MILITARY JUSTICE AND HUMAN RIGHTS

Historically military discipline has been harsh as Cicero commented;

> "the general was at liberty to behead any man serving in his camp and to scourge with rods the staff officer as well as the common soldier; nor were punishments inflicted merely on account of common crimes, but also when an officer had allowed himself to deviate from the orders which he had received or when a division had allowed itself to be surprised or had fled from field of battle."

In the 19th Century – Britain reformed its system of Military Justice with the enactment in 1847 of the Naval Discipline Act and in 1879 the Army Discipline and Regulation Act. It may surprise you that those Acts as amended from time to time formed the basis of the Australian military justice system until 1982 with the enactment of the Defence Force Discipline Act 1982 (DFDA).
Prior to its enactment – the three services were subject to different disciplinary systems and procedures – based substantially on British legislation as amended and adopted in Australia. Two codes operated for Army – depending on whether it was on war service or not.

In 1985 for the first time in Australia's history the three services of the Australian Defence Force (ADF) became subject to the same legislation – whether at peace or on active duty overseas.

The process in getting to the DFDA was long and arduous – it took no less than 39 years, from 1946 – 1985, from when the first committee sat until the legislation commenced.

For the first time the three services had the same code of discipline – and the same legislation – Australian legislation. For those of you interested in a thorough detailed history of this journey I recommend the book “Military Law in Twentieth Century Australia – The Development of a Common Disciplinary Code” by Neil Preston who was a public servant involved in the project to develop a common discipline code.

So the question of which system – the civil system or the military system should exercise jurisdiction over defence members – particularly in Australia became important. Members of the ADF remain citizens of Australia and they are subject to both the civilian criminal justice system and the military justice system.

<u>So who should exercise jurisdiction?</u>

It is of course a fundamental principle of international human rights law that no one should be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. International Covenant on Civil and Political Rights (ICCPR) Article 14(7)

This issue has been considered in the High Court on a number of occasions.

Firstly *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518

> This involved a challenge to the jurisdiction of a Defence Force magistrate to hear and determine service offences charged against a defence member where the conduct alleged also amounted to the commission of a civil offence.
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> In this instance the offences were;
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> (1) Making a false entry in a service document contrary to s55(1)(b) DFDA, and
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> Two charges of Absence Without Leave (AWOL).
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> The appellant sought an order nisi for prohibition to prevent the respondent from hearing and determining the civil type offence because that would involve conferring jurisdiction on the respondent to exercise commonwealth judicial power contrary to Ch III of the Constitution.

It also raised the issue of s80 – and the right to trial by jury for an indictable offence. It was determined by the majority that service offences did not have to be treated as indictable offences.

Service Tribunals were not created under Ch III, but pursuant to s51(vi) which empowered the Commonwealth to legislate with respect to the “naval and military defence of the Commonwealth and the several states, and the control of the forces to execute and maintain the laws of the Commonwealth”.

The Court held 5:2 that the service tribunal had jurisdiction to hear and determine the charges.

The original act attempted to protect ADF members from double jeopardy by s190(3) & (5) DFDA which purported to prevent a civilian prosecution in the event that the military had exercised jurisdiction. The High Court found this provision to be invalid – civilian jurisdiction could not be extinguished. As a matter of practice ADF members are not exposed to double jeopardy – there exists a Memorandum of Understanding between Military/Civilian authorities where jurisdiction to prosecute is resolved.

In *Re Nolan Ex Parte Young* (1991) 172 CLR 460 Staff Sergeant Young was charged with making and using a false document. He was a Unit Pay Representative with the Survey Regiment at the time that Defence was changing to Net Pay Deposit. He continued to be paid in the normal manner, which enabled him to raise a pay sheet whenever he wanted and pay himself by attending at the cash office. The High Court held 4-3 that the Service Tribunal had jurisdiction to try the offence – Mason and Dawson JJ because it was open to Parliament to provide that any conduct that constitutes a civil offence should constitute a service offence if committed by a defence member and be triable by a service offence – Brennan & Toohey JJ if it could be reasonably said that the maintenance and enforcement of service discipline would be served by charges being tried by a service Tribunal.

The majority decision of the High Court was reaffirmed in *Re Tyler; Ex Parte Foley* (1994) 181 CLR 18.

Wing Commander Foley was charged with theft of about $25,000.00 under s47(1) of the DFDA – an offence substantially the same as then s71 of the Crimes Act 1914 and breach of a lawful general order. The facts were essentially that he continued in receipt of Rental Assistance after he had purchased a home in his posting locality which was suitable for his family composition – he rented out the home. His failure to advise the appropriate authority of his change of circumstances constituted the breach of the lawful general order.

In essence the triology of cases established that – service tribunals can exercise jurisdiction over defence members for service offences, that may be substantially similar to civil offences, provided that the proceedings can be regarded as substantially serving the purpose of maintaining and enforcing service discipline. The service tribunals can stand outside Ch III and the disciplinary code created by the DFDA was constitutional.

In 2003 the Senate Foreign Affairs, Defence and Trade References Committee commenced their inquiry into the effectiveness of Australia's military justice system. In 2005 they delivered their final report. In relation to the disciplinary system, 23 recommendations were made. The Committee recommended that the ADF not investigate and prosecute offences that had a civilian equivalent unless authorities declined to investigate or prosecute the matter. In relation to the DMP the Committee recommended that the

Government hurry steps already then taken to establish the DMP as a statutory position.

The Committee also recommended that the ADF replace the courts martial and DFM system and replace it with a Military Court established under Ch III of the Constitution.

The Government did not agree to the automatic referral of equivalent civilian offences to civilian investigating and prosecuting authorities. They agreed to abolish the courts martial and DFM system but replaced it with a military tribunal that was not established under Ch III of the Constitution although it borrowed a large number of the features of a Ch III court. They also agreed to hurry the establishment of the DMP.

In *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308

The High Court had to consider whether the defence power could be relied upon by Parliament to make it an offence triable before a service tribunal, for a member of the Australian Regular Army (ARA) on overseas service, but on recreation leave at the time to unlawfully sexual assault a civilian. (A Territory Offence under the DFDA).

Alpert was deployed as a member of the Butterworth guard, and took leave to travel to Thailand. There it was alleged that he unlawfully sexually assaulted a British citizen. Could a General Court Martial hear and determine the charge against him?

4-3 – the majority of the Court answered yes.

- primarily on the basis of there being a service connection.

McHugh J saying “A soldier who rapes another person undermines the discipline and morale of his army. He does so whether he is on active service or recreational leave.

In the matter of *White v DMP* (2007) 231 CLR 570 Chief Petty Officer White was charged with Acts of Indecency in relation to her subordinates at various locations in Victoria whilst off duty.

The High Court determined 6-1 that it would not overrule its previous decisions in *Ex parte Ryan, Ex parte Nolan* and *Ex parte Foley*.

The Chief Justice saying;

> “To adopt the language of Brennan and Toohey JJ in Tracey, history and necessity combine to compel the conclusion as a matter of construction of the Constitution that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and when that jurisdiction is exercised the power which is exercised is not judicial power of the Commonwealth it is a power sui generis which is supported solely by s51(vi) for the purpose of maintaining or enforcing service discipline”.

So in June 2007 it had been settled one would think that service tribunals could exercise jurisdiction over defence members for service offences (including Territory Offences) (even where there were civilian-like offences and the civil courts available) provided to do so would substantially maintain and enforce service discipline. This was determined by a service connection test, rather than status test. Service tribunals did not have to be created

pursuant to Ch III of the Constitution as they did not exercise the judicial power of the Commonwealth, but those administering them had a duty to act judicially.

I return to the Senate Inquiry recommendations that had seen the creation of the positions of DMP and Registrar of Military Justice (RMJ) in 2006. Both positions existed at the time of the decision in White.

The Senate had also recommended the creation of a Ch III Court. The government did not accept that recommendation, and instead determined to create the Australian Military Court (AMC). It was not to be a Ch III Court, and reliance was placed on S51(iv) for its validity.

Some of the features of the Court included.

- judges 10 year appointment with a mid-term promotion
- a court of record
- jury trials x 6 or x 12 or judge alone dependant on nature of offence and elections.

The Court operated from Oct 07 to Aug 08. During that period it heard and determined about 100 matters. In 2008 – 13 jury trials, 14 judge alone and 63 sentencing hearings.

Its Constitutional validity was challenged by Leading Seaman Lane – who had been charged with an act of indecency and assault on a superior – two others were involved and they were dealt with by the AMC.

For the first time the High Court was unanimous in its decision 7-0 – and it struck down that part of the Act that created the Court. The changes that were made to the Command based Court Martial system were too significant and the attempt to create the AMC pursuant to s51(iv) failed – the Court finding that it was a Court exercising the judicial power of the Commonwealth, but as it was not created pursuant to Ch III it was invalid. *Lane v Morrison and Anor* (2009) 239 CLR 230.

The Service Tribunals

Prior to the creation of the AMC – service tribunals existed:

Subordinate Summary Authority (SUBSA)

Commanding Officer (CO)

Superior Summary Authority (SUPSA)

Restricted Court Martial (RCM)

Defence Force magistrate (DFM)

General Court Martial (GCM)

(Discipline Officer Scheme) (DO)

The AMC replaced the RCM, DFM and GCM tribunals with the Court comprised of a Judge alone, Judge x 6 military jury and Judge x 12 military jury.

The Command Based System

Under the Command based system:

- a Court Martial could decide guilt/innocence by a majority verdict
- the Court sentenced the member in the absence of the Judge Advocate (JA)
- all findings of guilt and punishments awarded were subject to review by a Reviewing Authority
- members could petition against conviction and punishment
- members could appeal conviction to the Defence Force Discipline Appeals Tribunal (DFDAT)
- the summary authority system had similar review and petition rights
- no prosecution appeal rights

The Australian Military Court

Under the AMC

- the jury was required to be unanimous on questions of guilt or innocence
- the judge sentenced
- the decisions were not subject to review
- a member could appeal both conviction and punishment to the DFDAT
- there was a limited review at summary level as members could appeal to the AMC
- prosecution appeal right against inadequacies of sentence, and referral on questions of law to DFDAT

General entitlements of members;

- Legal Aid - all members are entitled to free legal and the Counsel of their choice
- summons, ordered to appear rather than arrested and held in custody pending trial
- continuation of engagement pending trial

Where to now?

After the AMC ceased operation the ADF reverted to the command based Court Martial system – This system will continue until legislation is enacted to create a Ch III Court to hear and determine serious service offences. Legislation introduced to the Parliament to achieve this end lapsed with the calling of the last election. Though I understand legislation will again be introduced to achieve that end.