

THE AUSTRALIAN MILITARY JUSTICE SYSTEM: HISTORY, ORGANISATION AND DISCIPLINARY STRUCTURE

DAVID DENTON QC*

To understand the Australian military and its justice system requires a knowledge of its development since 1788. The essence of this article is to briefly examine the historical development of the legal basis of each stage of Australian naval and military discipline, from colonial times until the current period. As will be seen the chain of command is considered crucial to the military justice system as an incidence of the management and functioning of the military. Specifically, this article addresses the following points: the historical development of military justice, the structure of the Australian Defence Force, the chain of command; and the constitutional exceptionalism of military justice.

I GENESIS OF MILITARY JUSTICE

Since the first armies were raised in ancient times there have been systems of military justice. One of the earliest recorded military courts was in Ancient Greece in 330 BC when a military tribunal condemned General Filotas to death for conspiring against Alexander the Great.¹ In the time of the Roman Empire, records reveal formalised troop discipline being maintained by enforcing the principle of ‘who gives the orders sits in judgment’, ultimately presided over by the *Magister Militum*.²

The Roman philosopher, lawyer and politician, Marcus Tullius Cicero, made famous the phrase *silent leges inter arma* (‘the laws are silent amidst arms’),³ which was used by him to describe the *sui generis* relationship that existed between civil law and the ways of the military.

The fact that armies have almost always existed did not mean that 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 15th and 16th centuries’.⁴ From that period on it is possible to state that ‘where there is an army, there is military justice’.⁵ Although this has been disputed as an historical fact,⁶ that expression stands in support of the proposition that military courts existed as a natural consequence of the existence of the military apparatus.

There have been various attempts to classify the different types of military justice. Gilissen⁷ suggested a means of classification based on the three main existing systems of law: the common law system, the Roman law system and the socialist system, whereas John Stuart-Smith, Francis Clair and Klaus suggested a classification based on the jurisdictional powers of military courts. They distinguished 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.⁸

* BA, LLM (Monash). Adjunct Professor, Victoria University, postgraduate doctoral student, University of Western Australia.

¹ International Society for Military Law and the Law of War, ‘Report’ (Military Jurisdiction Seminar, Rhodes, 10–14 October 2001) <<http://www.soc-mil-law.org/seminar%20Rhodos%20Report.htm>>.

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 watchword about the erosion of civil liberties during wartime and civil unrest.

⁴ John Gilissen, *Evolution Actuelle de la Justice Militaire, Rapport General*, in *Huitieme Congress International, Ankara, 11–15 October, 1979, L’Evolution Actuelle de la Justice Militaire, Rescues de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre VIII* (1981) vol 1, 48. (French original, free translation)

⁵ *Ibid* 39.

⁶ Dini Dewi Heniarti and Agus Ahmad Safei, ‘Developing Trends of Military Justice System’ (2012) 5(1) *International Journal of Social Sciences* 5, 9.

⁷ Gilissen, above n 4, 48.

⁸ *Ibid* 44.

Howsoever the systems 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 that convene on a case-by-case basis, whereas standing military courts operate in civil law systems. Common law countries are increasingly moving towards a system of standing military courts. One of the main reasons for this is to improve the flexibility of the system of military justice.

Purely military justice systems, which mainly prevail in common law countries, are based on the exclusive jurisdiction of military courts over offences committed by military personnel. In some continental European countries, civilian courts have jurisdiction over military cases. For example, several countries, including Germany, Austria, Norway and Sweden, have abolished military courts in peacetime. There are no peacetime standing military courts. Administrative (disciplinary) tribunals deal with service offences, while civilian courts concentrate on crimes. Some eastern and central European countries have abolished standing military courts in peacetime, but their Constitutions still allow for the creation of such a system in wartime.⁹

With this background to the genesis of military justice, the present article now turns to review how military justice has developed in Australia from colonial times until the present.

II AUSTRALIAN MILITARY JUSTICE BACKGROUND

A Colonial Era to Federation

On 18 January 1788, the First Fleet¹⁰ under the command of Captain Arthur Phillip landed at Botany Bay in what was to become the 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 civilian convicted persons; 4 companies of Royal Marines; 20 officials including wives and children; and the officers and crews of the vessels and the Fleet's necessary supplies.

From 1788, the naval and military disciplinary regime for the crews of the naval ships stationed in the new colony were those prevailing in England, being the *Naval Discipline Act 1749*, 22 Geo 2, c 33 for the Royal Navy and for the Marines (when borne on the books of a Naval ship). At all other times, the Marines were subject to the *Marine Mutiny Act*¹¹ and the *Articles of War* made under that Act.

Governor Arthur Phillip had the authority to raise and maintain an armed force in the new colony that was contained in his commission from King George III, on 2 April 1787, which authorised him¹², as Governor with:

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.

This form of delegation of power to the colonial governors was to prevail until the Parliament at Westminster eventually provided authority of a legislative nature to the Governor. Judicial power in the colony was conferred in several ways. The Governor's commission empowered him to appoint Justices of the Peace. The office of Justice of the Peace is an ancient one and its jurisdiction includes the power 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

⁹ Federico Andreu-Guzman, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights* (International Commission of Jurists, 1990) vol 1, 158.

¹⁰ A total of 756 convicts (564 males, 192 females), 550 officers, marines, ship 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* (1798).

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* (Government Printing Office, 2nd ed, 1920) 19. The *Articles of War*, published by the Crown, governed British military forces when serving overseas: See Henry Wager Halleck, *Military Tribunals and their Jurisdiction* (1911) 5(4) *American Journal of International Law* 958.

¹² Migration Heritage Centre (NSW), *1787 Draught Instructions for Governor Phillip* (2010) <<http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/draughtinstructions/index.html>>.

higher court for trial. A higher court exercising criminal jurisdiction was created by George III by a separate instrument made on 2 April 1787 under the *New South Wales Act 1787* (Imp) 27 Geo 3 c 2. The Court, referred to in the instrument as the ‘Court of Criminal Jurisdiction’, consisted of the Judge Advocate of the colony and six officers of the naval and military forces or the marines, convened by the Governor. Until 1809, the Judge Advocate of the colony was usually a military or marine officer and lacked legal qualifications. This Court had jurisdiction¹³ to try and punish ‘all such outrages and misbehaviours’, which, if committed in England, would be taken according to English law to be treason, felony or misdemeanour.

During the period 1790–92, the 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 Corps were subject to the prevailing *Mutiny Act* and the *Articles of War* made under that Act.

By 1803, the nature of the colony’s society was changing with the emancipation of convicts and the immigration of small numbers of free settlers. The military appearance and court martial-based procedure of the Court of Criminal Jurisdiction had become anachronistic. When Governor Lachlan Macquarie arrived in the colony in December 1809, he was accompanied by Ellis Bent; a lawyer who had been appointed Deputy Judge-Advocate, one of whose functions was to act as judicial member of the Court of Criminal Jurisdiction. This was the first occasion this office had been filled by a lawyer.¹⁴

In response to complaints about the exercise of autocratic power by Governor Macquarie, in 1819 King George III appointed John Bigge to inquire into various matters relating to the colony. Bigge was formerly Chief Justice of Trinidad. In 1822 he reported on the matter and the *New South Wales Act 1823* (Imp) 4 Geo 4 c 96 (‘*NSW Act 1823*’) gave effect to his recommendations. This Act can 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.¹⁵ The Act created an appointed Legislative Council and vested legislative power in the Governor, acting with the advice of the Council. Only the governor could propose legislation. Because there was now a local legislature with power to make laws authorising (inter alia) the raising of local armed forces, the power to raise armed forces was omitted from the commissions of subsequent governors.

The *NSW Act 1823* also authorised the establishment of a Supreme Court by Letters Patent issued by the Sovereign. The Court was vested with power to try criminal charges before a judge and jury. The jury was not the traditional English jury, but a unique body that consisted of seven commissioned naval or military officers and was clearly adapted from the Court of Criminal Jurisdiction set up in 1788 and abolished by the *NSW Act 1823*. When the Bill for the 1823 Act was before the English 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 1827.¹⁶ The Act also empowered the Governor to establish Courts of General Session and Court of Quarter Session. Governor Brisbane did this and circumvented the operation of the Act – which made no provision for juries at trials before these courts – by providing for juries by an administrative act of doubtful validity. George IV established an Executive Council in 1825.¹⁷ This reduced the Governor’s autocratic powers because he was required to consult the new Council before exercising executive authority and had to act upon its advice, except in certain circumstances.

¹³ ‘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’.

¹⁴ 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: Helen Cumming, *The Governor: Lachlan Macquarie 1810 to 1821* (State Library of New South Wales, 2010) 22.

¹⁵ The free white population increased from about 2000 in 1800 to about 13 000 in 1820.

¹⁶ Castles, Alex, *An Australian Legal History* (Law Book Company, 1982).

¹⁷ 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* (UK). The Governor was thereby directed to consult with act upon its advice.

In 1828, the Imperial Parliament passed the *Australian Courts Act 1828*, 9 Geo 4 c 83, which extended the date of expiry of the *NSW Act* to the end of 1829. This Act can be regarded as another constitution.

The British Government enhanced Britain's naval presence in the Australian region in 1859 in response to a proposal by the Tasmanian Government.¹⁸ The Royal Navy's Australian command was separated from the East Indies station as a new Australia station, which encompassed 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.¹⁹

Lord Granville, Secretary for the Colonies, informed the Australian colonies in 1869 of an imminent reduction in the number of British troops stationed in the colonies to a single regiment of infantry and two batteries of artillery.²⁰ The time for the Australian colonies to take control of their own defences was drawing upon them quickly.

Between 1855 and 1890 each of the Australian colonies had gained responsible government. Notwithstanding, the Colonial Office in London retained control of some affairs; the Governor of each colony was required to raise their own colonial militia. To do this, they were granted the authority from the British Crown to raise naval and military forces. Nonetheless, until 1870 the actual defence of the Australian colonies was provided by British Army regular forces and the Royal Navy.²¹ This protection was to change in August 1870 when the last of the British troops stationed in Australia were withdrawn to Great Britain and other parts of its Empire.²²

With the withdrawal of British troops, the colonial naval and military forces provided the military defence of the colonies and included unpaid volunteer militia, 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 reforms in the 1870s – including the expansion of the permanent forces to include engineer and artillery units – they remained too small and unbalanced to be considered armies in the modern sense.²³

From the mid-1800s, the British system of military justice as it applied in the Royal Navy and the British Army had been reformed with the passage of the *Naval Discipline Act 1847* (UK), then replaced by the *Naval Discipline Act 1866*, 28 & 29 Vict, c 109 ('*Naval Discipline Act 1866*'), and the *Army Discipline and Regulation Act 1879* 42 & 43 Vict, c 33. Before the *Rules of Procedure* could be finally settled, the *Army Discipline and Regulation Act 1879* was repealed and replaced by the *Army Act 1881* 44 & 45 Vict, c 58 ('*Army Act 1881*'). These latter acts²⁴ provided military personnel with a wider range of rights and aligned the laws of military discipline more closely with the societal standards of the day.

From the outset of the establishment of each colonial naval and military force²⁵ the Australian colonial legislation reveals a pattern whereby the United Kingdom statutes were invoked, in varying circumstances,

¹⁸ *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, 1859).

¹⁹ G L Macandie, *Genesis of the Royal Australian Navy* (Government Printer, 1949) 17.

²⁰ 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. See *Report and Minutes of the Proceedings of the Intercolonial Conference Held in Melbourne in the Months of June and July 1870* (Government Printer, 1870).

²¹ However, by 1870, 25 British infantry regiments had served in the Australian colonies, as had a small number of artillery and engineer units.

²² 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.

²³ Jeffrey Grey, *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 Michael McKernan and M Browne (eds), *Australia: Two Centuries of War and Peace* (Australian War Memorial, 1988), 44; Sarah Dawson (ed), *The Penguin Australian Encyclopaedia* (Viking, 1990) 135; Australian Bureau of Statistics, 'Military System in Australia Prior to Federation in *Year Book Australia 1909* (1909); Arndell N Lewis, *Australian Military Law* (1936); Frank B Healy, 'The Military Justice System in Australia' (2002) 52 *Air Force Law Review* 93.

²⁴ *Naval Discipline Act 1866; Army Act 1881*.

²⁵ 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

to provide for the discipline of the colonial forces with minor variations dealing with naval and military justice as applied equally to the colonial forces.²⁶ From a military legal standpoint, it is significant that s 45 of the *Naval Discipline Act 1866*, and s 41 of the *Army Act 1881* still had operation over colonial Australia's naval and military forces²⁷ when s 51(vi) of the *Constitution* was drafted prior to 1901 as these provisions continued to govern the new nation's naval and military forces until passage of the *Defence Force Discipline Act 1982* (Cth) ('DFDA').

B *The Colonies Federate*

On 1 January 1901, the Commonwealth of Australia came into existence as a federated nation. However, the new Commonwealth Parliament did not immediately legislate for the establishment of a naval and military force. This was not to occur until passage of the *Defence Act 1903* (Cth), which formally established a Department of State for Defence to provide for the naval and military defence of the new nation.

It was not until 1 March 1903 that the commands of the respective State naval and military forces were transferred to the Commonwealth. As Victoria had been the only State with a Defence Department, the entire staff of the Victorian Defence Department, all 12 people, were transferred to the Commonwealth together with a combined 1750 permanent and approximately 28 000 militia forces namely: Navy – 2 000 (of whom 250 were permanent members) and military – 28 886 (of whom 1500 were permanent members).²⁸

With the passage of the *Defence Act 1903* (Cth), the Commonwealth Government established the Australian Army and Commonwealth Naval Force, by amalgamating the forces each of the States had maintained. In 1911, the Government established the Royal Australian Navy, which absorbed the Commonwealth Naval Force.²⁹ The Army established the Australian Flying Corps in 1912, although this separated to form the Royal Australian Air Force in 1921.

From 1903 until 1975 each of the services were not linked by a single chain of command, as each reported to their own separate Minister responsible for the Navy, Army and the Air Force, respectively, and each had separate administrative arrangements within their own departments of State.

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.

²⁶ *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).

²⁷ 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 war.

²⁸ 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; Commonwealth, *Gazette*, No 9, 20 February 1901, 21. As at 1 March 1901 the actual strength of the Australian Military Force was 28 886. See Australian Bureau of Statistics, above n 25.

²⁹ The Royal Navy remained the primary naval force in Australian waters until 1913, when the Australia Station of the Royal Navy ceased and responsibility transferred to the Royal Australian Navy.

III CURRENT ORGANISATION OF THE DEFENCE FORCE

A *Structure of the Australian Defence Force*

The separate three service structures changed in 1976 when there was an integration of the command structure of all three services into a single Department of Defence whilst maintaining the individual existence of each service³⁰. The Australian Defence Force ('ADF'), as it was to be known, was established on 9 February 1976.

The *Defence Act 1903* (Cth) provides that the Minister for Defence is responsible for the general control and administration of the Force. The Act allows for the appointment of different service Chiefs: the Chief of the Defence Force ('CDF'), the Vice Chief of the ADF ('VCDF'), and a Chief for each of the Navy ('CoN'), Army ('CoA') and Air Force services ('CoAF').³¹

In order to regulate the military and civilian personnel within the Department, the Act established the Australian Defence Organisation, which consists of the ADF and the civilian Department of Defence personnel supporting the ADF. The CDF and the Secretary of the Department of Defence ('SECDEF') jointly administer the ADF.³² 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'.³³ The diarchy are responsible for the administration of the Defence Force and both are answerable to the Minister.³⁴ 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. The Secretary's responsibilities include policy, departmental management and resource management matters. The CDF delegates the command of each service to its respective Chief.

The Department of Defence's budgeted estimate of personnel for the year 2015–16 was for 76 842 military personnel comprised of 57 982 Permanent ADF and 18 860 Active Reserve Force, all supported by a permanent Civilian Force of 18 864.³⁵

B *The Chain of Command*

The Governor-General of the Commonwealth of Australia³⁶ and the Minister for Defence³⁷ have general control and administration of the ADF. However, the CDF and the VCDF³⁸ sit at the apex of the 'chain of command'.

The chain of command is how the military is managed and how 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.

General Peter Cosgrove, as Chief of Defence Force, described discipline within the Defence Forces as:

Essential to command – a non-negotiable requirement for operational effectiveness. For this reason, the control of the exercise of discipline, *through the military justice system*, is an essential element of the chain of command, from the most junior leader upwards... discipline is much more an aid to ADF personnel to enable them to meet the challenges of military service than it is a management tool for commanders to correct or punish unacceptable behaviour that could undermine effective command and control in the ADF (emphasis added).³⁹

All personnel fit within that chain of command, and consequently, '*all members of the ADF are under command of some nature*' (emphasis added).⁴⁰ It is an important concept to understand, because protecting

³⁰ *Defence Act 1903* (Cth) s 17 provides that the ADF consists of three service arms, namely, the Australian Navy, the Australian Army and the Australian Air Force.

³¹ *Defence Act 1903* (Cth): s 9(1) CDF, s 9(3) VCDF, s 18(1)(a) CoN, s 19(1)(a) CoA, s 20(1)(a) CoAF.

³² *Defence Act 1903* (Cth) s 10(1).

³³ Department of Defence (Cth), *The Diarchy* <www.defence.gov.au/cdf/diarchy.asp>.

³⁴ *Defence Act 1903* (Cth) s 8(2).

³⁵ Commonwealth of Australia, *Portfolio Budget Statements 2015–16: Defence Portfolio* (2015).

³⁶ 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'.

³⁷ *Defence Act 1903* (Cth) s 8(1).

³⁸ *Ibid* ss 9(1) CDF, 9(3) VCDF.

³⁹ P J Cosgrove, Submission No P16 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Effectiveness of Australia's Military Justice System*, 16 June 2005.

⁴⁰ *Ibid* [2.5].

and ensuring its integrity is often cited by those who argue for a separate military justice system.⁴¹ The position of rank in the military accordingly is most important to its hierarchy and the discharge of responsibilities in aid of the accomplishment of the mission, whatever the mission may be.

General Cosgrave, as a principal proponent of a separate military justice system, that is, separate to the civilian system, maintains that the ability to issue orders to a subordinate and the ability to prosecute those who fail to follow the order must go hand-in-hand.⁴² Orders may only be handed down one person at a time, and only to a specific class of subordinates. 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. 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 exercise of the chain of command lessens the possibility for breaches of military discipline.

The chain of command is a hierarchical system designed to ensure that orders will be followed, and followed without question. As a corollary to the importance that is placed on obeying orders, failing to do so, assuming it is a lawful order, is an offence.⁴³ Consequently, the military justice system is also used as a management tool. The ADF deals with the consequences of breaches of military discipline by the system of military justice established under the *DFDA*.

IV DISCIPLINARY STRUCTURE SINCE FEDERATION

A *The Former Australian Military Justice System: 1901–1985*

Until passage of the *Defence Act 1903* (Cth) the colonial naval and military legislation continued in force in each of the States.⁴⁴ However, rather than write a new naval and military code for the new Commonwealth forces, the *Defence Act*,⁴⁵ continued the application of the *Army Act 1881* and the *Naval Discipline Act 1866*, respectively, to the naval and military forces of the Commonwealth while on active service. This was followed by the *Naval Defence Act 1910* (Cth),⁴⁶ which applied s 45 of the *Naval Discipline Act 1866* as if ‘Australia’ were inserted in lieu of ‘England’.

The general situation was summarised in the *Manual of Military Law*:⁴⁷

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.

Specifically, the military discipline of the emerging Australian Army was regulated in Australia by the *Army Act 1881* until the enactment of the *Defence Act 1903* (Cth) and the subsequent introduction of the *Australian Military Regulations and Orders* in 1914 and amended in 1916 which provided, in a form adapted from the *Army Act 1881* and *Regulations*, a series of military offences and a regime for the conduct of courts martial and summary proceedings. That scheme remained in place but was subject to a significant revision and re-write by the *Australian Military Regulations 1927* (Cth), which repealed the *Australian Military Regulations 1916* (Cth).

For the Navy, matters remained as provided under the Imperial statutes until passage of the *Naval Defence Act 1910* (Cth), which provided for the continued application of the Imperial law as modified by the *Defence Act 1903* (Cth).

⁴¹ Sam Nunn, ‘The Fundamental Principles of the Supreme Court’s Jurisprudence in Military Cases’ in Eugene Fidell and Dwight Sullivan (eds) *Evolving Military Justice* (Naval Institute Press, 2002). 3

⁴² Cosgrave, above n 41, [2.2]-[2.4].

⁴³ *DFDA* s 27.

⁴⁴ *Defence Act 1903* (Cth) s 6.

⁴⁵ *Ibid* ss 55, 56.

⁴⁶ *Naval Defence Act 1910* (Cth) s 36 and *Naval Forces Regulations 1921* (Cth) reg 6(a)(v).

⁴⁷ 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 RAAF came into being in 1923 and its members were subject to the *Air Force Act 1923* (Cth) and the terms of the *Air Force (Constitution) Act 1917*, 7 & 8 Geo 5, c 51 were applied with modifications.

This ‘Imperial’ framework continued to serve as the disciplinary regime for the ADF from 1901 through to immediately prior to the commencement of the *DFD Act* in 1985. That is, the ADF was regulated by no less than 11 separate sources of authority being variously: United Kingdom Acts and Regulations; and, Commonwealth Acts and Regulations.⁴⁸ By 1982 a change of governance for Australia’s Defence Force was well overdue because the UK Acts had long ceased to apply to British forces themselves.⁴⁹

B *The Current Australian Military Justice System*

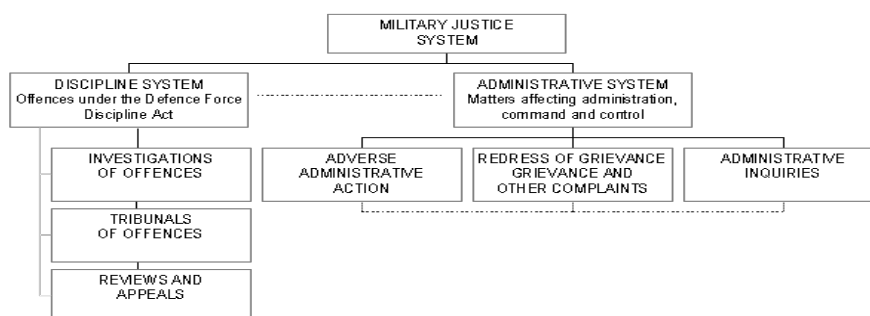
The *DFDA* now provides the legislative framework for the military discipline system. It creates tribunals to try members of the Defence Force on charges of Service offences against the Act, and provides these tribunals with powers to try civilians accompanying the Defence Forces on operations. The Act creates a system of appeals, and covers related matters such as investigation of offences, suspension from duty, and powers of arrest.

The Act when viewed as a whole, has the effect of dividing the Australian military justice system into two sub-systems: an Administrative System, and a Discipline System, both designed to support the command and organisational structure of the ADF.

The military’s Administrative System enables factual inquiries to determine what went wrong in an incident, and therefore hopefully prevents 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.

The military’s Discipline System is analogous to the civilian criminal justice system. It combines the investigating of allegations that, 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 that would be conducted in the civilian system by the police, Director of Public Prosecutions, a criminal court judge and jury (or magistrate) and Corrective Services, respectively. However, is the military justice system founded on a proper constitutional basis?

Figure 1. *Australian Military Justice System*⁵⁰



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.

⁴⁸ As at 1985 – All services: *Defence Act 1903* (Cth). Army: *Army Act 1881*; *Rules of Procedure 1947* (UK); *Australian Military Regulations 1985* (Cth). Air Force: *Air Force Act 1917*, 7 & 8 Geo 5, c 51; *Rules of Procedure (Air Force) 1933* (UK); *Air Force Act 1923* (Cth); *Air Force Regulations 1927* (Cth); *King’s Regulations and Air Council Instructions* (UK). Navy: *Naval Discipline Act 1957*, 5 & 6 Eliz 2, c 53; *Queen’s Regulations and Admiralty Instructions 1953* (UK). See Explanatory Memorandum, *Defence Force Discipline Bill 1982* (Cth) [44]-[59].

⁴⁹ 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.

⁵⁰ Parliament of Australia, Senate Standing Committee on Foreign Affairs, Defence and Trade, *The Effectiveness of Australia’s Military Justice System* (2005) 8.

V CONSTITUTIONAL BASIS OF THE CURRENT MILITARY JUSTICE SYSTEM: CONSTITUTIONAL EXCEPTIONALISM

Since World War II the High Court of Australia has maintained a line of authorities supporting a doctrine of constitutional ‘exceptionalism’, being that courts martial do not exercise judicial power under ch III of the *Constitution* but constitute an exception based upon on a construction of the *Constitution* that is ‘necessary not only from a practical, but also from an administrative view’.⁵¹

The Court’s judgments reveal three distinct theories on this issue. The first view holds that military tribunals exercise judicial power, but not ‘the judicial power of the Commonwealth’ within the meaning of s 71 of the *Constitution*.⁵² The second view⁵³ holds that the power in question is not judicial power at all for constitutional purposes. The third view⁵⁴ holds that the power is ‘the judicial power of the Commonwealth’, but can be exercised by courts martial under a limited exception to the rules set out in ch III of the *Constitution*.

The third view was challenged most recently in 1989 in *Re Tracey; Ex parte Ryan*.⁵⁵ In this case the constitutional basis of the *DFDA* was challenged in the High Court of Australia insofar as it purported to oust the States’ civilian criminal justice system in peacetime and constituted a breach of ch III.⁵⁶

By a decision (without a discernible ratio), the High Court determined that the *DFDA* was constitutional as being an exception to ch III of the *Constitution* whilst deciding that the purported ouster of the reach of the States’ criminal justice systems was unconstitutional.

The narrowness of the base upon which the High Court decided that constitutional exceptionalism survived was highlighted upon the delivery of judgment when the following exchange⁵⁷ took place:

Mason CJ: The Order of the Court is: Order nisi for prohibition discharged. No order as to costs.

Mr Muecke (counsel for the Commonwealth): I note that the Court has made no order as to costs. On my instructions, the matter of costs has not been argued. If the Court is not prepared to award the Commonwealth costs [now] perhaps the Court would allow 21 days?

Mason CJ: *What I suggest you do is read the judgment. Whilst on the face of the Court’s order you appear to have won the battle, I think you will find on reading the judgment you have limped away* (emphasis added).

Since *Re Tracey* the High Court has considered several further challenges to the extent to which the *DFDA* may lawfully subject ADF members to certain offences established under the *DFDA*.⁵⁸ These challenges have relied upon the similarity in respect of charges of which there are direct civilian criminal counterparts under the States’ criminal law.

The succession of decisions by the High Court dealing with the *DFDA* clarifies, although does not truly settle, the current basis of the power of military tribunals to hear disciplinary offences by service personnel. However, it remains the case that the High Court has long struggled with the constitutional basis for exceptionalism. In the challenges since the introduction of the *DFDA* the High Court has never unanimously agreed on exceptionalism. The more cogent view is that the High Court by majority has held that military

⁵¹ Established in the wartime cases: *Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 468 (Starke J); *R v Cox; Ex parte Smith* (1945) 71 CLR 1. (The author is undertaking a PhD at University of Western Australia on the correctness of this approach).

⁵² *Re Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 468 (Starke J); *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

⁵³ *Lane v Morrison* (2009) 239 CLR 230.

⁵⁴ *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570.

⁵⁵ (1989) 166 CLR 518.

⁵⁶ The author was Defending Officer for SSGT Ryan in the trial before the Defence Force Magistrate, MAJ RRS Tracey, QC. I was then Counsel for SSGT Ryan in the High Court challenge. I was led by Brind Zichy-Woinarski QC.

⁵⁷ Transcript of Proceedings, *Re Tracey; Ex parte Ryan* [1989] (High Court of Australia, 10 February 1989).

⁵⁸ The *DFDA* has now been considered by the High Court in seven cases: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *McWaters v Day* (1989) 168 CLR 289; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570; *Lane v Morrison* (2009) 239 CLR 230.

tribunals exercise ‘the judicial power of the Commonwealth’, but operate under an exception to the usual rules on the exercise of judicial power contained in ch III closely reliant upon there being a service connection between the offence and the ADF member’s activities.

The relationship between the judicial power and a service connection can only be fully appreciated once the constitutional and historical basis for the power exercised by military tribunals is acknowledged. It is submitted that portraying the power as outside ‘the judicial power of the Commonwealth’, as the High Court has traditionally done, only obscures the central constitutional question raised by military justice: specifically, to what extent the existence of service tribunals exercising federal judicial power outside ch III properly falls within the defence powers of the Commonwealth.

In attempting to answer that question it requires a discussion of the attempts by the Commonwealth Parliament to enact a new military justice system to replace that under the *DFDA* when it enacted the *Military Court of Australia Act 2012* (Cth), which was subsequently declared unconstitutional by the High Court⁵⁹ for breaching ch III of the *Constitution*. As such, the answer to that question is outside the scope of this article.

Until the Commonwealth attends to introducing legislation that constitutionally complies with ch III and has a ‘court’ exercising completely independent and impartial justice, Australia’s military personnel continue to experience a military justice system that suffers from the perception (or perhaps, even the reality) of a lack of true independence and impartiality away from the military and the chain of command.

It is strongly argued that the time for the Commonwealth to act is now, in peacetime, when it can get it right. Perhaps, even, the nation is mature enough to consider the benefits of the European model of abolishing military courts entirely in peacetime.

⁵⁹ *Lane v Morrison* (2009) 239 CLR 230. The *Military Court of Australia Act 2012* (Cth) and of *Australia (Transitional Provisions and Consequential Amendments) Act 2012* (Cth) were the culmination of a series of attempts by the Commonwealth to create a new institution for the trial of serious service offences that enjoyed greater independence and impartiality than the traditional service tribunals. The Acts breached the separation of powers in the Constitution. This was predominantly of the basis that the Australian Military Court made final and definitive findings of guilt and passed sentence without review from within the military chain of command.