable namely, independence from the military chain of command, was also one which facilitated the conclusion that it was exercising judicial power. A rationale for the military discipline system standing outside Chapter III of the *Constitution* is that it is a function of command. Removal of the trial forum from the chain of command removed the presence of that rationale. That facilitated a conclusion that it was judicial power that was conferred on the AMC. Given this, the limited tenure of its members became a constitutionally insufficient basis for the appointment of those who were to exercise the judicial power of the Commonwealth.

In addition to an original jurisdiction in respect of the trial of service offences, the AMC exercised an appellate jurisdiction in respect of outcomes before summary authorities. The DFDAT was retained for the purpose of exercising its historic, appellate role in respect of convictions, now from the AMC. Further, and for the first time, a jurisdiction was conferred on the DFDAT to hear appeals against punishment.

The *Military Justice (Interim Measures) Act (No. 1) 2009* (Cth), an urgent legislative response to the outcome in *Lane v Morrison*, did not just result in the restoration, on what was said to be an interim basis, of the original jurisdiction in respect of military discipline cases hitherto exercised by summary authorities and, as required, by DFM and courts martial. It also resulted in the restoration of the jurisdiction hitherto exercised by the DFDAT in respect of convictions by DFM or courts martial. There was no continuance of the provision for appeals to the DFDAT in respect of punishment.

A Bill, designed to replace both the original jurisdiction exercised by DFM and courts martial and the appellate jurisdiction exercised by the DFDAT with a new court established under Chapter III of the *Constitution*, to be known as the "Military Court of Australia", was introduced into Parliament in 2010, only to lapse without enactment upon a pre-election dissolution.[77]

The Bill proceeded on the basis that a court designed to hear and determine charges in respect of service offences might not sit overseas if, materially, the court determined that it was necessary so to do but the security of the place concerned would not permit that.[78] In that circumstance, the charge concerned was to be taken to be withdrawn with any further proceeding in respect of the service offence to be taken before a service tribunal under the DFDA. To say the least, one might, with respect, think it odd for a nation's parliament so obviously to identify in advance a potential need to undertake a particular task in wartime, in this instance trial by service tribunal, only deliberately to decide not to take every available opportunity to practise that task in peacetime. In this respect, the lapse of that Bill is not, I respectfully suggest, to be lamented.[79]

Thus, so far as the trial of service offences is concerned, trial by court martial or DFM has the advantage of demonstrated constitutional validity. Further, unlike the model in the lapsed Bill, it also, in the court martial procedure, offers a procedure proven by experience to be suitable for both peace and war. The wartime suitability of trial by court martial was demonstrated abroad on countless occasions in the course of Australian participation in general and more limited conflict in the course of the 20th century. There is no reason to think that the less elaborate, trial by DFM alternative, an innovation that came with the DFDA, would be any less suitable. That the

procedures one practises in peacetime will be the same as one adopts in wartime is surely also an advantage, and one of inestimable value.

Associate Professor Collins regards *White's Case* as evincing a deference by the High Court to the Executive in military matters so far as the trial of service offences is concerned.[80] The upholding of a system designed to enforce, within the chain of command, discipline is said by her not to acknowledge "changed realities". Such "changed realities" are said to be evidenced by an acknowledgement by a recent Chief of Army of a need to adapt military command methods to new technologies and new types of warfare.[81] She opines, "prioritising hierarchical obedience can forego the bigger structural issue: the duties between the military and society".[82]

But for the military in a country of British heritage, the "bigger structural issue" was long ago emphatically resolved in favour of the absolute subservience of the military to civil authority, as exemplified in the Australian Constitution and the Defence Act. And for Captain Semrau and his OMLT on the ground in Afghanistan, evolution in technology brought with it an ability readily to communicate with the crew of an attack helicopter who were able to deploy in short order precision munitions to devastating effect. But the end to which all this was directed was as timeless as warfare itself, killing an enemy in a theatre of operations. As it happened, for one of the enemy, death may not have been instantaneous and, in the agony of the moment, Captain Semrau made a value judgement the nature of which is hardly unique to our times.[83]

It is, with all due respect, just arrant nonsense to suggest that, on deployment and within an OMLT usually comprised of an officer, warrant officer and two more junior soldiers, there is no longer a place for "hierarchical obedience". If, for example, the calling in of the attack helicopter required a signaller in the OMLT to relay to the crew the OMLT commander's request for an air strike, can it sensibly be suggested that, while the unit was being ambushed, there was room for that signaller to refuse to relay that request and to seek to debate its merits with his commander because of some "bigger structural issue"? No-one with any understanding of what is entailed in the practice of the profession of arms would suggest there was any such room. That is the point made by Fraser in the passage quoted.

Apart from the subject of battlefield euthanasia, a subject beyond the scope of this paper, the real issues exposed by the Semrau case are the length of time taken by a modern military justice system to deal with an alleged service offence corresponding with a violation of the Laws of War and the trial venues.

The incident occurred on October 19, 2008, in Helmand Province, Afghanistan. Captain Semrau was arrested on December 31, 2008, by the Canadian Forces National Investigation Service and charged with second-degree murder while deployed in Afghanistan as commander of an OMLT. He was released from custody with conditions on January 7, 2009. On September 17, 2009, three additional charges were brought forward to a court martial, which began on January 25, 2010, at the Asticou Center in Gatineau, Québec. The verdicts noted above were returned on 19 July 2010. Captain Semrau was sentenced on 5 October 2010[84]. Thus, a period of almost two years elapsed between arrest and sentencing.

Part, but not the whole, of the trial was held in Canada. The court martial also sat at Kandahar Airfield in Afghanistan over two weeks in June 2010 so as to take evidence from two Afghan witnesses.[85]

There is no reason to believe that, under Australia's present military justice system, either the length of trial or the trial venues would be any different in respect of the trial of this kind of service offence under the prevailing operational conditions.

For Australians, the misconduct during the Boer War of Lieutenant Harry ("The Breaker") Morant and his co-defendants, summary execution in the field of a suspect, offers an enduringly notorious and controversial example another type of violation of the Laws of War. [86] Their court martial offers a useful starting point for a survey to test whether the likely present length of the military justice process is any different from earlier times and also to test that against timeliness in the civilian criminal justice system of the day.

A survey commencing at the Boer War era, moving to the Vietnam War era and then drawing upon more recent cases which have come before the DFDAT is annexed to this paper.

It is noticeable from this survey not just that the length of time for charging, trial and, where applicable, sentencing in respect of service offences has expanded over the course of the last century but also that this expansion in time has broadly corresponded with a like expansion in timelines in the civilian criminal justice system.[87] There is, therefore, no reason to expect that the wholesale replacement of a military trial system by the civilian court system would confer any advantage at all on either an accused or the nation state in terms of timeliness of justice. Further, it is, to say the least doubtful, whether the Executive could compel a judge enjoying Chapter III independence to serve overseas to conduct, even in part, the trial of a service offence in a theatre of operations. The correctness of that proposition was apparently recognised in the lapsed Bill to which I have referred above.

Timeliness aside, is it truly desirable, in terms of the command and discipline within the military, that the commission of a service offence in a theatre of operations provides an accused defence member with an invariable, certain opportunity to quit that theatre of operations for a trial in Australia? The self-evident answer, I suggest, is that the offering of that opportunity is potentially subversive of command and discipline. Of course with short term deployments abroad or with particular types of overseas deployments there will often be a convenience about holding a trial for a service offence, wherever committed, in Australia. But a study of the history of warfare discloses many examples of the flaw in designing one's defence strategies and preparations around a particular assumed scenario.[88] "Civilianisation" of military justice, to the extent that it entails an abandonment of trials by a panel of officers, offers a good example of this type of flawed thinking in my view. A "civilianised" alternative is undoubtedly workable in times of peace and in certain limited warfare scenarios but not generally. In my view, the current Australian limit of "civilianisation", present in the appellate jurisdiction exercised by the DFDAT, draws a line at the limit of what is suitable for warfare in all its potential forms.

In terms of the historic Australian experience, where an alleged service offence has been committed in the course of an ongoing operational deployment, the court martial has been held in

theatre. During the Vietnam War, courts martial were held in theatre. What has changed since then, one might ask rhetorically, so as to warrant the elimination of a proven facility for a local trial in respect of a service offence committed in an ongoing theatre of operations or to consign the conduct of any such trial to a tribunal the operation of which one is not going to rehearse in peace?

Timeliness is a legitimate concern in relation to any justice system, civil or criminal, civilian or military. In the military, the intermediate limbo between charging and disposal of a charge carries with it the superadded difficulty of how to employ the defence member concerned over that period. How greater timeliness might be introduced into the military justice system is a subject worthy of detailed attention. But the answer will not be found in "civilianisation", as the survey demonstrates.

However much academics might think otherwise, our day and age is no different to earlier ages in relation to why an army exists. Warfighting, as determined necessary by the civil power, and with that killing an enemy, is an immutable. So, too, are Fraser's warfighting essentials of leadership, discipline and training. So, too, is the need for enforcement of discipline by a means that is suitable for war fighting, not just peace or something intermediate. That means must be practised in peace to prepare for its use in war. Within the bounds of constitutional legislative competence, the choice of means is a matter for the legislature, not the judiciary. As with other national defence decisions, making the wrong choice is not a bad business decision; it may form part of why national independence is lost. "Civilianising" the military is a contradiction not just in terms but also in thinking.

ANNEXURE A

Year	Case	Time of Alleged Offence	Charged	Court Martial	Appeal	Date of Judgement	Outcome
1901	Morant		23 Oct 1901	16 Jan 1902		26 Feb 1902	Death Penalty
1962	Re Marwood's Appeal	4 May 1959		18 – 19 Jan 1962	28 June 1962	12 Nov 1962	
1966	Re Nickols' Appeal	20 Sep 1965		14 Oct 1965	12 April 1966	31 May 1966	Dismissed
1968	Re Knight's Appeal	6 Dec 1967 (in Vung Tau)		1 – 5 Feb 1968 (Vietnam)	16 April 1968	3 June 1968	Overturned
1968	Re Dean's Appeal	14 March 1967		16 Aug 1967		30 Aug 1968	Dismissed

1971	Re Ferriday's Appeal	25 Dec 1970 (2 x murder)	25 Dec 1970	6 March 1971 (Vung Tau)		23 Dec 1971	Dismissed
2008	Z v Chief of Navy [2008] ADFDAT 1	16 January to 21 April 2006	1 June 2006 - interviewed	31 January 2008	22 Feb 2008	5 March 2008	
	Hardy v Chief of Air Force [2008] ADFDAT 2	19 November 2003 – 26 February 2005			21 February 2008	26 March 2008	Dismissed
	Chapman v Chief of Army [2008] ADFDAT 3	08 February 2005	May 2005		30 June 2008	28 July 2008	Dismissed
	Vitler v Chief of Army [2008] ADFDAT 4	10 Feb, 28 Feb, 9 March, 10 March 2007			09 October 2008	15 October 2008	Dismissed
2009	Stapleton v Chief of Army [2009] ADFDAT 2	17 March 2007	Before Nov 2007	28 August 2008	30 January 2008	13 February 2009	Dismissed
	Pook v Chief of Army [2009] ADFDAT 1	23 April 2007 (in Timor)			29 January 2009	13 February 2009	Dismissed
	Carmichael v Chief of Navy [2009] ADFDAT 3	6 October 2006		5 July 2007	11 May 2009	18 May 2009	Dismissed
2010	Flynn v Chief of Army [2010] ADFDAT 1	24 October 2008 (Iraq)	29 May 2009 (issue in trial whether appellant was charged)		15 April 2010	11 June 2010	Overturned
	Watson v Chief of Army [2010] ADFDAT 3	19 Nov 2008	01 Apr 2009	24 June 2010		11 Oct 2010	Overturned

	Parker v Chief of Air Force [2010] ADFDAT 2	15 Feb 2003	21 June 2007	19 April 2010	20 Aug 2010	29 Nov 2010	Overturned in part
2011	Davis v Chief of Army [2011] ADFDAT 1	6 May 2009			29 November 2010	22 Feb 2011	Dismissed
	Green v Chief of Army [2011] ADFDAT 2	17 January 2008 – August 2009	6 August 2009		29 April 2011	22 June 2011	Dismissed
	Low v Chief of Navy [2011] ADFDAT 3	21 Feb 2010	24 Sep 2010	14 March 2011	16 Sep 2011	21 November 2011	Dismissed
2012	Li v Chief of Army [2012] ADFDAT 1	3 Feb 2010	5 Aug 2010	4 April 2011	15 Dec 2011	16 March 2012	Dismissed
	Jones v Chief of Navy [2012] ADFDAT 2	Feb – November 2010	29 November 2011	13 December 2011	15-16 March 2012	22 May 2012	Dismissed with exception of Count 22
2012	Bateson v Chief of Army [2012] ADFDAT 3	7 April 2009		3 August 2010	28 April 2012	25 May 2012	Overturned in full
	King v Chief of Army [2012] ADFDAT 4	16 April 2011 (Timor)			27 – 28 Sep 2012	28 Sep 2012 (publication on 12 Oct 2012)	Allowed
2013	Yewsang v Chief of Army [2013] ADFDAT 1	Course of 2011			6 -7 Feb 2013	21 March 2013	Dismissed; charge 1 quashed
	Ferdinands v Chief of Army [2013] ADFDAT 2	15 Jan 1999	28 Sep 1999	25 Oct - 4 Nov 1999	28 Feb 2013	21 March 2013	Dismissed
	King v Chief of Navy [2013] ADFDAT 3	27 Apr – 4 Aug 2011		29 Nov – 12 Dec 2012	4 – 5 April 2013	28 May 2013	Allowed

		(rental fraud)					
	Leith v Chief of Army [2013] ADFDAT 4	23 June 2011	24 June 2011	28 Feb 2012	5 June 2013	20 Aug 2013	Dismissed
	McLaren v Chief of Navy [2013] ADFDAT 5	2 Jan 2012		4 May 2012	20 Sep 2013	29 November 2013	Allowed
2014	**NIL JUDGMENTS**						
2015	Thompson v Chief of Navy [2015] ADFDAT 1	August 2011		15 – 19 Sept 2014	27 March 2015	22 May 2015	Allowed
	Jordan v Chief of Air Force [2015] ADFDAT 2	14 Feb – 4 June 2013			26 June 2015	17 July 2015	Allowed
	Jesser v Chief of Air Force [2015] ADFDAT 3	14 Jan 2014		19 November 2014	17 July 2015	24 August 2015	Allowed
	Hodge v Chief of Navy [2015] ADFDAT 4	6 March 2014 and 12 May 2014		25 Sept 2014	10 August 2015	4 Sept 2015	Allowed
2016	Angre v Chief of Navy (No 1) [2016] ADFDAT 1	August 2011		16 – 22 Sep 2014	23 – 24 June 2016	29 Aug 2016	Refused
	Angre v Chief of Navy (No 2) [2016] ADFDAT 2	August 2011			29 July 2016	26 Aug 2016	Allowed in part
	Williams v Chief of Army [2016] ADFDAT 3	26 Jan 2014		23 April 2015	31 March 2016	16 December 2016	Dismissed
2017	McKenna v Chief of Navy	27 May 2014	2 Sept 2015	7 December 2015	10 Feb 2017	6 March 2017	Dismissed bar charge 1

	[2017] ADFDAT 1						
	Angre v Chief of Navy (No 3) [2017] ADFDAT 2	August 2011		16 - 22 Sept 2014	12-16 Dec 2016	27 March 2017	Allowed
	Baker v Chief of Army [2017] ADFDAT 3	24 April 2014		4 - 13 Aug 2015	27 Oct 2016	28 April 2017	Dismissed
	Douglas v Chief of Army [2017] ADFDAT 5	Late June – Early July 2015		12 Sep 2016	28 April 2017	1 June 2017	Allowed
	Komljenovic v Chief of Navy [2017] ADFDAT 4	18 April 2015	August 2015	30 November 2015	27 April 2017	5 May 2017	Dismissed
	O'Neill v Chief of Army [2017] ADFDAT 6	6 Oct 2014		12 May 2016	1 June 2017	3 November 2017	Dismissed
2018	Herbert v Chief of Air Force [2018] ADFDAT 1	12 March – 18 Nov 2015	On or before 22 December 2015	18 May 2017	15 Dec 2017	27 April 2018	Dismissed

ANNEXURE B

Case	Offence	Offence date	Date of conviction	Date appeal decided
R v Warton [1905] St R Qd 167	Wilful murder	23 March 1905	May 1905	7 June 1905
R v Muratovic [1967] Qd R 15	Wilful murder	16 December 1965	15 March 1966	18 August 1966
R v Hay and Lindsay [1968] Qd R 459	Rape and attempted rape	31 August 1967	29 November 1967	6 March 1968
R v McIntosh [1968] Qd R 570	Dangerous driving	7 October 1967	29 May 1968	28 August 1968

R v Benson [1970] QWN 12	Wilfully and unlawfully killing a cow	June-October 1968	June 1969	25 July 1969
R v Warburton [1970] QWN 15	Arson	20 July 1969	December 1969	13 March 1970
R v Draper [1970] QWN 20	Attempted carnal knowledge	September 1969	18 February 1970	8 May 1970
R v Marshall [1993] 2 Qd R 307	Assaulting a police officer	8 July 1991	10 January 1992	30 March 1992
R v Van Den Bemd [1995] 1 Qd R 401	Unlawful killing		28 March 1992	30 October 1992
R v Shaw	Rape and sexual assault	29 March 1992		28 February 1995
R v Percival [1998] 2 Qd R 191	Incest	1 January 1983	22 August 1997	19 December 1997
R v Ali [2003] 2 Qd R 389	Stalking	1 August 1999 – 5 April 2000		15 March 2002
R v McKeirnan [2003] 2 Qd R 424	Stealing a church bell	9 February	9 May 2002	21 February 2003
R v Anderson [2006] 1 Qd R 250	Dangerous driving causes death or bodily harm	13 July 2003	28 February 2005	23 August 2005
R v Ping [2006] 2 Qd R 69	Torture	26 September 2002 – 5 October 2002	21 July 2005	2 December 2005
R v Chalmers [2013] 2 Qd R 175	Child sex offences	14 November 2009	1 March 2011	21 June 2011
R v Oliver [2016] 2 Qd R 586	Homicide	5 February 2011	5 December 2013	16 February 2016
R v SCL [2017] 2 Qd R 401	Rape of a minor	March/April 2014	2 July 2015	26 April 2016

[1] **Caveat** - The views expressed in this paper, though derived from my experience as a serving judge, member of the Defence Force Discipline Appeal Tribunal and sometime Active List Australian Army Reserve general service officer (Australian Intelligence Corps), are personal. They not to be regarded as those of either the Australian or Papua New Guinea governments of any court or tribunal of which the author is a member.

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Joanna Fear in the conduct of research for and in the compilation of the comparative table annexed to this paper.

[2] Robert Semrau, The Taliban Don't Wave, Wiley, 2012; Description of the incident and its sequel taken from the Forward by Major-General Lewis Mackenzie, Canadian Army, Retired.

[3] Ibid

[4] Australian Defence Department website, Royal Australian Infantry Corps page: https://www.army.gov.au/our-people/corps/royal-australian-infantry-corps - viewed, 7 August 2018.

[5] Canadian Government, National Defence website, Job description – infantry soldier page: https://www.canada.ca/en/department-national-defence/services/caf-jobs/career-options/fields-work/combat-specialists/infantry-soldier.html Accessed 19 August 2018.

[6] Australian Army website;" Learn to Lead" page: https://army.defencejobs.gov.au/lifestyle-and-benefits/learn-to-lead - viewed 9 August 2018.

[7] Author's personal experience as a graduate of an Officer Cadet Training Unit.

[8] D Fraser, *And We Shall Shock Them, A History of the British Army in World War Two*, Hodder & Stoughton, 1983, p 41.

[9] Ibid, pp 99-100.

[10] Obituary, General Sir David Fraser, Daily Telegraph, 26 July 2012: https://www.telegraph.co.uk/news/obituaries/military-obituaries/army-obituaries/9430379/General-Sir-David-Fraser.html Viewed, 8 August 2018.

[11] Defence Act 1903 (Aust), s 27.

[12] Marks v. The Commonwealth (1964) 111 CLR 549, at 586 per Windeyer J; The Commonwealth v. Quince (1944) 68 CLR 227, at 234, 241-242.

[13] Defence Regulation 2016 (Aust), reg 24(1)(c).

[14] Author's experience.

[15] Conference Papers, Interdisciplinary Perspectives on Special Operations Forces (Gitte Højstrup Christensen, ed.), Chapter 4, Dr. Alastair Finlan, Special Forces: Leadership, Processes and the British Special Air Service (SAS), pp 84-85. Royal Danish Defence College, 2017: http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=17&cad=rja&uact=8&ved=2ahUKEwjeob3XtencAhXHUd4KHUaSB-Y4ChAWMAZ6BAgEEAI&url=http%3A%2F%2Ffak.dk%2Fpublikationer%2FDocuments%2F

Conference%2520Proceedings%2520No%25204%2520(a)%25202017%2520NET.pdf&usg=AOvVaw2tKZUW2pXky6cW99gx_B7x :Accessed 13 August 2018.

[16] Groves v The Commonwealth (1982) 150 CLR 113.

[17] Groves v The Commonwealth (1982) 150 CLR 113, at 134.

[18] Brill Nijhoff, Leiden, 2018 – "Collins".

[19] For another, see Stephen S. Strickey, "Anglo-American military justice systems and the wave of civilianization: will discipline survive?" (2013) Cambridge Journal of International and Comparative Law 1.

[20] Collins, p. xiv.

[21] The account of constitutional provision for the command and control of the Australian Defence Force draws upon, without further attribution, the account offered by the Administrative Appeals Tribunal in Secretary, Department of Defence v Thomas [2018] AATA 604, in which the author was the presiding member of the Tribunal.

[22] Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901) p.713.

[23] The Rt Hon Sir Ninian Stephen, *The Governor-General as Commander-in-Chief*, Address on the Occasion of the Graduation of Course 27/83, Joint Services staff College, Canberra, 21 June 1983: Website of the Governor-General:http://www.gg.gov.au/about-governor-general/governor-general-commander-chief#_ftn26 Accessed 7 March 2018.

[24] Strictly, s 69 of the Constitution provided for the transfer to the Commonwealth, on a date fixed by proclamation after Federation, of the State departments responsible for naval and military defence but thereafter the authority for the several arms of what is now the ADF was statutory – Defence Act 1903 (Cth)(Army), Naval Defence Act 1911 (Cth) (Navy) and Air Force Act 1921 (Cth) (Air Force).

[25] Defence Act, s 8(1).

[26] Department of Defence website: https://www.minister.defence.gov.au/ Accessed, 8 March 2018. The Minister for Defence is currently Senator the Honourable Marise Payne. Save for presently immaterial exceptions, the administration of the Defence Act is consigned to the Minister's administration by the Administrative Arrangements Order made by the Governor-General on 1 September 2016: Department of Prime Minister and cabinet website, "Resource Centre": https://www.pmc.gov.au/resource-centre/government/administrative-arrangements-order-1-september-2016 Accessed, 8 March 2018. Other Ministers are appointed to the Department of Defence but it is the Minister for Defence who is responsible for the control of the ADF.

[27] Defence Act, s 9(1).

[28] Defence Act, s 9(3).

[29] Defence Act, s 9(4).

[30] Defence Act, s 9(2).

[31] Defence Act, s 10(1).

[32] Defence Act, s 10(3).

[33] Constitution, s 71.

[34] A like jurisdiction has been conferred on the Federal Court of Australia by s 39B(1A) of the Judiciary Act 1903 (Cth) but that jurisdiction is not constitutionally entrenched.

[35] R v Bevan; Ex parte Elias and Gordon (1942) 66 CLR 452

[36] See, for example, Re Tyler; ex parte Foley, (1994) 181 CLR 18 and Re Aird; ex parte Alpert(2004) 220 CLR 308.

[37] Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 35-36, applying Marbury v. Madison [1803] USSC 16; (1803) 1 Cranch 137, at p 177 (5 US 87, at p 111).

[38] "Civil-Military 'Legal' Relations", pp 243-244.

[39] See, further, as to this background, the Second Reading Speech of the then Minister for Defence, the Honourable Sir Philip McBride: Australia House of Representatives, Commonwealth Parliamentary Debates, (10 May 1955) Vol 49, p 566 (CMAT Second Reading Speech); see also: Enderby KE (then Barrister and Senior Lecturer, ANU Law School; later Commonwealth Attorney-General and later yet a judge of the Supreme Court of New South Wales), *Courts-Martial Appeals in Australia*, (1964) 1 FedLR 96.

[40] *Courts Martial (Appeals) Act 1951* (UK).

[41] Commenced 1 June 1957; *Commonwealth of Australia Gazette* (1957) p 1501.

[42] *Courts-Martial Appeals Act 1955* (Cth) s 23(1).

[43] *Defence Force Discipline Appeals Act 1955* (Cth) s 23.

[44] As a result of amendments made in 1977, that s 72 tenure is now until age 70 or, for courts other than the High Court, such lesser age as Parliament may establish.

[45] CMAT Second Reading Speech, p 567.

[46] *Defence Force Discipline Appeal Tribunal Act 1955* (Cth) s 14(1).

[47] Advice to the author from its current President, Tracey J of the Federal Court of Australia, 30 September 2009 and the author's subsequent experience.

[48] It would, for example, be anomalous were DFDAT members deployed to a theatre of operations not granted the like medical benefits and tax concessions to other Commonwealth officers, military and civilian, deployed in that theatre.

[49] *Courts-Martial Appeals Act 1955* (Cth) s 8(1).

[50] The High Court of Australia, the Federal Court of Bankruptcy and the Australian Industrial Court.

[51] New South Wales and Victoria, where the volume and complexity of work at the Bar had made taking Silk more feasible than at the Bars of other States. Increasingly from the late 1950's, Silk became more pervasive at the other State Bars with superior court appointment practices from then on usually but not invariably conforming with the settled position in the UK, New South Wales and Victoria.

[52] *Courts-Martial Appeals Act 1955* (Cth) s 8(2).

[53] CMAT Second Reading Speech, p 567.

[54] Oswald B and Waddell J, *Justice in Arms*: *Military Lawyers in the Australian Army's First Hundred Years* (Big Sky Publishing, 2014) pp 248-249.

[55] Enderby, supra.

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

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

[58] *Defence Force Discipline Appeal Tribunal Act 1955* (Cth) s 8.

[59] *Defence Force Discipline Appeal Tribunal Act 1955* (Cth) s 52. There is no such appeal in respect of single member tribunal decisions; in effect, procedural decisions.

[60] *Federal Court of Australia Act 1976* (Cth) s 33(3).

[61] Compare s 41 of the Army Act 1881, which incorporates by reference the criminal law of England with s 61 of the DFDA, which incorporates "Territory offences, which are defined thus:

"Territory offence" means:

(a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; or

(b an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences.

[62] DFDA, Part VII.

[63] The office of JAG is held as a persona designate appointment by an officer of the ADF who is or has been a Justice or Judge of a federal court or of a Supreme Court of a State or Territory: DFDA, s 180.

[64] A Judge Advocate is appointed by the Chief of the Defence Force or a Service Chief on the nomination of the JAG and must be an officer enrolled as a legal practitioner who has been so enrolled for not less than 5 years: DFDA. S 196.

[65] The Director of Military Prosecutions is appointed by the Defence Minister and must be a "One Star" officer enrolled as a legal practitioner who has been so enrolled for not less than 5 years. The functions of that office are akin to those of a civilian Director of Public Prosecutions: see DFDA, Part XIA.

[66] Department of Defence, *The Effectiveness of Australia's Military Justice System* (AGPS, Canberra, June 2005).

[67] Senate Report, Recommendation 19, at [5.95].

[68] Senate Report, Recommendation 18 at [5.94].

[69] Department of Defence, *Government Response to Report by the Senate Foreign Affairs, Defence and Trade References Committee (Senate Committee) into the Effectiveness of Australia's Military Justice System* (AGPS, Canberra, October 2005) Recommendation 18, p 4.

[70] (2009) 239 CLR 230.

[71] Senate Report, pp xxxii at [36]; 77 at [5.5]; 84 at [5.25]; 86-88 at [5.33] – [5.44].

[72] (2004) 220 CLR 308.

[73] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 and, in particular, *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

[74] (2007) 231 CLR 570.

[75] (1994) 181 CLR 18.

[76] *R v Généreux* [1992] 1 SCR 259 (Canada); *Findlay v United Kingdom* (1997) 24 EHRR 221 and *Grieves v United Kingdom* (2004) 39 EHRR 2.

[77] *Military Court of Australia Bill 2010* (Cth).

[78] *Military Court of Australia Bill 2010* (Cth) cl 49(4)(a) and cl 49(6)

[79] Like thinking is evident in the subsequently introduced and also lapsed Military Court of Australia Bill 2012: see, especially, cl 51.

[80] "Civil-Military 'Legal' Relations", pp 245-247.

[81] "Civil-Military 'Legal' Relations", p 246.

[82] Ibid.

[83] Susan J Neuhaus, "Battlefield euthanasia — courageous compassion or war crime?" (2011) Med J Aust 194 (6): 307-309: online version: https://www.mja.com.au/journal/2011/194/6/battlefield-euthanasia-courageous-compassion-or-war-crime Accessed, 22 August 2018.

[84] Canadian Government, National Defence Website, Archived Page, Press Release of 5 October 2010, "Captain Semrau Sentenced Following Court Martial Proceedings": http://www.forces.gc.ca/en/news/article.page?doc=captain-semrau-sentenced-following-court-martial-proceedings/hnps1ux3 Accessed 21 August 2018.

[85] CTV News website, "Court martial for Semrau heads back to Canada", published 26 June 2010: https://www.ctvnews.ca/court-martial-for-semrau-heads-back-to-canada-1.526828 Accessed, 21 August 2018.

[86] Murder of a suspect – for a detailed account of events, trial and execution after court martial, see K Denton, Closed File The True Story Behind the Execution of Breaker Morant and Peter Handcock, Rigby Publishers, 1983.

[87] For details, see the comparative table annexed to this paper.

[88] See, for example, the discussion of the flawed "Singapore strategy" of the 1930's in Thomas; Secretary, Department of Defence and (Freedom of information) [2018] AATA 604 at [57].